

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

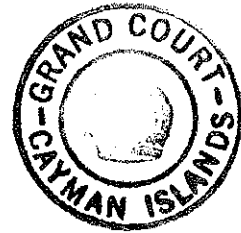
3 **CAUSE NO: FSD 45 OF 2013 (AEFJ)**
4 **(FORMERLY CAUSE NO: 18 OF 1998)**

5
6 **IN THE MATTER OF PEREGRINE DERIVATIVES LIMITED (IN OFFICIAL LIQUIDATION)**
7 **AND IN THE MATTER OF THE COMPANIES LAW (2012 REVISION) (AS AMENDED)**

8
9 The Hon Mr. Justice Angus Foster
10 In Chambers
11 30th July & 9th August 2013

12
13 **Appearances:** For the Applicant Official Liquidators - Ms Caroline Moran of Maples and Calder

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16 **RULING**



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18 **Introduction**

19 1 This is an application by the joint official liquidators of Peregrine Derivatives Limited (In Official
20 Liquidation) ("the Company") seeking retrospective sanction of various actions carried out in the
21 liquidation of the Company, including litigating in Taiwan on behalf of the Company in two actions as
22 plaintiff and as defendant respectively, compromising and settling claims and selling assets of the
23 Company.

24 **Background**

25 2 The Company was incorporated as a Cayman Islands exempted company on 19th March 1992 and
26 was subsequently registered in Hong Kong as an overseas company on 9th July 1992. The Company
27 was a member of the Peregrine Investment group of companies ("the Peregrine group"), a Hong Kong
28 based investment group operating mainly in the Asian markets. The Company's principal business
29 was issuing and trading in equity derivatives. It also purchased shares, options, swaps and other
30 assets for hedging purposes. Its business was based in Hong Kong, hence it being registered there as
31 an overseas company, but its investments and assets were international. In 1998 the Peregrine group
32 collapsed as a result of major losses and the Asian financial crisis generally at that time. The resulting
33 liquidation of the Peregrine group has been one of the largest liquidations in Hong Kong.

1 3 On 13th January 1998 a creditor of the Company presented a winding up petition in respect of the
2 Company in the High Court of Hong Kong ("the Hong Kong court") and a provisional winding up order
3 was made by the Hong Kong court on that date. Three members of the firm of Price Waterhouse (now
4 PriceWaterhouseCoopers – "PwC") in Hong Kong ("PwC Hong Kong") were appointed as provisional
5 liquidators. Shortly thereafter the same creditor presented a winding up petition in this court and on
6 26th January 1998, this court also made a provisional winding up order. The same three persons from
7 PwC Hong Kong, together with a member of the firm of PwC in Cayman ("PwC Cayman"), were
8 appointed as provisional liquidators.

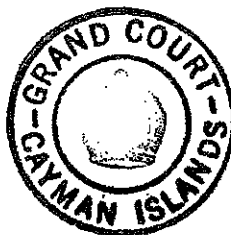
9 4 The provisional liquidators of the Company appointed by this court were David Hague, Stephen
10 Caswell and Donald Osborn of PwC Hong Kong and Richard Harris of PwC Cayman. The provisional
11 liquidators of the Company appointed by the Hong Kong court were the same David Hague, Stephen
12 Caswell and Donald Osborn of PwC Hong Kong only. Mr Harris of PwC Cayman was not appointed in
13 Hong Kong.

14 5 On 18th March 1998 this court and the Hong Kong court each made winding up orders in respect of the
15 Company. In this court the same four persons were appointed official liquidators ("the Cayman
16 Liquidators"). In Hong Kong, under the procedure there, the three provisional liquidators remained as
17 provisional liquidators until they were approved as official liquidators by the creditors and appointed as
18 official liquidators ("the Hong Kong Liquidators") by the Hong Kong court on 2nd July 1998. Again, Mr
19 Harris of PwC Cayman was not appointed in Hong Kong. At the same time, the Hong Kong court
20 approved the membership of a Hong Kong creditors' committee comprising three creditors from Hong
21 Kong, who have remained members of the creditors' committee ever since.

22 6 For completeness I should mention that Mr Caswell of PwC Hong Kong, who, as explained above,
23 was originally both a Cayman Liquidator and a Hong Kong Liquidator later resigned from PwC and
24 was removed as a Cayman Liquidator and as a Hong Kong Liquidator by orders of this court and the
25 Hong Kong court respectively in 2002.

26 7 On 21 August 1998 and 10 September 1998 respectively, this court and the Hong Kong court each
27 made similar orders regulating the conduct of the parallel liquidations. Although the orders did not
28 expressly say so, the purpose of these orders was to operate as a form of quasi protocol between the
29 Hong Kong Liquidators and the Cayman Liquidators in an attempt to ensure the efficient
30 administration of the parallel winding up proceedings.

31 8 In particular, under these quasi protocol orders of both courts, the assets of the Company were to be
32 divided into "Hong Kong Assets" and "Non-Hong Kong Assets". Hong Kong Assets were to comprise



1 all assets of the Company located in Hong Kong, including any debts payable in that jurisdiction. The
2 Non-Hong Kong Assets were to comprise any assets located outside Hong Kong, including debts
3 payable in a jurisdiction other than Hong Kong. The Hong Kong Liquidators were to be responsible for
4 collecting in and realising all Hong Kong Assets pursuant to relevant Hong Kong law and practice. The
5 Cayman Liquidators were to be responsible for collecting in and realising all Non-Hong Kong Assets
6 pursuant to relevant Cayman law and practice. The quasi protocol order made by this court on 21st
7 August 1998 also established a Cayman creditors' committee to comprise the same three members as
8 had already been appointed in Hong Kong on 2nd July 1998. The creditors' committee was to act as a
9 creditors' committee for purposes of both the winding up by the Hong Kong Liquidators and the
10 winding up by the Cayman Liquidators and the proceedings in both Cayman and Hong Kong.

11 9 Unlike the position under relevant Cayman law and practice, the relevant law and practice in Hong
12 Kong empowered the Hong Kong Liquidators to initiate or defend legal proceedings in the name of the
13 Company and to compromise debts and claims with the sanction only of the creditors committee,
14 without the need for the sanction or approval of the Hong Kong court. Furthermore, the Hong Kong
15 Liquidators had the power to sell the Company's assets without the sanction of either the creditors
16 committee or of the Hong Kong court, although, according to the evidence before me, as a matter of
17 good practice official liquidators in Hong Kong would usually seek the approval of the creditors
18 committee of any proposal to sell assets of the company concerned.

19 10 Since the commencement of the official winding up in 1998, total realisations of assets of the
20 Company to the value of some HK\$1,259,000,000 (approximately US\$162,171,000) have been made.
21 Of this amount some HK\$709,500,000 (approximately US\$91,390,000) related to Hong Kong Assets
22 and the balance of some HK\$549,500,000 (approximately US\$70,781,000) related to Non-Hong Kong
23 Assets. Most of this has now been distributed to creditors by way of several dividends and only one
24 more relatively small dividend is anticipated before the winding up is complete

25 11 However, notwithstanding the quasi protocol orders of this court and the Hong Kong court and the
26 obvious intent behind them, the official liquidators have dealt with all assets of the Company, including
27 the Non-Hong Kong Assets, pursuant to Hong Kong law and practice and without reference to this
28 court. Only the approval in Hong Kong of the creditors committee has been sought by the Hong Kong
29 Liquidators. Clearly this did not accord with the quasi protocol orders. Various significant actions taken
30 in relation to Non-Hong Kong assets, which should have been taken by the Cayman Liquidators
31 pursuant to Cayman law and practice, clearly required the sanction of this court pursuant to the
32 provisions of the relevant revisions of the Companies Law (see for example Companies Law (1998
33 Revision) section 109). Such sanction was never sought, still less obtained.





1 Retrospective Sanction

2 12 The Cayman Liquidators now seek retrospective court sanction of the following actions which have
3 been taken in relation to the Non-Hong Kong Assets of the Company, in some instances as long as 14
4 years ago and in the most recent case some 5 years ago:

5 12.1 commencement in April 1999 and pursuit of litigation against Maxi Harvest Limited in Taiwan
6 for the recovery of some HK\$17 million (approximately US\$2,189,750) resulting in the ultimate
7 recovery by the Company in early 2003 of approximately HK\$8.5 million (approximately
8 US\$1,094,880).

9 12.2 settlement in 1999 with Samyang Merchant Bank abandoning a possible contractual claim by
10 the Company for some US\$2.1 million.

11 12.3 defence of litigation commenced by Sweet Bygones Limited against the Company in Taiwan
12 for the return of certain collateral worth US\$1,067,506.45 which the Company believed was
13 owed to it. The Company's defence was ultimately unsuccessful in December 2001 leading to
14 Sweet Bygones Limited being entitled to the collateral with interest thereon and the Company
15 also being required to pay Sweet Bygones an amount of US\$73,890.15 in respect of court
16 fees together with a contribution of US\$24,946 towards Sweet Bygones Limited's legal fees.

17 12.4 the sale of some US\$19 million worth in total of listed shares held by the Company on various
18 Asian markets over the period July 1998 to August 2000.

19 12.5 settlement in June 2008 of a claim against PIV Services Sdn Bhd resulting in a recovery by
20 the Company of some HK\$99 million (approximately US\$12,753,500) on condition of the
21 acceptance of five creditor claims against the Company.

22 Pursuant to relevant Hong Kong law and practice the creditors committee was consulted in Hong Kong
23 by the Hong Kong Liquidators in relation to all of these matters and the committee in Hong Kong
24 approved the actions taken by the Hong Kong Liquidators. However, as explained above, these
25 actions all related to Non-Hong Kong Assets which were required to be dealt with by the Cayman
26 Liquidators pursuant to Cayman law and practice under which sanction by this court was required but
27 was never sought.

28 13. I should mention that in May 1998 the Cayman Liquidators did apply to this court for leave to sell an
29 asset of the Company, namely shares held by it in another Peregrine group company in the Philippines.
30 Sanction was granted by order dated 11th May 1998. This was, of course, prior to the quasi protocol

1 orders of this court and the Hong Kong court but it does indicate to me that the Cayman Liquidators,
2 who at that time included the three members of PWC Hong Kong, two of whom still remain Cayman
3 Liquidators, as well as the liquidator from PwC Cayman, were aware of the need to seek sanction from
4 this court for such transactions.

5 The February 1999 Order

6 14. On 22nd January 1999 the Cayman Liquidators also applied to this court to vary the terms of the quasi
7 protocol order made by this court on 21st August 1998 to the extent that the remuneration of the
8 Cayman Liquidators and their expenses should be subject to the approval of the creditors committee
9 rather than the approval of this court. Again, in my view, this demonstrates, this time subsequent to
10 the protocol orders, that the Cayman Liquidators were well aware of the need to apply to this court in
11 relation to the Cayman aspects of the winding up of the Company. This application was, somewhat
12 surprisingly, granted by order dated 4th February 1999 (Kipling Douglas J.) The relevant provision of
13 the Companies Law then in force (the 1998 Revision) (which is substantially unchanged in the current
14 revision of the Companies Law) provided at section 107 (2):

15 *"There shall be paid to the official liquidator such salary or remuneration, by way of percentage or*
16 *otherwise, as the Court may direct; and if more liquidators than one are appointed such remuneration*
17 *shall be distributed amongst them in such proportions as the Court directs" [my emphasis].*

18 It is not clear to me in light of this provision that this court had jurisdiction to make the order of 4th
19 February 1999. However, be that as it may, the application does, as I have said, suggest to me that the
20 Cayman Liquidators appreciated that this is the supervising court in relation to them and all Cayman
21 aspects of the winding up. On the other hand, it was argued before me that the terms of this order
22 emphasised the role of the creditors committee in the winding up rather than the court, in line with Hong
23 Kong law and practice. After this order was made the Cayman Liquidators only sought approval of their
24 fees and costs from the creditors committee and not from the court.

25 The Law on retrospective sanction

26 15. I was not referred to any Cayman authority on retrospective sanction. In England rule 4.184 (2) of the
27 Insolvency Rules 1986 (as amended) provides:

28 *"where the liquidator had done anything without that permission [of the liquidation committee or of the*
29 *court], the court or the liquidation committee may, for purposes of enabling him to meet his expenses*
30 *out of the assets, ratify what he has done; but neither shall do so unless it is satisfied that the*
31 *liquidator has acted in a case of urgency and has sought ratification without undue delay."*



1 The English Insolvency Act 1986 provides for similar conditions concerning urgency and delay in the
2 case of retrospective sanction of the bringing of proceedings by a liquidator in the name and on behalf
3 of the company. However, there is nothing equivalent or similar to these conditions in the relevant law
4 or regulations in this jurisdiction.

5 16. I was referred by counsel for the Cayman Liquidators to the case of *Gresham International Ltd and*
6 *another v. Moonie and others [2010] Ch 285* in which Peter Smith J in the English High Court
7 considered an application for retrospective sanction of the commencement by an official liquidator of
8 legal proceedings on behalf of the company, which were still continuing. The failure to obtain
9 prospective sanction was described by the applicant liquidator as an "accidental omission". In his
10 judgment the judge made it clear, and it was agreed by all concerned, that failure by a liquidator to
11 obtain sanction of his issue of court proceedings does not affect the validity of the proceedings and it
12 does not give the defendant any right to object to the proceedings. The consequence of the lack of
13 sanction is the inability of the liquidator to recover his costs and expenses out of the assets of the
14 company. As the judge said, obviously if the liquidator's costs and expenses are disallowed out of the
15 assets of the company there will be an increase in the sums available for distribution to the creditors.

16 17. Peter Smith J, having reviewed various authorities, went on to say at paragraph 64:

17 " I conclude therefore that on the authorities such as they are the court has power under its
18 supervisory role of compulsory winding up and bankruptcy to make orders the effect of which is to
19 grant retrospective sanction despite the [statutory] requirements [relating to urgency and delay] not
20 being made out It seems to me that it is essential that the court retains a residual power of
21 control in such areas where it can in appropriate circumstances overcome non compliance with the
22 statutory requirements.

23 More significantly in light of the position in this country, where there are no such statutory
24 requirements, he went on to say at paragraph 68:

25 "I see no reason why, as a matter of principle, in most cases where there has been an inadvertent
26 failure to obtain sanction, the court (even if no urgency and no undue delay) should not retrospectively
27 sanction the proceedings under its supervisory powers. There is no real justification for punishing a
28 liquidator for such inadvertence and as a result conferring an uncovenanted bonus on the creditors of
29 the company on whose behalf the liquidator is seeking to recover assets. It may be different of course
30 if the application [I take this to mean the legal proceedings initiated by the liquidator in name of the
31 company] is unsuccessful but there are other assets out of which the liquidator's costs and liability to
32 pay costs can be recovered. In that situation where there has been no sanction the court will be able



1 to investigate the case fully and decide whether or not it is appropriate to grant retrospective sanction
2 only if the [statutory] requirements [of urgency and no undue delay] are made out"

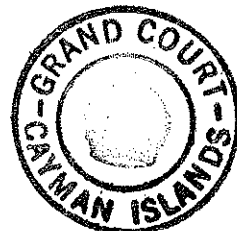
3 18. In considering the exercise of his discretion in the particular circumstances of that case Peter Smith J
4 was not satisfied by the reasons put forward by the liquidator. He was not persuaded that there was
5 any inadvertence or any other factor that would justify departing from the statutory requirements,
6 which were, in his opinion, clearly not satisfied. He therefore declined to grant retrospective sanction.
7 However, he did say at paragraph 80 of his judgment:

8 'If it was a mere matter of inadvertence I would have no doubt about it. [granting retrospective
9 sanction].

10 Analysis

11 19. Although the judgment in the *Gresham International* case is, of course, not binding on this court, in my
12 opinion the view expressed in that case that as a matter of principle the court has power, under its
13 supervisory role in compulsory winding up, to grant retrospective sanction in appropriate
14 circumstances is equally applicable under Cayman Islands law. I respectfully agree with Smith J that
15 "It is important to ensure that the court retains the fullest power to regulate its proceedings". As I have
16 already pointed out, there are no statutory pre-conditions to the grant of retrospective sanction by this
17 court as there are in England. Accordingly, in my view, there is a general discretion on the part of this
18 court whether or not it should grant retrospective sanction in the particular circumstances of the case.
19 The relevant factors to be taken into account will clearly vary from case to case and it would be
20 inappropriate for me to try to itemise them. However, in the *Gresham International* case the judge
21 considered that in most cases where there has been an inadvertent failure to obtain sanction there is
22 no reason why the court should not, as a matter of principle, grant retrospective sanction under its
23 supervisory powers. He clearly would have done so in that case if it had been simply a matter of
24 inadvertence.

25 20. In the present case the Cayman Liquidators say that it was due to inadvertence on their part that they
26 did not seek sanction from the court of the taking of any of the actions set out at paragraph 12 above
27 which spanned many years. This was notwithstanding that they were appointed by this court, of which
28 they are consequently officers, and notwithstanding the clear terms of the quasi protocol orders which
29 required them, and not the Hong Kong Liquidators, to deal with all the Non-Hong Kong Assets in
30 accordance with Cayman law and practice. Furthermore, as I have pointed out above, they did in fact
31 seek sanction from this court at an early stage in the winding up to sell an asset of the Company. They
32 also made other applications to this court relating to the winding up, including in relation to their fees. It



1 seems to me that the Cayman Liquidators must have been well aware that this court was the
2 supervisory court, at least in respect of Non-Hong Kong Assets, and of the need to seek directions
3 from this court in respect of the Cayman aspects of the winding up. Furthermore, the circumstances of
4 the present case are very different from those in the *Gresham International* case. In that case the
5 liquidator had initiated legal proceedings without sanction but applied for retrospective sanction of her
6 doing so while the proceedings were still under way. While the judge declined to grant retrospective
7 sanction of the initiation of the proceedings for the reasons mentioned above, he did grant prospective
8 sanction for the continuation of the proceedings. In the present case the relevant legal proceedings
9 initiated by the official liquidators against Maxi Harvest Limited in Taiwan were commenced in 1999,
10 some 14 years ago, and were completed approximately 10 years ago in 2003. The defence of the
11 litigation with Sweet Bygones Limited, also in Taiwan, was commenced by the official liquidators in
12 September 1998, almost 15 years ago and was unsuccessfully concluded in December 2001. All of
13 the other transactions of which the Cayman Liquidators now seek retrospective sanction were also
14 concluded long ago as set out in paragraph 12 above.

15 21. I find it surprising and unsatisfactory that official liquidators of a Cayman Islands company who are
16 members of a well-known and experienced international insolvency firm and who, for obvious reasons,
17 included a senior member of the Cayman Firm, should fail to seek the necessary sanction of the court
18 of a number of major transactions and actions, including litigation overseas, over many years through
19 inadvertence. This is particularly so in light of the specific emphasis of the role of the Cayman
20 Liquidators in the quasi protocol orders of both courts and the specific appointment as one of the
21 Cayman Liquidators of a senior member of PwC Cayman. In my view, in the particular circumstances
22 of this case, the line between mere inadvertence and incompetence is a fine one.

23 21. However, I must accept that in carrying out these actions and transactions relating to the Non-Hong
24 Kong Assets as they did, the Hong Kong Liquidators were seeking to act in the best interests of the
25 Company's estate and to maximise returns to creditors. The Hong Kong Liquidators apparently
26 complied with their obligations under Hong Kong law and practice and they obtained the approval of
27 the creditors' committee before taking these actions. They also obtained legal advice. As a result of
28 the Hong Kong Liquidators' efforts, the creditors of the Company have received substantial dividends
29 and it is anticipated that they will ultimately recover a total of approximately 90% on their claims. The
30 winding up is now almost complete. It was also submitted by counsel for the Cayman Liquidators that
31 since pursuant to the order of the Hong Kong court dated 2nd July 1998 and the order of this court
32 dated 4 February 1999 the creditors' committee is responsible for approving the official liquidators'
33 remuneration and costs, if the creditors' committee was dissatisfied with any of the actions taken by



1 the official liquidators in respect of any of these Non-Hong Kong Assets, they could simply have
2 refused to sanction the official liquidators' relevant remuneration and costs but they did not do so.

3 22. While this is hindsight, I also consider that had prospective sanction in respect of the actions and
4 transactions concerned been sought from this court at the appropriate times such prospective sanction
5 would most probably have been granted in each case. The evidence is that, at least in respect of the
6 two court actions in Taiwan, the official liquidators took and acted upon legal advice from appropriate
7 professionals and, although they were ultimately unsuccessful in defending the litigation with Sweet
8 Bygones Limited, it nonetheless seems probable to me that in the circumstances the defence of that
9 litigation would have been sanctioned at the time.

10 23. I have also referred earlier to the comment in the judgment in the *Gresham International* case to the
11 effect that there is no real justification for punishing a liquidator for mere inadvertence and as a result
12 conferring a bonus on the creditors on whose behalf the liquidator is seeking to recover assets. Of
13 course that comment was made in the context of the circumstances of that case, but in the present
14 case I do particularly take into account the evidence that the actions and transactions concerned were
15 all approved at the time by the creditors' committee, as were the official liquidators' fees and costs
16 incurred in respect and as a result of such actions and transactions.

17 Conclusion

18 24. I am concerned about the Cayman Liquidators' obvious failure over many years to comply with
19 Cayman law and practice, to comply with the clear intent of this court (and of the Hong Kong court) as
20 expressed in the quasi protocol orders and to seek the necessary sanction for significant actions and
21 transactions long ago until now, when the winding up is almost complete. Nonetheless, I must accept
22 that the Cayman Liquidators' failures to obtain prospective sanction at the appropriate times has
23 probably made little or no practical difference at the end of the day and there is no point in the
24 circumstances in seeking to penalise the Cayman Liquidators for such failures. In these circumstances
25 and for the reasons set out above, I therefore now, somewhat reluctantly, grant retrospective sanction
26 to the Cayman Liquidators in respect of the actions and transactions set out at paragraph 12 above.

27 Dated 9th August 2013

28
29 
30 The Hon. Mr. Justice Angus Foster
31 JUDGE OF THE GRAND COURT

