Claim No. CFI 033/2009

THE JUDICIAL AUTHORITY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE JUSTICE SIR JOHN CHADWICK

IN THE MATTER OF

THE DIFC INSOLVENCY LAW NO.3 OF 2009

and

ORION HOLDING OVERSEAS LIMITED

(In Liquidation)

Hearing:14 January 2010

Counsel: Mr Kaashif Basit, JSA Law for ClaimantMr Nicholas Carnell, Kennedys for Mr Abu Al Haj

Mr Axel Jacob, Fichte & Co for Shereen Aldisi & Ors

Judgment:14 January 2010

JUDGMENT

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1. Orion Holdings Overseas Limited, to which I shall refer as "the company", is a DIFC registered company. It was incorporated on 11 November 2004 as a company limited by shares in the Republic of Panama. It changed its domicile to the Dubai International Financial Centre with effect from 1 April 2008.

2. The company acts as a holding company for a number of subsidiaries. It is necessary that I should refer to six of those. They are the Swiss Orion Fund, a fund established in Switzerland, Orion Brokers DMCC, a company registered in the DMCC, Orion Capital Limited, a regulated company within the DIFC, Orion Global Financial Services LLC, a company registered in Delaware, Orion Tradesoft Middle East FZ-LLC, a company registered in the Tecom area of Dubai, and Orion Financial FZ-LLC, also registered in Tecom.

3. The current shareholders in the company are these: Petra Invest Limited, controlled by Mr Mohammed Abu Al Haj, holding shares amounting to some 34.32 per cent in the company; Shuaa Capital PSC, holding 20 per cent; Prima Vera Holdings Cayman Limited, holding some 15.6 per cent; MHK Investments Limited, holding 11.23 per cent; A.J. Capital Limited, holding 16.85 per cent; and Mr Shihab Khalil, holding some 2 per cent.

4. The company carried on business in the financial service sector as holding company for the various subsidiaries that I have mentioned. By the early part of last year the company commissioned a report from accountants, Messrs Ernst & Young, as to its ability to meet its debts on a cash flow basis. The conclusion in that report was that the company would probably be able to do so; but that it was impossible to be sure.

5. By that stage, the business of the company had effectively ceased. Disputes had arisen amongst the shareholders, in particular between Petra Invest on the one hand, represented on the Board by Mr Mohammed Abu Al Haj, and the other main shareholders, Shuaa Capital, Prima Vera, MHK and A.J. Capital on the other hand, represented on the Board by the individuals nominated by them. The disputes arose in connection with proposed refinancing of the company and its group. The proposal for refinancing came to nothing.

6. The position during the summer of 2009 was that the company was no longer paying its employees and was taking steps to dispose of its assets and the assets of the group. That process continued throughout the summer and early autumn.

7. Among the assets of the group were deposits with a Swiss bank (IHAG Bank Zurich). Those deposits amounted in all to approximately US$2 million: of which US$1.09 million was held in the name of Orion Capital Limited, US$880,000 in the name of Orion Global Financial Services LLC and some US$30,000 in the name of the company. Those deposits were held in order to provide the necessary regulatory security for the business of Orion Capital Limited in the DIFC. It had been decided to discontinue that business and to withdraw the license,

so that it was no longer necessary to have that regulatory security in place. But when the company and its subsidiaries sought to withdraw that money, it was met by the response from IHAG Bank that those monies were pledged. It seems that the pledge was to secure credit facilities provided to Mr Mohammed Abu Al Haj. It is said on behalf of the other directors - that is, the Directors other than Mr Al Haj - that was the first they knew about the pledge claimed by the Swiss bank. It is not for the Court, at this stage, to decide whether or not the monies held in the Swiss bank are indeed subject to a pledge: and, if so, whether that pledge was given with the authority of the company.

8. The practical consequence is that the US$2 million held at the Swiss bank did not become available for meeting the obligations of the company or the group; and is unlikely to become available without litigation in Switzerland. It is plain that, without those funds, the group could not meet its liabilities on a day-to-day basis. It is said there are now other substantial assets represented by monies advanced to Mr Al Haj and his brother in the sum in excess of $1 million. Again, the liability or Mr Al Haj for his brother to repay those monies is in issue: the practical consequence is that those monies, also, are unlikely to be repaid without litigation.

9. In those circumstances, the Board of Directors, including Mr Al Haj, commissioned a report from accountants, Sajjad Haider Chartered Accountants LLP, as to the solvency of the company and the steps that should be taken. Sajjad Haider are registered insolvency practitioners under the DIFC Insolvency Regulations. For present purposes they act through their principal, Mr Shahab Haider. He prepared a report which was put before the Board on 23 September 2009. He recommended that the company should wind up and that the subsidiaries should also be wound up: in other words, that the process of realising assets and distributing them to those entitled should be formalised within the context of a liquidation. He advised, correctly, that winding up could be effected voluntarily if a meeting of the members so resolved with a majority of at least 75 per cent. Had that taken place, there would have been a need to consider whether the Directors could make a declaration of solvency; and, if they could not do so, whether there should be a creditors' meeting so that, thereafter, the winding up proceeded by way of creditors' voluntary winding up. That position was not reached. Although a shareholders' meeting was summoned and held on 11 October 2009 for the purposes of considering a resolution to wind up, two of the shareholders, Mr Al Haj and Mr Khalil, voted against it. Mr Al Haj, voting on behalf of Petra, was in a position to prevent the passing of a resolution to wind up because Petra's shareholding was some 34 per cent or more. Accordingly, voluntary winding up did not proceed.

10. Nevertheless, the need for a winding up continued: the underlying circumstances had not changed. Mr Haider had advised that, in those circumstances, an application for a winding up Order could be made to the Court. That is what ought to have happened, promptly, following the failure to obtain a resolution of the shareholders on 11 October 2009. But, for whatever reason, that did not happen.

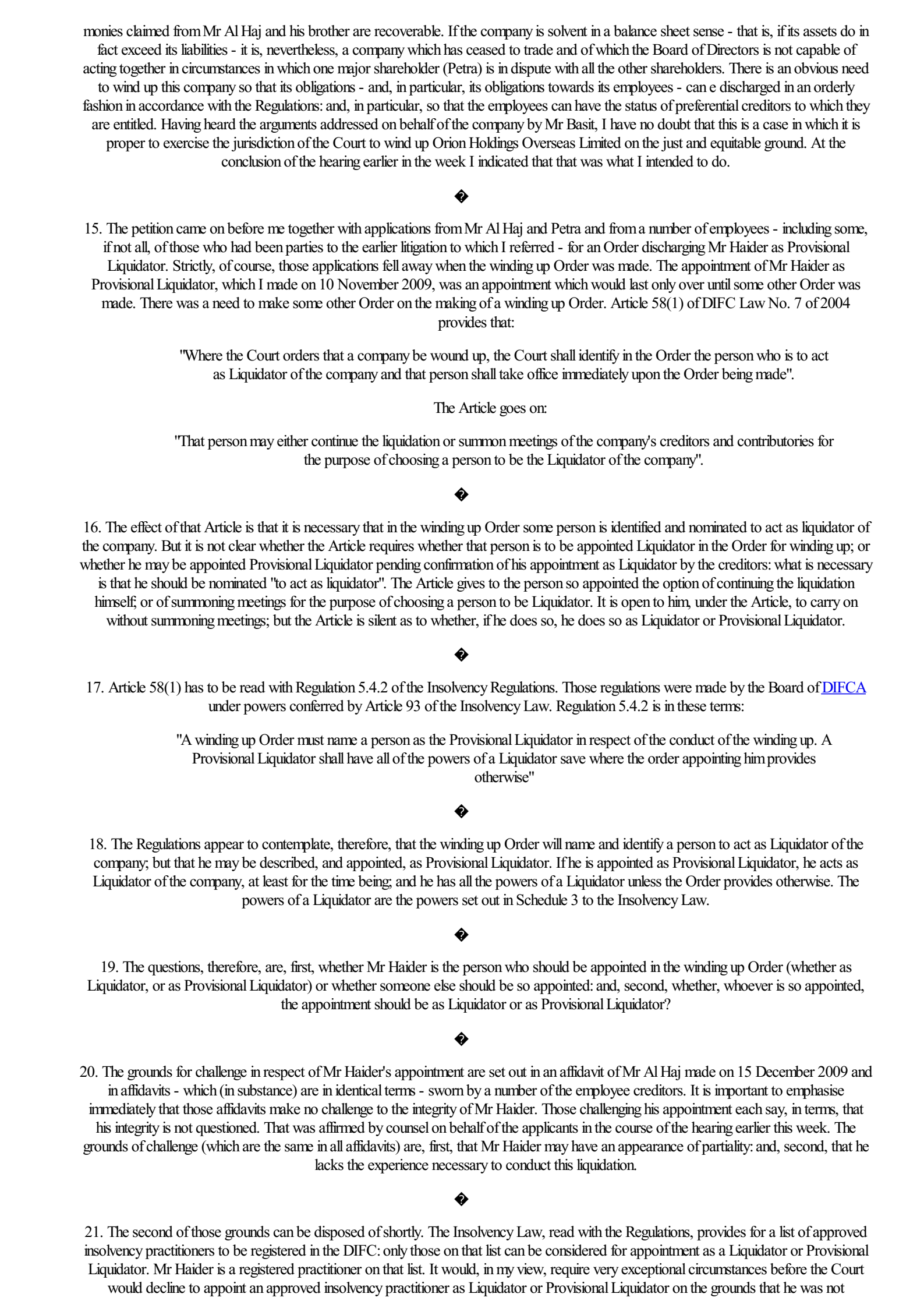
11. The situation which existed at the end of October was deeply unsatisfactory. There was at the time a considerable volume of litigation against the company and some of its subsidiaries, brought by employees (or former employees) who, understandably, were concerned that their employment claims were not being met; that the company appeared to be realising its assets; and that there was no obvious regime under which the assets would be properly applied and distributed to them. In those circumstances, the sensible course would have been for those employees, themselves, to seek a winding up Order on the basis that they were creditors; that the company was not paying their debts; and that the company should be wound up under the Insolvency Law. That would have protected the assets of the company and the group; put those assets into the hands of a neutral and independent Liquidator, or Provisional Liquidator, who would distribute them according to law; and, even more importantly from the employees' point of view, it would have triggered the provisions of the Insolvency Law and the Regulations under which the employees were preferential creditors so that they could expect to be paid out first before any other creditors.

12. The employees did not take that course. They applied to this Court for Freezing Orders. They obtained Freezing Orders, not only in relation to the company of which they were creditors, but also in relation to each of the subsidiaries, of which (in many cases) the employees were not creditors at all. Further, the Freezing Orders were obtained without it having been shown that there was any real risk that the proceeds of realisations which were then taking place would actually be mis-applied. The effect of the Freezing Orders was to stop any further realisation of the group's assets. In particular, they stopped the sale of the shares in one of the subsidiaries (Orion Tradesoft Middle East); and they stopped the realisation of a lease held by another of the companies.

13. The company and its subsidiaries applied to the Court to discharge those Freezing Orders. That application came before me on 10 November. I acceded to it. I discharged the Freezing Order; but, taking the view that the position, as it then was, could not sensibly be allowed to continue, I appointed a Provisional Liquidator on the undertaking of the company to present a petition for winding up within 48 hours. That petition was presented: it is now before the Court. The Provisional Liquidator appointed (Mr Shahab Haider) was at the time the only candidate proposed for appointment: he was the obvious candidate at the time given that he had made the report to the Board to which I have referred.

14. The petition now comes before the Court in circumstances in which, having been advertised, it is not opposed. There is, therefore, no person who has sought to persuade me that it would not be right to make a winding up Order in this case. I am satisfied that the Court has ample jurisdiction to make such an Order; whether the company is or is not presently insolvent. I put it that way because it is unlikely to be possible to tell whether the company is insolvent without resolving the pledge issue with the Swiss bank and the question of whether or not the

monies claimed from Mr Al Haj and his brother are recoverable. If the company is solvent in a balance sheet sense - that is, if its assets do in fact exceed its liabilities - it is, nevertheless, a company which has ceased to trade and of which the Board of Directors is not capable of acting together in circumstances in which one major shareholder (Petra) is in dispute with all the other shareholders. There is an obvious need to wind up this company so that its obligations - and, in particular, its obligations towards its employees - can e discharged in an orderly fashion in accordance with the Regulations: and, in particular, so that the employees can have the status of preferential creditors to which they are entitled. Having heard the arguments addressed on behalf of the company by Mr Basit, I have no doubt that this is a case in which it is proper to exercise the jurisdiction of the Court to wind up Orion Holdings Overseas Limited on the just and equitable ground. At the conclusion of the hearing earlier in the week I indicated that that was what I intended to do.



15. The petition came on before me together with applications from Mr Al Haj and Petra and from a number of employees - including some, if not all, of those who had been parties to the earlier litigation to which I referred - for an Order discharging Mr Haider as Provisional Liquidator. Strictly, of course, those applications fell away when the winding up Order was made. The appointment of Mr Haider as Provisional Liquidator, which I made on 10 November 2009, was an appointment which would last only over until some other Order was made. There was a need to make some other Order on the making of a winding up Order. Article 58(1) of DIFC Law No. 7 of 2004 provides that:

> "Where the Court orders that a company be wound up, the Court shall identify in the Order the person who is to act as Liquidator of the company and that person shall take office immediately upon the Order being made".

The Article goes on:

> "That person may either continue the liquidation or summon meetings of the company's creditors and contributories for the purpose of choosing a person to be the Liquidator of the company".

16. The effect of that Article is that it is necessary that in the winding up Order some person is identified and nominated to act as liquidator of the company. But it is not clear whether the Article requires whether that person is to be appointed Liquidator in the Order for winding up; or whether he may be appointed Provisional Liquidator pending confirmation of his appointment as Liquidator by the creditors: what is necessary is that he should be nominated "to act as liquidator". The Article gives to the person so appointed the option of continuing the liquidation himself; or of summoning meetings for the purpose of choosing a person to be Liquidator. It is open to him, under the Article, to carry on without summoning meetings; but the Article is silent as to whether, if he does so, he does so as Liquidator or Provisional Liquidator.

17. Article 58(1) has to be read with Regulation 5.4.2 of the Insolvency Regulations. Those regulations were made by the Board of DIFCA under powers conferred by Article 93 of the Insolvency Law. Regulation 5.4.2 is in these terms:

> "A winding up Order must name a person as the Provisional Liquidator in respect of the conduct of the winding up. A Provisional Liquidator shall have all of the powers of a Liquidator save where the order appointing him provides otherwise"

18. The Regulations appear to contemplate, therefore, that the winding up Order will name and identify a person to act as Liquidator of the company; but that he may be described, and appointed, as Provisional Liquidator. If he is appointed as Provisional Liquidator, he acts as Liquidator of the company, at least for the time being; and he has all the powers of a Liquidator unless the Order provides otherwise. The powers of a Liquidator are the powers set out in Schedule 3 to the Insolvency Law.

19. The questions, therefore, are, first, whether Mr Haider is the person who should be appointed in the winding up Order (whether as Liquidator, or as Provisional Liquidator) or whether someone else should be so appointed: and, second, whether, whoever is so appointed, the appointment should be as Liquidator or as Provisional Liquidator?

20. The grounds for challenge in respect of Mr Haider's appointment are set out in an affidavit of Mr Al Haj made on 15 December 2009 and in affidavits - which (in substance) are in identical terms - sworn by a number of the employee creditors. It is important to emphasise immediately that those affidavits make no challenge to the integrity of Mr Haider. Those challenging his appointment each say, in terms, that his integrity is not questioned. That was affirmed by counsel on behalf of the applicants in the course of the hearing earlier this week. The grounds of challenge (which are the same in all affidavits) are, first, that Mr Haider may have an appearance of partiality: and, second, that he lacks the experience necessary to conduct this liquidation.

21. The second of those grounds can be disposed of shortly. The Insolvency Law, read with the Regulations, provides for a list of approved insolvency practitioners to be registered in the DIFC: only those on that list can be considered for appointment as a Liquidator or Provisional Liquidator. Mr Haider is a registered practitioner on that list. It would, in my view, require very exceptional circumstances before the Court would decline to appoint an approved insolvency practitioner as Liquidator or Provisional Liquidator on the grounds that he was not

sufficiently experienced. The obvious purpose of the list is to identify those who are sufficiently experienced and qualified to carry out the work of liquidation. I do not rule out the possibility that there could be cases in which the nature of the liquidation was so specialised that it was necessary to select - or at least appropriate to select - a liquidator with particular expertise in that speciality. An example which comes to mind is the winding up of a life insurance company. But this case is not of that nature. This is a perfectly straightforward winding up. It involves settling disputes as to debts owing, pursuing litigation (probably in Switzerland) and identifying, and quantifying, the claims of those claiming to be creditors, particularly employees.



22. It was suggested that Mr Haider had no relevant experience of litigation in Switzerland. But a challenge on that ground is of no substance. The Court would not expect an insolvency practitioner in the DIFC to be experienced in Swiss litigation: what is to be expected is that he would take advice from those who were experienced in such litigation. There is nothing to suggest that Mr Haider is not well able to identify competent Swiss lawyers and to take their advice. It may well be, in any event, that the relevant question in relation to the pledge will turn on the extent to which authority is conferred to pledge the company's assets; and that that question will be a matter of the law of the DIFC and not the law of Switzerland. But that is a matter for the Swiss lawyers. What can be said with some confidence is that a liquidator in the DIFC who sought to be his own Swiss lawyer would attract justifiable criticism: that is simply not his role.



23. For those reasons I reject the suggestion that Mr Haider is not a suitably experienced practitioner; and I reject the suggestion that he is not entitled to work in collaboration with another experienced insolvency firm (Messrs. Griffins) as he intends to do.



24. The complaints as to appearance of partiality - and I emphasise, again, that there is no challenge to Mr Haider's integrity - arise, so far as I can see, entirely from the fact that he was asked to advise the Board of Orion Holdings Overseas in September 2009; and that he did so. His advice is in evidence. It was sound advice. He advised that the company should be liquidated. He explained how it should be liquidated. The shareholders (or at least one of them) chose, at the time, not to follow that advice. That opposition is now withdrawn. I can see nothing in the advice which Mr Haider gave in September which is capable of attracting any criticism at all coming from Mr Al Haj.



25. The criticism from the employees is slightly different. They clearly feel seriously aggrieved by the conduct of the management in failing to pay remuneration which they assert are due to them. Looking at the matter as a whole, it becomes obvious that the reason why they were not being paid was that, at the time, there was no money to pay them. There is no doubt that if remuneration is due to them - and there are assets to pay that remuneration - they should be paid. But there is nothing in the evidence to suggest that Mr Haider was party to any scheme to refuse payments that were due to the employees. It was no part of his role, as adviser to the company, to make those payments. He could not do so. That was for the management; and there was an understandable reason why the management could not do so. There were insufficient liquid assets at the time; and - although this may not have been recognised - the management needed to be careful not to make payments to some employees at the expense of others if there was a danger that ultimately there would be a shortfall.



26. So although I recognise that the employees may believe that anyone who has been associated with the previous management is in some way suspect - or tarred with a brush of antagonism towards them - I am not persuaded that that belief is well founded in respect of Mr Haider; or that it presents any good reason for suspecting that he will not discharge his duties as Liquidator or Provisional Liquidator with the impartiality that office requires.



27. I should add that the company has sought support for its nomination of Mr Haider as liquidator from a number of well known professional firms who are creditors of the company in this jurisdiction; and that no opposition has been expressed from any of them. Those are creditors who would be expected to know if there was any reason why Mr Haider and his firm was not a suitable appointee in this liquidation.



28. So I propose to name Mr Haider as the person in the winding up Order who is to act as Liquidator in this liquidation. The remaining question then is whether I should formally appoint him as Liquidator or continue his appointment as Provisional Liquidator with a view to that appointment being confirmed or otherwise in due course. That has seemed to me to be a difficult question. The underlying premise in a liquidation is that the Liquidator should have the support of those in whose interests he is carrying on his task. I have the benefit of a preliminary report to the Court prepared by Mr Haider's firm. Having reached the conclusion that the company should be wound up, I considered that report, and discussed its contents with counsel for the parties. The report enabled me to form a view as to whose interests were really at stake in this liquidation.



29. It becomes reasonably plain that the persons most at risk in the liquidation of Orion Holding Overseas Limited are the non-preferential creditors. On the figures before me it can be seen that, if the assets realise the amount of the estimate, the employees can expect to be paid in full. There will be a shortfall in relation to the unsecured non-preferential claims; and, accordingly, there will be nothing for the shareholders. That, of course, is no more than a provisional view based on the figures that are before me and the position may change; but, on the basis of those figures, the voices which have the most powerful claim to be heard would be those of unsecured non-preferential creditors because it is they who are likely to be affected most by the conduct of the liquidation.

30. Of the unsecured non-preferential creditors, there are, as I have said, a substantial number of professional firms with quite substantial debts. I have heard their voices; at least in some respects. There is one overwhelmingly large unsecured non-preferential creditor - representing some 75 per cent or thereabouts of the total - whose voice I have not heard. It seems to me, therefore, that it would be wrong to set in stone a regime which made it difficult for that creditor to raise any objection that it might have to Mr Haider's appointment as Liquidator of the company. It should have the opportunity, as it seems to me, to make its views heard.

31. Although the petition has been advertised, neither the petition itself nor the advertisement named the proposed Liquidator. It is impossible, therefore, to take the view that the major creditor, to whom I have referred, has in fact had an opportunity to consider its position in relation to the appointment of Mr Haider. It would, for the future, be more satisfactory if the petition did name the proposed Liquidator - and if the advertisement of the petition indicated that - so that there was an opportunity for creditors and others to object at the hearing of the petition. But that is not required at present by the rules; and it has not happened in this case.

32. In those circumstances, the Order which I propose to make is that the company be wound up and that Mr Haider be appointed the Provisional Liquidator for the purpose of that winding up. But I will go on to add this. It seems to me that there is, really, no purpose in calling a meeting of creditors in the present case to determine who should be liquidator unless there are grounds for thinking that the major creditor to whom I have referred opposes the appointment of Mr Haider. If it does not oppose that appointment, then there are very good reasons for Mr Haider continuing, and I shall mention those in a moment. As I have said, Article 58 of the Insolvency Law provides for the person appointed as Provisional Liquidator to decide whether he continues or whether he calls a meeting. I propose to direct Mr Haider that, as Provisional Liquidator he is not required to call a meeting of creditors unless there is a request for him to do so from the major creditor of OHO. He should, therefore, write to the creditors of the company indicating that he does not propose to call a meeting of creditors; but that he will seek confirmation of his appointment as Liquidator from the Court on receipt of their responses. What I envisage is that, if there is no substantial demand for a meeting of creditors made by those whose voices would be expected to prevail, Mr Haider can apply in writing to the Court for confirmation of his appointment as Liquidator, thereby bringing the provisional liquidation to an end. I take that course because it is notoriously difficult to remove a Liquidator who has been appointed; and it is more satisfactory, therefore, that the position be left in a state where the creditors' meeting can express a view if there is any real prospect that it would be likely to do so.

33. I should add, however, that there are powerful reasons for continuing with Mr Haider both as Provisional Liquidator and Liquidator. Those reasons stem both from the work which he and his firm has done already and from the position in relation to the liquidation of the subsidiaries. Only one of those subsidiaries is a DIFC company: the others are not subject to the DIFC insolvency regime. It is clear from the preliminary report that Mr Haider - acting quite properly, as Provisional Liquidator since November 2009 - has taken steps to ensure, or procure, that he is recognised as Liquidator in the jurisdictions in which those other subsidiaries are established. Those steps have progressed to a point at which recognition seems to have been conferred in some cases; and is reaching a final stage in others. To start again with a new application by a new Liquidator is likely to give rise to further expense and delay; leading to potential chaos. This is plainly a case in which the same person should be Liquidator both of the holding company and of the subsidiaries. Progress has been made in that direction and it seems to me that it would require strong grounds to seek to reverse that progress at this stage. That is the positive reason why it seems to me that this appointment is proper and desirable.

34. Accordingly, I make the Order with the direction that I have indicated. The powers of the Provisional Liquidator will be the powers in Schedule 3 to the Insolvency Law; unless there are any applications that I should limit those powers in the Order at this stage.

Justice Sir John Chadwick

Date of Issue: 14 January 2010