



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 111 OF 2018 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

**AND IN THE MATTER OF ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN
OFFICIAL LIQUIDATION)**

ON THE PAPERS

**JUDGMENT ON APPLICATION BY MASHREQBANK AND
THE JOINT RECEIVERS FOR LEAVE UNDER SECTION 97
OF THE COMPANIES ACT (2023 REVISION)**

Introduction

1. By their summons (the *Application*) dated 17 September 2024 Mashreqbank psc (the *Bank*) and Keiran Hutchison and Hani Bishara in their capacity as joint receivers appointed by the Bank (the *Joint Receivers*) (the Bank and the Joint Receivers being together, the *Applicants*) apply for orders pursuant to section 97(1) of the Companies Act (2023 Revision) (the *Act*) that they be given retrospective leave to: (a) file and serve a counterclaim (the *Counterclaim*) against Abraaj Investment Management Limited (In Official Liquidation) (*AIML*) acting by its joint official liquidators (the *AIML JOLs*) in the proceedings commenced before the High Court in London (the *English Proceedings*) by AIML and Sage Venture Group Limited (*Sage*) against KES Power Ltd. (*KESP*); and (b) take such steps as may be required to prosecute the Counterclaim in the English Proceedings. The Applicants seek an order that there be no order as to costs.

2. Having reviewed the evidence adduced by the Applicants (including the Counterclaim) and the written submissions made on their behalf by Walkers, for the reasons briefly explained below I have decided that (a) leave is required but that (b) leave should in the circumstances be given and therefore that the Application should be granted.

The background

3. The English Proceedings relate to a dispute concerning who is the creditor entitled to a receivable (the ***KESP Receivable***) said by the Applicants to be owed by KESP as a result of its receipt of inter-company loans. The Applicants claim that the KESP Receivable was assigned by Abraaj Holdings Limited (***AH***) to the Bank by way of security for loans made by the Bank to AH. AIML and Sage dispute this and instead claim that the KESP Receivable is owed by KESP either to AIML or Sage.
4. AIML (acting by the AIML JOLs) and Sage have issued the English Proceedings against KESP to establish and enforce their asserted rights against KESP in respect of the KESP Receivable.
5. In view of its claim to be the creditor of KESP and to be the assignee of the KESP Receivable, the Bank (and the Joint Receivers) sought to be, and have now been, joined as parties (defendants) to the English Proceedings.
6. On 16 April 2024, the Bank and the Joint Receivers filed and served a defence to the claims in the English Proceedings and the Counterclaim against AIML and Sage claiming (*inter alia*) that the Bank, and not AIML or Sage, has the right, title and interest in the KESP Receivable, and therefore that the KESP Receivable is owed by KESP to the Bank (not AIML or Sage).
7. AIML (acting by the AIML JOLs) and Sage consented to the joinder of the Bank and the Joint Receivers to the English Proceedings for the purposes of enabling them to file a defence and any counterclaim (to make any other related claims).

8. On 11 September 2024 AIML (acting by the AIML JOLs) and Sage issued an application in the English Proceedings to join K Power Holdings Limited (*K Power*) as a claimant on the basis that on 28 May 2024 Sage purportedly assigned such right, title and interest that Sage allegedly had in the KESP Receivable to K Power. I am informed by counsel for the Applicants, and by counsel for AIML, that since the date of the Application the application to join K Power has been granted and that the pleadings in the English Proceedings have been amended accordingly. However, since there is no evidence before me to that effect, and with the agreement of the parties, I shall proceed on the basis of the evidence that is before me, which indicates that only AIML and Sage are the claimants in the English Proceedings. In any event, the joinder of K Power to the English Proceedings as a third claimant does not affect the substance of the dispute or the issues arising on the Application.

The Application

9. The Applicants now apply, pursuant to section 97 of the Act, for retrospective leave to file and serve and then prosecute the Counterclaim in the English Proceedings. The Applicants argued that (a) leave was not required but (b) that if leave was required it should be granted in the circumstances.
10. The AIML JOLs' position is that leave is required but they do not oppose the granting of leave.
11. The Applicants have requested, and the AIML JOLs have not objected, to the Application being dealt with on the papers.
12. The AIML JOLs have, following my direction to give notice of the Application to relevant creditors, given notice to those two members of the AIML liquidation committee who do not have a conflict of interest. On 1 October 2024 the AIML JOLs confirmed that each of these liquidation committee members had confirmed that they take no position on the Application (by which I assume that they mean, having considered the position of the

general body of AIML's creditors, they see no need to make submissions on or intervene in the Application).

13. The Applicants relied on Mr Hutchison's Fourth Affidavit (*Hutchison 4*) filed in support of the Application and made written submissions by way of a letter to the Court from Walkers dated 17 September 2024.

The English Proceedings

14. By a claim form issued by AIML and Sage on 21 March 2023 AIML claims that KESP owes it US\$41,446,114 (the *Debt*) in respect of services provided by AIML to KESP and expenses incurred by it. The claim form asserts that in August 2022 AIML sold its rights in respect of the sums outstanding at that time in respect of the Debt to Sage but that Sage simultaneously assigned the balance of the Debt to AIML by way of security. AIML asserts (at [6] of the claim form) that it is the creditor at law in respect of the Debt. At [7] AIML and Sage claim against KESP in the alternative "*according to their respective entitlements as assignor and assignee.*" Particulars of the claim are set out in the Particulars of Claim. It is clear that the Debt relates to sums payable under a consultancy services agreement dated 18 May 2009 (the *Consultancy Services Agreement*) which was extended by a side letter dated 15 July 2015 (the *Side Letter*). Both the Consultancy Services Agreement and the Side Letter contain clauses in which the parties submit to the exclusive jurisdiction of the English court.
15. The Counterclaim asserts that the Bank's loans to AH were originally made pursuant to a loan agreement to which both AH and AIML were parties (and that AIML was a guarantor in respect of these loans). The Counterclaim further asserts that in spring 2017 AH and AIML sought an extension of the repayment date of the loans and the Bank made it a condition of its agreement to such an extension that further security be granted to it. On 23 July 2017 a second amendment agreement (the *Second Amendment Agreement*) was entered into by AH, AIML and the Bank in which the extension was granted in

consideration for the granting of security over the KESP Receivable. On the same date an assignment agreement (the *Assignment Agreement*) was entered into by AH and the Bank which the Bank claims included an assignment by way of security of the KESP Receivable. The KESP Receivable and the Debt represent the same indebtedness and liability.

Is leave required?

16. On the question of when leave is required, the Applicants cited and relied on a number of authorities. In particular they relied on the judgment of Justice Richards in *Re Adenium Energy Capital, Ltd. (In Official Liquidation)* (unreported, 26 April 2022) at [52] and [54] where the learned Judge held that "*defensive steps are not within the statutory moratorium*" and that "*If a counterclaim is pleaded solely to raise a defence by way of set off, it is a defensive measure and no permission of the court is required. If, on the other hand, the counterclaim seeks a net payment from the claimant to the defendant, it does constitute a legal proceeding against the company for which the permission of the court is required.*"
17. The Applicants accepted that the nature of the claim being asserted in a counterclaim (or of course by way of originating process) which is the subject of a leave application, is the key consideration when determining whether leave is required. In order to avoid the requirement for leave the claim must be characterised as defensive in nature. For the purpose of the Application, I accept that this is the right approach (it is neither necessary or appropriate on an application on the papers such as this to review the authorities in detail).
18. In the present case, the Bank claims to be the assignee (from AH by way of security) of the KESP Receivable with (the primary) title to sue KESP and receive payment of the debt owed by KESP. The Bank asserts rights in respect of and over the KESP Receivable. AIML in the claim form and the Particulars of Claim has asserted that it is the creditor with rights against KESP. It claims to hold those rights as creditor in law either on its own or with Sage as assignee. AIML has asserted in correspondence that the relevant debt owed by KESP was never assigned by AIML to AH (and therefore the rights against KESP could

not have been assigned to the Bank) or that the rights in respect of the debt owed by KESP were never properly covered by and assigned pursuant to the Assignment Agreement.

19. It seems to me that in these circumstances the Bank's claim, as asserted in the Counterclaim, involves the positive assertion of rights adverse to and against AIML which cannot be characterised as merely defensive for section 97 purposes. The Bank asserts rights in respect of the sums owing by KESP which AIML claims are owed to it and claims that it and not AIML is the creditor of KESP. It seeks to establish its own rights against KESP and that AIML has no rights against KESP in respect of the relevant indebtedness (or possibly that the rights which it, the Bank, has have priority over the rights asserted by AIML).
20. The Bank is positively asserting rights adverse to AIML and against property (a chose in action) which AIML claims to be property of the AIML estate (and in addition the Bank relies on an agreement to give it security to which AIML was a party). As Walkers said in their letter (my underlining): "*The Counterclaim was filed to obtain (inter alia) a positive finding that the Bank owns the right, title and interest in the KESP Receivable (rather than simply no finding being made that Sage owns such right, title, and interest), and that such title cannot be challenged further by any of the parties to the English Proceedings.*"
21. In these circumstances, in my view leave is required.

Should leave be granted?

22. As regards the approach to be adopted by the Court when considering whether to grant leave, the Applicants relied on the judgment of the Chief Justice in *BDO Cayman Ltd and BDO Trinity Ltd v Ardent Harmony Fund Inc (In Official Liquidation)* (unreported, 19 November 2021). At [24] of her judgment the Chief Justice held that:

“(a) *The applicant for leave must first establish an arguable case to be litigated;*

- (b) *If it establishes an arguable case, the Court then has to consider whether it would be fair, in the context of the liquidation as a whole, for the JOLs to have to deal with the burden of that litigation. The Court's discretion is wide and unfettered - there is no presumption in favour of or against giving leave - and each case turns on its own facts;*
- (c) *In deciding what would be fair, the Court can give s. 97 leave subject to conditions subject to a consideration of what would be fair, in the context of the liquidation as a whole."*

23. The Applicants also noted that the principles to be applied by the Court had previously been considered by Chief Justice Smellie (as he then was) in *Ahmad Hamad Algosaibi And Brothers v Saad Investments Company Limited* [2010 (1) CILR 553] (AHAB) at [71]-[72]. Chief Justice Smellie had held that section 97 gives the Court “*a free hand to do what is right and fair according to the circumstances of each case*” and that fairness in this context is fairness in the context of the liquidation as a whole, and the ascertainment of what is fair necessarily involves a consideration of the interests of the creditors as a whole and of the capacity of the liquidators to deal with the burden of the proposed litigation. They also noted that applications made under section 97 do not require the Court to investigate the merits of the claim being commenced but only to be satisfied that there is an arguable claim (*Re Bank of Credit and Commerce International SA (No.4)* [1994] 1 BCLC 419, per Ferris J at p. 426C) and that if the proposed action raised issues which could conveniently be decided in the liquidation proceedings leave would generally not be given.
24. In the present case, the AIML JOLs have chosen to litigate AIML's claim against KESP in respect of the Debt in the English court. This is, no doubt, because, as I have already noted, both the Consultancy Services Agreement and the Side Letter contain clauses in which the parties submit to the *exclusive* jurisdiction of the English court (even though KESP is incorporated in this jurisdiction). The AIML JOLs have been required to initiate proceedings to resolve the dispute concerning the rights to the sums owed by KESP, and under the terms of the relevant agreements such proceedings needed to be in England. In the circumstances, the dispute is not of a kind that can be resolved by use of the proof of

debt procedure or otherwise easily be dealt with in the winding up proceedings (KESP would need to consent to the proceedings against it being brought in this jurisdiction).

25. Unsurprisingly, in the circumstances, the AIML JOLs have not opposed the Application. Having chosen to initiate proceedings and do so in London in the interests of the AIML estate, they could hardly now claim that it is against the interests of AIML's creditors to allow all the disputes relating to AIML's rights against KESP to be resolved in those proceedings and to allow the Bank to assert its rights by way of the Counterclaim. Or that the disputes relating to the Debt and the KESP Receivable should be dealt with without the need for litigation, or otherwise litigated, within the winding up proceedings.
26. Furthermore, a brief review of the facts and claims as set out in the Counterclaim establishes that the Bank has satisfied the arguable case to be litigated test.
27. In the circumstances, having regard in particular to the interests of AIML's creditors and the proper conduct of the AIML liquidation, in my view it is clear that the Bank (and the Joint Receivers) should be granted the leave they seek (and that leave shall apply with effect from the date of the filing of the Counterclaim) and that the Application be granted.
28. I see no reason to deny the Applicants' request for an order that there be no order as to the costs of the Application.



The Hon Justice Segal
Judge of the Grand Court, Cayman Islands
25 November 2024