IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 87 OF 2021

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND

IN THE MATTER OF OBELISK GLOBAL FUND SPC

AND

IN THE MATTER OF OBELISK GLOBAL GOLD FOCUS FUND

In Open Court

Appearances:	Mr Paul Kennedy, Ms Katie Logan of Campbells on behalf of the Petitioner
	Mr Michael Wingrave of Dentons on behalf of Obelisk Global Gold Focus Fund, Segregated Portfolio.
	Mr Conal Keane and Mr Russell Smith on behalf of the JOLs
Before:	The Hon. Justice Raj Parker
Heard:	11 June 2021
Draft Judgment: Circulated	6 July 2021
Judgment delivered:	12 August 2021

HEADNOTE

Segregated portfolio -insolvency-receivership order-s.224 Companies Act (2021 Revision)-meaning and effect- assets are or are likely to be insufficient to discharge the claims of creditors-balance sheet or cash flow test-discretion-identity of receivers.

Introduction

1. Obelisk Capital Management Limited (in official liquidation) (the "Petitioner") is an exempted Cayman Islands investment management company incorporated on 12 June 2013.

2. By Order of the Grand Court dated 26 June 2020, the Petitioner was placed into official liquidation and Declan Magennis and Russell Smith were appointed as joint official liquidators (the "JOLs").

3. In addition to providing investment management services to other entities, the Petitioner operated the sourcing and pre-financing of gold doré ("Doré") from mines in both East and West Africa for transportation and delivery to gold refineries outside of Africa, typically using contracted agents and other intermediary parties. Doré refers to smelted precious metal bars generally composed primarily of 91% - 97% gold with additional silver and/or aggregates content that are generally created at the site of the mine. These bars are then typically transported to a refinery for market grade purification.

4. Obelisk Global Gold Focus Fund (the "Fund") is one of at least two segregated portfolios of Obelisk Global Fund SPC (OG SPC), together with WE Affluence Gold Fund (WE AGF).

5. OG SPC was incorporated in the Cayman Islands on 12 June 2013 as a segregated portfolio company and holds a mutual fund license issued by the Cayman Islands Monetary Authority. As was the case with the Petitioner prior to its official liquidation, the directors of OG SPC are Mr. Sifton and Mr. Ho. The shareholders of OG SPC are Mr. Ho, Mr. Jones and Worldwin Investments Limited.

6. According to its website, OG SPC's business is to provide investment opportunities in a variety of markets and jurisdictions located throughout the world via its preferred shares developed through a segregated portfolio corporate structure. The Global SPC further states that it specialises in creating funds that offer low-risk, high-yield fixed returns, that are non-correlated to markets and interest rates.

7. The Fund is indebted to the Petitioner in the sum of at least US$55,000 pursuant to a loan transferred via OG SPC to the Fund on 6 May 2019, which was described in the relevant bank transfer documentation as a *"loan to funds to pay dividends*[sic]*"*.

8. On 1 December 2020 the JOLs demanded repayment of the loan forthwith .On 4 December 2020 the management of the Fund replied asking that a formal request be made to the directors of OG SPC and further stated that the loan would be '*added to the Q1 2021 cash flows'.* On 10 February 2021 the Petitioner served a statutory demand on the Fund.

9. The Fund has acknowledged the debt and that it has not made any payment to the Petitioner despite the statutory demand[1].

Summary of dispute

[1] *paragraph 30 of the First Affidavit of Jazeb Jones ("Jones 1").*

10. The Petitioner seeks a receivership order on the basis of the Fund's insolvency. It submits through Mr Paul Kennedy that this is a classic case of a company seeking to raise 'a cloud of objections' in order to seek to stave off such an order in the face of an unpaid debt which is plainly due and owing. In these circumstances, the Court should make a receivership order on the Petition.

11. The Fund through Mr Michael Wingrave opposes the application on two main bases:

a. It has not been shown that the Fund has or is likely to have insufficient assets to meet the claims of its creditors; and

b. Even if the Court concludes otherwise, the Court should not exercise its jurisdiction to make the order sought.

The law

12. Section 224 of the Companies Act (2021 Revision) sets out the grounds for the appointment of receivers over the segregated portfolio of a company by the Court:

> *(1) Subject to subsections (2) to (5), if in relation to a segregated portfolio company, the Court is satisfied-*
>
> *(a) that the segregated portfolio* ***assets*** *attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets)* ***are or are likely to be insufficient to discharge the claims of creditors*** *in respect of that segregated portfolio; and*
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> *(b) that the making of an order under this section* ***would achieve the purposes set out in subsection (3),***
>
> ***the Court may make a receivership order under this section in respect of that segregated portfolio.***
>
> *(2) A receivership order may be made in respect of one or more segregated portfolios.*
>
> *(3) A receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of-*
>
> *(a)* ***the orderly closing down of the business*** *of or attributable to the segregated portfolio;* ***and***
>
> *(b)* ***the distribution of the segregated portfolio assets*** *attributable to the segregated portfolio* ***to those entitled to have recourse thereto****.*
>
> *(4) A receivership order-*
>
> *(a) may not be made if the segregated portfolio company is in winding up; and*
>
> *(b) shall cease to be of effect upon commencement of the winding up of the segregated portfolio company, but without prejudice to prior acts of the receiver or his agents.*

(5) *No resolution for the voluntary winding up of a segregated portfolio company of which any segregated portfolio is subject to a receivership order shall be effective without leave of the Court. (my emphasis).*

13. The Court was referred to only one authority which considered the position of segregated portfolios[2] under this section. This case made it clear that proposed revisions recommended by the Law Reform Commission in April 2006 to conform the regime for the liquidation of segregated portfolios with other companies in the Cayman Islands were not accepted.

14. This was confirmed by Chadwick P :

> *"In those circumstances, the legislature must be taken to have decided not to give effect to the recommendation of the Law Reform Commission ……..that 'a segregated portfolio should be liquidated in exactly the same way as if it was a company'[3].*

15. The particular case dealt with a petition to wind up on a just and equitable basis and did not directly deal with the question of whether a balance sheet or cash flow test ought to be applied. Mr Kennedy and Mr Wingrave agreed that the matter for the court principally involves an interpretation of section 224 itself.

Submissions of Petitioner

16. Mr Kennedy put the issue before the court as follows: the Fund takes the position that the Petitioner's unsatisfied demand for repayment of a liquidated sum does not bring it within Section 224(1) (a), so the question at issue is how the test under that sub-section is to be satisfied by a petitioner. There does not appear to be any Cayman Islands case law which specifically interprets the sub-section.

17. The question whether the Fund has sufficient assets to meet the claim of its creditor is a question of solvency. As is well known, the insolvency of a company in the Cayman Islands is governed by Section 93 of the Companies Law which provides that a company will be deemed unable to pay its debts when, inter alia, it has failed to meet a demand served on it for a sum exceeding CI$100 or it is proved to the satisfaction of the Court that it is unable to pay its debts: sections 93(a) and (c). In the first case the court decides the issue on the basis of a statutory presumption which the company has the burden of rebutting. The test under section 93(c) of the Companies Law is one of commercial or 'cash flow' insolvency: *Re Weavering Macro Fixed Income Fund Limited* [2016 (2) CILR 514] at [40] per Martin JA. The Fund is clearly not solvent on a cash flow basis.

18. The relevant legal principles for challenging the presentation of a winding up petition on the ground of insolvency in respect of a company are also well-established:

[2] *ABC Company and J Company [2012 (1) CILR 300] CICA §§ 20-24*
[3] §24

(1) The fundamental question is whether the petition debt is *bona fide* disputed on substantial grounds: *Camulos Partners Offshore Limited v Kathrein* [2010 (1) CILR 303] per Chadwick JA at [58]-[61].

(2) The burden lies on the Company to show that the petition debt is *bona fide* disputed on substantial grounds: *Allied Leasing & Fin Corporation v Banco Economico SA* [2000] CILR 118 at p.129.

19. In this case the Fund does not dispute that a sum is owed above the statutory minimum, the quantum of the debt,or the fact that it is due and payable.

20. The Fund's opposition to the Petition is set out a paragraph 32 of Jones 1. Mr Jones states that the Fund does not accept that the assets of the Fund "*are likely to be insufficient to discharge the claims of creditors*". In other words, the Fund relies on the wording of Section 224 to the effect that the test for appointing receivers over a segregated portfolio is different to the long established test for the appointment of liquidators to an insolvent company.

21. Notably, Mr Jones does not aver that the assets of the Fund are currently (or at the time of swearing of his affidavit) sufficient to discharge the claims of creditors. Indeed, he could not do so where the Fund admits that it does not have sufficient assets to pay the petition debt. The Fund therefore appears to rely entirely on an interpretation of the wording of Section 224 to the effect that if the Fund is deemed to be balance sheet solvent in the long term the Court may not make an order for the appointment of receivers.

22. The Petitioner does not dispute that the language of Section 224 differs from that of Section 93. The question is whether the effect of that language is to change the test for insolvency of a segregated portfolio from the well-established solvency test for a company.

23. Mr Kennedy submitted that the relevant case law and commentary frame the tests for insolvency by reference to either a "cash flow" test or a "balance sheet" test. A company is deemed to be insolvent under the 'cash flow' test if it cannot pay the debts that are due at present, or if, on the balance of probabilities, it does not (or will not) have the resources to discharge those debts that will fall due in the reasonably near future.[4]

24. A company is insolvent under the balance sheet test if its assets do not exceed its liabilities, taking into account its contingent and prospective liabilities: (section 123(2) of the UK Insolvency Act 1986 (the "IA")). In *BNY Corporate Trustee Services Ltd and others v Eurosail* [2013] UKSC 28, the Supreme Court held that a company's contingent and prospective liabilities are to be taken into account by considering them in the context of the company's

[4] *SEB v Conway and anor (JOL's of Weavering)[2019] (2) CILR 245 at 261 PC*

circumstances as a whole, so that the test is not a strict mathematical exercise based on a company's balance sheet.

25. The Supreme Court in *Eurosail* was concerned with the UK IA, which contains alternative cash flow and balance sheet tests. A petitioner before the English courts can prove that the relevant company is insolvent on either basis.

26. Mr Kennedy submits that there is no reported case of a petitioner before the Cayman Islands courts being required to prove that an entity is balance sheet insolvent. So if, the Fund contends, the test is a pure balance sheet test then it throws up evidentiary issues with which this Court has not had to grapple previously and which in all of the years since the concept of segregated liability was introduced, no Cayman court has had to pronounce on.

27. Mr Kennedy submits that it would have been a striking development in Cayman company law if the drafters of the provisions relating to segregated portfolio companies had intended that a petition for the appointment of a receiver over a segregated portfolio could be defended purely on the basis that the portfolio was balance sheet solvent (i.e. that the value of its assets exceed its liabilities taking into account contingent and prospective liabilities) when the portfolio is unable to pay its debts. A pure balance sheet test would encourage late payment or non-payment of debts by otherwise healthy companies on the basis that a creditor would have no basis to wind the company up and its demands for payment would therefore have little or no effect. However, that is precisely the position which the Fund would appear to argue exists in relation to Cayman segregated portfolio companies.

28. Mr Kennedy submits that the wording of section 224 is not supportive of the analysis that it provides for a balance sheet test at all. Indeed the subsection of the UK IA which provides for an alternative balance sheet test is in different terms to section 224.

29. Section 123(2) of the IA provides as follows: "*A company is also* ***deemed unable to pay its debts*** *if it is proved to the satisfaction of the court that* ***the value of the company's assets*** *is less than the* ***amount of its liabilities, taking into account its contingent and prospective liabilities*** *". (my emphasis).*

30. He points out that there is no equivalent language in section 224 comparing the value of assets against the amount of liabilities. Rather he submits the phrase '*discharge the claims of creditors'* used section 224 equates to the phrase '*unable to pay its debts'* under section 92(d).

31. He submits that the focus is therefore on the ability to discharge (i.e. pay) claims rather than on assessing the relative values on either side of the balance sheet. There is no mention of 'claims of creditors' in IA 132(a). He says that the fund is placing too much weight on the use of the word '*assets* 'in section 224.

32. He relies on McPherson[5] :

> "*As it is not always easy, in terms of both time and costs, to establish that the value of the company's assets are outweighed by its liabilities, some of the reasons for which are discussed later, this ground is rarely relied on [fn 142: The creditors do not usually have access to the company's books and records, they cannot obtain information from company officers, and the financial position of the company may well be disputed.]*"
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> " [the balance sheet test] *is not employed anywhere nearly as frequently by creditors seeking to establish that a company is unable to pay its debts in the course of applying for a winding-up order. There are probably a number of reasons for this, but one of the primary ones is that a creditor, unless perhaps a director or possibly a shareholder as well, will not commonly have access to the financial statements and other no details of a company. The test is used to establish inability to pay debts more often in other contexts, such as in a claim that a person has benefited from a transaction that can be challenged by a liquidator."*

33. He also relies on the fact that the valuation of assets is not an easy matter even if one had access to the relevant information. As McPherson says[6] :

> *"assets have to be valued, and the valuation of assets is not an exact science; rather it is a matter of judgment in gauging what a willing purchaser would give to the seller for the asset. Furthermore (and something alluded to in Professor Goode's quotation above), do you value assets on a fire-sale basis or on the basis that the company is a going concern? Undoubtedly it is difficult, where no market value has been established, for some assets to be valued. Even where there is a market value, factors which may affect the value of an asset can vary substantially and influence the amount which can be obtained for the asset. One can envisage a situation where in applying the balance sheet approach there are two reasonable views given concerning the solvency of the company, but they are inconsistent. Of course, the actual amounts which are likely to be received on a realisation of assets, if a company is in financial straits, could well be far less than what might be obtained if the assets were disposed of in good times and with no pressure brought to bear by creditors. Whether assets are valued on a going-concern basis or a break-up basis depends on the circumstances. Just as the valuation of assets can cause difficulties, so can the estimation of liabilities. Those causing special concern are usually unquantified existing liabilities, contingent liabilities and liquidation expenses.'*

[5] *The Law of Company Liquidation 4th Ed. at [94] and [111]*
[6] *Ibid at [116]*

34. Mr Kennedy points to the fact that the UK balance sheet test is a means by which the petitioner can prove insolvency, but not the only means. In the Cayman Islands where accounts are not made public in relation to companies such as the Fund, a stand-alone balance sheet test would be problematic.

Decision

35. I do not accept Mr Kennedy's submission that s.224 equates to a cash flow test of insolvency. The sub section, on a plain reading, clearly provides that the test is whether the assets of the company are or are likely to be sufficient to discharge the claims of creditors. The claims of its creditors can be regarded as its liabilities.

36. By referencing 'assets' the section is similar in wording to section 123 (2) IA in the UK, albeit that the UK statute has the words 'value' added to assets and 'amount' added to liabilities.In my view these words do not materially change the meaning of the section .Both sections establish in my view what may be called a '*balance sheet'* test albeit '*the discharge of claims of creditors'* wording in the Cayman statute adds something more than simply assessing the relative values of two sides of a balance sheet. The court has jurisdiction to make a receivership order when the portfolio's assets are or are likely to be insufficient to discharge those claims .That involves a determination on the available evidence of whether the assets are sufficient now, or are likely to be in the reasonably near future ,when assessed against its liabilities (as well as its prospective and contingent liabilities), and are held in a form where they may be used to pay the claims of creditors.

37. I therefore accept Mr Wingrave's submission that on a plain reading of section 224 one does not derive a traditional cash flow test of insolvency with language as to debt and timing of payment. There is no deeming provision, and the differences have been made plain in *ABC Company v J & Company* where reference was made to the proposed recommended Law Reform Commission's revisions not being adopted by the legislature in respect of segregated portfolios.

38. I accept that a stand-alone test more akin to a traditional balance sheet test for segregated portfolios may set a different bar to clear for creditors, with no deeming provision, but that is what the statute plainly provides. I also acknowledge that there may be practical difficulties for creditors accessing information in relation to segregated portfolios and situations where assets may appear to be more valuable than in fact they turn out to be.

39. However, as a practical matter it is to be noted that section 224 does provide two alternative bases of satisfying the court. First the court may make a receivership order if the assets attributable to a particular segregated portfolio of the company *are* insufficient to discharge the claims of creditors in respect of that segregated portfolio. In the alternative if the assets *are likely to be* insufficient. Difficulties in the precise valuation of assets may not be a particularly high hurdle when creditors' claims for relatively modest amounts are accepted, as they are in this case, and are not discharged. The starting point in such a situation is that a

petitioner may legitimately say that the assets, presently realisable or liquid, are insufficient to discharge the claim.That is not in dispute in this case.

40. The court is able to assess the evidence before it as to whether the Fund has assets sufficient to discharge the claim of a creditor now, or is likely to have sufficient assets in the reasonably near future. There is no evidence whatsoever in this case as to the asset position of the segregated portfolio Fund, save for the amounts said to be due from third parties.

41. As there is no dispute that the Fund currently has insufficient assets to meet the claims of its creditors, the court has jurisdiction to make a receivership order. The only argument has been as to third party realisable assets which it is said makes it likely that the Fund will have sufficient assets in a reasonable period of time in the future. This does not provide the Fund with a defence as to the court's jurisdiction.

Postscript

42. The Petition debt was settled before Judgment was delivered and so this Judgment has only dealt with the jurisdictional aspect of the application .

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THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT