IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Hon Mr Justice Andrew J. Jones QC
Monday 31st January 2011, hearing by telephone

Cause Nos.24 and 25 of 2009 (AJJ)

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)

AND IN THE MATTER OF Bear Sterns High-Grade Structured Credit Strategies Enhanced Leverage (Overseas) Ltd (in liquidation) AND Bear Sterns High-Grade Structured Credit Strategies (Overseas) Ltd (in liquidation)

Appearances: Ms Laura Hatfield of Solomon Harris for the Joint Official Liquidators

RULING

1. This is an application by the Joint Official Liquidators ("JOLs") of two Bear Sterns feeder funds for an order that an affidavit sworn by one of the JOLs in support of a sanction application, together with part of its exhibit, be sealed and kept confidential. The application is made by an *ex parte* summons issued on 19th January 2011 pursuant to Order 24, rule 6 of the Companies Winding Up Rules. The general principle, embodied in CWR O.26, r.4(1)(e), is that those who have an economic interest in the outcome of a liquidation should have a right access to whatever affidavits, reports and other documents are placed on the Court file. CWR O.24, r.6 confers a limited power upon the Court to order that any such document shall be sealed and kept confidential for a specific period or until the happening of a specified event. I was originally asked to make an order that Mr Geoffrey Varga's 5th affidavit ("the Affidavit") and the litigation report comprising pages 1-99 of Exhibit "GV5" ("the Exhibit") be sealed. During the course of making her submissions, counsel for the JOLs withdrew the application to the extent that it related to pages 1-42 of the Exhibit.

2. There is jurisdiction to make such an order only if the Court is satisfied that (a) the information contained in the Affidavit and the Exhibit is of a confidential nature and will not come into the public domain unless and until the Affidavit is filed in Court and (b)

the publication or immediate publication of the information contained in these documents will harm the economic interests of the Funds' shareholders. If I am satisfied in respect of both limbs of this test, I then have a discretionary power to make an order that the documents be sealed for a limited time. This discretionary power has to be exercised for the purpose of protecting the economic interests of the general body of creditors (if the company is insolvent) or shareholders (if it is solvent). The Court's power cannot be exercised for the benefit of third parties.

3. The Affidavit has been sworn in support of a sanction application in which the JOLs seek a direction authorizing them to use the whole or part of a sum of US$18 million for the purposes of paying the costs of pursuing two actions pending in the United States District Court for the Southern District of New York ("the New York proceedings"). The first of these proceedings is an action for damages against The Bear Sterns Companies, Inc and certain other related companies and employees. The second is an action for damages against Deloitte & Touche LLP, Deloitte & Touche Cayman Islands, Walkers Fund Services SPV Limited and two employees who served as directors of the Funds. The action against the Deloitte defendants has been dismissed and they have a contractual claim against the Funds for an indemnity in respect of the legal fees and expenses incurred by them in successfully conducting their defence. The JOLs' appeal against this decision has not yet been heard and determined.

4. In order to make an informed decision about the merits of the sanction application, the Funds' shareholders must have a proper understanding of the financial status of the liquidation and the merits of the New York proceedings. The Affidavit addresses these issues. To date, the New York proceedings have been funded by the proceeds of a third party lending agreement and the first part of the Affidavit, under the heading *Liquidation Assets,* explains that the only other asset available to the JOLs is $18 million in cash, representing the proceeds of the claim asserted against the Funds' former administrator. The JOLs are bound to disclose the basic facts relating to the settlement of this claim to the shareholders in any event in the performance of their routine accounting and reporting obligations. It cannot be said that the disclosure of these facts *now* for the purposes of the sanction application will cause any economic harm to the shareholders. However, counsel's original intention was also to put a copy of the settlement agreement in evidence (as pages 1 – 42 of the Exhibit), but it seemed to me that the detailed terms and conditions of the agreement are not relevant to the sanction application and that the document did not need to be put in evidence at all, in which case the question of sealing it does not arise. All the shareholders (and the Court) need to know for the purpose of the sanction application is that the sum of $18 million

was paid by the former administrator in full and final settlement of the claims asserted against it and that no further money will be forthcoming from this source. Having come to this conclusion, counsel withdrew the application to seal the settlement agreement, which will not now be exhibited to the Affidavit. The application was therefore limited to the two documents comprised in pages 43-99 of the Exhibit.

5. The first of these two documents is a memorandum dated January 25, 2011 and addressed to the JOLs from ReedSmith, their New York attorneys ("the Memorandum"). Put simply, it comprises a progress report in respect of the New York proceedings. The second document is a printout of a power point presentation which was used by ReedSmith for the purposes of making a report about the New York proceedings to the JOLs' informal advisory committee ("the IAC") at a meeting held on November 30, 2010. No liquidation committees have been formally established in accordance with the Rules. Instead, an informal committee, which comprises five shareholders who are said to be representative of both institutional and private investors, has been established for the purpose of acting as a sounding board and source of advice for the JOLs. It is relevant to note that the committee members have each entered into confidentiality agreements with the JOLs. Counsel put the JOLs' case on the basis that both these documents are of a confidential nature, notwithstanding that everything on the court file in the New York proceedings is open to public inspection, and that the disclosure of their content, in particular to the Deloitte defendants, would harm the economic interests of the Funds' shareholders.

6. The Memorandum is just nine pages long. Its content is divided into sections, under five headings. It was prepared by ReedSmith for a number of related purposes. It was prepared for the purpose of reporting to the JOLs and the IAC. It was also prepared for the purpose of reporting to the Court and will constitute an important part of the evidence intended to be relied upon in the sanction application. Absent an order under CWR O.24, r.6, it will also constitute a report which is available to the shareholders. The first section of the Memorandum, under the heading *Summary of the Claims Asserted in the Litigation,* is a generalized summary of the causes of action asserted against the Bear Sterns and Walkers defendants. To the extent that this part of the Memorandum merely summarises the pleadings, motions, affidavits and other documents on the New York court file, it cannot be said that its content is of a confidential nature within the meaning of CWR O.24, r.6, because the underlying documents are all open to public inspection. However, the content of this section of the Memorandum does go slightly beyond a mere summary of the pleadings and motions. ReedSmith make the statement (at page 45 of the Exhibit) that "We believe that the prospects for success for each of

prosecuting the New York Proceedings through trial, regardless of the availability of additional funds with which to pay their fees. It goes on to report that ReedSmith have had discussions with the existing financiers regarding the prospects of providing further funding. They express the view that no additional funding is likely to become available from this source, at least on acceptable terms. This is information of a confidential nature which, so I am told, cannot be gleaned from the New York court file. However, I am not satisfied that the disclosure of this information, taken as a whole, will harm the economic interests of the Funds' shareholders even if it were to come to the attention of their opponents in the New York proceedings. To contrary, it seems to me that its disclosure would deliver a positive message. The knowledge that the JOLs' attorneys are committed to conducting this litigation through to the conclusion of the trial and any appeal, regardless of the availability of further funding with which to pay their fees, would strengthen rather than weaken the JOLs' hand in any settlement negotiations.

10. The printout of the power point presentation contains evidence which is said to support the Funds' case against Bear Sterns, Walkers and Deloitte defendants in respect of certain key issues. Most of this evidence appears to comprise copies of e-mails produced by the defendants as part of their discovery. It presents a very positive view of the Funds' case. Counsel for the JOLs was unable to identify anything in the presentation which might be said to be an admission against the Funds' interest. The presentation was made to the IAC whose members are subject to a confidentiality agreement. As I understand it, the argument is that the presentation should not be made available to other shareholders who have not signed confidentiality agreements because they would be free to use documents drawn from the Court file as they think fit, with the result that the presentation might somehow get into the hands of the opposing parties. However, counsel was unable to identify any part of the presentation which might actually assist the defendants' cases or harm the Funds' case. It seemed to me that the presentation was deliberately focused on the strengths of the Funds' case.

11. It has to be bourne in mind that official liquidators routinely commence litigation of various sorts. It is not uncommon for the official liquidators of failed hedge funds to commence litigation against their former professional service providers, as they have in this case. In such circumstances, the official liquidators must report upon the progress and outcome of the litigation to the creditors and/or shareholders, who are entitled to be heard on the questions whether litigation should be commenced, continued or settled. It is incumbent upon official liquidators to prepare their reports in a way which does not unnecessarily include information, the publication of which would be counter-productive, but the shareholders and/or creditors are entitled to be given all the

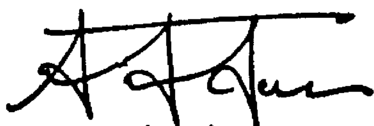
information necessary to make informed judgments about the course of action proposed by their official liquidators. In this context, CWR O.24 r.6 provides a mechanism by which the Court can protect the general body of creditors/shareholders from the adverse consequences of putting information into the public domain. The assumption is that the creditors/shareholders have a common interest, but this may not always be so. In this case counsel made it clear that the JOLs' only real concern is that they do not want the Deloitte defendants to gain access to the Exhibit by exercising their rights as creditors of the Funds. Their proofs of debt have not yet been adjudicated but, for the purposes of this application, I shall assume that the Deloitte defendants are creditors and that the only scope for argument relates to the amount payable pursuant to their contractual indemnity. The action against the Deloitte defendants has been dismissed, but I shall assume that there is at least a possibility that it will be reinstated as a result of a successful appeal by the JOLs. Therefore, the question is whether the disclosure of the Exhibit to the Deloitte defendants will harm the economic interests of the shareholders (assuming that their claim is reinstated on appeal), such that it justifies making an order that it be sealed, thus preventing its disclosure to *all* those entitled under CWR O.26, r.4 to inspect the Court file, including the shareholders themselves.

12. In my judgment, both the Memorandum and the printout of the power point presentation appear to have been carefully crafted so as not to contain anything which might be harmful if disclosed to the Funds' opponents in the New York proceedings. These documents do not contain any real legal analysis, let alone any admission against the Funds' interest or any opinion which reflects adversely upon the merits of the Funds' case. The Memorandum states (at page 46 of the Exhibit) that the actions have been dismissed as against the Deloitte defendants. The only part of this statement which could be regarded as confidential as against the Deloitte defendants is the statement that the JOLs intend to appeal, but it was not suggested by counsel that the disclosure of this intention could possibly harm the shareholders' economic interests. The Memorandum does not contain any discussion or advice about the merits of the intended appeal. The power point presentation was prepared prior to the dismissal of the case against the Deloitte defendants and so does contain some material about the way in which the Funds' case would have been put. However, it is difficult to see how the disclosure of this document could possibly present Deloitte with some advantage in the event that the action is reinstated, thereby harming the shareholders' interest.

13. For these reasons I am not satisfied that the criteria set out in CWR Order 24, r.6 are met, with the result that the application must be dismissed. Even if I had come to the

conclusion that the disclosure of the Exhibit to the Deloitte defendants would cause economic harm to the shareholders, I would have exercised the Court's discretion by refusing to seal the Exhibit for two reasons. Firstly, it is important that the shareholders have access to a report about the progress and funding of the New York proceedings, without which they cannot sensibly participate in the sanction application. Secondly, it is not necessary to seal the Exhibit in order to prevent it from coming into the hands of the Deloitte defendants. If the Registrar is of the view that the Deloitte defendants' application to review the Court file is made for an improper purpose, she could refuse to allow it in the exercise of her power under CWR O.26, r.4(5). In their capacity as creditors, the Deloitte defendants have a legitimate interest in the financial status of the liquidation. They are entitled to be heard on the sanction application for the purpose of making the point that the JOLs need to make appropriate provision for paying the Funds' creditors out of the available assets. It follows that they should not be denied access to the JOLs' accounts and the Affidavit in so far as it relates to litigation funding. However, in their capacity as contingent debtors, the Deloitte defendants are not entitled to be heard on the question whether claims or appeals should be pursued against them. It follows that any attempt to obtain information from the Court file for the sole purpose of damaging the Funds' case or advancing their own defence would be regarded by the Registrar as improper, with the result that the Registrar could exercise her power under r.4(5) by denying the Deloitte defendants access to the file or limiting the scope of their access. It is not necessary to seal a document on the Court file in order to prevent a particular creditor or shareholder from using the document or its contents for an improper purpose.

Dated 1st February 2011



The Hon. Mr Justice Andrew J. Jones, QC