

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MCMURDO J

No 5183 of 2008

RE: OCTAVIAR INVESTMENT NOTES LIMITED (FORMERLY MFS
INVESTMENT NOTES LIMITED)

No 5194 of 2008

RE: OCTAVIAR LIMITED (FORMERLY MFS LIMITED)

No 5185 of 2008

RE: OCTAVIAR INVESTMENTS BONDS LIMITED (FORMERLY MFS
INVESTMENT BONDS LIMITED)

No 5186 of 2008

RE: OCTAVIAR FINANCIAL SERVICES LIMITED

No 9922 of 2008

OCTAVIAR LIMITED AND OTHERS

and

JOHN LETHBRIDGE GRIEG AND ANOTHER

No 12963 of 2008

OCTAVIAR INVESTMENTS NOTES LIMITED AND OTHERS

and

JOHN LETHBRIDGE GRIEG AND ANOTHER

BRISBANE

..DATE 18/12/2008

ORDER

HIS HONOUR: The Public Trustee of Queensland is the applicant to wind up four companies. Each of those applications has been adjourned for further hearing today.

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Yesterday, at meetings of creditors, the scheme of arrangement was put by administrators to the meeting. In relation to two of these companies, creditors did not accept the proposal and Public Trustee today seeks orders for their liquidation. They are Octaviar Investment Notes Limited and Octaviar Investment Bonds Limited.

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The only creditors of those companies are the Public Trustee representing certain note holders and the interest which I have previously described as Challenger. Challenger supports the application for the winding up of these two companies and supports the appointment of the Public Trustee's nominees as liquidators, who are two people from Ferrier Hodgson.

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The companies, that is, Octaviar Investment Notes Ltd and Octaviar Investment Bonds Ltd, do not now oppose the applications for their winding up. Nor is there any opposition from any other party to that course.

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At a previous hearing, there was a question as to whether the Public Trustee or the note holders that he represents were creditors or, instead, contingent creditors. I've been told by counsel for the Public Trustee that the position according

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to the evidence is that the note holders are now indisputably
creditors and nothing is said against that submission.

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The applications are made, of course, upon the insolvency
ground. It is plain that that ground is established. Again,
there is no suggestion to the contrary.

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The only issue in relation to these two companies to be wound
up has been one concerning the identity of the liquidators.
On behalf of the companies, an affidavit of an officer of the
company has been read, setting out a number of matters said to
be relevant to that issue. The companies' arguments are that
the administrators or someone else from the same firm are the
appropriate liquidators, essentially for reasons of economy
and convenience, having regard to the work done by
administrators or their firm so far in the administration of
these companies and others and the ongoing work, at least for
the time being pending further litigation by people from that
firm in the administration of the deed, which was approved for
other companies. That is a relevant consideration but it is
not the only one.

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There is, undoubtedly, a dispute between the Public Trustee or
the interests he represents and the administrators, which is
likely to result in a hearing to impugn the deed of company
arrangement to be executed in consequence of the outcome of
the creditors meeting in the company, Octaviar Ltd. The
Public Trustee is strongly critical of the administrators in
that respect and, in particular, as to the administrators'
approach to the validity of a security which was granted to a

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company, which I will call "Fortress", at the commencement of
this year. Now, I do not mean to suggest that I have a view
as to the merit of the Public Trustee's complaint in that
respect. That will almost inevitably be a matter to be
litigated, but the fact that the Public Trustee has that
complaint is relevant to the present issue of whether the
administrators or people from their firm ought to be
liquidators of these two companies.

I have a letter from solicitors acting for Challenger which
supports the applications for winding up and for the
appointment of the two individuals proposed from Ferrier
Hodgson or the alternative proposal to appoint someone from
the firm of McGrath Nicol. In other words, all creditors of
these two companies wish those persons to be appointed as
liquidators and oppose the appointment of the administrators
or someone from their firm. That is a very important
consideration and as there is on its face a logical
explanation for the preference, it is, I think, fairly
conceded on behalf of the companies that according to the
authorities, ordinarily, the preferences of the creditors
should be accepted.

There are some other matters raised by the companies about the
appointment which is proposed. One is that Ferrier Hodgson
has had an involvement with this group and, in particular, as
an advisor to the note holders represented by the Public
Trustee during sometime earlier this year. I refer to that
involvement in reasons for judgment I gave last September:

[2008] QSC 216 at [21]. In my view, however, that is not a matter which makes it inappropriate for two persons from that firm to be appointed.

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Further, it is said that there is a potential preferential payment to be investigated by a liquidator which is a payment of approximately \$14 million made by Octaviar Investment Notes Ltd through Octaviar administration in April this year.

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However, against that, as I have said, both creditors favour the appointment of the persons from Ferrier Hodgson. It may be that that suggested preferential payment has not been considered by Challenger, but no doubt, if Challenger considers that this is a difficulty so far as the appointment of Ferrier Hodgson is concerned, it can move for a substitution of another person or persons as liquidators.

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Accordingly, there will be orders for the winding up of Octaviar Investment Bonds Ltd and Octaviar Investment Notes Ltd, in each case upon the insolvency ground, and it will be further ordered that the appointees as liquidators be Mr W M Colwell, Mr G M Maloney and Mr Gothard of Ferrier Hodgson. It will be further ordered that the applicant's costs of and incidental to the application in each case be the applicant's costs on the winding up.

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I mention, then, one further matter which was argued in relation to these two companies. It is a submission made on behalf of OPI Pacific Finance Ltd, which is not a creditor of either company, that there should be an order in its favour in

the winding up of these companies. In particular, what is sought is an order that its costs be costs in each of those liquidations.

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As appears from previous judgments, it has participated in earlier hearings for the winding up of these companies and others. In so far as these companies are concerned, its participation was by leave because it is not a creditor. It is, in my view, not at all appropriate that it should have the costs or part of the costs of its participation from the winding up of these companies in which it has no interest as creditor. There is the further consideration that at least until today it has opposed the winding up of those companies. So there will be no order made in its favour in relation to these two companies.

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Turning then to the other applications which are returnable today, which are for the winding up of Octaviar Ltd and Octaviar Financial Services Ltd, the Public Trustee seeks a further adjournment of the hearing and seeks a further extension of the date by which those applications are to be determined. The latter order, of course, is sought pursuant to section 459R(2). I have previously made an order under that section extending the date for the determination of the applications to 18 February, next. The reason for the further adjournment of the winding up applications is to permit the Public Trustee to challenge the deed of company arrangement which was approved at yesterday's meetings. The deed itself has not yet been executed and according to the authorities

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therefore, that application to challenge the deed cannot be made at this point. The applicant proposes that the applications be adjourned to 6 March next. There is no submission made against that proposal, nor is there any opposition to the application to extend time under section 459R until 6 April 2009. Accordingly, there will be orders in those respects in each of the applications for Octaviar Ltd and Octaviar Financial Services Ltd. There will be a further order that the applicant's costs of and incidental to today's hearing be the applicant's costs in the winding up.

In the Octaviar Ltd application, there will be an order for the administrators' costs of today to be reserved. In each of these two applications to be adjourned, there will be an order reserving the costs of OPI Pacific Finance Ltd.
