In The Supreme Court of Bermuda

COMPANIES (WINDING UP) JURISDICTION
2019 No 278

Re Culligan Limited (in liquidation)

Application for court sanction for the joint liquidators to enter into a compromise under section 175(1) (f) of the Bermuda Companies Act 1981

Appearances

Adam Al-Attar KC of South Square and *Rhys Williams* of Conyers Dill & Pearman Limited for the joint liquidators

Ex parte application on behalf of joint liquidators on notice to Culligan Softwater Company and Donald E Meredith (who did not appear)

Date of Application and Order: 17 July 2026

Date of Reasons: 29 July 2026

Martin J in Chambers

Reasons for Order

Introduction

1. This is an application by the joint liquidators of Culligan Limited (in liquidation) ("the company") for the court's sanction to enter into a compromise of certain claims that have been brought in the name of the company by way of derivative proceedings in the Supreme Court of New York (No 651863/2012) ("the New York action") on the terms set out in a draft Settlement Agreement ("the Settlement Agreement").

2. The sanction application was heard on 17 July 2026. At the hearing, the court reviewed the background materials in support of the application, read the affidavits of Mr Morrison and Mr Singler (who had sworn affidavits in opposition to the sanction), as well as the expert opinion on New York law provided by Hon Shelley C. Chapman (Ret) a retired judge of the US Bankruptcy Court in relation to matters of New York law[1], and considered the legal principles that apply on an application for sanction under section 175 (1) of the Companies Act 1981.

[1] Affidavit of Hon Shelley C Chapman dated 21 April 2026 ("Chapman").

3. Based upon the submissions made on behalf of the joint liquidators, and its own independent consideration of the materials, the court concluded that it was appropriate to grant the sanction to the joint liquidators to enter into the Settlement Agreement on the terms proposed. At the conclusion of the hearing, the court indicated that it would supplement the terms of the Sanction Order with brief reasons to expand on the basis on which the court had granted its sanction. Those reasons are now set out below.

Brief background facts[2]

4. The New York action relates to a claim in which 71 minority shareholders (holding approximately 8% of the issued shares of the company) seek to recover (inter alia) the value of a dividend declared in 2007 on the grounds that it had been paid improperly out of the proceeds of borrowing by the company to refinance its existing debt burden. In 2007, the company had borrowed US$850 million and used the proceeds of the borrowing to refinance US$400 million of existing debt and to pay a dividend of US$375 million to shareholders. When the company was later unable to refinance these loans upon their maturity in 2012, the company entered into a transaction by way of a debt for equity swap under the terms of which the company's assets were transferred to a new company.

5. In response to this, the minority shareholders commenced the New York action and alleged that the 2007 dividend was unlawful under New York law and sought to unwind a debt for equity swap restructuring on the grounds (inter alia) that the transfer of the assets to the new company was a fraudulent conveyance, and that the directors had acted in breach of their fiduciary duties.

6. The New York action was the subject of numerous procedural objections, and motions to dismiss, which have resulted in the amendment, withdrawal and re-amendment of the complaint, which is now in its fifth iteration. The plaintiffs have threatened to make a sixth amended complaint adding the joint liquidators as named parties seeking injunctive relief to restrain the joint liquidators from proceeding with the liquidation.

7. The joint liquidators were appointed on 23 August 2019 without a committee of inspection. The joint liquidators applied to the US Federal Bankruptcy Court for the Southern District of New York under Chapter 15 of the US Federal Bankruptcy Code for recognition as foreign liquidators on 2 July 2021.

8. After due consideration and having taken appropriate advice from New York attorneys engaged for the purpose of advising and representing the joint liquidators in relation to the New York action, the joint liquidators came to the conclusion that the claims made in the New York action in the name of the company are (on proper analysis) meritless and that it was appropriate to compromise those claims on the best terms they could.

[2] These facts are in digested form taken from the summary provided by Mr Michael Morrison (one of the joint liquidators) in his third affidavit dated 23 April 2026 in support of the application ("Morrison").

The terms of the Settlement Agreement

9. As a result of reaching that view, the joint liquidators negotiated a settlement of the claims on terms set out in a Settlement Agreement which was concluded in 2025. The essential features of the Settlement Agreement are that the defendants will pay a Settlement Fund of US$1,580,000.00 to the joint liquidators in return for the dismissal of the New York action. The Settlement Fund will form part of the assets of the company and will be distributed to the shareholders (other than the defendants in the New York action) in accordance with the statutory priorities provided under the Bermuda Companies Act 1981. These priorities require the expenses of the liquidation to be paid in priority to the distribution of the surplus to the shareholders. The joint liquidators estimate that approximately US$750,000.00 will be paid out to the relevant shareholders, after the expenses of the liquidation have been met, and the joint liquidators will be able to proceed to close the liquidation thereafter.

The sanction application under section 175 (1) of the Companies Act 1981

10. Because the joint liquidators were appointed without a committee of inspection, the joint liquidators only have power to enter into a compromise with the sanction of the Bermuda court, pursuant to section 175 (1) of the Bermuda Companies Act 1981. Therefore, the Settlement Agreement is subject to the grant of the sanction of this court.

11. Initially, the sanction application was opposed by two of the plaintiffs in the New York action, but that opposition has been withdrawn, and those parties did not appear on the present application to pursue any of their previous objections.

12. Nonetheless, counsel for the joint liquidators explained the basis for the various points of objection, gave the joint liquidators' reasons why those objections (on proper analysis) had no merit, and submitted that those objections did not justify the court in withholding its sanction.

13. In addition, counsel for the joint liquidators explained the terms of the Settlement Agreement and the reasons why the joint liquidators had concluded that it was in the best interests of the company and its shareholders as a whole to settle the New York action on the terms proposed. In the light of that conclusion, the joint liquidators sought the court's sanction to enter into the Settlement Agreement on those terms.

The role of the court on a sanction application under section 175 (1)

14. This specific application is made under section 175 (1) (f) which provides (so far as material):

> *"The liquidator in a winding up by the court shall have power, with the sanction either of the court or the committee of inspection—*
>
> *(f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and...any other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or winding up of the company, on such terms as may be agreed....and give a complete discharge in respect thereof."*

15. The terms of section 175 (1) (f) are clearly wide enough to give the court power to sanction a compromise of the claims which have been brought derivatively by the plaintiffs in the New York action.

16. The approach the court is to take on an application for sanction under this provision have been explained in various cases decided in England under the equivalent provision from which the Bermuda section is drawn, and this guidance has been adopted and applied in Bermuda in earlier cases[3].

17. In summary, the court must make its own assessment when exercising its discretion but is entitled to take into account and attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so, or that for some other reason the liquidator's view is flawed.

18. The case law shows[4] that the liquidator seeking a sanction of a compromise must take the view that the proposed compromise is in the best interests of the estate as a whole but does not need to be satisfied that it is in the best interests of every creditor or stakeholder. That view must be genuinely held and be based on reasonable grounds. The liquidator must not act in a partisan way or act under a conflict of interest. There must be no substantial reason in the evidence for the court to withhold its sanction, and the liquidator's reasoning must not be based on a flawed understanding of the facts or the applicable law. The court will refuse a sanction which provides no discernible benefit to the estate, but which might do some harm to those interested in the estate.

19. In making its assessment, the court is not required[5] to decide the ultimate merits of the claim, or conduct a mini-trial of the issues, or come to a view as to the value of the claim. The court is concerned to determine whether the interests of the stakeholders are better served by permitting the company to enter into the compromise than by refusing it[6]. The court will give weight to the views of those properly interested in the compromise but will disregard the wishes of those who will be unaffected by the compromise or those whose views have been influenced by extraneous factors[7].

The court's assessment of the sanction application

20. With those principles in mind, the court approached the assessment of the effect of the compromise on those interested to determine whether the interests of the estate as a whole and the stakeholders who are interested in the effect of the compromise are better served by the entry into the compromise than not. It is useful to compare the analysis of the joint liquidators in support of the compromise against the objections that had been raised, but which are no longer pursued, to test that proposition.

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[3] See **Greenhaven Motors Ltd (in liquidation)** [1999] 1 BCLC 635 (CA) per Chadwick LJ approving Lightman J in **Re Edennote (No 2)** [1997] 2 BCLC 89 applied in **Re US Holdings Limited** (2024) SC (Bda) 11 civ (Subair Williams J) and **Re Afiniti Limited (in liquidation)** (2024) SC (Bda) 65 civ (Martin J).
[4] See **Greenhaven** (supra) at 646, **Re Sova Capital Ltd** [2023] Bus LR 799 at 172, 249-50 and **Re Afiniti Ltd** (in liquidation) (supra) at paragraphs 71-2.
[5] **Re Afiniti Ltd Ltd (in liquidation)** (supra) at paragraph 98.
[6] **Re Bluebrook Ltd** [2010] 1 BCLC 338 at paras 70-1 per Mann J applied in **Re Afiniti Ltd** (in liquidation) (supra).
[7] **Re Longmeade Ltd (in liquidation)** [2016] EWHC 356 (Ch).

21. The joint liquidators provided their reasoning in support of their conclusion. This was based on a number of factors which the court has summarised below.

Standing

22. The plaintiffs in the New York action have as yet failed to establish standing to bring the derivative claim in the first place. The claim is therefore demurrable and vulnerable to summary dismissal[8].

Merits

23. The joint liquidators have been consistently advised by successive New York attorneys over a period of more than ten years that the derivative claim to recover the dividend is a weak claim on the facts and the law[9]. The 2007 refinancing was supported by an independent opinion as to solvency by a reputable financial adviser before the dividend was paid. The directors are entitled to rely upon the business judgment rule, in the absence of self dealing, which is not alleged. The company continued to operate for almost five years before it was liable to default on its loan obligations. The evidence is that it never was insolvent[10]. The plaintiffs in the New York action acquiesced in and benefitted from the dividend the legality of which they now seek to challenge. The claim seeks a recoupment of a dividend in order to distribute it back to the shareholders by way of distribution on a liquidation, with no benefit to the company. These factors present substantial (if not insurmountable) obstacles to the progress and successful outcome of the claim.

Time and cost

24. The joint liquidators point to the fact that the pleading of the claims has not survived the several challenges that have been made, and there is very low expectation that the claim will survive further challenge in its sixth iteration, or it does, it has a very low to no chance of success. The present settlement achieves a return for the estate from a meritless claim, where a dismissal of the claim, or failure at trial, will achieve nothing.

25. The joint liquidators have structured the Settlement Agreement to ensure that only those who were not defendants to the New York action will receive any financial benefit, so that there is no repugnancy in the terms of the settlement, thereby increasing the distribution to those who are not alleged to have benefitted improperly, avoiding circularity.

Closure

26. The joint liquidators say that once the Settlement Agreement is implemented, they will be able to proceed to close the liquidation which is now in its seventh year, with no other tangible benefit to the estate to show for it.

27. The joint liquidators genuinely consider that it is in the best interests of the company as a whole to enter into the settlement on the proposed terms rather than to continue the litigation.

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[8] Morrison 15-17.
[9] Morrison 12-25.
[10] Morrison 40-52.

Are there substantial reasons or a fundamental flaw in the joint liquidators' reasoning to justify the court withholding its sanction?

28. Against this a number of points were taken in opposition by certain of the New York plaintiffs. Even though these are no longer pursued, the court has taken into account the points raised in its assessment of the sanction application. These included (i) the joint liquidators have no authority to settle the New York action (ii) the claims are sufficiently pleaded (iii) the joint liquidators are conflicted or partisan (iv) the joint liquidators should disclaim the New York action rather than settle it (v) the terms of the settlement are insufficient (compared to an earlier partial settlement in 2015) (vi) the joint liquidators have not given adequate notice of the sanction application.

29. The joint liquidators addressed each of these heads of objection in their submissions. Being mindful that the court is not required to engage in a mini-trial or to determine the merits of the proposed settlement terms, the court has undertaken a high level evaluation of the points that might have been taken in order to satisfy itself that there is no substantial reason why the court should withhold its sanction or that there is not some fundamental flaw in the joint liquidators' reasoning as to fact or law.

30. The court is satisfied that even if the above objections had been advanced in opposition to the application for sanction, the court would not have been inclined to accept them as substantial reasons to refuse the court's sanction or as a basis for holding that the joint liquidators' reasoning was flawed as to fact or applicable law for the reasons briefly summarised below.

Authority to settle

31. The court accepts that as a matter of Bermuda law, the derivative cause of action being pursued by the plaintiffs in the New York action vested in the joint liquidators upon their appointment under sections 174 (1) and 185 (1) of the Bermuda Companies Act 1981.

32. The court also accepts that upon recognition of the present liquidation proceedings as a foreign main proceeding under 11 USC 1520 (a) (3) the joint liquidators were vested with the rights and powers of a bankruptcy trustee over the company's US assets under US federal Bankruptcy law which supersedes any New York law analysis. This is based on the uncontradicted and clear analysis given by Hon Judge Shelley Chapman (Ret) in her expert affidavit on US Bankruptcy law[11].

33. Therefore, the court is satisfied the joint liquidators have authority to settle the New York action (subject to the grant of the Bermuda court's sanction to enter into it).

[11] Chapman affidavit 29-37.

Insufficient pleading

34. The court is satisfied that following the recognition of the Bermuda liquidations as a foreign main proceeding, the relevant standard of pleading would be governed by the requirements of the US Bankruptcy Code for the New York plaintiffs to show a colourable claim and an unjustified failure of the estate to sue because the litigation would benefit the estate. The court accepts that the New York plaintiffs are likely to fail to meet those requirements. This is based upon the uncontradicted and clear analysis given by Hon Judge Shelley Chapman (Ret) as to (a) the relevant test and (b) the likelihood of their failure to meet the standard required[12]. Although the court does not need to (and does not) make any ultimate findings, it is clear the joint liquidators' reasoning on this point is not based on a flawed understanding of the relevant legal issues.

No conflict/partisanship

35. The court is satisfied that there is no basis on which to allege that the joint liquidators are subject to a disqualifying conflict of interest because of their prior employment at KPMG or that they have acted in a partisan or less than even handed manner. The joint liquidators are officers of the Bermuda court who have engaged independent professional legal advisers and have engaged in a proper analysis of the issues they are required to consider in their roles as liquidators. There is no evidence of any conflict of interest that would undermine the court's confidence in granting the sanction.

No disclaimer

36. The court accepts the submission that the New York action also represents a contingent liability, and as such cannot be disclaimed as a matter of Bermuda law[13].

Settlement value

37. The court does not usually evaluate the merits of a settlement unless there is some substantial reason to justify the court doing so. In this case, there is clearly a discernible benefit to the estate as a whole, namely the ability to conclude the liquidation, to resolve the outstanding contingent liability represented by the New York action and to return a meaningful amount of value to the minority shareholders, net of the expenses of the liquidation.

38. Although the court notes that the 2015 partial settlement was for a larger sum, in that instance the sum was wholly exhausted by the fee claims for the litigation. Under the Settlement Agreement there will be a surplus distributed to the minority shareholders. While the fees and expenses of the liquidation are taken into account, including legal fees, there is likely to be a surplus for the shareholders by way of a distribution. Without the Settlement Agreement there is (on the evidence before this court) a likelihood of no return at all.

39. There is no evidence of a risk of harm and there is a discernible benefit to the estate that will flow from the settlement on the terms agreed both in terms of distribution to the minority, as well as enabling the joint liquidators to proceed to close the liquidation and meet the costs of the liquidation. As earlier noted, the benefit does not need to be in the interests of every stakeholder, but to the estate as a whole. In the court's view, that requirement is satisfied.

[12] Chapman affidavit 45-49.
[13] Morrison 56-59.

No delay or prejudice

40. This point is not easy to understand. Insofar as it appears to be an objection on the grounds that the joint liquidators did not apply to the court for sanction to enter negotiations which resulted in the Settlement Agreement. This is not a substantive objection. The recital to the Order requires the joint liquidators to give notice of the present application for sanction, which they have done. In any event, the objection has been withdrawn and so this 'complaint' does not represent a substantial reason for the court to withhold its sanction.

Conclusions

41. In weighing the various elements involved in this application, the court is satisfied that (i) the joint liquidators genuinely believe that the terms of the proposed settlement are in the interests of the estate as a whole (ii) the joint liquidators have reasonable grounds for holding that belief (iii) the grounds on which the joint liquidators have reached that view are not based on a flawed understanding of the facts or the applicable law (iv) the joint liquidators' conclusions are not tainted by any conflict of interest and they have not acted in a partisan manner which would justify the court in withholding its sanction (v) the terms of the settlement achieve a discernible benefit to the estate as a whole and (vi) there is no harm caused to the estate by entering into the Settlement Agreement.

42. Having made that assessment, the court is satisfied that it can give appropriate weight to the joint liquidators' views in exercising its discretion to grant the sanction. The court takes into account that the joint liquidators have been deeply immersed in the detail of the New York action for a considerable period. They have had the benefit of expert legal advice from leading firms who have consistently advised them that the New York action is without merit and, despite numerous attempts to rescue its legal foundation, is likely to founder on technical and substantive grounds.

43. The court also takes into account that the Settlement Agreement will achieve a much better result in a shorter period of time and on terms that respect the underlying theory of the claim and will meet the expenses of running the claim thus far. Finally, the court takes into account that the joint liquidators are under a positive duty to progress the liquidation, and gives due weight to their assessment that this is the appropriate basis on which to settle the claim in order to be able to do so.

44. Apart from the due weight the court will give to the views of its officers, who are experienced in conducting complex cross border litigation, the court recognises the clear and compelling challenges that have been identified in respect of a claim that requires a party to prove insolvency retrospectively. From the court's own experience, leaving aside the existence of difficulties in meeting the technical requirements as to standing and other procedural issues, the court considers that the claim is one that justifies settlement on the best available terms. The court is therefore entirely satisfied that the interests of the estate are better served by the entry into the Settlement Agreement than not doing so.

45. For those reasons, at the conclusion of the hearing, the court granted the Sanction Order authorising the joint liquidators to enter into and perform the Settlement Agreement according to its terms.

Dated this 29th day of July 2026

THE HON. MR. JUSTICE ANDREW MARTIN

PUISNE JUDGE OF THE SUPREME COURT