Neutral Citation Number: [2023] EWHC 2884 (Ch)

Case No: CH-2023-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 Rolls Buildings,
Fetter Lane,
London,
EC4A 1NL

Date: 24th July 2023
Start Time: 15.00 Finish Time: 15.49

Before:

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between:

EAST RIDING OF YORKSHIRE COUNCIL AS ADMINISTRATING AUTHORITY OF THE EAST RIDING PENSION FUND **Appellant**

- and -

KMG SICAV - SIF - GB STRATEGIC LAND FUND **Respondent**

- -

- -

MR DANIEL LEWIS (instructed by **Spector Constant & Williams)**) for the Applicant
MR KEVIN MUDD appeared In Person for the Respondent

- -

Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

THE HONOURABLE MR JUSTICE MICHAEL GREEN:

Introduction

1. This is an appeal from the order of Insolvency and Companies Court Judge Burton, dated 2 February 2023. By that order, ICC Judge Burton ("the Judge") set aside an earlier order, dated 18 May 2021, of ICC Judge Prentis, who granted the appellant permission to serve its winding up petition out of the jurisdiction. The Judge refused permission to appeal but this was granted by Marcus Smith J on 9 May 2023.

2. The appellant is the East Riding of Yorkshire, acting as administrator of the East Riding Pension Fund. The winding up petition is brought against an investment sub-fund called KMG SICAV – SIF – GB Strategic Land Fund (the "Sub-Fund"). The respondent to this appeal is an investment company incorporated and regulated in the Grand Duchy of Luxembourg, called KMG SICAV – SIF – SA. The Sub-Fund is one of the respondent's designated funds in which investors place their money and is segregated from other sub-funds.

3. The respondent received notice of this hearing and a Mr Kevin Mudd has appeared in person this morning on behalf of the respondent. The respondent was represented by counsel at the hearing before the Judge and, indeed, succeeded on its application. On 12 July 2023, however, solicitors came off the record. Mr Mudd told me that he had dismissed the solicitors and that they had been acting in person since then.

4. On Friday, 21 July 2023, he sent an unissued application on behalf of the respondent asking for an adjournment until September because they needed more time to prepare. No evidence in support of that application was provided, such as why they were not in a position to defend the appeal. It seemed to me that they must have known that their solicitors had come off the record. He had left it to the day before the hearing to make that application. I refused to adjourn it.

5. Later that evening, Mr Mudd sent a further email saying that, as he was in the UK, he would attend the hearing, also explaining that he and his fellow director had been seriously ill and that they had not been able to secure legal representation on what would have had to have been a no-win/no-fee basis. He told me that they had no indemnity insurance covering this case concerning the Sub-Fund and that is why he was appearing in person.

6. He agreed to proceed with the hearing today and he was a clear and articulate advocate. I have taken his submissions into account. I also heard from Mr Daniel Lewis, on behalf of the appellant. He relies on six grounds of appeal which I will come to after setting out shortly the relevant background. The essential facts were not in dispute at the hearing below. I will set out what the Judge said about them in paragraphs 2 to 8 of her judgment. (When the Judge refers to the applicant, that is the respondent to this appeal, and the respondent, in her judgment, is now the appellant.)

7. At paragraphs 2 to 8 of the Judgment, the Judge said as follows:

> "2. The Applicant is a public limited company operating as an investment vehicle under the laws of the Grand Duchy of Luxembourg. It qualifies as an alternative

investment fund. It is regulated by the Commission de Surveillance du Sector Financier (CSSF) which, like the Financial Conduct Authority in this country, supervises professionals operating in the financial services sector. The Applicant is a form of umbrella fund, comprising a number of sub-funds, each of which has designated to it a distinct collection of assets and liabilities of the umbrella fund.

3. The Respondent invested £20 million in one such dedicated sub-fund ("the Sub-Fund") in return for which it received £17,110,835 Sub-Fund designated shares in the Applicant.

4. The Applicant's Articles of Incorporation explain the structure:

> 'The company is one single entity; however, the rights of investors and creditors regarding a Dedicated Fund or raised by the constitution, operation or liquidation of a Dedicated Fund are limited to the assets of this Dedicated Fund, and the assets of a Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors whose claim arose in relation to the constitution, operation or liquidation of this Dedicated Fund. In the relations between the Company's shareholders, each Dedicated Fund is treated as a separate entity…'.

5. The Sub-Fund's stated objective was to invest in real estate assets in the UK, via direct ownership, joint ventures, and by holding options via corporate entities to purchase land or by being party to contracts with a view to benefiting from future sales of land. It is said to have received total investments of £55 million. In June 2016, the Applicant's board of directors received a notice of suspension to those holding shares in respect of the Sub-Fund, stating that the Sub-Fund had a significant exposure on an option to acquire land which prompted the Applicant's board to suspend their net asset value calculation and the issue, conversion, and redemption of shares in the Sub-Fund during the suspension period.

6. In February 2019, following what the Applicant's board described as 'continuing economic uncertainty' and having received redemption requests representing more than 25% of the value of the Sub-Fund's net

> assets, the Applicant's board took the decision to liquidate the Sub-Fund and to appoint a 'liquidator of the Sub-Fund under the supervision of the board'.
>
> 7. On 11 December 2020, the Applicant's board of directors informed investors that, after three years of marketing the Sub-Fund's assets for sale, and with no proceeds then expected to be realised, the board had concluded that the Sub-Fund's value was zero and would co-operate with the investment fund manager to conclude the liquidation from which there would be no return to those holding shares in respect of the Sub-Fund.
>
> 8. On 13 May 2021, the Respondent presented a petition to this court to wind up the Sub-Fund as an unregistered company. On the same date, it applied, ex parte, for permission to serve the petition on the Sub-Fund out of the jurisdiction that is at its, ie the Sub-Fund's, registered office."

8. So, the petition was presented on 13 May 2021 against the Sub-Fund as an unregistered company under section 221 of the Insolvency Act 1986. The petition was presented because of an understandable concern that there had been no independent investigation into what had happened to the £55 million that had been invested in the Sub-Fund despite its stated purpose being to invest in real estate in the UK. Apparently, the Sub-Fund and its SPVs have no assets that might be distributable to investors. The appellant says that this is likely to be the result of incompetence or fraud on the part of those managing the Sub-Fund and the Judge seemed to agree. She said in her judgment, at paragraph 40(b)(ii):

> "The loss of such enormous sums of money certainly appears to merit investigation."

9. Mr Mudd strongly objected to the innuendo involved and the assumption that there must have been serious incompetence or even fraud. He says that the company and the Sub-Fund are highly regulated in Luxembourg and Luxembourg would not be the financial centre that it is without there being serious and respected regulation of the funds industry. He says that all parts of the business are subject to intense scrutiny from regulators, auditors, valuers and the main board who have oversight. Furthermore, the SPVs, through which the funds are invested, have their own boards and have borrowed money from the government and banks that also will have subjected the fund to real scrutiny. He said that they kept investors informed of the value of assets and there was complete transparency. Furthermore, they have explained what has happened to the investors and, indeed, he says that the Luxembourg regulator has conducted a two-year investigation and, apart from one aspect to do with a valuation, they found nothing much wrong.

10. Mr Lewis said that this was the first his clients had heard of such an investigation and, apart from a conference call with the directors, they claimed to be largely in the dark about what has happened.

11. I obviously cannot decide who is in the right here and, certainly, I am in no position to make any findings as to what might have gone on. If the petition is to proceed, then Mr Mudd, or anyone else representing the respondent, can put in evidence to such effect and seek to demonstrate that there does not need to be any further investigation into what happened because nothing nefarious did happen. In other words, the respondent will still have a very full opportunity of arguing that an English liquidation of a regulated Luxembourg sub-fund is inappropriate and should not be ordered.

12. What I have to consider at this stage is whether the appellant gets over the rather low threshold for demonstrating that it should have permission to serve the petition out of the jurisdiction. On the evidence before me, as was the evidence before the Judge, I can agree with her assessment that there clearly needs to be or to have been an investigation. The appellant says there has not been an independent investigation, largely because the Sub-Fund has been liquidated voluntarily under the supervision of the respondent's board of directors. That is, they say, the very people who the appellant says should be the subject of an investigation. In testing whether permission should be granted at this stage, I am bound to accept their evidence on this.

Judgment Below

13. Turning to the judgment below, the hearing took place on 28 April 2022 but it was not until 2 February 2023, some nine months later, that judgment was handed down. Following the provision of the draft judgment to the parties, the Judge had requested that the parties provide their grounds of appeal in advance of the handing down. The appellant provided their grounds of appeal as requested. As a consequence, it seems, the Judge amended her judgment before hand-down to amend certain paragraphs, namely paragraphs 37, 38, 40(a)(i) and 48, to change the references to "*separate legal entity*" or "*separate entity in law*" to "*separate entity*". However, it seems that the Judge left in her judgment some other references to "*separate legal entity*". This forms quite a major part of the grounds of appeal and I will deal with it in due course.

14. The Judge held that the petition did not have a real prospect of success. Mr Lewis submitted that the Judge addressed the merits of the petition applying the wrong test. She asked whether they satisfied the "*good arguable case*" test when she should have applied the "*serious issues to be tried*" test. She held that there was no good arguable case primarily on the basis that the Sub-Fund was not a "*separate entity*" or was not a "*separate legal entity*" or an "*entity with separate legal personality*".

15. As part of those findings, the Judge found that the Sub-Fund "*could not enter into contracts in its own name*" and "*could not, at any time, have held assets in its own name*" and "*does not have a registered office*". She had expert evidence on Luxembourg law from which she derived those propositions.

16. Separately, the Judge also held that the appellant did not have standing, whether under the grounds relied on under section 221(5)(a) or section 221(5)(b) of the Insolvency Act 1986 because the appellant is not a creditor of the Sub-Fund but only akin to a shareholder.

17. As a result of those findings, the Judge held that the evidence in support of the original application, which was a without notice paper application, was materially misleading in failing to draw attention to each of these matters.

18. So, the grounds of appeal are as follows:

(1) The Judge did not apply the correct test as to whether permission to serve the petition out of the jurisdiction should have been granted. This is the point I have just referred to; namely that she should have applied the "*serious issue to be tried*" test rather than the "*good arguable case*" test.

(2) The Judge erred in law in holding that the Sub-Fund was an entity in respect of which the court could not make a winding up order.

(3) The Judge erred in fact and law in finding that the test of sufficient connection to the jurisdiction was not met.

(4) The Judge erred in rejecting the standing of the appellant to petition as a creditor under section 221(5)(b) of the Insolvency Act 1986.

(5) The Judge erred in rejecting the standing of the appellant under section 221(5)(a) of the Insolvency Act 1986 to petition on the ground that the Sub-Fund was dissolved, had ceased to trade or carry on business or was carrying on business only for the purposes of winding up.

(6) The Judge erred in finding that there had been a material failure to give full and frank disclosure. Alternatively, permission to serve out should not have been set aside if, as contended for above, permission would still be given if the full facts were known.

19. I will take each of the grounds in turn.

Ground 1

20. Ground 1 is whether the Judge did not apply the correct test as to whether permission to serve the petition out of the jurisdiction should have been granted.

21. The test for permission to serve out is now reasonably well-established. Mr Lewis referred to the summary in *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5, paragraphs 5 and 164. It was for the appellant to show, he said:

(1) that there was a "*serious issue to be tried*", ie: "*There is a serious issue to be tried on the merits of the claim, ie a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim*."

22. (2) That there was: "*A good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of practice direction 6B.*" A good arguable case does not now require that the applicant for permission have the "*much better argument*" but connotes that the applicant has the better argument than the respondent (see *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, paragraph 7).

(3) That the court should exercise its discretion to grant permission to serve out. This requires that: "*In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the dispute and that, in all the circumstances, the*

court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

Mr Lewis submitted that the Judge did not apply this test or the evidential burden on each part correctly.

23. As to "*good arguable case*", it does seem to me that there was some confusion in the judgment as to the applicable test for each of the matters to be considered by the court on an application for permission to serve out. The second matter is whether the claim is within the grounds set out in practice direction 6B. As the Judge recorded, in paragraph 21 of her judgment, there was no dispute as to this. Therefore, the aspect that required a "*good arguable case*" to be shown was already satisfied.

24. Mr Lewis fairly pointed out in his oral submissions, by reference to the transcript of the hearing, that the respondent's then counsel was not conceding the ground in practice direction 6B because she was maintaining that there was no jurisdiction under the statute. I can see, perhaps, where the confusion might have stepped in. However, the Judge seemed to have thought, in her judgment at least, that the point had been conceded (see paragraph 21).

25. In the next section of her judgment, dealing with the merits of the petition between paragraphs 22 and 39, the "*good arguable case*" test is again considered by the Judge. She includes this heading in her judgment above this section, "*Has jurisdiction to wind up the Sub-Fund been established to the criterion that there is a good arguable case?"* It can immediately be seen that the Judge was intending to apply that test to consider the merits of the petition.

26. As I said, there may have been confusion arising from the submissions of counsel but, in any event, the merits of the petition should have been considered pursuant to the lower threshold test of "*serious issue to be tried*". At paragraph 39, the Judge concluded, "*I do not think that this court's jurisdiction has been established to the criterion of good arguable case*". In referring to the court's jurisdiction, the Judge was intending to refer to its insolvency jurisdiction to wind up the Sub-Fund as an unregistered company.

27. Turning to the question of "*serious issue to be tried*", the Judge considered this in the second part of her judgment when addressing the third part of the permission to serve out test; namely discretion. This section was headed, "*Is there a serious issue to be tried as to whether the jurisdiction to wind up the Sub-Fund ought, in the court's discretion, to be exercised?*" That makes reasonably clear the Judge is dealing with the exercise of the court's discretion and she covered certain factors relevant to the discretion: namely (1) whether there was a sufficient connection with this jurisdiction; (2) whether there was a real possibility of benefit to the petitioner; (3) whether they were persons subject to the court's jurisdiction.

28. The appellant challenges the exercise of discretion in its ground 3 of the appeal. At this stage, the relevance is that the Judge seems to have confused and conflated the respective tests and the standard of proof, applying the wrong test to the three matters to be considered on such an application. Crucially, it appears that the Judge did not actually consider the prospects of the success of the petition to the right standard. It should have been the lower "*serious issue to be tried*" or "*more than fanciful*

prospects of success", rather than the higher test of "*good arguable case*" that she applied to this aspect of the application.

29. Mr Lewis submitted these errors of approach are so fundamental that the appeal should be allowed, the setting aside order set aside, and that I should either determine the application afresh or remit it for a further hearing before a different ICC Judge.

30. I will consider that outcome after I have considered the other grounds of appeal because they affect what I shall do. At this stage I say that I accept ground 1 of the appeal.

Ground 2

31. I turn to ground 2 of the appeal which is that the Judge erred in law in holding that the Sub-Fund was an entity in respect of which the court could not make a winding up order. The question of whether the Sub-Fund was a "*separate entity*" or an "*entity with separate legal personality*" was a core part of the Judge's decision to set aside the permission to serve out order. It feeds into ground 1 in so far as the appellant said that the Judge should have applied the "*serious issue to be tried*" test to this issue.

32. Mr Lewis relied on four aspects to this grounds of appeal:

(1) The Judge amended her judgment in the light of the appellant's grounds of appeal before hand-down and, as a result of those amendments, the primary basis for her findings was unclear.

(2) The Judge erred in law in that she rejected the court's jurisdiction to wind up the Sub-Fund as it was "*not a separate entity*" or a "*separate legal entity*".

(3) The Judge misdirected herself, in this regard, in giving insufficient weight to the features of the Sub-Fund similar to those of a company which made it arguable that parliament intended it to be wound up as an unregistered company.

(4) The Judge erred in fact in that she rejected the distinguishing features identified by the appellant as making the Sub-Fund appropriate for winding up as an unregistered company. She is said to have done so on a reading of the evidence that was incomplete or inaccurate.

33. I will deal with each point in turn. First of all, the correction to the judgment before hand-down: the appellant does not criticise the Judge for amending her draft judgment before hand-down and she is, of course, perfectly entitled to do that. We do not know, however, why the revisions were made to the judgment but what the appellant does criticise the Judge for is that the changes make it unclear what was the basis of the decision and asked why did she change in only certain places from "*separate legal entity*" to "*separate entity*".

34. However, I do not think there is much substance to this point, as the real issue is why the Judge thought that it was so decisive to the court's jurisdiction that the Sub-Fund be a separate entity, whether in law or otherwise. That is the question raised by the second aspect, which is whether there was a legal error as to the requirement that the Sub-Fund be a separate legal entity.

35. Mr Lewis submitted that there is no authority for the proposition that, to be wound up as an unregistered company, an entity must be a separate entity or have a separate legal personality. He referred to authorities that showed that entities which did not have legal personality could be wound up and that a lack of legal personality was not a reason for refusing to wind up. Those authorities include *Re International Tin Council* [1989] 1 Ch 309, *Re Witney Town Football and Social Club* [1993] BCC 874 and *Panter v Rowellian Football Social Club* [2012] Ch 125.

36. Section 220 of the Insolvency Act 1986 refers to any "*association*" as well as a company and that does not necessarily mean an entity with legal personality. It can further be pointed out that the court has jurisdiction to wind up partnerships as unregistered companies under section 221 of the Insolvency Act 1986. Yet, they also lack legal personality.

37. Basically, Mr Lewis's submission was that there is no authority either way and that he had, at least, demonstrated a serious issue to be tried as to the power of the court to wind up the Sub-Fund as an unregistered company, despite its lack of separate legal personality.

38. The third point was a misdirection as to whether the Sub-Fund was intended by parliament to be wound up as an unregistered company. The court approaches the application of section 220 of the Insolvency Act by testing whether the attributes of the body which is claimed to be an unregistered company are such that they can reasonably be inferred, that parliament would have intended the jurisdiction to wind up to apply. It looks at the normal attributes of a company and sees whether the company concerned has some or all of such attributes and, therefore, whether it can be inferred that parliament would have intended the jurisdiction to wind up to apply (see *Re International Tin Council* at pages 329 to 330).

39. Mr Lewis referred to certain distinguishing features, as he called them, that showed that the Sub-Fund was similar to a company. He submitted that the Judge gave insufficient weight to those features. However, he submitted that the Judge wrongly focused on whether the distinguishing features resulted in the Sub-Fund having a separate legal personality, which she clearly saw as being crucial. For example, she said in the judgment at paragraph 33:

> "Whilst, as Mr Lewis [for the appellant submits], the Sub-Fund was treated as a separate entity, the experts agree that this is not the same as the Sub-Fund having separate legal personality."

At paragraph 34, she said:

> "The first element of the second Distinguishing Feature, that the Sub-Fund can only be sued as a defendant through the Applicant, again highlights that it does not have its own legal personality."

Paragraph 34 continued:

> "The second element, that it can be liquidated voluntarily or judicially in its own name must be read in context… As the

> Respondent's expert states, under Luxembourg law, bankruptcy is used exclusively to wind up an insolvent companies. The Sub-Fund is not a company."

And at paragraph 38, she said:

> "I have rejected almost all of the Distinguishing Features on the basis that the Sub-Fund is not a separate entity. Whilst Luxembourg law makes provision in limited circumstances for it to be treated as if it were a separate entity, in fact it is not."

40. I think the Judge was a little fixated on the point about whether the Sub-Fund was a separate entity with a separate legal personality. That is clearly a relevant factor. However, it is not the end of the matter. The authorities, such as they are, are more directed as to whether the entity is akin to a company, such that Parliament would have intended it to be within section 220, and capable of being wound up by the English court.

41. Mr Mudd took issue with this point. He said that the structure adopted in this case is very common and it is used around the world in many sophisticated funds jurisdictions. He said that Parliament could not possibly have intended that investors in the UK should be able to petition in England against a fund registered and regulated in Luxembourg. He said that if this petition is allowed to go ahead, it could be massively disruptive to the global funds industry.

42. I do not consider that it would have such a dramatic effect. In any event, as I have emphasised, I am considering whether the appellant has a real prospect of succeeding in its argument that the Sub-Fund can be wound up under part V of the Insolvency Act 1986 and whether Parliament could be said to have intended it to be subject to this court's jurisdiction. The respondent will still be able to argue against it on the full hearing of the petition.

43. Turning to Mr Lewis's fourth point, which is that the Judge made factual errors in her approach to the distinguishing features, the Judge rejected each of the distinguishing features identified by the appellant set out in paragraph 30 of her judgment. In doing so, Mr Lewis submitted, the Judge erred in that her findings were based upon an incomplete and incorrect reading of the documentary evidence.

44. First, he submitted that the investors were treated as shareholders of the Sub-Fund. However, the Judge recorded his submissions as being that, "*Investors were shareholders in the Sub-Fund*" (see paragraph 31). The offering document and articles of association each provided:

> "The assets of a Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund. In the relations between the Company shareholders, each Dedicated Fund is treated as a separate entity."

45. Secondly, Mr Lewis relied upon notices given to, "*The Shareholders of the Sub-Fund named GB Strategic Land Fund*". The Judge criticised that quotation as being selective. In fact, the notices issued by the respondent's board of directors continued

by referring to "*the best interests of the shareholders of the Sub-Fund*" (in the notice dated 18 February 2019); "*The Shareholders of the Sub-Fund*" (the notice dated 12 August 2019); "*The best interests of the Shareholders of the Sub-Fund*" (the notice dated 11 December 2020); and "*No distribution of liquidation proceeds to the Shareholders of the Sub-Fund will occur*" (the same notice dated 11 December 2020).

46. Thirdly, Mr Lewis relied upon the Sub-Fund being "*treated as a separate entity*". Again, the Judge said that it was not, in fact, a separate entity. She said, in paragraph 33:

> "Whilst, as Mr Lewis submits, the Sub-Fund was treated as a separate entity, the experts agree that this is not the same as the Sub-Fund having separate legal personality."

Mr Lewis submitted that this shows that she gave insufficient weight to the point that it was treated as a separate entity, even though it was not as such, in fact or law.

47. Fourth, the appellant relied upon the facts: that the assets of the Sub-Fund were ring-fenced; that the Sub-Fund owned 100% of the shares in its subsidiaries which were the investment vehicles; and that it had inter-company loans to those same subsidiaries. The Judge rejected this on the basis that the Sub-Fund could not own assets. Mr Lewis said that that finding is unsupported by the expert evidence and it was contradicted by the respondent's own witness evidence. The respondent's offering document for the Sub-Fund, which provided that:

> "The GB Strategic Land Fund will, subject to relevant tax and legal advice, establish operating subsidiaries to hold the assets (the "Subsidiary Companies").
>
> Strategic land assets, (including contracts to buy land), will be held in separate Subsidiary Companies. These will be incorporated in Luxembourg as private investment companies with limited liability and will be beneficially owned by the Dedicated Fund."

I should add that Mr Mudd said that the SPVs were owned not by the Sub-Fund but by the umbrella company but he accepted that they were treated as assets of the Sub-Fund. As he explained, each SPV has its own creditors including bank and government borrowing and they are all now heavily insolvent. So, he said, there is no chance that there will be any recovery by any investor in the Sub-Fund.

48. Mr Lewis's fifth point was that the appellant relied upon the fact that the Sub-Fund could be wound up in Luxembourg by the court in its own name. Mr Lewis submitted that in deciding that this factor was of little, if any, weight, the Judge erred in that she gave undue weight to the fact that liquidation was only available in limited circumstances under Luxembourg law, whereas the relevance of it was the fact that it was available at all. In other words, because it was possible to liquidate the Sub-Fund in Luxembourg, it shows that it had sufficient personality to be dealt with in that way. In any event, this court is required to apply English insolvency law, not Luxembourg insolvency law.

49. Ultimately, this question comes down to whether there is a serious issue to be tried, as to whether the Sub-Fund was an entity in respect of which there could be a winding up order made in England under part V of the Insolvency Act 1986. In my view, the Judge erred in deciding this on the basis that the Sub-Fund was not a separate entity or had no separate legal personality when there was sufficient evidence that it could be an entity in respect of which a winding up order could be made.

Ground 3

50. I turn to ground 3, which is that the Judge erred in fact and law in finding the test of sufficient connection to the jurisdiction was not met. As I said, the Judge wrongly addressed the test of sufficient connection, applying the standard of "*serious issue to be tried*" (see paragraph 40). Mr Lewis submitted that the relevant test was that provided for in *Stocznia Gdanska SA v Latreefers Inc* [2001] BCC 174. At page 194, the court said:

> "(1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.
>
> (2) There must be a reasonable possibility, if a winding up is made, of benefit to those applying for the winding up order.
>
> (3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction."

51. On each of these, the appellant submitted, firstly, that there was a sufficient connection to the jurisdiction through the nationality of the investors, the respondent's directors, the location of the real estate which was the subject of the investment and the COMI(centre of main interests) of certain subsidiary SPVs. The reason given by the Judge for rejecting the relevance of these factors was that the Sub-Fund "*did not exist as a separate entity*", which does not seem to me to be an answer to the points as to sufficient connection or to be relevant to the exercise of the discretion as to whether to assume jurisdiction.

52. Secondly, the appellant relied upon the reasonable possibility of benefit to the appellant. The Judge accepted the fact that, "*The loss of such enormous sums of money certainly appears to merit investigation*" but went on to consider that, essentially, Luxembourg was the more appropriate place for investigation, should it wish to do so, and that the English court should not assume jurisdiction for such purpose.

53. Mr Lewis said that this was not a valid reason for rejecting this factor but it was certainly endorsed by Mr Mudd. Indeed, he went on to say that there had, effectively, been an investigation and all the scrutiny that could have been asked for in Luxembourg. It is true to say that the appellant knew what it was investing in and that it was a fund regulated in Luxembourg. I agree that it should have been expected for there to be a thorough investigation in Luxembourg. Maybe there has been but, again, at this stage I have no evidence that there has been and I think it is not unreasonable

for the appellant to take the view that there is not now going to be any such investigation and the only way of achieving that is by pursuing this petition.

54. Thirdly, Mr Lewis said that the appellant and the majority of the investors were domiciled in England and they were, therefore, persons subject to the jurisdiction of the court. The Judge rejected that submission on the basis that they were merely investors and not creditors, and the fact that there were no assets in the UK, and the fact that the Sub-Fund was not a separate entity.

55. That actually leads neatly into the next two grounds which concern the standing of the appellant to present a petition. Mr Mudd pointed out that, in any event, many of the so-called investors in the UK are not actually direct investors but, rather, they have invested through their pension funds or insurance policies.

56. But going back to the main issue on ground 3, I do find that the Judge erred in finding that there was not even a serious issue to be tried on the sufficient connection to the jurisdiction.

Ground 4

57. Turning to standing and, first of all, ground 4, the Judge dealt with standing in paragraphs 40 to 48 of her judgment. The appellant, during the operation of the Sub-Fund, could have requested that its shares be redeemed, at which point they would have become creditors of the Sub-Fund. The Sub-Fund ceased redemptions, however, on 30 June 2016 and they were not resumed at any time thereafter. It is accepted that the appellant did not submit any redemption requests during the period when it was permitted to do so.

58. Mr Lewis relied on the experts' joint report, which stated that a shareholder of the fund would become a creditor with a right to a share of any liquidation surplus of the Sub-Fund. The situation is different, he said, from that of a shareholder of a company generally, who does not become a creditor of that company by reason of its investment. The joint expert report, which the Judge referred to, said that shareholders "*acquire a status of creditor of the fund*" when dividends are approved or redemptions confirmed but also "*if and once a distribution of a liquidation surplus (only for liquidation) has been decided/declared in favour of the shareholders*". That latter sentence was actually not reproduced in the judgment but it is that sentence that Mr Lewis submitted, makes these investor shareholders contingent creditors.

59. I have to say that I was sceptical about this point when I first read the papers, thinking that, if this is right, every shareholder could claim to be a contingent creditor. Mr Mudd also said that if a shareholder is allowed to petition in these circumstances, when it clearly has no financial interest in the fund, it would open the floodgates. However, it is only because of the joint expert opinion that I think the appellant gets over the line in establishing that it has a serious issue to be tried as to whether it has standing. That report says that they do acquire the status of creditor. It may be that it is unlikely to be in a position to pay out a distribution surplus but it is distinguishable from the ordinary company situation where shareholders stay as shareholders throughout, even if they get a share of the liquidation surplus.

60. Contingent creditors have standing to present a winding up petition and can rely on all of the grounds available to existing creditors (see *Re a Company No. 003028 of 1987* (1987) 3 BCC 575), where in which case reliance was placed on the just and equitable ground. A contingent creditor must have and demonstrate a sufficient interest in the making of a winding up order. In this case, Mr Lewis submitted that interest is demonstrated because:

(1) The evidence of the respondent was that all other creditors have been paid so that any further recoveries would be available for distribution to the appellant and other investors.

(2) That there are potential recoveries arising from either the negligent or dishonest operation of the Sub-Fund; that such recoveries are realistic as demonstrated by:

(a) the complete loss of all the sums invested in the Sub-Fund, a net figure of £55 million, for which no adequate explanation has been offered;

(b) the Judge's acceptance that the loss of such enormous sums of money certainly appears to merit investigation; and

(c) the readily identifiable targets for such investigations and litigation are the directors of the respondent.

61. However, it seems to me that, as a contingent creditor relying on section 221(5)(b), namely the inability to pay debts, that that is an insufficient financial interest to justify being able to proceed on that ground as a contingent creditor.

Ground 5

62. However, in relation to section 221(5)(a), which is ground 5 of the appeal, namely that, "*If the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs*" the position may be slightly different". Mr Lewis submitted that the appellant's status as a contingent creditor in the Sub-Fund was a sufficient interest for the purposes of a petition under that ground. The Judge's grounds for rejecting the appellant's standing under section 221(5)(a) was that the Sub-Fund was "*not a separate entity*" and that "*it could not, at any time, have held assets in its own name*".

63. I have already dealt with both points. The separate entity point, I have found that there is, at least, a serious issue to be tried on that. In relation to the assets point, I have also referred to this. The Sub-Fund was effectively holding assets in its name but, in any event, I do not see why that is an answer to the appellant's standing as a petitioner on this ground. Therefore, I would allow the appeal on this ground 5.

Ground 6

64. That leaves ground 6, which is the failure to give full and frank disclosure. In part, this depends on all the previous grounds. The Judge was concerned that these points were not brought properly to the attention of the Judge considering the matter on the papers and on a without notice basis. I think that there are instances where the petition and the supporting evidence should have been more forthcoming as to the

potential difficulties around the nature of the Sub-Fund, its distinction to the umbrella company, and the status and the standing of the petitioner.

65. Mr Lewis said that the reference to the company in the petition was in the standard court form and not via the drafting of the petitioner, and that the use of the words were appropriate in the circumstances, where it is the petitioner's case that the respondent to the petition is an unregistered company. However, this did lead to some confusion in the wording of the petition. In particular, where it referred to the shares in the company, which was quite clearly somewhat misleading.

66. The second point Mr Lewis referred to was that the witness statement in support of the application to serve out made it clear that it was the petitioner's case that the Sub-Fund was an unregistered company by saying, "*The petitioner contends that the Sub-Fund is an unregistered company and is liable to be wound up by the court pursuant to sections 220 to 221 of the Insolvency Act*".

67. I think Mr Lewis accepted that the original documents could have been better drafted. However, I think these were innocent errors and knowing, as we do, the full facts and that permission should have been granted if the correct test and approach had been applied, I do not think that the non-disclosures have, in the end, had a material effect and should not, in my judgment, affect whether permission is given now. I could have allowed the Judge's order to stand but, effectively, give permission to the appellant to issue a new petition. But it seems to me that would be a futile exercise.

Conclusion

68. I, therefore, propose to allow the appeal and restore the original order giving permission to serve out.

69. As I have said many times, that means that the respondent will be able to argue all their points on jurisdiction, discretion and standing at the substantive hearing. Mr Lewis suggested that I could express the court's disapproval as to the way the original documents were drafted by way of a costs order. I do think that might be appropriate in these circumstances. The result of that is that I will make no order for costs on this appeal. But I allow the appeal and the order will be set aside. That means that the original order made by ICC Judge Prentis will be restored.

(This Judgment has been approved by Mr Justice Michael Green.)

Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com