IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 200 of 2015 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF STERLING MACRO FUND

IN CHAMBERS

Appearances: **Mr. P Jones Q.C. instructed by Mr. P Kendall of Walkers for the Petitioner.**
Mr. T Lowe Q.C. instructed by Mr. J Harris of Higgs & Johnson for the Respondent.
Mr. M Goodman of Campbells for the Joint Provisional Liquidators.

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **7 July 2016**

Draft Ruling Circulated: **22 July 2016**

Ruling (No.2) Delivered to Counsel and parties only: **27 July 2016**

Ruling Released for Publication: **6 April 2017**

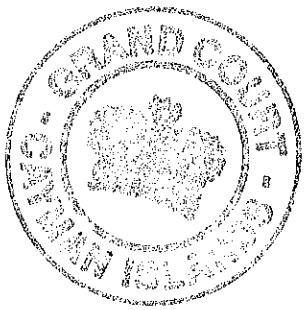
HEADNOTE

Company Law-Winding Up Petition - Provisional Liquidators' Application for fees - Appropriate Order to Make Pending Determination of winding up proceedings - Application by Company for revocation of ex parte order requiring Company to pay costs of provisional liquidators pending determination of Petition and seeking that Petitioner pay - Undertaking sought from foreign shareholder - Fortification/Security for Undertaking - Companies Winding Up Rules 2008, Order 4, Rule 3, Order 4, Rule 7(3)(a).

RULING

1. On 23 May 2016, the joint provisional liquidators (the "JPLs") filed a Summons in respect of fees, seeking the following relief:-

> "1. *The fees and expenses of the JPLs in the total amount of US$398,037 incurred in the period from 16 December 2015 up to and including 31*



March 2016, as set out in more detail in the second affidavit of Andrew Richard Victor Morrison sworn herein, be approved and paid out of the assets of the Company;

2. *Such further orders or other relief with respect to the payment of the JPLs' fees and expenses as the Court may deem appropriate; and*

3 *The costs of and incidental to this Summons be paid out of the assets of the Company as an expense of the provisional liquidation.*"

2. On the 26th May 2016, I ordered that the fees and expenses of the JPLs in the total amount of US$398,037 incurred in the period from 16 December 2015 up to and including 31 March 2016, as set out in more detail in the Second affidavit of Mr. Morrison, sworn on 20 May 2016, be approved. I further ordered that the costs of and incidental to the summons be paid as an expense of the provisional liquidation.

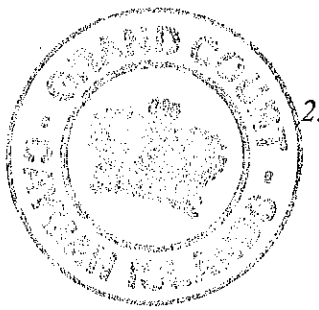
3. There was insufficient time to consider certain matters which were in contest between the JPLs and the Petitioner, on the one hand, and the Company on the other. In particular, the question of the source of payment of the JPLs' fees and expenses were reserved.

4. Sterling's opposition was set out in paragraphs 15 to 21 of its skeleton argument dated 27 April 2016, and in paragraphs 24 to 31 of its submissions dated 20 May 2016.

5. A skeleton argument dated 23 May 2016 has been filed by the Petitioner along with a bundle of authorities. Mr. Goodman, on behalf of the JPLs filed a skeleton argument on 6 July 2016 and stated that the JPLs rely upon the legal authorities advanced by the Petitioner.

6. By an amended summons filed 26 May 2016, which deals with issues related to the JPLs' summons, Sterling also seeks the following orders:

> "*1. That paragraph 2(w) of the ex parte order dated 16th December 2015 whereby the Respondent was required to pay the costs of the Joint*



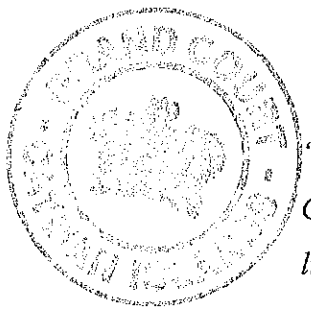
Provisional Liquidators pending the trial of the Petition be revoked and provision be made for the Petitioner to do so.

2. *That Niaga Holdings Limited provide an undertaking to the Court and to the Respondent that it will meet any order for costs made against the Petitioner in these proceedings, and further that it provide a cross-undertaking in respect of any damages which the Court might award to the Respondent as a result of the appointment of theJoint Provisional Liquidators.*
3. *That Niaga Holdings Limited do provide fortification of its aforesaid undertaking and cross-undertaking by means of suitable security in the form of a bank deposit or guarantee from a reputable financial institution.*
4. *That paragraph 6 of the Order of 16th December be set aside, and the costs of and incidental to the application for the appointment of provisional liquidators be reserved to the trial of this action.*"

7. Paragraphs 2(w) and 6 of the ex parte order made on 16 December 2015, read as follows:

> *"**IT IS ORDERED** as follows:*
>
> .....
>
> *2. The JPLs is/are hereby authorised to:*
>
> .....
>
> *(w) pay the JPLs' remuneration out of the assets of the Company in accordance with the Insolvency Practitioners Regulations 2008 (as amended);*
>
> .....
>
> ....
>
> *6 The costs of and incidental to the application for the appointment of provisional liquidators be paid out of the assets of the Company as an expense of the provisional liquidation."*

8. The Petitioner gave an undertaking on that occasion in the following terms:



" ...AND UPON the Petitioner undertaking to pay any damage suffered by the Company as a result of this order and/or the appointment of provisional liquidators in the event that the winding up petition is ultimately withdrawn or dismissed..."

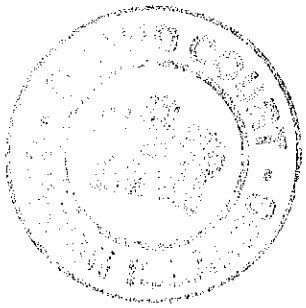
9. Mr. Lowe Q.C. on behalf of the Company submits that on a just and equitable Petition, the Petitioner should be funding the costs unless and until the Court makes a winding up order and further that it is fundamentally unfair that the Company should bear costs before it has lost the proceedings. Learned Counsel reminded the Court that this was an ex parte order that was made, and that no special reasons were advanced by Counsel who appeared on behalf of the Petitioner at that time as to why I should make the Order in the terms in which it was made.

10. It was submitted by Mr. Lowe that there is no basis for following the original English practice in this regard. The Cayman Islands does not, he stated, have the equivalent of Rule 4.30(3)(a) of the ***English Insolvency Rules*** 1986 which was the subject of the debate in ***Re Walter Jacob*** [1987] 3 BCC 532. In that case, Harman J. described the English Rule as "directory". In the UK, the rule has been modified but the default position, it was argued, remains that the JPLs' costs are paid by the Company.

11. The English Rule was amended, and Rule 4.30(3)(a) now provides that:-

> *"Without prejudice to any order the court may make as to costs, the provisional liquidator's remuneration (whether the official receiver or another) shall be paid to him, and the amount of any expenses incurred by him ....reimbursed:-*
>
> *(a) if a winding up order is not made, out of the property of the Company."*

12. Rule (3A) was also added at the same time, and reads as follows:-



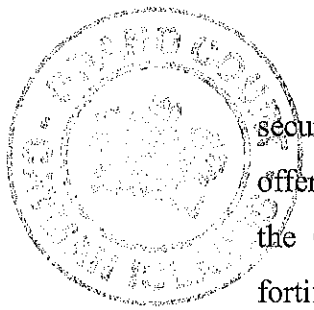
"3A. Unless the court otherwise directs, in a case falling within paragraph 3(a) above, the provisional liquidator may retain out of the company's property, such sums or property as are or may be required for meeting his remuneration and expenses."

13. Reference was made to the later decision in ***Re UOC Corporation*** [1998] BCC 191. At letter B of page 197 of that decision Carnwarth J. discussed the above amendments which had followed the decision in ***Re Walter & Jacob*** as follows:-

> *"The amendment of R. 4. 30 appears to be designed to reverse the effect of or mitigate that decision, and to confirm the court's discretion to decide as between the parties to the petition and the company, who is to bear the costs of the petition, including those of the provisional liquidator. I do not read it as affecting the ordinary right of the provisional liquidator himself to look to the company's assets for his remuneration and expenses. The issue is the extent to which the court may order that the company is able to reimburse itself from the other parties to the petition."*

14. The Company submits that the Grand Court has powers under CWR Order 4 Rule 7(3) (a) in the form of a general discretion to make an order but it is not a matter as of course, as in the UK. There is therefore, it was put forward, no default rule in the Cayman Islands that suggests that a provisional liquidator should be paid from the Company's assets on a just and equitable petition prior to a winding up order being made. It was argued that the JPLs should and would normally be expected to protect themselves by means of an indemnity/retainer from the Petitioner before conducting work.

15. It was suggested that in a case such as this, with what was described as the opaque foreign backing of Niaga, at the very least, meaningful security should be provided by the Petitioner. Learned Queen's Counsel submitted that if Niaga loses, the Company will have borne the JPLs' costs and it is fundamentally wrong that the Company should not be able to recover costs if it wins. It was submitted that it cannot do so without meaningful



security from Niaga. It was submitted that the undertaking which Niaga has to date offered, ought to be recorded in a Court Order, and because no information is known by the Company as to Niaga's finances, the Company seeks that such undertaking be fortified by an appropriate guarantee.

16. The Petitioner in its written submissions states that it has no objection to the JPLs' summons. It goes on to say that this dispute is entirely academic.

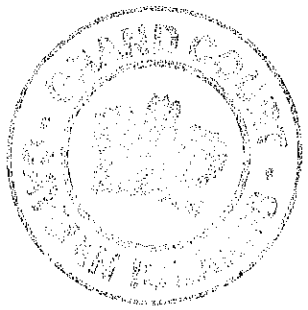
17. It was stated that as at 31 December 2015, Sterling had net assets of US$48.9M – see the JPLs' 2nd Report paragraph 3.1. The submission continues that it is a significantly valuable company, and continues to be. The only Participating Shareholder is Worthing and economic interest in Sterling belongs entirely to Worthing.

18. Mr. Jones Q.C, in his submissions states that in truth, Sterling's opposition is yet another example of the directors seeking to fight Mr. Katz' battle. He suggests that there is no doubt, if the case being put forward by Mr. Katz is correct, Mr. Katz will be against Worthing causing itself and Sterling to expend money on the winding up petition because ultimately, no matter who wins, Worthing will suffer a loss. If Worthing wins, its costs will at least in the 1st instance, be payable out of the liquidation of Sterling, but Worthing is the only party interested, so it is effectively paying itself. If Worthing loses, it will have to pay its own costs.

19. However, Mr. Jones Q.C. submits that this is an entirely improper and irrelevant consideration in respect of the present issue. If Mr. Katz wishes to do something about this, he argues that it is necessary for him to take proceeding to injunct Worthing from pursuing the winding up petition and he has not done so.

20. In terms of the substantive aspects of the issues raised by the Company, the Petitioner submits that the appointment of the provisional liquidators is substantially no different to that of a receiver or manager and the same principles apply.

21. Learned Counsel submitted that when the Court appoints a receiver or manager the receiver/manager is an officer of the Court, not the agent of either of the parties to the proceedings. Reference was made to ***Gardner v London Chatham and Dover Railway Co (No 1)*** (1867) LR 2 Ch App 201 at 211-212 where Cairns LJ stated:



> *"When the court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the court, and upon any question arising as to the character or details of the management, it is the court which must direct and decide."*

22. Reference was also made to ***Capewell v Revenue and Customs*** [2007] UKHL 2, [2007] 1 WLR 386, where Lord Walker, at paragraph [21] discussed the matter in this way:

> *"It has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and expenses, and his remuneration if he is entitled to be remunerated, out of the assets in his hands as receiver. Warrington J stated the principle in a well-known passage in* ***Boehm v Goodall*** *[1911] 1 Ch 155 at 161:*
>
> > *"Such a receiver and manager [that is, one appointed] is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the court. The court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control."""*

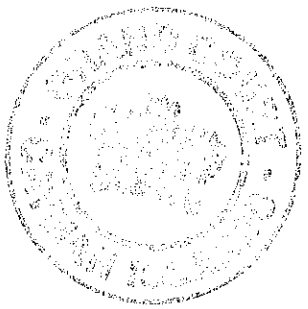
23. It was Mr. Jones Q.C.'s submission that there are two reasons why, pending final determination, a plaintiff should not be responsible for the ongoing remuneration and expenses of the receiver and the receiver should look to take his remuneration and expenses out of the assets over which the receivership extends. Firstly, the plaintiff has no control over the receiver. The receiver is not an agent of the plaintiff, and is an officer of the Court, subject to the control of the Court. Thus, the plaintiff should not be responsible *per se* for all the remuneration and expenses. Secondly, the appropriate time to determine whether the plaintiff should be responsible for the receiver's remuneration and expenses, and if so, how much, is at the end of the trial. This is done, Mr. Jones submits, on an inquiry as to damages on the cross-undertaking. If the plaintiff is successful, it would be wrong that he should be paying the remuneration and expenses. If the plaintiff is unsuccessful, it does not follow that the appointment of the receiver has caused all the remuneration and expenses to be incurred. Learned Counsel argues that the remuneration and expenses incurred may well have been caused or increased by unnecessary actions of the defendant, in which case the defendant should bear those costs, those costs having in those circumstances been caused by the defendant's actions rather than the appointment of the receiver as such.

24. Reference was made to ***In re Andrews*** [1999] 1 WLR 1236 at 1246 D where Ward LJ stated:

> *"The true position, as it now appears to me, is that the investigation of whether or not the defendant has suffered loss by reason of the receivership is an investigation which should be and ordinarily would be conducted in deciding whether or not damages should be awarded against the plaintiff for breach of the usual undertaking as to damages a plaintiff would normally be required to give. Such an investigation would enable justice to be done."*

25. As regards costs already incurred pursuant to an order which is subsequently discharged, reference was made to the decision of Mr. Michael Hart QC, deputy High Court Judge, as

he then was, (subsequently became a full High Court Judge), in ***Mellor v Mellor*** [1992] 1 WLR 517, where at pages 525 E-H he stated:



> *"I am myself unable to understand the basis on which it is said that the receiver's rights to remuneration in respect of services actually rendered by him during the currency of his appointment can depend in any way on whether the order appointing him would not have been made had the party applying for it made fuller disclosure to the court than in fact he did. Absent any evidence that the receiver was in some way complicit in the non-disclosure or other impropriety on behalf of the applicant in obtaining the order, the receiver is entitled to act and be remunerated for acting on the footing that his appointment is valid.*
>
> ....
>
> *The court appointing a receiver on interlocutory motion does so because it is satisfied on the evidence before it that such an appointment is desirable in the interests of those interested in the assets thus placed in receivership. The apprehended risk to those assets may or may not exist and a judgment has to be made as to whether the additional cost which a receivership necessarily throws up will be justified by the perceived threats to the safety of those assets. That judgment is made when the appointment is made.*
>
> *The idea that the court may subsequently deprive a receiver of his right of remuneration on the sole ground that the court with hindsight comes to the conclusion that the receivership which it had ordered had better not have been ordered at all, has only to be stated in those terms for its injustice to be apparent....."*

26. Worthing closed its submissions by stating that the order at paragraph 2(w) is a standard one, was properly justified, and should remain.

27. Mr. Goodman, on behalf of the JPLs, made reference also to the role of the JPLs. He submitted that the duty of the JPLs is partly public, which is to assist the Court. But it is partially private, in that the JPLs have a private duty to protect the assets of the Company for the stakeholders of the Company. Counsel submitted that the JPLs' mandate is to preserve the assets pending the hearing of the Petition. Their role is therefore to protect the interests of the Company, whether the interests of the Company are equated with the interests of the shareholders or whether the interests of the Company are equated with the interests of the Company's creditors.

28. This role of protecting the interests of the Company, Mr. Goodman submits, is exactly why the rule in England is clear and, he says, the rule in Cayman is presumptive. To the extent that there is a risk to the Company, that is protected, he submits, by the Petitioner's undertaking and the Company's ability to apply, as it has in this case, for fortification.

29. Counsel succinctly summarised that the balance of risk therefore favours an order that the payment should be made from the Company's assets, and the risk to the Company is protected by the undertaking, and if ordered, fortification of the undertaking.

30. In response to Worthing's submissions drawing an analogy between JPLs and Receivers or Managers, Mr. Lowe submitted that that analogy is wrong. Learned Counsel submitted that, quite apart from the fact that the jurisdiction to appoint the JPLs and to order their remuneration is statutory, the difference between a PL and a receiver is that a receiver is appointed over assets, whereas a PL displaces the Company's organs. The directors lose all of their authority except to defend the winding up. Another difference that was pointed to is that the appointment of JPLs will usually, if not often, have devastating effects on the continuance of the Company because of the effect on the directors. This is not so in a receivership because the person or entity is still able to go about its business in any way not covered by the receivership.

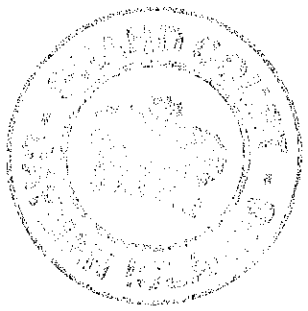
31. It was Sterling's position that it being common ground that the JPLs are officers of the Court, the Court has a choice to make between two parties: the Petitioner or the

Company. Mr. Lowe submitted that it would be a disproportionate interference with the Company's right to peaceful enjoyment of its property to construe the rules to say that prima facie the costs should be put on the Company prior to the determination of the Petition. Reference was made to the interesting decision of the Supreme Court in ***Barnes v Eastenders Cash & Carry plc et al*** [2014] UKSC 26 which arose out of an ex parte restraint order secured by the Crown Prosecution Service under the ***Proceeds of Crime Act 2002***. Reference was also made to Article 15 of ***The Cayman Islands Constitution Order*** 2009, which deals with a person's right not to have Government interfere with his peaceful enjoyment of his property, subject to carved out exceptions and to certain conditions.

32. It was Mr. Lowe's submission that this case demonstrates the concept of proportionality, and that all the relevant and competing rights have to be balanced and qualified with other rights, and cannot be treated as absolute. Learned Counsel says that one of the important points that the ***Barnes*** case shows is that, even the common law principle regarding the receiver's entitlement to get his payment out of the assets of the Company can, depending on the facts, and context, be capable of offending against rights and freedoms.

33. In the ***Barnes*** case, reference is made to the ***Capewell*** decision, cited by Mr. Jones. The Headnote in ***Barnes*** is useful and states as follows:

> *"Held, (1) that, at common law, a court appointed receiver was entitled to look for payment of his proper expenses and remuneration to the assets placed by the court in his control and he had a lien over those assets for that purpose; that the setting aside of the receivership order did not retrospectively deprive the receiver of his right to remuneration under it; that the relevant provisions of the* ***Proceeds of Crime Act*** *2002, together with the common law of receivership satisfied the requirement under article 1 of the First Protocol to the Convention that a person should only be deprived of his possessions subject to the conditions provided for by*



law, and the provisions as to the payment of receivers served the legitimate public interest of combating crime by making it unprofitable; but that, in circumstances where the companies had not been defendants nor had there been any reasonable cause, at the time when the receivership order had been made, for regarding their assets as those of the defendants, an order that the receiver's costs and expenses should be met out of the companies' assets was disproportionate, in that it did not achieve a fair balance between the interest of the community and protection of the companies' right to their own property; and that, accordingly, the companies' rights under article 1 of the First Protocol would be violated if the receiver were allowed to use their assets to meet his remuneration and expenses……

*…..**Capewell v Revenue and Customs Comrs**…., distinguished.*

But (2), allowing the appeal in part, that to take away the receiver's lien for his proper remuneration and expenses over the receivership property without compensating him would violate his rights under article 1 of the First Protocol to the Convention; that, although there was in the 2002 Act no power to order the Crown Prosecution Service to pay the receiver's remuneration and expenses, under the law of restitution or unjust enrichment the receiver was entitled to recover his proper remuneration and expenses from the Crown Prosecution Service because there had been a total failure of consideration in relation to the receiver's rights over the companies' assets, which was fundamental to the basis on which the receiver had agreed to act in accordance with the Crown Prosecution Service's request; and that, accordingly, the judge's order that the receiver's remuneration and expenses should be paid by the Crown Prosecution Service would be reinstated."

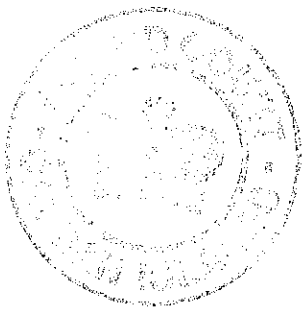
DISCUSSION AND ANALYSIS

34. The CWR, Order 4, Rule 3, and Order 4, Rule 7(3)(a) provide as follows:

"Order 4

Application for Appointment of Provisional Liquidator

Part 1: Application by Creditor or Contributory



...

Security (O.4, r.3)

3 (1) The applicant shall give an undertaking to the Court to pay-

(a) any damage suffered by the company by reason of the appointment of the provisional liquidator; and

(b) the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed.

(2) [The] *Court may require the applicant to give security for his undertaking in such manner as the Court thinks fit.*

.....

Part II: Application by the Company

....

Order for Appointment of Provisional Liquidators (O.4, r.7)

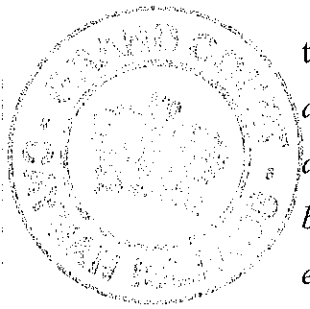
7. ...

(3) The Court may make orders and directions in respect of the following matters-

(a) that the remuneration and expenses of the provisional liquidator be paid out of the assets of the company in any event."

35. I note in any event that Order 4, Rule 7(3)(a) really applies to applications by the Company for the appointment of provisional liquidators, which takes place in the context of a compromise or arrangement to be presented to the company's creditors, and thus is not directly relevant here.

36. In my judgment, the submissions of Worthing and the JPLs are correct. It does seem to me that the ordinary position is that until the Petition by a contributory or creditor is determined, the JPLs' remuneration and expenses are to be paid out of the assets of the Company. This, as stated by Carnwath J in ***Re UOC Corp*** at page 198 B, simply orders



the position between the JPLs and the Company, *"without prejudice to the ultimate allocation of responsibility as between the parties to the petition....If the company's assets have been used to pay costs of the provisional liquidator which ultimately are to be borne by one or the other parties, the company's funds will be replenished to that extent."*

37. The argument made by Mr. Lowe Q.C. regarding the right to enjoyment of property is an interesting one, but in all of the circumstances it seems to me that it is not apt in the circumstances. I think that the analogy to Receivers drawn by Mr. Jones Q.C. is appropriate and helpful, to the extent at least that although the JPLs are officers of the Court, it is not the Court that pays the receivers or the JPLs. The Court has to make a decision as between the parties as to who will bear the JPLs' expenses and remuneration, and this is without prejudice to the ultimate allocation of responsibility in respect of the JPLs' remuneration and expenses. There is therefore in my view nothing disproportionate in the treatment of the interim position by the CWR as I have interpreted their meaning.

38. Under the CWR, unlike the English Rules, there is no requirement for a Petitioner to deposit any sum to cover the JPLs' remuneration and expenses. That points, in my view, away from a default position that the Petitioner should be ordered to make provision for those matters at this stage. More importantly, it seems clear to me that what the undertaking in CWR Order 4, rule 3 provides is for the Company's protection and reimbursement in the event that the Petition is unsuccessful. It is pursuant to the undertaking that the Company will be entitled to seek replenishment of its assets in respect of the JPLs' remuneration and expenses which it had been required to satisfy in the interim. I am of the view that, without more, the CWR Order 4, rule 3 does appear to impliedly raise the presumption suggested by Mr. Goodman. However, the Court does have discretion to make some other order in a proper case.

39. The wording of Order 4, rule 7(3)(a), which relates to a Company's application for the appointment of JPLs, states that the court may make an order that the remuneration and expenses of the JPLs be paid out of the assets of the Company in any event. That is

because of the nature of that application, which is by the Company. Order 4, rule 7, obviously, in contrast to Order 3, does not require any undertakings by the applicant because the applicant is the Company. The use of the words "in any event" in relation to an application by the Company, suggest to me that when the application is by a contributory or creditor, the remuneration and expenses are paid out of the assets of the Company. However, this is not "in any event" because the Court may have to make an adjustment after determination of the Petition and pursuant to the Petitioner's undertaking under O. 4, r. 3. All told, I accept Mr. Goodman's submission that the balance of risk therefore favours an order in the circumstances of this case that the payment should be made from the Company's assets. The risk to the Company is protected by the undertaking, and if ordered, fortification of the undertaking. That is why any undertaking given must be meaningful and satisfactory.

UNDERTAKING

40. Although the wording of the undertaking given by the Petitioner could have been more precise, it is common ground that the undertaking given is intended and accepted to be a fulfillment of the requirements of CWR Order 4, Rule 3.

41. In his 2nd affidavit, sworn in support of the application for the appointment of the JPLs, Mr. Keilman stated at paragraph 69 as follows:

> *"I can confirm that the Petitioner has entered into a funding agreement with Niaga in respect of the costs that will arise out of the litigation in relation to the Petitioner, and Niaga is willing and able to provide an undertaking in damages in connection with the application for the appointment of provisional liquidators to the Company. Following receipt of written confirmation from Niaga, I verily believe that Niaga has the necessary assets and resources to honour its undertaking in damages."*

42. Through oversight, that cross-undertaking was not incorporated in the order which I made appointing the JPLs. However, undertakings by Niaga were formally given to the

Court on 29 April 2016 through Counsel although it appears that due to oversight, they were not recorded in the order drawn up then either. I agree with Mr. Jones Q.C. that the orders need to be amended to formally record the giving of these undertakings. The commitments given were that Niaga undertook that it would meet any adverse costs orders that may be made against Worthing in the event that the Winding Up Petition is dismissed. Further, Niaga provided a cross-undertaking in damages in respect of any damages that may be awarded to the Company arising from the JPLs' appointment.

43. As regards the Company's request for fortification of the undertaking, the Petitioner objects because firstly, according to it, had the point been argued, a cross-undertaking could not possibly be justified. Secondly, it was submitted that it would be manifestly unfair for Niaga to incur the costs of providing such fortification when there is no prospect of such costs or any loss incurred thereby being compensated if the Petition is successful. The only party that can compensate Niaga is Sterling, but that will fall ultimately on Niaga as the main Shareholder in Worthing. According to the submissions, there is no offer in the present case by Mr. and Mrs. Dabah (the Directors of Sterling) to submit to the jurisdiction of the Court, and to undertake to the Court and to Niaga that they will compensate it for the costs incurred or losses suffered by Niaga should the Petitioner be successful.

44. It is obvious to me that the Company's request for fortification is justified because the Company is saying it has no knowledge of the financial position of Niaga. In Walkers' letter dated 12 April 2016, it indicated that Niaga is not minded to disclose its financial records to the Company, nor does it consider it has any obligation to do so.

45. However, it seems to me that having agreed to give the undertaking, that is not a reasonable position for Niaga to take. The undertaking could, on the face of it, be meaningless in circumstances where nothing is revealed to the Company, or to the Court as to the financial records and means of Niaga. In my judgment, the fortification ought to be provided. The fact that Mr. and Mrs. Dabah or Mr. Katz are not prepared to, or have not given any undertaking is, in my view, not a factor to consider at this point, and on this

issue, since they are not the ones applying for the appointment of the JPLs or the winding up of Sterling.

46. Mr. Jones raised an objection to the fortification in so far as there are no figures currently to work with and that banks or financial institutions do not provide unspecified guarantees. I think the point is a sound one. I trust that the parties will be able to come to some agreement on this point. If not, Sterling has liberty to apply to work out the terms of the order for fortification.

47. I would therefore ask Counsel to discuss these matters within 7 days after this Judgment, and thereafter Counsel for the JPLs and Counsel for Sterling are to draft Orders on their respective summonses for my approval and signature.

48. I would suggest that the parties attempt some agreement as to costs on Sterling's application, in respect of which they have partially succeeded. If it cannot be agreed then, subject to any views from the parties to the contrary, it seems to me that proper use of the Court's resources would suggest that this matter be dealt with at some future case management stage of this case. I have refused Worthing's application for summary judgment and thus, the matter is currently set for trial for 10 days commencing on 12 September 2016. There will therefore inevitably be a further need for case management and/or pre-trial review orders at which time any issues outstanding can be dealt with.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT