IN THE SUPREME COURT OF BERMUDA

COMMERCIAL COURT

COMPANIES (WINDING-UP)

2007: Nos. 12, 12A-12H

IN THE MATTER OF (12) IPOC INTERNATIONAL GROWTH FUND LIMITED
AND IN THE MATTER OF (12A) CONVERGENCE CAPITAL LIMITED
AND IN THE MATTER OF (12B) COM TEL EASTERN LIMITED
AND IN THE MATTER OF (12C) GAMMA CAPITAL FUND LIMITED
AND IN THE MATTER OF (12D) FIRST NATIONAL TELECOMMUNICATIONS FUND LIMITED
IN THE MATTER OF (12E) IPOC CAPITAL PARTNERS LIMITED
AND IN THE MATTER OF (12F) CONVERGENCE CAPITAL MANAGEMENT LIMITED
AND IN THE MATTER OF (12G) AUGMENTATION INVESTMENTS LIMITED
AND IN THE MATTER OF (12H) TELCO OVERSEAS LIMITED
("the Companies")

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

Date of hearing: November 29, 2007
Date of Reasons: December 6, 2007

Mr. Kulandra Ratneser and Ms. Susan Davis-Crockwell, Attorney-General Chambers, for the Petitioner, the Registrar of Companies
Mr. Mark Diel, Marshall Diel & Myers, for the Companies
Mr. Jeffrey Elkinson and Mr. Ben Adamson, Conyers Dill & Pearman, for LV Finance Group Limited ("LVFG")
Mr. David Kessaram, Cox Hallett & Wilkinson, for Santel Limited, Avenue Limited and Janow Properties Limited and OOO Alfa-Eco ("the Alfa Companies")
Mr. Rod Attride-Stirling and Mr. Nathaniel Turner, Attride-Stirling & Woloniecki, for OAO CT-Mobile ("CTM")

Introductory

1. The Respondents in 12 ("IPOC"), 12B ("Com Tel") and 12E ("IPOC Capital") issued Summonses on November 1, 2007 for an Order that, in the event that the

Companies are wound-up, the disposition of assets effected by the Master Settlement Agreement dated July 25, 2007 ("MSA") should not be avoided by virtue of section 166 of the Companies Act 1981 ("the validation application"). On November 26, 2007, the Petitioner issued a Summons for the appointment of a provisional liquidator to investigate whether or not the relevant transaction was in the best interests of the Companies ("the PL application").

2. The Registrar of Companies did not positively oppose the validation application, but expressed various public interest concerns as to whether the Court was in a position to accede to the application at the present time. It seemed to me that those advising the Petitioner had wisely decided to adopt a precautionary position. While they were unable to identify any clear objections to the validation application, they were understandably concerned about consenting to the application only to have their client later embarrassed by unforeseeable subsequent events. The Companies may well have been a highly significant "blip" on the Bermudian regulatory screen for several years, but those regulatory concerns might not have required detailed attention to be given to the compromised litigation which has recently engaged the attention of this Court.

3. The MSA disposes of the Companies' claims (principally the claim of IPOC International Growth Fund Limited ("IPOC")) to the billion dollar MegaFon Stake, which has formed the subject of some 25 proceedings in Bermuda, the Bahamas, British Virgin Islands ("BVI"), Cyprus, Russia and the USA for roughly four years. In addition, it resolves arbitration proceedings in Geneva, Stockholm and Zurich. The Alfa Companies, CTM and LVFG have, under the MSA, agreed to provide the following consideration: (a) the release of actual, contingent and/or prospective costs claims worth approximately $35 million, and (b) a covenant, subject to applicable law, not to voluntarily cooperate with any prosecuting or regulatory authorities in respect of the subject of the compromised dispute (clause 29).

4. The principal concern raised by the Petitioner's counsel was that the entire MSA was tainted by the "immorality" of clause 29, notwithstanding the fact that the MSA included a severability clause.

5. Having read the Petitioner's written submissions and authorities, the written submissions of the Companies and the creditors and the evidence filed in relation to the various applications in advance of the hearing, I did not hear full argument from the Applicants/Respondents, but only briefly heard oral submissions from counsel for the Petitioner. At the beginning of the hearing, I requested and was given an undertaking by the Companies and the creditors that they would submit to this Court in respect of any dispute concerning the parties' obligations under clause 29 of the MSA. Mr. Ratneser conceded that this undertaking, to some extent at least, met his client's concerns. However, he reiterated that the Petitioner still had concerns about the *bona fides* of the transaction, based on the presently available information.

6. In light of this undertaking, I granted the validation application with an effective date as of 29 November 2007. I dismissed the PL application, but reserved the costs of both applications to the hearing of the Petition, and made no order as to the creditors' costs. Because of the importance of this matter, and in light of the Petitioner's counsel's concerns about the suggestion that the validation order could be perceived as this Court approving the validity of the MSA as a whole, including clause 29, I indicated that I would give reasons for this decision.

The validation application

7. The Companies sought an Order in the following terms:

> "*In the event of an order for the winding-up of* [the Companies] *being made on the Amended Petition presented to the Court on 19 September 2007, any disposition* [the Companies'] *property made pursuant to the*

terms of the Master Settlement Agreement exhibited to the First Affidavit of Maria Kastrista is hereby sanctioned such that it shall not be void by virtue of the provisions of section 166 of the Companies Act 1981."

8. The MSA provides for some 25 separate court and arbitration proceedings to be discontinued by the parties in the following fora: Bermuda (eleven court proceedings), BVI (four court proceedings), Cyprus (four court proceedings), District of Columbia (two court proceedings), Geneva (one arbitration), New York (one court proceeding), Russia (one court proceeding), and Zurich (one arbitration proceeding). In addition, it is agreed that the Stockholm arbitration award of April 30, 2007 will not be challenged. It is common ground between the Companies and the MSA party creditors that this litigation all revolves around IPOC's disputed claim to the MegaFon Stake. This litigation has been widely publicised in Bermuda and internationally over the last four years. IPOC claimed that it was entitled to acquire a 25.1% shareholding in a Russian telecommunications company, MegaFon, under two Option Agreements purportedly entered into with LVFG in April and December 2001. CTM contended that it validly holds the MegaFon Stake, and the Alfa Companies contend that they validly control the valuable shares through their control of CTM.

9. On September 1, 2006, pursuant to a Ruling dated August 31, 2006[1], this Court entered judgment in terms of two Zurich arbitration awards in respect of the April Option Agreement, holding that this agreement was unenforceable[2]. The second of these awards ("the SPA") was based on the premise that the April Option Agreement was unenforceable because the transaction involved the commission of a money laundering offence (SPA, paragraph 561). On October 6, 2006, this Court granted permanent injunctions restraining IPOC from pursuing the Russian proceedings in breach of arbitration agreements between IPOC and CTM and LVFG[3]. The Court of Appeal narrowed this injunction on March 23, 2007[4]. On December 15, 2006, this Court refused the Alfa Parties' strike-out application and refused to grant an anti-suit injunction in favour of certain other Alfa entities who were defendants in a New York action brought by IPOC[5]. An appeal against these decisions was pending when the MSA was consummated. In April 2007, a Swiss Court set aside the Geneva arbitral tribunal's initial award in IPOC's favour[6], opening the way for LVFG to run the same money laundering defence in respect of the December Option Agreement which was successful in Zurich in respect of the April Option Agreement. This significant proceeding in respect of roughly 22.3% of the MegaFon Stake was pending when the MSA was consummated.

10. The status, history and extent of the litigation in Bermuda and elsewhere was quite familiar to me as the judge dealing with these matters at first instance, and could have been gleaned by the Petitioner and his advisers from the published judgments in relation thereto. The Companies were also not unfamiliar to the Petitioner as well because, as his own Petition states in the present case, on March 18, 2005, Messrs. Malcolm Butterfield and Michael Morrison of KPMG were appointed as Inspectors by the Minister of Finance under section 132 of the Insurance Act 1978. These prominent Bermuda insolvency practitioners reported on June 30, 2006. The Registrar of Companies presented this Petition (which as Amended on September 19, 2007 runs to 64 pages) on January 12, 2007. Reliance is placed on various regulatory infractions and uncertainty about the beneficial ownership of the Companies. But there is no suggestion that the Companies are believed to be insolvent. No creditors other than the parties involved in the

[1] [2006]Bda LR 67.
[2] In modified form, this Order confirmed the ex parte Order initially made in terms of the Awards on June 14, 2006.
[3] [2006]Bda LR 69.
[4] [2007]Bda LR 43.
[5] [2006] Bda LR .
[6] The status of the Geneva arbitration was referred to before this Court by Mr. Elkinson in the present proceedings on May 4, 2007; Transcript page 48 lines 20-22, page 49 lines 1-4. Outstanding matters in the Zurich arbitration were also mentioned.

MegaFon Stake appeared on the hearing of the Petition. This is unsurprising, because the Petition itself asserts that: (a) apart from a four month period in 2003, "*IPOC's investments consisted exclusively of shares or options to acquire an interest in …MegaFon*" (paragraph 73), and (b) the "*main asset of Com Tel was an interest in the shareholding of MegaFon*" (paragraph 159). IPOC Capital was seemingly simply an investment manager for the IPOC and Com Tel funds (paragraph 242).

11. Having regard to the concerns expressed as a reason for not granting the validation application, at least without further investigations, it is somewhat surprising that the Petition does not appear, even in part, to be explicitly based on ongoing concerns that the Respondents may have been used as vehicles for money laundering, and are suspected of being essentially criminal enterprises.

12. The First, Second and Third Affidavits of Maria Kastritsa were sworn in support of the validation application in the deponent's capacity as a director of IPOC, IPOC Capital and Com Tel, respectively. The Companies' case was that costs in the region of $45 million had been spent to date in pursuing civil litigation relating to the MegaFon Stake, and dealing with criminal and regulatory investigations placed in their path by their civil litigation adversaries. To avoid fighting both the winding-up proceedings and these other battles simultaneously, and having regard to the difficulties they now faced in the civil litigation, it was deposed, the MSA was negotiated. Having regard to legal advice about the merits of the civil claims, the Companies would benefit from saving the expenditure of funds on litigation and the release of countervailing costs claims. An additional important positive economic benefit was said to be the possibility of a public listing of MegaFon if the shareholder dispute (which the litigation in large part is) is brought to an end. The disputing parties have an overt common commercial interest in clearing the highly visible storm clouds which have hung over MegaFon since the litigation began. Having regard to the averments made in the Petition and the various matters of record in this Court in relation to the longstanding and wide-ranging legal battle over the MegaFon Stake, this rationale for the settlement seemed highly plausible and reasonable on its face. It remains to consider the financial detail provided by the Companies.

13. Ms. Katritsa estimated IPOC's 8% shareholding in MegaFon as being worth some $960 million, but conceded that this may have to be discounted as MegaFon is a private company (First Affidavit, paragraph 91). IPOC's total creditors' claims (excluding litigations costs claims of around $35 million) were valued at roughly $135 million, with unrelated creditor claims of less than $200,000 (First Affidavit, paragraphs 94-96). IPOC Capital was said to have assets worth $13 million against liabilities (principally to service providers and related entities) of some $6 million (Second Kastritsa Affidavit, paragraphs 23-26). It was also asserted, plausibly, that IPOC Capital under the MSA was "*not giving up any existing claims*" (Second Affidavit paragraph 31), but would receive the benefit of avoiding the possibility of an adverse costs order in favour of CTM (Second Affidavit, paragraph 20). The Com Tel position is similar in that it is plausibly asserted that "*the only remaining issue in the litigation is that of costs, in particular, the possibility that there is an adverse costs order against Com Tel in favour of CTM. By entering into the MSA, this possibility is extinguished*" (Third Kastritsa Affidavit, paragraph 20). Although the solvency of Com Tel was to some extent irrelevant, it claimed to have liabilities to related parties of nearly $14.5 million (Third Affidavit, paragraph 24) and assets in excess of $2 billion, which principally comprises an indirect 31.3% holding in MegaFon (Third Affidavit, paragraphs 24-25).

14. Bearing in mind that the Companies had been under investigation by the Minister of Finance (in whose Ministry the Petitioner sits) since 2005 with no suggestion of serious solvency concerns, no need for further investigation of any risk to creditor interests appeared to me to arise. It seemed clear that the Companies' pursuit of the MegaFon Stake was reaching the point where it would soon enjoy little more than "nuisance value", albeit a very substantial nuisance value

15. But, I now must turn to the reasons why I rejected the request for a further opportunity to investigate the Petitioner's concerns that clause 29 was so contrary to public policy that it tainted the entire MSA in such a way as to justify refusing the validation application.

Clause 29 and the Petitioner's public policy concerns

16. Clause 29 of the MSA provides as follows:

> " *From the execution date of this Deed,* **to the extent permitted by the applicable laws of the investigating or prosecuting jurisdiction**, *the Parties and/or their Associated Parties shall not voluntarily assist in the Criminal Investigations or any other criminal or regulatory investigation or prosecution relating to the Megafon Dispute against any of the Parties and/or their Associated Parties, shall take such reasonable steps relating thereto as they may properly agree upon in advance, including, but not limited to the submission of the appropriate letters or other filings to the relevant authorities, and shall not make any further allegations against the Parties and Associated Parties of criminal conduct of the other Parties and/or their Associated Parties regarding the subject matter of the Megafon Dispute to any authority or investigative body. To the extent that any of the Parties and their respective Associated Parties are compelled by valid subpoena, court order or any other criminal or regulatory investigation or prosecution relating to the Megafon Dispute against any of the Parties and/or their Associated Parties, they agree to provide the other Parties to this Deed with notice thereof.*" [emphasis added]

17. Mr. Ratneser was understandably concerned that the effect of this clause would potentially undermine the ability of Bermuda's prosecuting authorities to effectively investigate the money laundering allegations it appears one or more of the creditors have already assisted such authorities to start to look at. Accepting that absent such an agreement, any voluntary informant could lawfully bring their voluntary cooperation to an end, he focussed his complaints on the fact that the creditors were receiving a financial benefit for so doing. But, at the outset of the hearing, I enquired whether the creditors (all foreign companies) to give an undertaking, which was duly offered by LVFG's counsel (and subsequently by the Companies as well) in the following terms[7]:

> "*3 MR ELKINSON: Thank you, my Lord: my Lord, we're grateful*
>
> *4 for the short break. It has been fruitful, my Lord. We*
>
> *5 are able to offer up an undertaking. I speak on behalf*
>
> *6 of Mr Kessaram and Mr Attride-Stirling as well. An*
>
> *7 undertaking in the following words: the parties*
>
> *8 undertake to submit to the jurisdiction of the Bermuda*
>
> *9 courts for the sole purpose of determining any dispute*
>
> *10 as to the extent to which clause 29 of the Master*

[7] Page 10 of the transcript.

11 Settlement Agreement unlawfully prevents any party to

12 that agreement providing voluntary assistance to the

13 Bermuda criminal or regulatory authorities."

18. The Petitioner's counsel accepted that this undertaking, to some extent, met his concerns. The motivation of the Court in seeking this undertaking, in relation to an agreement which is governed by English law with an English exclusive jurisdiction clause, was to avoid the unpalatable scenario of an English court deciding whether or not clause 29 was inconsistent with Bermuda public policy in the context of matters which would likely be of considerable local public importance. Once this contingency was avoided, it seemed to me that there was no need to determine whether or not clause 29 was invalid by reason of public policy unless it could be concluded at the present time that clause 29 was on its face so offensive as to make it impossible to properly make a validation order. No authority could be found which supported the narrow proposition that a non-cooperation agreement was contrary to public policy, let alone the wider proposition that such an agreement was so offensive as to impeach the entire transaction of which it formed part.

19. I was satisfied that clause 29 was not, to any extent material to the validation application, contrary to public policy on its face, because (a) the clause only reflected an agreement by the parties to discontinue voluntary cooperation "*to the extent permitted by the applicable laws of the investigating or prosecuting jurisdiction*", and (b) the severability clause in the MSA (clause 43) evidenced the parties' consensus that clause 29 was not essential to the viability of the entire contract, irrespective of what the result of any subsequent challenge to the validity of clause 29 might be. It also seemed obvious, having regard to the history of the MegaFon Dispute which has been recounted extensively before this Court, that any criminal complaints which the parties to the MSA had made were made as part of their wider civil litigation strategy. Any suggestion that such complaints were made purely out of disinterested civic duty would be completely divorced from reality. In these circumstances, it seemed to me to be entirely legitimate for the parties to the MSA, as an incident to settling the civil dispute surrounding the MegaFon Stake, also to seek to reassure each other that they would not be continuing to engage in positive acts of aggression on the criminal and regulatory front.

20. The position would be entirely different if the parties had entered into an agreement to either (a) not to report criminal offences which had been alleged in the course of civil proceedings, (b) use their best endeavours to avoid compliance with legal steps taken by the authorities to procure their assistance in criminal or regulatory investigations or proceedings, and/or (c) if clause 29 formed part of a free-standing agreement between parties who were not also primarily intent on settling civil proceedings. There is, after all, a public interest in promoting settlement in civil cases and the larger the number and size of cases involved, the greater the interest in promoting settlement must be. This Court's duty to actively manage cases includes "*helping the parties to settle the whole or part of the case*" (Order 1A(4)(2)(f)).

21. The Petitioner's counsel did fairly point out that the following provisions of clause 29 appear to be inconsistent with the prohibition of "tipping off" in section 47 of the Proceeds of Crime Act:

> "*To the extent that any of the Parties and their respective Associated Parties are compelled by valid subpoena, court order or any other criminal or regulatory investigation or prosecution relating to the Megafon Dispute against any of the Parties and/or their Associated Parties, they agree to provide the other Parties to this Deed with notice thereof.*"

22. Firstly, it was necessary to remember that an offence would only be committed under section 47 if a party disclosed "*information or other matter which is likely to prejudice any investigation*". Secondly, it seemed to me that the notification terms were merely subsidiary to the preceding terms of clause 29, the dominant purpose of which is to bring active pursuit of existing or future criminal complaints to an end. The notification obligations are therefore only operative "*to the extent permitted by the applicable laws of the investigating or prosecuting jurisdiction*". If any legal process is served by the Bermuda authorities which they do not want to be disclosed to the Companies because it would prejudice the investigation, this concern can simply be notified to the party affected. It is difficult to believe that they would expose themselves to the risk of prosecution for a tipping-off offence for fear of breaching clause 29, because clause 29 clearly envisages that the parties are required to comply with any applicable criminal or regulatory obligations which are inconsistent with these contractual terms.

23. Mr. Ratneser did raise potentially serious, but wholly hypothetical and un-particularised, concerns about the practical ability of the Bermuda Police to pursue investigations into allegations of breaches of the Proceeds of Crime Act 1997 without voluntary cooperation from persons abroad. But, if the present national and/or international legal framework does not adequately equip the Police to investigate, using compulsory legal measures, money laundering offences where key evidence and witnesses are abroad, these are statutory and judicial assistance loopholes which must be filled by new legislative and/or treaty regimes. Most major investigations under the 1997 Act will likely involve an international element, and if the Bermuda Police Force is impotent to investigate and prosecute such offences without voluntary cooperation, this would be a very serious defect with the anti-money laundering regime. If the MSA parties become, in circumstances which have not yet been identified, under a legal obligation to assist the authorities, clause 29 does not prevent them from providing such assistance. Any disputes over the application of clause 29 in relation to any Bermuda investigation may be referred to this Court.

24. It may be that traditional law and practice with regard to complex and large scale international criminal offences is not fully equipped to deal with the circumstances thrown up by modern complex multi-jurisdictional commercial transactions. It is easy to envisage many commercial disputes, especially touching offshore financial centres such as Bermuda, where expensive criminal and regulatory investigations will be launched in response to complaints primarily motivated by the desire to gain a private commercial advantage or remedy. Some complaints may be mischievous; others may be meritorious. Pursuing the complaints will involve private as well as public expense. When a private complainant has settled his civil dispute, he will have no commercial interest in voluntarily incurring further expense in pursuit of a public complaint. In cases of fraud where criminal proceedings are commenced which deal with facts which overlap with those which form the subject of parallel civil proceedings, it is accepted that the civil court proceedings may be stayed until the criminal proceedings have been prosecuted. It is unclear how easily this principle can be applied in the context of money laundering offences which are raised as a shield in the context of private arbitration proceedings. Private companies', and individual businessmen's, property rights cannot, absent statutory authority, be compelled to expend their private resources for some public purpose. Public policy does not, surely, require the courts to frown on non-cooperation clauses which merely require the parties, as part of a wider civil compromise, to lawfully cease to prosecute public complaints.

25. Rather, the compulsory statutory investigative tools should be strengthened, if they are weak, and penalties created (if they do not already exist) for making frivolous complaints. Parliament might also, for instance, decide that complainants who instigate large scale criminal investigations (at great public expense) with a view to gaining some private commercial advantage should be required to post a bond, which is liable to forfeiture if they subsequently make it

impossible to complete the investigation by withdrawing their voluntary cooperation. But under the existing law, it is neither unlawful nor contrary to public morality for a party to commercial litigation to agree, provided that this is lawful (in Bermuda and elsewhere), to cease actively pursuing a criminal complaint as part of a wider civil settlement entered into in good faith.

26. It seemed clear, in any event, that Clause 29 did not, according to its terms, contravene section 129 of the Criminal Code, which provides as follows:

> "***Compounding felony***
> *129Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or for any other person upon any agreement or understanding—*
>
> *(a) that he will compound or conceal a felony; or*
>
> *(b) that he will abstain from, discontinue or delay, a prosecution for a felony; or*
>
> *(c) that he will withhold any evidence of a felony,*
>
> *is guilty of a summary offence, and is liable to imprisonment for twelve months.*"

27. Assuming, as counsel for the Petitioner implicitly invited the Court to do, the offences under the Proceeds of Crime Act being investigated are felonies, the parties had clearly not agreed to either compound or conceal a felony. Nor had they agreed to withhold evidence of a felony, because they had only agreed to act in accordance with applicable law. Since no prosecution had yet been commenced, clause 29 could not be said to infringe section 129 (b) of the Criminal Code either. However, it is additionally far from clear that offences under the Proceeds of Crime Act 1997 are felonies to which section 129 applies, in any event[8]. Without deciding this point, it appears to me that offences under the 1997 Act are explicitly indictable but are not described as felonies, and must accordingly be classified as misdemeanours under the following provisions of the Criminal Code:

> "***Classification of unclassified indictable offences constituted by other Acts***
> *14 Where by or under any other Act any indictable offence is constituted, and it is not stated whether the offence is a felony or a misdemeanour, then that offence shall, for the purposes of the application of the general provisions of this Act relating to offences and criminal procedure, be deemed to be a misdemeanour.*"[9]

28. If the parties to substantial commercial litigation which raises issues requiring the making of a criminal complaint were to be prevented from settling such litigation merely because they have initiated a criminal complaint, this could create a strong financial disincentive to making criminal complaints. The present case illustrates this point. The main object of the MSA was to compromise litigation which has given rise to actual or potential combined costs of roughly $80 million and which had spawned 25 civil proceedings in around 10 forums, as well as several public investigations. The main object of the validation application is to abandon the Companies' now tenuous claim to the billion dollar MegaFon Stake. This tenuous

[8] It is generally assumed in Bermuda that no common law criminal offences have existed since the Criminal Code Act 1907 was enacted. The only case cited by counsel on the common law antecedents of section 29 made reference to "*compounding a felony*" and "*misprision of felony*", however: *Sykes-v- DPP* [1961] 3 All ER 33 HL.

[9] Perhaps this problem may be addressed when the Criminal Law (Abolition of Distinction Between Felony and Misdemeanor) Act 2005 is brought into force, but the Act, assented to on December 30, 2005, only explicitly abolishes procedural distinctions.

claim, a *chose in action*, was the asset which is being disposed of. This disposition was primarily being made in consideration for the creditors' abandonment of actual and potential costs claims worth $35 million, and the additional benefits of avoiding further costs liability and the opportunity to increase the value of IPOC's and Com Tel's existing investment in MegaFon.

29. Clause 29 in my judgment was a subsidiary and incidental part of the total consideration received, and raised no public policy concerns sufficient to justify delaying the adjudication of the validation application. Its enforceability remains to be formally adjudicated, if necessary, should ever a dispute arise as to any party's entitlement to rely upon the clause[10].

Principles applicable to validation applications and the appointment of provisional liquidators

30. Section 166 of the Companies Act 1981 provides in its salient part as follows:

> "*(1)In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void."*

31. The Companies in their skeleton argument relied on various authorities as to the applicable general principles on section 166(1) applications in relation to solvent companies, amply supported by shorter submissions filed on behalf of the creditors. I found the most helpful summary to be the following passage from the September 2, 2005 judgment of Henderson J of the Cayman Island Grand Court in *In the Matter of Fortuna Development Corporation*, Cause No. 356/04 at page 2:

> "*Thus there are four elements which must be established before an applicant shall be entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Second, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company. There is no dispute here that the directors do have that belief. Third, it must appear that the directors in reaching that decision have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourth, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.*"

32. I found that all four elements were made out by the evidence filed by the Companies and the creditors, read with the various matters of record in relation to the litigation in Bermuda and elsewhere in relation to the MegaFon Stake. The concerns about the need to investigate the *bona fides* of the transaction, set out in various affidavits filed by the Petitioner (hastily prepared, no doubt, because of the tight timetable that this Court mandated on November 15, 2007) appeared in large part to be based on a lack of familiarity with the background to and the terms and effect of the MSA itself. The Petitioner, quite properly, was unwilling to consent to a transaction which he did not feel in a position to positively support. Instead, he applied to appoint a provisional liquidator with powers limited to "*preserving the assets of the IPOC Parties and advising the Court on the merits of the section 166 application and the MSA.*"

33. It was not common ground that this Court could appoint a provisional liquidator to provide such advice. Assuming such jurisdiction to appoint to exist, however, such an appointment would have been prudent if the compromise embodied in the MSA related solely or substantially to a dispute with which this Court was

[10] This is illustrated by the following case on which the Petitioner relied: *Mahonia Ltd.-v-JP Morgan Chase Bank* [2003] 2 Lloyd's Rep 911.

unfamiliar, or if serious questions were raised as to the impact of the proposed disposition on the interests of either creditors or uninformed shareholders[11]. The Petitioner's counsel submitted that it is possible that the Companies have no *bona fide* purpose and are simply vehicles for money laundering, based upon findings made against IPOC in the Zurich Awards, recognition of which were confirmed, following an *inter partes* hearing, by this Court in its Ruling of August 31, 2006 and Order of September 1, 2006 (in Commercial Court 2006: No.170).

34. But, neither this allegation nor its investigation formed part of the Petition, as initially presented on January 12, 2007, over 10 months ago, or as amended on September 19, 2007. More significantly still, the Petitioner had been content to allow the existing management to remain in place, seemingly with full competence to both manage and negotiate a compromise of this substantial cross-border litigation, unrestrained by any ongoing independent supervision.

35. Furthermore, the Petition herein was presented over six months after the Inspectors appointed by the Minister of Finance on March 18, 2005 reported on June 30, 2006. The Petitioner was seemingly content to rely on undertakings given by the Companies in respect of the disposition of their more tangible assets, embodied in Marshall Diel & Myers' October 27, 2006 letter, after asset freezing orders made in March and April 2006 lapsed. If significant concerns existed about the ability of the Companies' existing management to continue their business and manage the well-publicised litigation in Bermuda and elsewhere, an application to appoint a provisional liquidator would have been made at the outset of the winding-up proceedings, in accordance with standard Bermudian insolvency practice. A provisional liquidator could have been appointed with full-blown powers, replacing the directors altogether, or with limited supervisory powers. No credible explanation was made in the Petitioner's evidence as to why the Registrar was content to give the Companies directors apparently free rein over conducting the litigation, incurring substantial costs, yet is unable to trust the directors' decision to bring this expensive and unsuccessful litigation to an end.

36. In fact Mr. Ratneser was keen to point out that the Registrar of Companies was merely seeking to assist the Court, and took no positive position against the application. In these circumstances, it seemed to me that it would border on unconscionable to burden either the Companies or the Petitioner with the considerable expense of appointing a provisional liquidator to review whether or not the MSA embodied a transaction which an honest and intelligent director could reasonably adopt. Such liquidator would have to retain counsel, potentially in ten jurisdictions, and familiarise himself with 25 separate proceedings and additional criminal and/or regulatory proceedings. Not only would there be an inevitable delay of several months, but the Companies and the creditors would have to take various steps to preserve their rights in the various proceedings, notwithstanding any standstill agreement. Further litigation costs would be incurred, and opportunities to develop the value of the Companies' existing MegaFon investment postponed and possibly lost to both sides of the MegaFon Stake dispute.

37. All this would be done in relation to an agreement to compromise litigation with which the Court was already familiar, on terms which seemed obviously reasonable, in light of such familiarity. The parties to the litigation before the Bermuda courts over the last nearly 18 months, had been represented most professionally by both specialist Bermudian counsel and the London-based solicitors of international law firms. Having regard to the vigour with which the litigation has been fought, it seemed improbable that the respective legal teams would fail to strain every sinew to compromise this substantial dispute on terms that were both commercially reasonable and legally viable. There seemed to be little opportunity for any unidentified *mala fides* on the part of the parties

[11] The public interest petitioner was concerned about uninformed shareholders in the validation case on which Mr. Ratneser relied, *Re Telisa Furniture Pty. Ltd* (1985) 3 ACLC 763.

themselves to undermine the legitimacy of the MSA, and the Petitioner did not identify any tangible basis for suspecting that the compromise was not a *bona fide* one.

Conclusion

38. For the above reasons I dismissed the Petitioner's application to appoint a provisional liquidator and granted each of the three validation applications.

39. As I indicated at the end of argument on costs, it seemed most appropriate to reserve costs until the hearing of the Petition at which time a fuller view of the appropriate disposition on costs could be taken.

Dated this 6th day of December, 2007

_____

KAWALEY J.