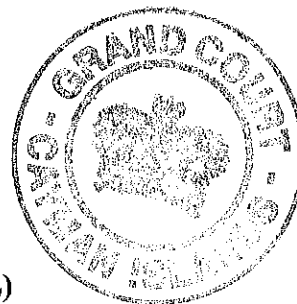


**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**



IN THE MATTER OF EXTEN INVESTMENT FUND (IVL)

Cause No.: FSD 96 of 2017 (IMJ)

AND

IN THE MATTER OF MARKETVIEW GLOBAL FUND (IVL)

Cause No.: FSD 97 of 2017 (IMJ)

AND

IN THE MATTER OF MARKETVIEW MANAGEMENT (IVL)

Cause No.: FSD 98 of 2017 (IMJ)

AND

IN THE MATTER OF DYNAMIC CORE CAPITAL (IVL)

Cause No.: FSD 99 of 2017 (IMJ)

IN OPEN COURT

Appearances: Mr. L Stockdale and Mr. A Davey of Maples and Calder for the Petitioner
Mr. G Smith of Loeb Smith on behalf of the Voluntary Liquidators

Before: The Hon. Justice Ingrid Mangatal

Heard: 31 May 2017

First Ruling Delivered: 2 June 2017

Draft Reasons for Ex Tempore Ruling and Ruling on Further point circulated: 14 June 2017

Reasons for Ex Tempore Ruling and Ruling on Further Point Delivered: 23 June 2017

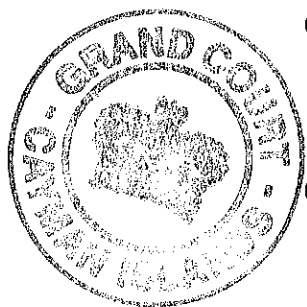
HEADNOTE

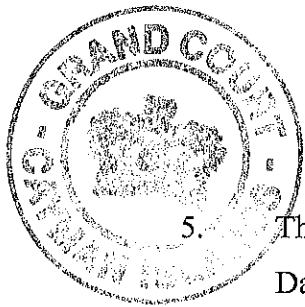
Funds and Managers in Voluntary Liquidation - Petitioner sole investor in Funds compulsorily redeemed - Discovery of suspect payments - Application for deferral of date of dissolution under section 151(3) of the Companies Law (2016 Revision) - Application for continuation of winding up under the supervision of the Court and for the appointment of Official Liquidators under section 131(b) of the Companies Law.

REASONS FOLLOWING EX TEMPORE RULING AND RULING ON FURTHER POINT

Introduction

1. On 31 May 2017 these four Petitions urgently filed on behalf of the Petitioner Credit Suisse London Nominees Limited (the “**Petitioner**”) came on for hearing before me. They were heard at the same time pursuant to Order 24, Rule 1(5) of the Companies Winding Up Rules, 2008 (as amended) (the “**CWR**”).
2. In respect of the investment funds, i.e. FSD 96 of 2017, Exten Investment Fund (In Voluntary Liquidation), and FSD 97 of 2017 Marketview Global Fund (In Voluntary Liquidation), (collectively the “**Funds**”) the principal relief sought has been two-fold:
 - (a) That the date of dissolution of each of the Funds, currently scheduled to take effect on 21 June 2017, be deferred pursuant to Section 151(3) of the Companies Law (2016 Revision) (the “**Companies Law**”); and
 - (b) That the Voluntary Liquidation of each of the Funds be continued under the supervision of the Court pursuant to section 131 of the *Companies Law* and that Michael Penner and Timothy Derksen of Deloitte & Touche be appointed joint official liquidators (“**JOLs**”) of each Company.
3. Summonses for directions were also filed in respect of the requested orders for supervision, seeking either the order for supervision, or alternatively directions in respect of the further hearing of the Petition.
4. In respect of FSD 98 of 2017, Marketview Management (In Voluntary Liquidation) and FSD 99 of 2017, Dynamic Core Capital (In Voluntary Liquidation), (the “**Managers**”), the principal relief sought has been that the date of dissolution of the Company, in the case of Marketview Management, currently scheduled to take effect on 5 June 2017, and in the case of Dynamic Core Capital, currently scheduled to take effect on 21 June 2017, be deferred pursuant to section 151(3) of the *Companies Law*.





5. The Voluntary Liquidator (the "**Liquidator**") in respect of these four companies is Mr. David Lloyd. He was served with the Petitions. In addition, Counsel for the Petitioner Mr. Stockdale advised that the Registrar of Companies has been notified of the hearing and provided with the relevant papers. Affidavit evidence of service was subsequently filed.
6. The Liquidator has retained Counsel Mr. Smith, who appeared on his behalf, opposing the Orders sought, firstly on the ground that the Petitioner has no standing to seek these Orders, and secondly, on substantive grounds.
7. Evidence was filed on behalf of the Liquidator.
8. I indicated to Counsel on 31 May 2017, that I intended to reserve my decisions with regard to the applications seeking to have the voluntary liquidations of the Funds continue under the supervision of the Court, and for the appointment of the proposed JOLs, for a short period of time.
9. On 2 June 2017, I gave my decision with regard to the deferral applications. On that date, I indicated that I am of the view that the Petitioner does have standing to make the application, and has satisfied the requirements of section 151(3) of the *Companies Law*. I also indicated that I was satisfied that in respect of each of the Funds and the Managers (collectively the "**Companies**"), it was a proper exercise of my discretion to order the deferral of the date of dissolution.
10. I ordered that the deferrals be, in the case of FSD 98 of 2017, until 5 June 2018, and in the case of each of the other three Companies, until 21 June 2018. I also ordered that the Petitioner shall have liberty to apply to vary the respective dates.
11. At that time I promised to give the reasons for my decision at a later date. These are my reasons for reaching my decision in respect of the deferral applications, as well as my

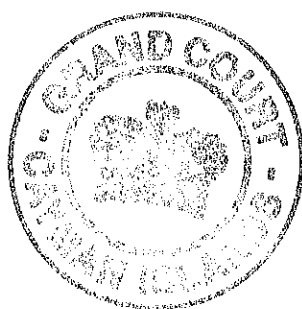
ruling and reasons in respect of the two applications for the continuation of the liquidations of the Funds under the supervision of the Court.

12. I wish to thank Counsel on both sides for their helpful and able submissions.

Part I: The Deferral Applications

13. Section 151 of the *Companies Law* provides as follows:

“Dissolution of a company-Dissolution following voluntary winding up



151.(1) The Registrar shall, within three days of receiving a liquidator's return under section 127(3), register such return.

(2) Upon the expiration of three months from the registration of the return the company is deemed to be dissolved.

(3) Notwithstanding subsection (2), the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect to such date as the Court thinks fit.

(4) An application under this section shall not be made after the company is deemed to have been dissolved.

(5) An order of the Court made under this section shall be registered with the Registrar within seven days of the date upon which it was made.”

Background

14. The Petitioner was the sole investor in the Funds prior to its shares being compulsorily redeemed simultaneously with the Funds being placed in voluntary liquidation on 13 January 2017. The Managers acted as investment managers for each of the Funds respectively. The Managers were placed into voluntary liquidation on 17 January 2017. Marketview Management was scheduled to be dissolved on 5 June 2017 and the other three Companies were scheduled to be dissolved on 21 June 2017.



The Petitioner's ground for seeking the orders sought is that it maintains that there is a need for an investigation into the Companies' affairs by independent and experienced Official Liquidators and that accordingly, the affairs of the Companies are not yet fully wound up. In particular, the Petitioner opines that the voluntary liquidations were commenced and completed very quickly against a background of extensive correspondence from the Petitioner over a period of nearly a year raising various questions and seeking information concerning the Funds. The Petitioner asserts that a number of those requests remain to date unanswered.

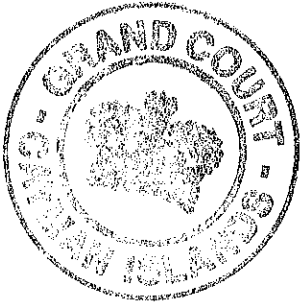
16. The Petitioner indicates that it has also learned, in the context of an ongoing criminal investigation in Switzerland, of certain suspicious payments amounting to millions of dollars (approximately US\$5 Million) made, it says, by the Managers, to companies ("**the Intermediary Companies**") owned or controlled by a former relationship manager of Credit Suisse AG, an indirect Parent Company of the Petitioner, who is the subject of the ongoing criminal investigation. It is the Petitioner's stance that there is a need to investigate whether or not the Funds and/or the Managers have claims against any party arising from those payments.
17. It is the Petitioner's case, that as the sole economic stakeholder in the Funds, it wishes the foregoing matters to be investigated and if necessary, pursued, before the Companies are dissolved. It was submitted that no prejudice to any other party will arise from the orders which the Petitioner is seeking.

The Petitioner's arguments

18. The Petitioner has indicated that the factual background to the applications has been set out in the affidavits of a director of the Petitioner dated 22 May 2017 (the "**Director's Affidavits**"). A summary of this background has been usefully provided in the Petitioner's skeleton argument as follows:

" ..

6.1 *Between May 2011 and May 2015 the Petitioner invested a total of US\$34.75 million in Marketview Global Fund and a*



- total of US\$49.25 million in Exten Investment Fund. It was the sole investor in both Funds.
- 6.2 *As the Petitioner had not been provided with reports and information concerning the Funds, to which it was entitled over a number of years since first investing in the Funds, the Petitioner engaged in extensive correspondence with the Funds and the Managers (via the Funds' Administrator) from March 2016 up to and beyond the compulsory redemption of the Petitioner's shares and the purported completion of the voluntary liquidations of the Companies in January 2017.*
- 6.3 *The Petitioner repeatedly pressed for copies of audited financial statements and other information concerning investment decisions made by or on behalf of the funds which had resulted in substantially all of the Funds' assets being invested in a single company and the Funds incurring investment losses of tens of millions of dollars.*
- 6.4 *During an on-going criminal investigation in Switzerland concerning a former relationship manager of Credit Suisse, banking records have come to light showing payments totaling several million dollars made by the Managers to companies owned or controlled by the former relationship manager (the "suspect payments"). The individual has made admissions to the Swiss authorities concerning the receipt of the suspect payments and they are understood to relate to investments made by the Petitioner into the Funds.*
- 6.5 *Without prior notice, on or about 13 January 2017, the Funds compulsorily redeemed all of the Petitioner's shares and all of the Companies were then placed in voluntary liquidation. The Companies were progressed through the voluntary liquidations in a week or less and it is apparent that the matters set out above are yet to be properly investigated.*
- 6.6 *The Petitioner only learned of the voluntary liquidations of the Companies through its own enquiries in March 2017. Thereafter, the Petitioner engaged in correspondence with the voluntary liquidator concerning these matters. As the voluntary liquidator was not prepared to make applications deferring the scheduled dissolution dates, the Petitioner was forced to bring the present applications itself."*

Standing

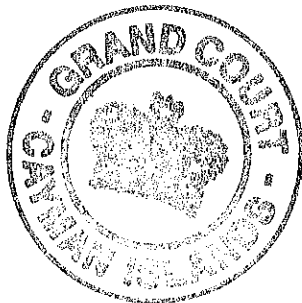
19. On the issue of standing, Mr. Stockdale submitted that the Petitioner has standing to make these applications as an interested party both in respect of the Funds and the Managers.

20. Counsel submitted that in respect of the Funds, given the Funds' potential claims as a result of the suspect payments, the Petitioner is a contingent creditor. The argument continued that there are a number of conceivable ways in which any recoveries made by the Funds in connection with the suspect payments could flow back to the Petitioner. For example, an official liquidator could exercise the powers in section 112(2) of the *Companies Law* and O. 12, R.2 of the *CWR* to rectify the Funds' registers of members so that the net asset value ("NAV") per share at the date of the compulsory redemption of the Petitioner's shares is adjusted to include the value of the recoveries. Alternatively, the Petitioner may have a contractual or restitutionary claim against the Funds.

21. Section 112(2) of the *Companies Law* provides as follows:

"Settlement of list of contributories

...



- (2) *In the case of a solvent liquidation of a company which has issued redeemable shares at prices based upon its net asset value from time to time, the liquidator shall have power to settle and, if necessary rectify the company's register of members, thereby adjusting the rights of members amongst themselves*

... "

22. As regards the Managers, Mr. Stockdale indicated that he is not aware of any Cayman Islands authority where section 151(3) has been considered. However, the phrase "*any person who appears to the Court to be interested*" is also found in section 201(3) of the *UK Insolvency Act* 1986 and its predecessors, section 651 of the *Companies Act* 1985 and section 352(1) of the *Companies Act* 1948. Counsel submitted that the English Courts have given the phrase a broad interpretation.

23. In *Re Test Holdings (Clifton) Ltd: Re General Issue and Investment Co. Ltd.* [1969] 3 All E.R.517, at page 519I, Megarry J described the phrase as one of “*great amplitude*”.
24. The following discussion at pages 519B - 520B, in *Re Test Holdings* is useful. The learned Judge Megarry J there stated:

“In order to determine this matter I think that I should first examine the language and operation of the two subsections.

Section 352(1) provides as follows:

“Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.”

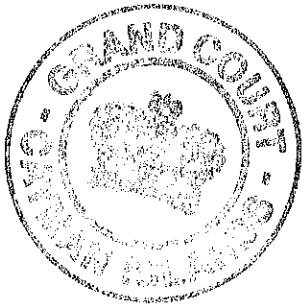
The language of s. 353(6) is very different. It runs:

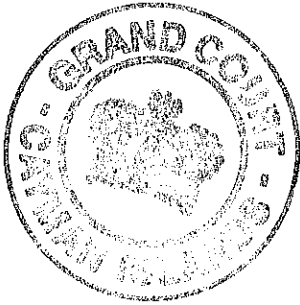
“If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.”

There are many contrasts between the two subsections.

...

Thirdly, the two subsections differ as to the persons who may make the application, although to some extent the difference is more linguistic than real.
Under s.352(1) the application must be made by the liquidator of the company or





by "any other person who appears to the court to be interested." This is a phrase of great amplitude. Under s. 353(6), however, the application is to be made by the company or a member or a creditor.The word "creditor" is a term that has been construed widely so as to include a mere contingent creditor (see *Re Harvest Lane Motor Bodies, Ltd...*) and this does much to give s. 353(6) the width of section 352(1). Nevertheless, it does not seem to go the whole way. A person who after the date of dissolution acquires shares in a company, or takes an assignment of one of its debts, is not a "member or creditor" of that company within s.353(6) (see *New Timbiqui Gold Mines, Ltd...*), although he might well be a "person who appears to the court to be interested" within s. 352(1)."

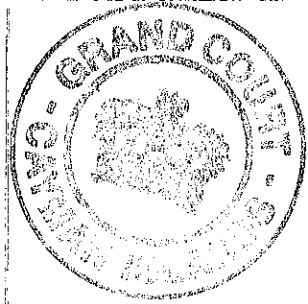
(My emphasis)

25. Reference was also made to another decision of Megarry J, in *Re Wood and Martin (Bricklaying Contractors) Ltd.* [1971] 1 All E.R. 732, where at page 736, Megarry J reasoned, that:

"Accepting all these contentions, it nonetheless seems to me that it would be somewhat unreal to say that the applicant has no interest of a proprietary or pecuniary nature in resuscitating the company. The situation is unusual, but the possibility of a claim being made by the applicant and the possibility of a claim being made against him, when added together, seem to me to remove him from the category of person who cannot fairly be regarded as having any proprietary or pecuniary interest of this kind. It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail: provided it is not merely shadowy, I think it suffices for the purposes of s 352."

(My emphasis)

26. *Re Wood* involved a case where a company passed an extraordinary resolution that it be voluntarily wound up and appointed a liquidator. Subsequently, the liquidator found out that the company had been struck off the year before for failing to make annual returns.



The liquidator then moved for a declaration under section 352 of the UK 1948 *Companies Act* for a declaration that the dissolution of the company was void. It was held that the applicant could not proceed as “liquidator” because on a true construction of s. 352 the expression must mean a liquidator validly appointed before the dissolution of the company. However, he was allowed to proceed under section 352 as a “person interested” since he had more than a shadowy interest in the company in that there was a possibility of a claim being made by him on a quantum meruit basis should a liquidator be validly appointed who made use of the work he had done and there was also the possibility of a claim against him by the Crown for intermeddling with property which was bona vacantia.

27. Mr. Stockdale submitted that, as the sole economic stakeholder in the Funds, there is no doubt that the Petitioner is the party entitled to the ultimate benefit of any recoveries which the Funds or the Manager acting by their liquidators may make in connection with the suspect payments. In the circumstances, it was Mr. Stockdale’s submission that the Petitioner satisfies the requirements for standing under section 151(3) in respect of all four companies.
28. Reference was made by Counsel to a number of other Cayman Islands cases where the Court had exercised the power to defer a dissolution date, although in those cases there do not appear to have been any written rulings. These included *In the Matter of Lydian Overseas Partners Master Fund Ltd (In Voluntary Liquidation)* Cause No. FSD 130 of 2011(AJJ), *In the Matter of Centaur Classic Convertible Arbitrage Fund Ltd. (In Voluntary Liquidation)* Cause No. FSD4 of 2015 (IMJ), *In the Matter of CQS Capital Structure Arbitrage Fund Limited (In Voluntary Liquidation)*, Cause No. FSD 49 of 2016 (RMJ) and *In the Matter of GLG Emerging Markets Credit Opportunity Fund (In Voluntary Liquidation)* Cause No. FSD 88 of 2016 (IMJ).
29. It was submitted that the Court can be guided by the approach taken in other common law jurisdictions which have similar legislation. Reference was made to section 248(4) of the *Hong Kong Companies Ordinance*, Cap. 32, which was described as being in

substantially similar terms to our section 151(3). The Hong Kong section provides as follows:

"Section: 248 Final meeting and dissolution

....

(4) The Registrar on receiving the account and in respect of each such meeting either of the returns hereinbefore mentioned shall forthwith register them, and on the expiration of 3 months from the registration thereof the company shall be dissolved:

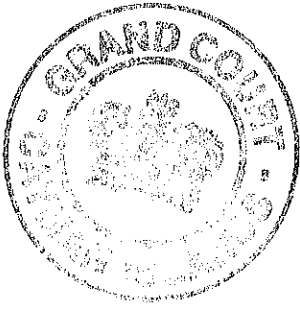
Provided that the court may, on the application of the liquidator or of any other person who appears to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the court thinks fit." (My emphasis)

30. Reference was made to the Hong Kong decision *The Commission of Inland Revenue v Fullbright Co. Ltd*, HCCW 208/2008. At paragraph [17], Kwan J summarised the approach to be taken in the exercise of the discretion under this provision as follows:

"For the court to exercise its discretion to defer the dissolution of a company, it is necessary to show there is still some aspect of the company's business which has not come to a conclusion, such as assets being found, or disagreement between the creditors and the liquidator as to whether the liquidator's work is completed. In other words, the company is anything other than a shell..."

31. In the decision of the Hong Kong Court of Appeal in *Kelso Enterprises Limited v Liu Yiu Keung* CACV 303/2006, at paragraphs 13, 15, 16 and 20, Rogers VP provides the following useful guidance:

"13. In my view the correct approach to the question of whether a dissolution should be deferred under section 239(4) must start with the question of what it is hoped, and what is likely, to be achieved by deferring the dissolution. Hence the reasons put forward by the applicant must be considered first. In this



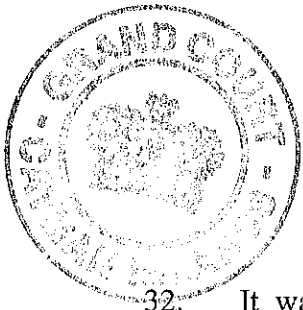
regard, of course, the interests of the creditors would be very important. The court must also have regard to the public interest. That public interest includes the proper and effective administration of the liquidation. That, in turn, includes the need that there be investigations into possible past conduct by those running and responsible for the running of the company. The court must then consider whether there is likely to be any detriment to any party by deferring the dissolution.

....

15. The judge dismissed the question of the directors of the company having permitted the company to trade whilst insolvent on the basis that it is unlikely that the applicant would have funded any claim. Questions involved in such actions by directors in knowingly trading whilst the company is insolvent could extend to more serious consequences than a mere civil claim. It is clearly in the public interest that any such conduct be thoroughly investigated and, if appropriate, those responsible brought to book.
16. As regards any possible detriment, whether to third parties or other creditors, I see none save that if there have been misdeeds, those responsible might have to account for them. In this regard, a highly important matter, which was referred to by the judge but does not appear to have weighed in this regard, was the fact that the applicant was prepared to fund the further conduct of the litigation. Importantly, therefore, the creditors and any others involved are unlikely to be prejudiced in any way. It could be added that the fact that the applicant is willing to chance its existing funds despite having lost a considerable amount of money already, is a litmus test of the fact that the major creditor considers that there are stones that need to be turned.

....

20. It remains to be said that in making the order that has been made there is no guarantee that the applicant will be able to secure recovery whether for itself or the other creditors. It is by no means certain that it may be possible to show any particular wrongdoing to the required standard of proof or that any penalties may be imposed on any parties responsible. Nevertheless, the circumstances would seem to me clear that,



even on the basis of the public interest alone, there are matters that require proper investigation.” (My emphasis)

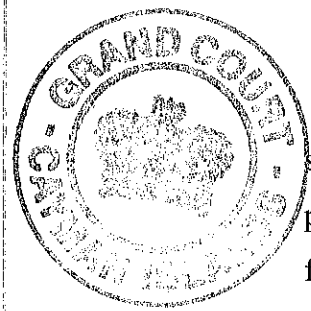
32. It was submitted on behalf of the Petitioner, that this is a sensible and persuasive approach, which should be followed by this Court.

The Liquidator’s arguments

33. Mr. Smith appeared at the hearing on behalf of the Liquidator. The written submissions produced seem to have been prepared, at least in part by Sarah Dobbyn and Chandra Glidden of Sinclairs, instructed by Loeb Smith.

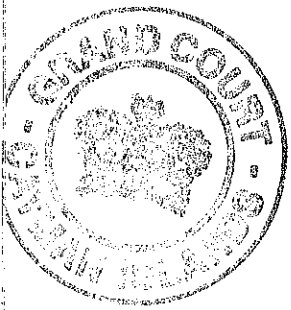
Standing

34. In relation to this issue, it was acknowledged that to bring an application under section 151(3), the Petitioner need only establish that it is a person who appears to the Court to be interested in such deferral of dissolution. Mr. Smith argued that to have standing as a person who appears to the Court to be “*interested*”, the Petitioner must show that it has a pecuniary interest in the Companies. Reference was made to the decision in *Commissioner of Inland Revenue v Fullbright*. The Liquidator takes the position that the Petitioner’s claim to be a contingent creditor of the Funds, and that the Funds could in turn be contingent creditors of the Managers, are fanciful, and not substantiated by any evidence.
35. The written submissions, at paragraph 2, state that it is the Liquidator’s general position that the Petitions appear to have been brought solely to facilitate the preference of the Petitioner’s parent company Credit Suisse AG to undertake an evidentiary “*fishing expedition*” in relation to claims of internal wrongdoing and impropriety by one of its own managers in Switzerland, and without any evidence sufficient to persuade the Court to exercise its discretion in favour of granting the relief sought.
36. It was argued that in relation to both of the Funds, the Petitioner is a former investor-shareholder in those companies, which was fully redeemed on 6 January 2017. It was



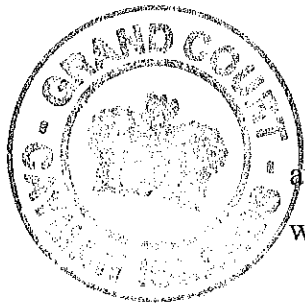
submitted that it is trite law that an ex-member (who is not a creditor) has no standing to petition for the winding up of a company under section 94(1) of the **Companies Law**. A former member of a company becomes a stranger to the company from the date such shareholder's name is removed from the register of members and cannot bring any petition or application to the court in relation to such company.

37. It was further argued that in order to fall into the category of a contingent creditor, the Petitioner would need to have adduced some evidence of a claim which could amount to a provable claim within the meaning of section 139(1) of the **Companies Law**. Such claim needs to be a debt "*payable on a contingency*" (with the Petitioner adducing clear evidence showing what such contingency could be) or a claim "*against the company whether present or future, certain or contingent, ascertained or sounding only in damages.*" or "*which for some other reason [does] not bear a certain value.*"
38. The argument continued that it is clear from section 139(1) of the **Companies Law** that no matter what the contingency, or whether the claim is ascertained or not, or whatever the reason it does not bear a certain value, it has at the very least to meet the threshold test of being a contingent claim for which a proof of debt could be submitted with supporting documentation proving the contingency, and thus one which the liquidator has some prospect of quantifying in order to "*make a just estimate so far as possible of the value of all such debts or claims.*"
39. In the written submissions filed on behalf of the Liquidator, it is noted that the Petitioner has failed to submit any proofs of debt in the liquidation of the Funds as a contingent creditor, despite being aware of the liquidations since mid-March 2017. Reference was made to the Director's Affidavit, paragraph 38.
40. Mr. Lloyd, at paragraph 18 of his affidavit, concludes that any such contingent claim by the Petitioner is fanciful, predicated, Counsel submits, as it hypothetically has to be, on (a) the independent and reputable Administrator as well as two different firms of independent auditors (PWC for Exten Investment Fund and KPMG for Marketview



Global Fund) acting either fraudulently or grossly negligently in relation to hypothetically fraudulently incorrect/inflated fees being paid by the said Funds to the Managers, and (b) that such fraudulent or negligent actions by the said independent professionals have an unspecified connection with a former relationship manager of the Petitioner's parent company in Switzerland, and certain companies owned or controlled by such relationship manager, which in a way that is wholly unclear and unproven, is thus alleged to amount to some contingency from which the Petitioner could derive a claim.

41. The Liquidator, in his affidavits, states that as Liquidator, he has received no notice of the ongoing Swiss Criminal investigation initiated by the Petitioner's parent company in connection with irregularities in its own activities in Switzerland. The Liquidator observes that, if after 16 months, the Swiss police and criminal authorities (with powers far beyond that of any liquidator) who had been granted full access to all Credit Suisse accounts and information concerning both the relationship manager and the Intermediary Companies had found any evidence of wrongdoing or impropriety against any of the Companies, it would surely have contacted him or the former directors or CIMA or other Cayman Islands law enforcement authorities in relation to the same.
42. At paragraph 22 of the Liquidator's written submissions, it is submitted that it is not enough for the Petitioner to depose in the Director's Affidavits to an ongoing criminal investigation of the former relationship manager of Credit Suisse AG, the indirect parent company of the Petitioner (for the past 16 months with no claims being brought against or notified to any of the Companies), and to make unsubstantiated allegations based on hearsay evidence in respect of the Intermediary Companies owned by the said relationship manager under investigation in Switzerland. It was argued that the Petitioner must show actual evidence to the Court, that such relationship manager improperly received money belonging to the Funds to contradict the fact that the Administrator who controls the bank accounts of the said Funds confirms such Intermediary Companies were "*unknown third parties*" in its email of 12 December 2016. Further, that all the years of



audited financial statements produced by PWC and KPMG also show no payments whatsoever to the Managers or the Intermediary Companies by the Funds.

Additional Evidence Filed

43. However, on 30 May 2017, the Petitioner filed the affidavit of Rachel Baxendale, a litigation paralegal employed by Maples and Calder, attorneys for the Petitioner. Attached to that affidavit were certain further records relating to the criminal investigation referred to in the Director's Affidavits.
44. In paragraph 3 of her affidavit, Ms. Baxendale states as follows:

"3.....I am informed by the ...Petitioner, that it obtained these records from the Swiss prosecuting authorities. I am further informed by the Petitioner that as it is a potentially injured party, Swiss law permits the Petitioner access to these records as part of the criminal investigation. The name and other identifying information relating to the former relationship manager who is under investigation has been redacted in these records....."

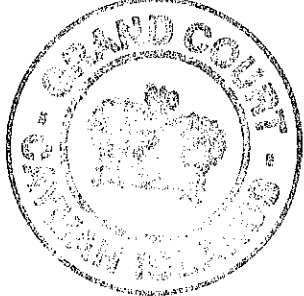
45. These records show that various payments between December 2012 and April 2015 totalling several millions of dollars (approximately US\$5 Million) were made by the Managers to the Intermediary Companies owned or controlled by the former relationship manager.

Discussion and analysis

46. As Megarry J stated in *Re Test Holdings*, the phrase "*any other person who appears to the court to be interested*" is a phrase of great amplitude. In my judgment, the Petitioner plainly has an interest in the deferral of the dissolution of the Funds and the Managers. This interest is not shadowy. I also accept Mr. Stockdale's submission that it is not a question of the Petitioner showing it has a pecuniary or proprietary interest in the

Companies. Rather, the Petitioner must demonstrate that it has a pecuniary or proprietary interest in resuscitating the Companies.

47. Applying the guidance in the *Kelso Enterprises* decision to the instant case, I find as follows:

- 
- (a) It is clear that aspects of the Company's business remain to be concluded, namely an investigation into the matters raised by the Petitioner in its correspondence prior to the purported completion of the voluntary liquidations and the investigation and possible pursuit of claims in connection with the suspect payments.
 - (b) If the Companies are dissolved, they will not be able to pursue any recoveries in respect of the suspect payments to which they may be entitled.
 - (c) It is in the public interest that any possible past misconduct by those running the Companies is properly investigated and, if appropriate, action is taken.

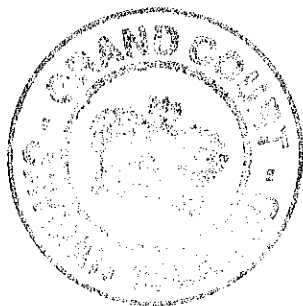
48. The Petitioner is prepared to fund the costs of court supervised liquidations of the Companies. As discussed in the *Kelso* decision, it is obvious that the Petitioner is prepared to expend more of its funds, after already suffering losses. This is a sign that it considers that there are important matters outstanding that require investigation.

49. In my view, importantly, no detriment to any party will flow from the deferrals. Obviously if there has been wrongdoing, then those accountable may have to answer for their deeds, but that is not the true meaning of detriment when considering this type of application. It was for these reasons that I granted the Petitioner's deferral applications.

Part II: Application for Court Supervision of the Liquidation of the Funds

50. Section 131(b) of the *Companies Law* provides as follows:

"131. When a resolution has been passed by the company to wind up voluntarily, the liquidator or any contributor or creditor may apply



to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that-

.....

(b) the supervision of the Court, will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors."

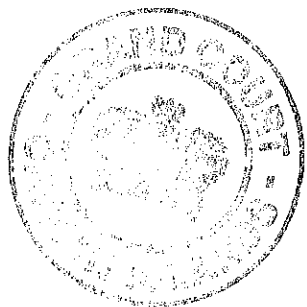
The Petitioner's submissions

51. Mr. Stockdale indicated that, as the Petitioner is not a contributory of the Managers and is not directly a creditor of the Managers, the present application for court supervision has been made in respect of the Funds only. He stated that it is anticipated that, should the Court make the supervision orders sought at this hearing, the JOLs would then consider whether to cause the Funds, as creditors or contingent creditors of the Managers, to apply to bring the voluntary liquidations of the Managers under court supervision.

52. It was submitted that continuing the voluntary liquidation of the Funds under the court's supervision and appointing Messrs. Penner and Derksen of Deloitte & Touche as JOLs satisfies the criteria in section 131(b) of the *Companies Law*, and in particular will facilitate a more effective liquidation of the Funds for the following reasons:

(a) Unlike the voluntary liquidator, JOLs can exercise the compulsory powers to require the delivery up of documents and property belonging to the Funds from former directors and professional service providers to the Funds and to examine such persons pursuant to section 103 of the *Companies Law*.

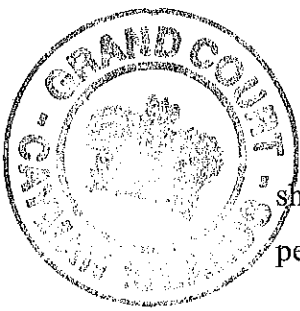
(b) Unlike the voluntary liquidator, should it be necessary to do so, JOLs can apply to the Court for the issue of a letter of request to the courts of a foreign jurisdiction to recognise and grant cross-border judicial assistance to the liquidators within that jurisdiction. Reference was made to *In re Basis Yield Alpha Fund (Master)* [2008] CILR 50.



- (c) The proposed appointees, Messrs. Penner and Derksen and their firm have the skills and experience to conduct an investigation of the kind which is necessary in this case.
- (d) The proposed appointees are wholly independent and have had no prior dealings with the former management of the Companies.
- (e) Deloitte & Touche has the necessary geographic coverage to take the steps which may become necessary in various jurisdictions including (a) the Cayman Islands - the place of incorporation of the Companies and the location of the auditors of Marketview Global Fund; (b) the Bahamas - the location of the former directors of both Funds; (c) Ireland - the location of the Administrator of both Funds and the auditors of Exten Investment Fund; and (d) Switzerland - the place where the criminal investigation is taking place.

The Liquidator's submissions

53. Mr. Smith submitted that, in order to bring a Petition under section 131 of the *Companies Law* seeking a supervision order, the Petitioner must show that it is one of the following:
- (a) The (voluntary) liquidator
 - (b) A contributory
 - (c) A creditor.
54. It was submitted that the Court has no discretion or inherent jurisdiction to grant a supervision order on the application of a party who is neither shareholder nor creditor (including contingent creditor) of the company in question.
55. It was submitted that, the Petitioner having been fully redeemed on 6 January 2017, it is now an ex-member. Further, that it is trite law that an ex-member (who is not a creditor) has no standing to petition for the winding up of a company under section 94(1) of the *Companies Law* and equally may not petition for the continuation of a voluntary liquidation under the court's supervision pursuant to section 131 of the *Companies Law*. A former member of a company becomes a stranger to the company from the date such



shareholder's name is removed from the register of members and cannot bring any petition or application to the court in relation to such company.

56. Counsel argued that the Petitioner is not a creditor of the Funds. It has never submitted any proof of debt in the liquidations of these companies. Any rights it may historically have had as a former redemption creditor ceased on 6 January 2017, the date of payment of the redemption proceeds from its respective former investments in the said Funds. Counsel reiterated the arguments that the Petitioner does not qualify as a contingent creditor, for the reasons set out in paragraphs 37 and following above.

57. Section 139(1) provides as follows:

"Provable debts

139(1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value."

58. In relation to the Petitioner's suggestion that it had been requesting information of the Managers, through the Administrator and not receiving it, on behalf of the Liquidator, it was submitted that the suggestion in the Director's Affidavits that the Petitioner had been deprived of information by the Funds for an extended period of time (and inferring that there was some dubious reason for this) is misleading and unfair. It was submitted that the first proper request for information to which the Petitioner was entitled pursuant to the Offering Memorandum ("**the O.M.**") of the respective Funds was made on 13 September 2016 and answered completely by the Administrator on 18 October 2016, with the modest delay of one month being due to the completion of the 2015 audit.



59. On 14 November 2016 the Petitioner wrote again to the Administrator, this time seeking additional information to which it had, according to Mr. Smith, no contractual right to under the O.Ms. of the respective Funds. In what Counsel describe as a clear “*fishing expedition*,” obviously to support the internal criminal investigation by Credit Suisse AG into the Intermediary Companies, the Administrator was improperly asked “*Please describe the services provided by [the Intermediary Companies]*”. The written submissions go on to state that this was being asked, in circumstances where the Petitioner was well-aware that the audited financial statements since the inception of both Funds showed no payment of any kind to these Intermediary Companies, and thus showed no evidence whatsoever that any services had ever been provided by them.

60. On 12 December 2016, the Administrator responded to the 14 November 2016 email, Mr. Smith submitted providing the detailed information requested as to the management fees and incentive fees paid by the Funds to the Managers respectively (which had been calculated, determined and paid out by the Administrator, based on the said Funds’ NAV’s also calculated by the Administrator) since inception. The Administrator, according to Counsel, unequivocally confirmed to the Petitioner that the Intermediary Companies were “*unknown third parties*”.

61. Amongst a number of other points made by the Liquidator about information provided, was the assertion that the Petitioner has failed to disclose that it received monthly NAV statements for both Funds from the Administrator along with an investors letter for all the years it was an investor in the Funds and was therefore at all material times able to monitor the said Funds’ fluctuating NAVs, to seek to redeem its investment on 3 months’ notice or, to increase its investments upon satisfactory performance, as in fact happened.

Discussion and Analysis

62. I think it is instructive to look at section 94(1) of the *Companies Law*, which sets out the categories of persons who may petition the Court for the winding up of a company.

That sub-section provides as follows:

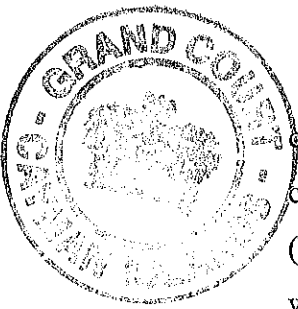
“Application for winding up

94. (1) *An application to the Court for the winding up of a company shall be by petition presented either by-*

- (a) the company;*
- (b) any creditor or creditors (including any contingent or prospective creditor or creditors)*
- (c) any contributory or contributories; or*
- (d) subject to subsection (4), the Authority pursuant to the regulatory laws.”*

63. Thus a winding up petition may be presented by a contingent or prospective creditor. In my judgment, the Petitioner wishes to carry out investigations which may ripen into the possible pursuit of claims in connection with the suspect payments. It does seem to me to be most unsatisfactory for the position to be left where it is at present, with the Administrator having responded to say that the Intermediary Companies are “*unknown third parties*” and yet the evidence is that significant payments were made by the Managers to these Intermediary Companies. Whilst I appreciate the point being made by the Liquidator about the Petitioner having received certain information, and not being “*entitled*” to receive some of the information that it was requesting, it seems plain to me that there is a need for further investigation.

64. As Mr. Stockdale pointed out, there is no evidence before the Court that suggests only the Administrator had signing rights in respect of the Funds’ bank accounts, or rather, there is no evidence to suggest that the Managers had no signing rights in respect of the Funds’ bank accounts. As the Petitioner’s Counsel pointed out, it was the sole investor, and all monies invested came from it. In my judgment, the point is not a simple one, but on balance, the Petitioner does fall within the definition of contingent creditor. Further, it is my view that a contingent creditor can apply for the voluntary liquidation to continue under the supervision of the Court, pursuant to section 131(b) of the ***Companies Law***. As Megarry J indicated in the ***Test Holdings*** decision, the word “*creditor*” has, in relation to other statutory provisions, been construed widely so as to include a mere contingent



creditor. There is nothing in the language of section 131(b) to suggest that a more limited construction should be put on the word "*creditor*". Indeed, the language of sub-section (b) is wide, and states that the application can be made where supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of contributories or creditors.

65. In my judgment, it is not necessary for either section 151(3) or 131(b) for the Petitioner's claim to have reached the level of being a provable claim or for the Petitioner to have submitted a claim as contingent creditor under section 139(1) of the *Companies Law*. In any event, it is clearly not fatal that no such claim had yet been made. This is because the investigations are still to be carried out and completed.
66. It does appear that the Liquidator has formed the view that the Petitioner's claims are fanciful. This would be another circumstance making it desirable that JOLs be appointed by the Court, in order to facilitate a more effective liquidation of the Funds. Messrs. Penner and Derksen plainly meet the necessary requirements for such appointment.
67. As stated previously, the Petitioner has indicated its willingness to fund the costs of court supervised liquidation of the Companies and thus there is no detriment or prejudice that could be occasioned to any other party if the orders sought are made.
68. As regards Part 1 Schedule 3 of the *Companies Law*, and the Court making orders permitting the JOLs to exercise the powers therein set out without further sanction, Mr. Stockdale seeks general powers for the JOLs to commence proceedings in the names of the Funds, depending on the outcome of their investigations. However, I am not satisfied that at this stage the Court should grant such a general power. In my view, further application should be made to the Court when the circumstances become clearer, after being thoroughly investigated. I will however grant the JOLs power to apply to the Court, if so advised, seeking to have the voluntary liquidations of the Managers continue under Court supervision.

69. In my judgment, it would be reasonable to grant the JOLs express power to deal with questions relating to the Funds' assets or the winding up of the Funds. This power would be broad enough to allow them to investigate the circumstances surrounding the suspect payments and other issues of concern identified by the Petitioner.
70. The JOLs will also require the power to engage staff and attorneys to assist them in the performance of their functions.
71. The Petitioner is to prepare a formal order in accordance with my Rulings.
72. The Liquidator will now, in accordance with the **CWR** O.15, R.6, cease to hold office automatically upon the making of a supervision order in respect of the Funds and is required to prepare his Final Report in accordance with O.15, R.6(3).

Costs

73. At the hearing, Counsel had indicated that they would make submission as to costs after I delivered this Ruling. I would therefore invite submissions in writing on the issue of costs within 14 days of the delivery of the finalised Ruling.


THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

