



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

**FSD 105 OF 2021 (ASCJ)  
FSD 107 OF 2021 (ASCJ)**

**IN THE MATTER OF F & C WARRIOR FUND LIMITED (DISSOLVED)  
IN THE MATTER OF F & C WARRIOR II FUND LIMITED (DISSOLVED)  
(together "The Companies")**

Representations: Blake Egelton and Peter Kendall of Walkers for the Former Joint Voluntary Liquidators of the Companies

**HEADNOTE**

*Former joint voluntary liquidators acting as statutory trustees of companies' undistributed assets - section 153 of the Companies Act (2021 Revision) and Order 23 of the Companies Winding Up Rules, 2018 (as amended) – application for directions for remuneration out of companies' undistributed assets and for balance of remaining funds to be transferred bona vacantia to the Financial Secretary of the Cayman Islands – appropriate exercise of Court's discretion under section 48 of Trusts Act and its inherent jurisdiction to direct that former joint voluntary liquidators' fees be capped in accordance with Order 25, rule 5 of the Companies Winding Up Rules, 2018 (as amended).*

**RULING**

1. These are applications by the former Joint Voluntary Liquidators ("Former JVLs") of the Companies, Messrs Simon Conway and Jess Shakespeare, brought in their capacities as statutory trustees of the assets of the Companies which remain after the dissolution of the Companies.
2. The Former JVLs apply by way of conjoined ex parte originating applications seeking directions pursuant to section 48 of the Trusts Act (2021 Revision) (the "Trusts Act") that they be remunerated by way of fixed fees from the remaining assets (described as the "Outstanding

Redemptions” for reasons to be explained below) and for the net remaining amounts to be deemed to go *bona vacantia* and paid over to the Financial Secretary of the Islands in accordance with section 153 of the Companies Act and Order 23 of the Companies Winding Up Rules (“CWR”) (the “Applications”). In support of the Applications, one of the Former JVLs, Mr Simon Conway of PWC Corporate Finance & Recovery (Cayman) Limited (“PWC”), has sworn two affidavits, one in respect of each of the Companies, giving the background to the Applications and explaining the rationale for the directions sought (the “Conway Affidavits”).

3. Because of their common legal and factual features and in keeping with the Grand Court Rules Order 85 to be discussed below (as well as in keeping with the FSD Users Guide), I agreed to take the Applications together and on the papers, without the need for a hearing. The Applications, as required by Order 85, are also supported by helpful written submissions from Messrs Egelton and Kendall.

### **Background**

4. By way of a special written resolution by the sole shareholder of the Founder Shares of each of the Companies, the Former JVLs were respectively appointed as Joint Voluntary Liquidators of the Companies on 29 December 2017.
5. This came about against the background of the conclusion having been reached in December 2016 by the former investment manager of each of the Companies, that it was too small to be economically managed as an investment fund and, accordingly, had to be wound up.
6. The Companies’ investment activities ceased shortly thereafter and all of the remaining shares of investors in each were compulsorily redeemed on 31 March 2017 (the “Final Redemption Dates”).



7. During the courses of the windings up of the Companies, the Former JVLs, among other things, sought to distribute redemption proceeds to former investors of the Companies which remained unpaid after the Final Redemption Dates (these are the “Outstanding Redemptions” already mentioned above). For reasons explained below, it was not possible for the Former JVLs to distribute all of the Outstanding Redemptions prior to the dissolution of the Companies.
8. After attending to all material matters in the Companies’ voluntary liquidations, the final meeting of each of the Companies took place respectively on 30 January 2019 (the “Final Meetings”). Following the Final Meetings, the Former JVLs’ final returns were filed with the Registrar of Companies pursuant to section 127(3) of the Companies Act (the “Final Returns”) and the Companies were dissolved with effect from 1 May 2019 pursuant to section 151(2) of the Companies Act, which provides that:

*“Upon the expiration of three months from the registration of the return the company is deemed to be dissolved”.*

9. As at the date of the Final Meetings, the Outstanding Redemptions available for distribution to the Companies’ former investors totaled respectively for F & C Warrior Fund and F & C Warrior II Fund, USD 93,179 and USD 530,678. The Outstanding Redemptions remained undistributed because either (i) the Former JVLs had been unable to make contact with the relevant former investors during the voluntary liquidation, or (ii) the Former JVLs’ request for the requisite and/or updated Know-Your-Customer (“KYC”) documentation required in order to allow the Former JVLs to effect distributions to the relevant former investors, had not been complied with.



10. As will be further explained below and as a matter of operation of law, following the dissolution of the Companies on 1 May 2019, the Outstanding Redemptions were held by the Former JVLs as statutory trustees on behalf of certain of the Companies' former investors, pursuant to section 153 of the Companies Act and in accordance with Order 23 of the CWR.

**Summary of the steps taken by the Former JVLs during the Trustee Period**

11. The steps and work streams undertaken by the Former JVLs in the period following the dissolution of the Companies up to the date of these applications (the "Trustee Period"), relating to the distribution (or attempts at distribution) of the Outstanding Redemptions, is set out in detail in the Conway Affidavits.

12. In summary, during the Trustee Period, the Former JVLs undertook various steps to locate former investors of the Companies to whom Outstanding Redemptions were due and/or obtain the requisite KYC information for certain investors, in order to allow for the transfer to former investors their *pro rata* entitlement to the Outstanding Redemptions. In addition, to the extent distribution of the Outstanding Redemptions were able to be made to the Companies' former investors, the Former JVLs effected such distributions in their capacities as statutory trustee.

13. Importantly, the Former JVLs initially set a deadline of 1 May 2020 for the submission of relevant KYC information by the former investors. Notwithstanding the deadline, the Former JVLs were contacted and advised by a number of former investors that, as a consequence of Covid-19 restrictions in place at that time, they had been unable to arrange for the translation and certification of KYC documentation prior to the 1 May 2020 deadline. In view of these circumstances and the continued engagement by certain former investors, the Former JVLs agreed to the extension of the deadline for the submission of the required KYC material.



As a consequence of the extension, further KYC information was received but only from certain of the former investors after 1 May 2020, following which, the final payments were processed on 24 March 2021.

14. As a result of those steps undertaken by the Former JVLs, a significant proportion of the Outstanding Redemptions were able to be distributed to former investors. In the case of Warrior Fund Limited, USD 93,179 remained to be distributed as at the date of the Final Meetings; USD 40,224 (43%) of which the Former JVLs were unable to distribute during the Trustee Period up to and including that date and this amount is therefore to be transferred to the Financial Secretary of the Cayman Islands pursuant to section 153(2) of the Companies Act.
15. In the case of Warrior Fund II Limited, the comparable amount in the relevant currencies, were USD 326,995 (USD 53,655 (16%) of which remained); GBP 8,329 (GBP 6,365 (76%) of which remained) and Euro 168,619 (Euro 63,600 (38%) of which remained); the remaining amounts being therefore required to be transferred to the Financial Secretary.

**Fees incurred by the Former JVLs during the Trustee Period**

16. The Former JVLs set out a breakdown of the fees incurred in their capacities as statutory trustees of the Outstanding Redemptions in the Conway Affidavits pursuant to O.23 rule 5 of the CWR.
17. It is submitted on their behalf, that having regard to various work streams undertaken by the Former JVLs as described in the Conway Affidavits (and in part described above), that the Court should direct, pursuant to section 48 of the Trusts Act, that the Former JVLs be remunerated out of the Outstanding Redemptions up to a maximum fixed fee of USD 65,000 in respect of work undertaken for the Companies (i.e.: fees in respect of F & C Warrior Fund



Limited in the fixed amount of USD 8,125 and in respect of F & C Warrior Fund II Limited in the fixed amount of USD 56,875); notwithstanding that in the latter case of F& C Warrior Fund II Limited, the actual [time] costs incurred in dealing with the post-liquidation matters, totaled USD 59,097.49. The amount of USD65,000 hereinafter to be referred to as the “Trustees’ Fee Amounts”.

18. I accept as attested by Mr Conway, that the Trustees’ Fee Amounts are referable to the Former JVLs’ time costs incurred in attending to the administration and subsequent distribution of the Outstanding Redemptions during the Trustee Period at the usual hourly rates of the Former JVLs firm, PWC. I also accept that in respect of the Companies, the combined total time costs of USD 65,000 incurred in administering the Outstanding Redemptions has been calculated based on the number of unpaid investors in each of the Companies at the date of the Final Meeting (and so do not reflect costs referable to earlier redeemers) in order to arrive at the Trustees’ Fee Amounts as set out above.
19. As to the legal basis on which the Trustees’ Fee Amounts may be recoverable, I accept that, in circumstances where the Former JVLs’ fees incurred during the Trustee Period are not subject to the caps prescribed by the Insolvency Practitioners’ Regulations, 2018 (as amended) (the “IPR”) (as would be the case in the context of an official liquidation), and as I am told by Mr Conway, that in order to ensure that the fixed fees sought by the Former JVLs are reasonable in the circumstances; that the charge out rates applied by them were, in fact, within the rates prescribed by the IPR.
20. Against that background, it is submitted and I accept that the Trustees’ Fee Amounts have been properly and reasonably incurred and that, in keeping also with the IPR, all relevant work has



been undertaken by appropriately qualified and designated staff members of the Former JVLs' firm.

**The applicable law**

21. Following the dissolution of the Company, the Former JVLs became statutory trustees over the Outstanding Redemptions by operation of section 153(1) of the Companies Act, which provides:

*"Any unclaimed dividends or undistributed assets in the possession or control of the liquidator or former liquidator of a company shall be held by that person as trustee upon trust for the benefit of the contributories or creditor to whom such funds are owed."*

22. After the period of one year following the dissolution of the Companies, the Former JVLs are required to transfer the Outstanding Redemptions to the Financial Secretary of the Cayman Islands, pursuant to section 153(2) of the Companies Act, which provides:

*"At the end of one year after the dissolution of the company, the former liquidator shall transfer any funds or other assets held on trust by that person to the Minister charged with responsibility for Finance who shall manage them in accordance with Part VIII of the Public Management and Finance Act (2020 Revision)."*

23. Order 23 of the CWR deals with practical matters relating to unclaimed dividends and undistributed assets held on trust by the Former JVLs pursuant to section 153 of the Companies Law, including, inter alia, the establishment of a trust account (see O.23, r.2 of the CWR), the transfer and/or payment of undistributed assets (see O.23, r.3 and 4 of the CWR) and the transfer of any remaining assets to the Financial Secretary after the one year trustee period (See O.23, r.6 of the CWR). Most relevantly to these fee approval Applications, O. 23, r.5 of the CWR deals with the Former JVLs' trustee fee and expenses, and provides that:



"(1) *The former liquidator shall be entitled to be paid a reasonable fee for acting as trustee pursuant to section 153 [of the Companies Act], the basis and amount of which shall be fixed by order of the Court.*

(2) *The trustee fee may comprise –*

(a) *a fixed fee or scale of fixed fees; and/or*

(b) *a percentage fee, calculated upon the value of the assets under administration and/or the amount distributed by him.*

(3) *The former liquidator shall be entitled to be reimbursed out of the assets under administration in respect of the costs and expenses reasonably and properly incurred by him for the purpose of advertising, administering claims and preparing his accounts."*



24. Thus, in summary, O.23, r.5 of the CWR provides that the Former JVLs are entitled to be paid a reasonable fee for advertising, administering claims and preparing the accounts in accordance with section 153 of the Companies Act and that the basis and amount of that fee must be fixed by the Court, as sought by the Application.

25. Finally, it was submitted and I accepted that section 48 of the Trusts Act provides the Former JVLs, in their capacity as statutory trustee over the assets remaining in the Companies after their dissolution pursuant to section 153 of the Companies Act, with a statutory gateway to seek an order for directions from this Court that the Trustees' Fee Amounts be paid in accordance with O.23, r.5 of the CWR. Importantly also, a successful application under this provision affords a statutory trustee acting in good faith, with an indemnity against liability. Section 48 of the Trusts Act provides that:

*"Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own*





*responsibility, to have discharged that person's duty as such trustee or personal representative in the subject matter of the said application:*

*Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as- aforesaid shall be in the discretion of the Court."*

26. I accept that these applications were brought properly in keeping with CWR O.23, r.5 and section 48 of the Trusts Act.

27. Moreover, to the extent that there might be any question as to whether the jurisdiction of the Court extends to allowing the Former JVLs to recover the Trustees' Fee Amounts from the Outstanding Redemptions, there is clear case authority on the point. *In Re Caledonian Securities Limited (in Official Liquidation)* 2016 (1) CILR 310, the joint official liquidators brought an application for an order entitling them to recover their fees and expenses incurred in the management and distribution of assets held on trust by the company of which they were liquidators. As the fees and expenses related to the work done by the liquidators qua trustees and not in the context of the liquidation itself, they were not chargeable to the liquidation estate as such and which, in any event, had already been exhausted.

28. It was held that the Court had an inherent equitable jurisdiction to order liquidators' fees and expenses to be paid from trust property held by the company in liquidation provided such fees and expenses were reasonably incurred in returning the trust property to those beneficially entitled to it. The complex work carried out by the liquidators in that case had been necessarily required and it had been for the benefit of all those who had an interest in the trust property. The liquidators' skill and labour might not have added directly to the value of the underlying trust assets but, taken as a whole, they doubtlessly added value to the assets in the sense that

the work was necessary before any of the assets could be retrieved and distributed for the benefit of those beneficially entitled to them.

29. So too I regard the situation here: the time costs reasonably incurred by the Former JVLs and strictly referable to the management and distribution of the Outstanding Redemptions must be recoverable as against those assets. I am satisfied that the Trustees' Fee Amounts were reasonably and proportionately incurred in that regard.

**Directions**

30. In view of the above and having regard to (i) the work undertaken by the Former JVLs; and (ii) the substantial distributions made to the Company's former investors during the Trustee Period, I accept that it would be an appropriate exercise of this Court's discretion pursuant to section 48 of the Trusts Act and/or its inherent jurisdiction, to direct that the Former JVLs' fees be capped at the Trustees' Fee Amount in accordance with O.23, r.5 of the CWR and that the Former JVLs be directed to transfer the balance of the Outstanding Redemptions to the Financial Secretary of the Cayman Islands forthwith.

31. Accordingly, the Former JVLs are directed in the following terms:

- (a) The Former JVLs shall be remunerated on a time costs basis up to a maximum of US\$8,125 in respect of F & C Warrior Fund Limited and USD 56,875 in respect of F & C Warrior Fund II Limited (together USD 65000 -the Trustees' Fee Amount) for administering the Outstanding Redemptions as trustees pursuant to section 153 of the Companies Act, such remuneration to be paid out of the assets of the Companies under administration by the Former JVLs.
- (b) The costs of and incidental to the Application be paid out of the assets under administration by the Former JVLs.
- (c) Any assets remaining in the Company be transferred to the Financial Secretary of the Cayman Islands forthwith.





**Post Script: Application not made under GCR O.85, r.2**

32. The making of a written application under section 48 of the Trusts Act, as distinct from an application for an oral hearing, can be made under and is required to also comply with GCR O.85, r. 8, which includes the requirement to explain why such application is not made by way of an administration action under O.85, rule 2, and served in accordance with rule 3 upon all the persons who are interested under the trust to which the application relates.

33. In relevant part GCR O.85, rule 8 provides:

*(1) An application by an executor, administrator, trustee or enforcer under Section 48 of the Trusts Act (2001 Revision) for the opinion, advice or direction of the Court upon any question respecting the management or administration of the estate or trust fund may be made by written submission without any oral hearing.*

*(2) ...*

*(3) An application under this rule shall be supported by written submission by the applicant's attorney which shall –*

*(d) explain why the application is not made under rule 2 and served in accordance with rule 3;..”*

34. It is submitted and I accept that an application of this nature falls squarely within the provisions of O.85, r.8 (1) itself (as set out above), rather than within O.85, r.2 and 3 which appear, by virtue of O.85, r.2 (1) to (3), to be primarily concerned with administration actions relating to the estates of deceased persons or to expressed trusts and matters related thereto, rather than to the position of statutory trustees seeking the approval of their fees in a post-liquidation context.

35. In particular, GCR O.85, r.2(1) provides that

*"An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an*



*administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought"*

36. Relevantly, for the purpose of GCR O.85, "administration action" is defined as "an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust" (see GCR O.85, r.1).

37. GCR O.85, r.2(2) also provides as follows:

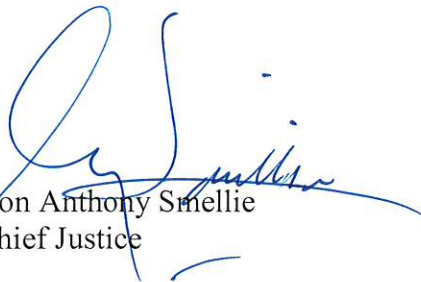
*"Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions –*

- (e) *any question arising in the administration of the estate of a deceased person or in the execution of a trust;*
- (f) *any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such person or in any property subject to a trust;*
- (g) *any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust; or*
- (h) *any question as to the rights or duties of an enforcer."*

38. O.85, r 3 for its part, expressly deals with the joinder and service upon parties who must be joined to an administration action and related matters.

39. In circumstances, as those here, in which the Application is more akin to an application for the approval of a liquidator's fees in accordance with the CWR as opposed to an administration action in respect of a deceased's estate or an expressed trust, I accept that GCR O.85, r.8 confers

jurisdiction on the Court to make an order for directions in the terms sought by the Former JVLs and that it is an appropriate exercise of the Court's discretion to grant the order in these circumstances upon the papers without the need for an oral hearing.



Hon Anthony Smellie  
Chief Justice

28 May 2021