



KRYS & ASSOCIATES
(BVI) LTD.
GLOBAL KNOWLEDGE • LOCAL PERSPECTIVE

FAIRFIELD SENTRY LIMITED – IN LIQUIDATION

(“THE COMPANY”)

Guidance for Members of the Liquidation Committee

July 2009

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1. INTRODUCTION

1.1 General

1.1.1 This guide has been produced to help investors and creditors understand the Liquidators' proposals relating to the formation of a Liquidation Committee and to provide some terms of reference and options on:

- the duties and functions of the Liquidation Committee
- their rights as members of the Liquidation Committee
- the procedural rules relating to Liquidation Committee business.

1.1.2 The introduction gives a brief explanation of the liquidation procedure, the powers of the Liquidators and summarises the principal functions of the proposed Liquidation Committee and the Liquidator's main duties in relation to it. The remainder of the guide deals with the proposed functions of the Liquidation Committee and the Liquidators' interaction with the Liquidation Committee.

1.2 Introduction

1.2.1 Christopher Stride and Kenneth Krys of Krys and Associates were jointly appointed as Liquidators of the Company by the High Court of the British Virgin Islands on 21 July 2009. .

1.2.2 The Liquidators were appointed pursuant to section 162(1)(b) of the Insolvency Act 2003 (the "Act") on the grounds that: *"it is just and equitable that a liquidator should be appointed"*. The Liquidators were not appointed on the grounds that the Company is insolvent.

1.2.3 The Act provides for the formation of a Creditors' Committee but does not provide explicit rules on the formation of a committee in the circumstances peculiar to this Company where the majority of interested parties appear to be investors in the Company rather than creditors. The number of creditors is not yet known to the Liquidators although the Liquidators are aware of a limited number of Creditors whose claims relate to amounts due to the Company's pre-liquidation Attorneys and service providers and the Company's Directors. Accordingly, the formation of a Creditors' Committee is not being sought by the Liquidators.

1.2.4 Bearing in mind the nature of the Company's business as an investment fund the Liquidators wish to enable investors as well as creditors to play an active role in the conduct of the liquidation. To satisfy this demand the Liquidators seek to form an *ad hoc* Committee made up of principally investors of the Company ("the Liquidation Committee"). The term "Liquidation Committee" is a term widely used in collective investment scheme liquidations where the stakeholders in the

liquidation are not strictly or solely “creditors”, but typically members or redeemed members (to the extent that redeemed members are not permitted to claim in the liquidation for their redemption proceeds).

1.2.5 It is anticipated that the Liquidation Committee will undertake the following roles within the liquidation:-

- Agreeing and authorizing the drawing of the Liquidators’ remuneration, and agreeing and authorizing the drawing of the Liquidators’ properly incurred disbursements and expenses (including legal fees, agents fees and other similar costs)
- Acting in a purely consultative role to the Liquidators regarding the Liquidators’ strategies, decision making and intentions; and
- Acting as a general sounding board to the Liquidators.

1.3 **Liquidation**

1.3.1 Liquidation (also termed ‘winding up’) is the formal winding up of a company’s affairs, entailing the realisation of its assets and the distribution of the proceeds in a prescribed order of priority.

1.4 **The Liquidators**

1.4.1 The Liquidators appointed to conduct the liquidation of the Company have wide powers, which are set out in the Order appointing them. The Order refers to the powers of a liquidator set out in Schedule 2 of the Act. but some of those powers may only be exercised by the Liquidators with the permission of the Court. Schedule 2 of The Act is attached at Appendix I for your information.

1.4.2 Section 185(1) of the Act states that:-

The principal duties of a liquidator are

- a) *to take possession of, protect and realise the assets of the company;*
- b) *to distribute the assets or the proceeds of realisation of the assets, in accordance with the Act; and*
- c) *if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with this Act*

1.5 **The Liquidation Committee**

1.5.1 If a Liquidation Committee is to be formed, it will need some rules for its effective operation. The following proposed rules for the formation and running of the committee have no statutory basis

under the Act but are based on the rules which govern the operation of creditors' committees, which the Liquidators believe will provide an appropriate template

- 1.5.2 As indicated above, the purpose of the Liquidation Committee will be to represent the interests of the investors and creditors as a whole and not just the interests of its individual members or creditors. The function of the Liquidation Committee will be to agree the basis of the Liquidators' remuneration and disbursements. In addition, the Liquidation Committee may be asked to consult upon certain matters by the Liquidators and to act as a sounding board for them to obtain views on matters pertaining to the liquidation. It should be noted that as there is no statutory requirement for a Liquidation Committee to be formed, the Liquidators are not under any duty to seek the opinion or sanction of the Liquidation Committee on any matter unless the Liquidators themselves determine that this is appropriate. The Liquidation Committee will be provided with information and documentation (aside from matters pertaining specifically to the Liquidators' fees and disbursements) on a "need to know" basis by the Liquidators and the Liquidators will not be obliged to provide any information to the Liquidation Committee unless the Liquidators themselves determine that this is necessary or beneficial to the conduct of the Liquidation.
- 1.5.3 The Liquidators will report to the Liquidation Committee on matters relating to the liquidation and to submit copies of their accounts when required. Meetings will be held when determined by the Liquidators, and voting is by majority in number of those Committee Members in attendance, either in person or by proxy or voting form.
- 1.5.4 Liquidation Committee members will not be entitled to remuneration, but the Liquidators propose that the reasonable professional fees and travel expenses incurred by the Liquidation Committee in properly discharging its functions should be treated as an expense of the liquidation to be paid out of the assets of the Company subject to the prescribed order of priority.
- 1.5.5 Although the Liquidator will normally have regard to the views of the Liquidation Committee, they may always refer matters of contention to a general meeting of investors and creditors or to the Court.

2. THE FUNCTIONS OF THE LIQUIDATION COMMITTEE

2.1 Liquidator's Remuneration

- 2.1.1 It is proposed that the Liquidation Committee should have a role in approving the Liquidators' time spent and fees incurred.

2.2 Expenses and Disbursements

2.2.1 Where the Liquidators propose to recover costs which, whilst being in the nature of expenses or disbursements, may include an element of shared or allocated costs (such as room hire, document storage or communication facilities provided by the Liquidators' own firm), they will be disclosed to and authorisation sought from the Liquidation Committee. Such expenses will be directly incurred on the case and subject to a reasonable method of calculation and allocation. However, this is a matter which can be discussed at the meeting on 6 August, and if not supported by the majority of investors as a reasonable liquidation cost such reimbursements will not be made.

2.3 **Court Assessment of Costs**

2.3.1 Where any costs, charges or expenses are payable out of the assets (for example agents or legal fees), the Liquidators may agree them with the person entitled to payment. However, if the Liquidation Committee resolves that any such costs, charges or expenses should be determined by the Court, the Liquidators may require the person entitled to payment to deliver his bill of costs for assessment. The Liquidators will bring to the Courts attention the specific reasons for the Liquidation Committee's objections or concerns.

2.3.2 The Liquidators will review and approve for payment legal, professional and other expenses and may pay up to 67% of such invoices pursuant to section 2.33 below. The Liquidators will share with the Committee invoices for these professionals reflecting detailed descriptions including time spent by task, by professional and rate in the form provided to the Liquidators. Invoices may be reasonably redacted as to those matters of which such redaction is necessary to preserve any claim of privilege.

The Committee will have 30 days after its receipt of an invoice to review and comment on the fees and expenses. To the extent the Committee disagrees with any such fees and expenses the Liquidators will work with the professionals and the Committee to reduce the invoice or otherwise satisfactorily resolve the disagreement. The Liquidators will advise the Committee as to how they have addressed the disputed portion of any invoice. In the event the Committee is not satisfied with the resolution of any dispute, the Liquidators will seek the approval of the Court and bring to the Court's attention the nature of any objection made by the Committee.

2.3.3 The Liquidators shall provide a monthly fee analysis report to the Liquidation Committee. Upon delivery of such reports to the Liquidation Committee, the Liquidators may pay 67% of the Liquidators' fees and expenses. Upon receipt of the reports, the Committee will have 15 days to review and approve or disapprove any of these fees and expenses. To the extent of any disapproval, fees and expenses of the Liquidators shall not be paid (up to the 33% sum withheld) and shall be referred to the Court for further adjudication.

3. LIQUIDATORS' OBLIGATIONS TO LIQUIDATION COMMITTEE

3.1 The Liquidators need not comply with any request for information where it appears to them that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to its relative importance, or there are insufficient assets to enable him to comply. Likewise, any request for information which the Liquidators believe is outside the remit of the Liquidation Committee need not be complied with.

3.2 The Liquidators will, as and when directed by the Liquidation Committee (but not more than once each month), send a written update to every member of the Liquidation Committee setting out the position generally as regards the progress of the liquidation, and matters arising in connection with it, to which the Liquidators considers the Liquidation Committee's attention should be drawn. The update will include the nature of major projects being undertaken in the following month.

4. LIQUIDATORS' ACCOUNTS

4.1 The Liquidators will prepare and keep financial records in relation to the liquidation, and such supporting documents as are necessary to explain the receipts and payments entered in the records, including an explanation of the source of any receipts and the destination of any payments, the Liquidators will obtain and keep the bank statements relating to any local bank account opened in the name of the Company.

4.2 The Liquidators will submit the financial records to the Liquidation Committee as and when the Liquidation Committee requests them for inspection but not more than once per month.

5. ESTABLISHMENT OF THE LIQUIDATION COMMITTEE

5.1 Number of Members

5.1.1 The Liquidation Committee will be established by vote at a general meeting of the Company's investors and creditors. The Liquidation Committee must consist of at least three, and not more than five, members.

5.2 Formalities of Establishment

5.2.1 The Liquidation Committee does not come into being, and accordingly cannot act, until the Liquidators have confirmed its constitution.

5.2.2 The Liquidators will not confirm the constitution of the Liquidation Committee until the minimum number of persons (three) required to be members of the Liquidation Committee have agreed to act.

5.3 **Formal Defects**

5.3.1 The acts of the Liquidation Committee are valid notwithstanding any defect in the appointment, election or qualifications of any Liquidation Committee member or the representative of any Liquidation Committee member, or in the formalities of its establishment.

6. **MEMBERSHIP**

6.1 **General**

6.1.1 It is the creditors or investors themselves who are the members of the Liquidation Committee, not the individuals who represent them. Thus a company which is an investor/creditor may be a member of the Liquidation Committee but can only act through a representative appointed in accordance with paragraphs 6.2.1 to 6.2.3 below.

6.1.2 Any investor/creditor, whose details are disclosed upon the Register of Shareholders as at 21 July 2009, as a Registered Shareholder, may be voted onto the Liquidation Committee.

6.1.3 Any creditor whose claim appears in the records of the company at 21 July 2009 may be a member of the Committee.

6.2 **Representatives**

6.2.1 A member of the Liquidation Committee may be represented by another person duly authorised by him. Such representative must hold a letter of authority entitling him so to act (either generally or specially) signed by or on behalf of the Liquidation Committee member. The chairman at any meeting of the Liquidation Committee may call on a person claiming to act as a Liquidation Committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient.

6.2.2 No member may be represented by –

- a body corporate
- an un-discharged bankrupt,
- a person who is subject to a bankruptcy restrictions order or undertaking, or
- a disqualified director.

6.2.3 No person may act as representative of more than one Liquidation Committee member, or both as a member and as a representative of another member, on the same Liquidation Committee.

6.2.4 Where the representative of a Liquidation Committee member signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

6.3 **Confidentiality Agreement**

6.3.1 All members of the Liquidation Committee will be required to sign a Joint Interest and Confidentiality Agreement. Any member unwilling to sign such an undertaking will be prohibited from taking up membership of the Liquidation Committee and the Liquidators may freely determine whether or not that member shall be replaced (if the membership of the Liquidation Committee continues to have at least three members).

6.4 **Resignation and Termination of Membership**

6.4.1 A member of the Liquidation Committee may resign by notice in writing delivered to the Liquidators.

A person's membership of the Liquidation Committee is automatically terminated if –

- a he becomes bankrupt, or
- b at three consecutive meetings of the Liquidation Committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not applied in this case), or
- c he misses 50% of the meetings in one calendar year
- d he ceases to be, or is found never to have been, an investor.

6.4.2 However, if the cause of termination is the member's bankruptcy, his trustee in bankruptcy replaces him as a member of the Liquidation Committee.

6.4.3 A member of the Liquidation Committee may be removed by resolution at a meeting of investors and creditors; 14 days notice must be given of the intention to move the resolution.

6.5 **Vacancies**

6.5.1 If there is a vacancy among the members of the Liquidation Committee it need not be filled if the Liquidators and a majority of the remaining members so agree provided the number of members do not fall below three. If another investor is to be appointed he can be appointed either by the Liquidators (provided the majority of the remaining Liquidation Committee members agree to the appointment and the investor agrees to act) or by a resolution passed at a duly convened meeting of members, after at least 14 days' notice of the resolution has been given.

7. PROCEEDINGS

7.1 Chairman

7.1.1 The chairman at any meeting of the Liquidation Committee will be one of the jointly appointed Liquidators, or a person nominated by them to act. A person so nominated must be either –

- a one who is qualified to act as an insolvency practitioner in relation to the company, or
- b an employee of the Liquidators who is experienced in insolvency matters.

7.2 Quorum

7.2.1 A meeting of the Liquidation Committee is duly constituted if due notice of it has been given to all members and at least two members are present or represented.

7.3 Meetings

7.3.1 General: The Liquidation Committee will meet where and when determined by the Liquidators, subject as follows:

7.3.2 First Meeting: The Liquidators must call the first meeting to take place within 2 months of their appointment or of the Liquidation Committee's establishment (whichever is the later).

7.3.3 Subsequent Meetings: Subsequent meetings of the Liquidation Committee must be called by the Liquidators –

- a if so requested by a member of the Liquidation Committee or his representative – the meeting must be held within 21 days of the request being received by the Liquidators – and
- b for a specified date, if the Liquidation Committee has previously resolved that a meeting be held on that date.

7.4 Notice of Venue

7.4.1 The Liquidators must give 7 days' notice in writing by email of the venue of any meeting to every member of the Liquidation Committee (or his representative, if designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signed either at or before the meeting.

7.5 Voting Rights and Resolutions

7.5.1 At any meeting of the Liquidation Committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it.

7.6 **Records of Meetings**

7.6.1 Every resolution passed will be recorded in writing, either separately or as part of the minutes of the meeting. The record will be signed by the chairman and kept with the records of the liquidation.

7.7 **Resolutions**

7.7.1 It is possible for resolutions to be passed by email, facsimile or post or other agreed communication medium. The Liquidators will send to every member (or his representative designated for the purpose) a copy of any proposed resolution on which a decision is sought, which will be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent.

7.7.2 However, any member of the Liquidation Committee may, within 7 business days from the date of the Liquidators sending out a resolution, require the Liquidators to summon a meeting of the Liquidation Committee to consider the matters raised by the resolution. In the absence of such a request, the resolution will be deemed to have been passed by the Liquidation Committee if and when the Liquidators are notified in writing by a majority of the members that they concur with it.

7.7.3 A copy of every resolution so passed, and a note that the concurrence of the Investors Committee was obtained, will be kept with the records of the liquidation.

8. CONFIDENTIALITY OF DOCUMENTS

8.1 Where the Liquidators consider that any document forming part of the record of the liquidation –

- a should be treated as confidential, or
- b is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors and/or Company;

they may decline to allow it to be inspected by a person (including a member of the Liquidation Committee) who would otherwise be entitled to inspect it.

9. CHARGES FOR COPY DOCUMENTS

9.1 Where the Liquidators are requested by a member of the Liquidation Committee to supply copies of any documents, the Liquidators will endeavor to provide such documents in electronic copy. If hard copies

are requested and significant copying is required, the Liquidators are entitled to charge for the copying at a rate of \$0.75 per page or an hourly rate of \$100 per hour..

10. EXPENSES OF LIQUIDATION COMMITTEE MEMBERS

10.1 Any reasonable expenses directly incurred by the Liquidation Committee members or their representatives either in attending meetings of the Liquidation Committee or otherwise on the Liquidation Committee's business will be paid by the Liquidators out of the assets in the due order of priority (as set out in Rule 199 of the Insolvency Rules 2005).

11. DEALINGS BY LIQUIDATION COMMITTEE MEMBERS AND OTHERS

11.1 The position of all Liquidation Committee members is fiduciary and they must not expose themselves to a conflict between their duty as members of the Liquidation Committee and their personal interest. Accordingly, no member of the Liquidation Committee, or his representative, or any person who is an associate of a Liquidation Committee member or his representative, or any person who has been a Liquidation Committee member at any time in the previous twelve months, can enter into a transaction whereby he –

- a receives out of the Company's assets any payment for services given or goods supplied in connection with the administration of the liquidation, or
- b obtains any profit from the administration of the liquidation, or
- c acquires any asset forming part of the estate.

Unless –

- a he first obtains the leave of the court to the transaction, or
- b he enters into the transaction as a matter of urgency or by way of performance of a contract in force before the date of the Order appointing the Liquidators and he obtains the leave of the court, having applied for such leave without undue delay, or
- c he enters into the transaction with the prior sanction of the Liquidation Committee where the Liquidation Committee is satisfied (after full disclosure of the circumstances) that he will be giving full value transaction.

11.2 Where a resolution is proposed in the Liquidation Committee that sanction be given to such a transaction, no member of the Liquidation Committee, and no representative of a member, can vote on the resolution if he is to participate directly or indirectly in the transaction.

11.3 The costs of obtaining the leave of the court referred to in 11.1 above are not payable out of the assets unless the Court so orders.

- 11.4 Circumstances may occasionally arise where a legal action or dealing involving a member of the Liquidation Committee or a person connected with the member make it inappropriate for the member to attend discussions on the subject in the Liquidation Committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

Schedule 2 to the Insolvency Act 2003

Powers of Liquidator

1. Power to pay any class of creditors in full.
2. Power to make a compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging that they have any claim against the company, whether present or future, certain or contingent, ascertained or not.
3. Power to compromise, on such terms as may be agreed
 - (a) calls and liabilities to calls, debts and liabilities capable of resulting in debts, and claims, whether present or future, certain or contingent, ascertained or not, subsisting or supposed to subsist between the company and any person; and
 - (b) questions in any way relating to or affecting the assets or the liquidation of the company; and take security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.
4. Power to commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the company.
5. Power to carry on the business of the company so far as may be necessary for its beneficial liquidation.
6. Power to sell or otherwise dispose of property of the company.
7. Power to do all acts and execute, in the name and on behalf of the company, any deeds, receipts or other document.
8. Power to use the company's seal.
9. Power to prove, rank and claim in the bankruptcy, liquidation, insolvency or sequestration of any member or past member for any balance against his estate, and to receive dividends, in the bankruptcy, liquidation, insolvency, sequestration or in respect of that balance, as a separate debt due from the bankrupt or insolvent, and ratably with the other separate creditors.
10. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.

Schedule 2 to the Insolvency Act 2003

Powers of Liquidator (continued)

11. Power to borrow money, whether on the security of the assets of the company or otherwise.

12. Power to take out in his official name letters of administration to any deceased member or past member or debtor, and to do any other act necessary for obtaining payment of any money due from a member or past member or debtor, or his estate, that cannot conveniently be done in the name of the company. For the purpose of enabling the liquidator to take out letters of administration or do any other act under this paragraph, to be due to the liquidator himself.

13. Power to call meetings of creditors or members for
 - (a) the purpose of informing creditors or members concerning the progress of or matters arising in the liquidation;
 - (b) the purpose of ascertaining the views of creditors or members on any matter arising in the liquidation; or
 - (c) such other purpose connected with the liquidation as the liquidator considers fit.

14. Power to appoint a solicitor, accountant or other professionally qualified person to assist him in the performance of his duties.

15. Power to appoint an agent to do any business that the liquidator is unable to do himself, or which can be more conveniently done by an agent.