



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 303 OF 2024 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF OAKWISE VALUE FUND SPC

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Alex Potts KC of counsel with Mr Jordan McErlean and Mr Erik Bodden of Conyers Dill & Pearman LLP for the Applicant (the “Company”)

Mr Liam Faulkner and Ms Lisa Yun of Campbells LLP for Tjin Joen Joe, Andy Tsjoe Kong and Li Jessica Wai Yan (the “HK Judgment Creditors”)

Heard: 29 October 2024

Date of decision: 31 October 2024

Draft Reasons Circulated: 3 December 2024

Judgment Delivered: 16 December 2024

Segregated portfolio company-petition presented by company on insolvency and just and equitable grounds-application to appoint joint provisional liquidators for restructuring purposes in relation to two solvent portfolios and one portfolio of doubtful solvency-whether enactment of restructuring officer regime deprived the Court of all jurisdiction to appoint joint provisional liquidators for restructuring purposes-appropriate characterisation of grounds for appointing provisional liquidators-Companies Act (2023 Revision), sections 91A-J, 92 (d)-(e), 94 (2), and 104 (3)-(4)

241216 Re Oakwise Value Fund SPC - FSD 303 of 2024 (IKJ) - Reasons for Decision

REASONS FOR DECISION

Introductory

1. In response to an advertised *Ex Parte* on notice Summons dated 25 September 2024 to appoint joint provisional liquidators (“JPLs”), the HK Judgment Creditors raised a jurisdictional objection which has seemingly never been previously contested in the Cayman Islands courts. Can a company present a winding-up petition and appoint provisional liquidators for restructuring purposes under section 104 (3) of the Companies Act (2023 Revision) (the “Act”) or is the exclusive restructuring jurisdiction now found in the restructuring officer regime set out in section 91A-J of the Act? This question cannot, in my judgment be answered in a binary fashion, because any proper analysis of it requires account to be taken of the factual matrix and legal context in which an application under section 104 (3) of the Act is made.
2. On 31 October 2024 I decided to grant the application to appoint Lai Wing Lun and Osman Mohammed Arab of Acclime Corporate Advisory (Hong Kong) Limited, together with Martin Nicholas John Trott of R&H Restructuring (Cayman) Ltd as Joint Provisional Liquidators (“JPLs”).
3. These are the reasons which I promised to deliver for that decision.

The Petition

4. The most pertinent averments in the Petition dated 25 September 2024 are as follows. The Company is a segregated portfolio company registered as a mutual fund with the Cayman Islands Monetary Authority (“CIMA”) (I was told that CIMA representatives were observing the hearing). It has two directors (Wang Fengyu and Xing Chao) and a local asset manager. Importantly:

“7. Oakwise has three active segregated portfolios, namely (1) Greater China High Yield Income SP (“Greater China SP”); (2) Multi-Strategy Growth and Income Fund SP (“Multi-Strategy SP”); and (3) Enhanced Fixed Income SP (“EFI SP”)....”

5. Greater China SP's investments are mainly in notes issued by Chinese companies financed by local governments. Multi-Strategy SP's investments include bonds issued by financial institutions in the US, Europe and China and the stock of US and PRC companies in various industry sectors. In contrast, the EFI SP investments are described as follows:

“26. Currently, the EFI SP's current investments holdings consist of debt securities and bonds issued by real estate developers in Greater China, Hong Kong and the Asia Pacific Region (the “Real Estate Notes”). The EFI SP has subscribed for more than 30 series of Real Estate Notes in various real estate companies operating in Mainland China.”

6. It is, of course, a notorious fact, that real estate investments in the PRC have been severely compromised in recent years. On 20 September 2024, the Board resolved pursuant to the Company's Articles to present the Petition. The redemption of Participating Shares in EFI SP, the unpaid redemption claim of CMB International Securities Limited (“CMBI”) (US\$92 million) and the Receivership Proceedings it commenced are described in respect of EFI SP. Those proceedings were initially dismissed by this Court (Doyle J) on 26 March 2023, but the Court of Appeal remitted the petition in the Receivership Proceedings back to this Court. A further approximately US\$10 million unpaid redemption claims are outstanding.

7. Also outstanding is the judgment in default obtained by the HK Judgment Creditors against the Company in the Hong Kong Court (“Default Judgment”) obtained on 23 December 2022 (US\$3.3 million) and the Garnishee Order made absolute by the Hong Kong Court on 28 March 2024 (Master Ebony Ling) in favour of the HK Judgment Creditors. The Company is appealing the Garnishee Order, which has been stayed pending appeal. As regards these proceedings it is averred:

“46. Significantly, by virtue of the Garnishee Application, Andy and Jessica have applied to have recourse to the assets of the other segregated portfolios of Oakwise outside of the EFI SP to satisfy the Default Judgment.”

8. Although the other two segregated portfolios are said to be demonstrably solvent, the financial position of EFI SP is summarised as follows:

“52. In the Receivership Proceedings, Oakwise confirmed that EFI SP was not insolvent, nor was EFI SP bordering on insolvency. This position was substantiated by

the NAV statements and balance sheet as at 30 December 2022 for EFI SP, as exhibited and referred to in the affirmation filed by Oakwise in the Receivership Proceedings.

53. The Receivership Proceedings have been on foot for a substantial period of time, since the CMBI Petition was presented in December 2022. As the Receivership Proceedings draw closer to the two year mark, there have been various judgments including the First Instance Judgment and the CICA Judgment. In light of amongst other things, the concerns raised by the Court of Appeal in the CICA Judgment regarding for example the lack of up-to-date audited accounts and NAV accounting, Oakwise has carefully considered its views on the solvency of EFI SP.

54. Accordingly, as at the date of this Petition, Oakwise considers that EFI SP is arguably no longer cash-flow solvent, without prejudice to Oakwise's position as to the validity of the Board's resolution to effect a suspension of redemption payment liabilities as of 16 February 2023."

9. My interpretation of this averment is that the Company accepts that it is cash-flow insolvent in the sense that, if its position that the redemption creditors are not actual creditors were found to be wrong, it would be unable to immediately pay their debts. It is finally averred:

"Grounds for the Winding Up of Oakwise

58. Given that EFI SP is arguably not solvent on a cash flow basis, and without prejudice to Oakwise's position as to the validity of the Board's resolution to effect a suspension of redemption payment liabilities as of 16 February 2023, the Company considers that the Company is arguably unable to pay its debts as a whole, and that it would be appropriate to wind up the Company unless a restructuring of the Company's affairs can be achieved.

59. Oakwise also considers that it is just and equitable to wind up Oakwise in view of the Receivership Proceedings, the Garnishee Application and other redemption requests received from the investors of EFI SP, without prejudice to Oakwise's position as to the validity of the Board's resolution to effect a suspension of redemption payment liabilities as of 16 February 2023, unless a restructuring of the Company's affairs can be achieved.

60. *The Petition is being presented on the grounds that Oakwise as a whole is arguably unable to pay its debts and/or on just and equitable grounds so as to facilitate a subsequent application to be filed by the Directors for the appointment of provisional liquidators over Oakwise (the “PL Application”).*

61. *The PL Application itself is being made to protect the interests of the investors of each of EFI SP, Greater China SP and Multi-Strategy SP and to ensure the orderly handling of the affairs of EFI SP (which is the only segregated portfolio facing various contentious proceedings).”*

10. These pleas on their face are not entirely straightforward, because the overwhelming majority of winding-up petitions are presented against a company in respect of its financial status viewed as a whole. The weight of this accumulated experience inevitably shapes an intuitive sense of what a winding-up petition ought to look like. Mr Faulkner’s professed incomprehension about the nature of the Petitioner’s case was, it seemed to me, only partly rhetorical.
11. It seemed at first blush counterintuitive to speak of the Company’s position “*as a whole*” when it is a segregated portfolio company with two solvent portfolios and one arguably insolvent one. However, by the end of the hearing I construed the pleaded grounds (in light of the evidence and submissions advanced) as potentially supporting *prima facie* findings as follows:
 - (a) EFI SP was liable to be wound-up on the grounds of insolvency (unless a restructuring could be implemented);
 - (b) Greater China SP, Multi-Strategy SP, EFI SP (in the alternative to the insolvency ground) and the Company as a whole, were liable to be wound-up on just and equitable grounds by virtue of the travails of EFI SP and the Hong Kong Garnishee Proceedings, which had compromised the integrity of the entire segregated portfolio structure.

The JPLs’ appointment application

The evidence

12. The Petition was primarily supported by the First Affidavit of Wang Fengyu (“Wang 1”) and the JPLs’ appointment Summons by the Second Affidavit of Wang Fengyu (“Wang 2”). As regards corporate formalities, Wang 2 avers that the Company is a mutual fund licensed by

CIMA. CIMA representatives attended the hearing, implicitly signifying regulatory concern about the Company's governance. It has two directors, the deponent and a Mr Xing Chao. As regards the investments made by the three segregated portfolios:

- (a) Greater China SP has 14 holders of Participating Shares and has invested mainly in Chinese local government financing bonds (79.5%), Chinese equities (14.5%) and also funds (6%);
 - (b) Multi-Strategy SP has one investor, a BVI company. It has invested in a variety of bonds issued by governments, financial institutions and conglomerates and US and Chinese equities;
 - (c) EFI SP has 33 investors located in Hong Kong, PRC, Cayman Islands, Luxembourg and BVI. It has invested in “*debt securities and bonds issued by real estate developers in Greater China, Hong Kong and the Asia Pacific Region ('Real Estate Notes')*”, including “*more than 30 series of Real Estate Notes*” in Mainland Chinese companies (paragraph 30, Wang 2).
13. The “*price crash*” of the Real Estate Notes consequent upon the collapse of the Chinese real estate market since 2022 is then described with reference to examples of particular Notes EFI SP has invested in. For instance:
- (a) as regards the ‘Yuzhou Notes’, these have been in default since 2022 and a Hong Kong scheme of arrangement was being implemented to restructure the related liabilities (US\$46 million in principal is outstanding);
 - (b) as regards the ‘Aoyuan Notes’, these have been in default since 2022 (US\$77 million in principal is outstanding);
 - (c) as regards the ‘Yango Notes’, these have been in default since 2022 (US\$91 million in principal is outstanding); and
 - (d) as regards the ‘Jingrui Notes’, these have been in default since 2022 (US\$92 million in principal is outstanding).

14. The Company's response is then explained. In short, EFI SP redemptions were suspended with effect from 2 November 2022. Next, demands for payment are addressed:
- (a) CMBI subscribed for shares worth just over US\$184.8 million and shares worth some CNY 10.7 million between June 2021 and January 2022. As of 2 November 2022, CMBI was an unpaid redemption creditor for US\$91.3 million and RMB 10.3 million;
 - (b) on 29 December 2022 in FSD 329/2022, CMBI petitioned this Court for the appointment of a receiver under sections 224-225 of the Act ("Receivership Petition"). The Receivership Petition was dismissed by Doyle J on 26 May 2023 but restored by the Court of Appeal's Judgment dated 13 June 2024; and
 - (c) The HK Judgment Creditors subscribed for some US\$3.5 million shares in EFI SP between 2019 and 2021. On 1 November 2022, they issued proceedings against the Company in the Hong Kong High Court, obtaining a Default Judgment on 26 January 2023. Based on that, the Judgment Creditors obtained a Garnishee Order Nisi which was made Absolute on 28 March 2024 (Master Ebony Ling) against certain Standard and Chartered Bank accounts held by the Company in respect of more than one segregated portfolio. An appeal by the Company to the Hong Kong Court of Appeal was still pending when the present Summons was heard on 10 October 2024;
 - (d) other investors' outstanding redemption requests total US\$113 million.
15. As regards the financial position of EFI SP, the following key averments are made:

"96...In light of amongst other things, the concerns raised by the Court of Appeal in the CICA Judgment regarding for example the lack of up-to-date audited accounts and NAV accounting, Oakwise has carefully considered its views on the solvency of EFI SP.

97. Without waiving privilege, I am advised that in general terms a court will apply a balance sheet test in the context of applications for the appointment of receivers over SPs of a segregated portfolio company, in comparison with a cash-flow test which is applied to applications for winding up a company as a whole. Accordingly, as at the date of this Petition, Oakwise considers that EFI SP is arguably no longer cash-flow solvent, without prejudice to Oakwise's position as to the validity of the Board's

resolution to effect a suspension of redemption payment liabilities as of 16 February 2023.”

16. In contrast, as regards the other two portfolios, they are “*currently financially healthy and solvent*” (paragraph 61, Wang 1). It is against this background that the case for appointing the JPLs is then addressed. The context is unusual, and so the fact that the grounds of the application do not easily fit into any familiar generic categories for appointing provisional liquidators was, to my mind, unsurprising. Nonetheless, read literally, the case did in some respects lack coherence as Mr Faulkner complained. In summary:
- (a) because there were doubts about the cash-flow insolvency of EFI SP, it was averred that there were doubts about the solvency of the Company as a whole so there was a case for winding-up the Company. This was, as a bare assertion, a *non-sequitur*. The insolvency of EFI SP meant that it was *prima facie* liable to be wound-up; special circumstances were required, it seemed to me, to justify winding-up the entire Company. For instance, positive evidence that the financially compromised position of one segregated portfolio compromised the position of the Company as a whole;
 - (b) the just and equitable ground was, however, compelling. It was averred that it was just and equitable to appoint the JPLs as independent management in light of the various proceedings the Company was embroiled in, in Cayman and in Hong Kong. Provisional liquidators would be best equipped to protect the disparate interest of the investors in the troubled EFI SP, on the one hand, and the healthy other portfolios on the other. This was an understandably understated way of commendably saying: we the existing management accept that we are no longer best equipped to protect the best interests of the diverse stakeholders in the Company. That the Judgment Creditors did not welcome this acknowledgement was compelling proof that their interests were not aligned with those of the majority of investors in/creditors of EFI SP;
 - (c) EFI SP required provisional liquidators to devise a means of maximising value from the underlying assets, which was not a short-term exercise. Some form of restructuring would likely be preferable to a liquidation;
 - (d) the other two portfolios would, the directors proposed with more coherence, be spun-off into a new company with CIMA approval; and

- (e) implicitly, in my judgment it obviously followed, after the proposed spin-off of the solvent portfolios occurred, the Company as a whole (consisting only of EFI SP) could be wound-up if necessary.
17. Finally, it was averred that the Company proposed that the Petition be adjourned for a further three months (from the initially listed December 2024 date) and for the JPLs to serve their Report two weeks before the Adjourned Hearing.
18. The Affidavit of Andy Kong (“Kong 1”) was sworn on behalf of the Judgment Creditors. Their opposition was on the face of it more revealing of the adverse nature of their position to that of most other stakeholders in the Company than it was of their ability to represent those interests. They were, after all, accused of one of the most deadly of sins an investor in a segregated portfolio company can commit: failing to recognise the sanctity of the segregated portfolio structure. The Garnishee Order they had obtained in Hong Kong was one of the central justifications for the JPLs’ appointment.
19. However, Kong 1 was forthright in making explicit the interests the so-called “Opposing Creditors” were advancing through their opposition. It was deposed from the outset that:
- “4. As set out in further detail below, Jessica and I (the ‘Opposing Creditors’) are of the view that the PL Application is being brought not for the genuine purpose of a debt restructuring of the Company, but instead to thwart the enforcement steps being taken by its creditors, including the Garnishee Application.”*
20. That was an odd complaint to make, because in traditional insolvency terms, one of the most common reasons for appointing a provisional liquidator is to ensure that all unsecured creditors are treated equally and that the few do not receive preferential payments at the expense of the many. The appointment of a provisional liquidator triggers the statutory stay of proceedings against the company, save with leave of the Court. Redemption creditors of EFI SP were generally not being paid; no one with the interests of the general body of creditors at heart would object to steps being taken to prevent one creditor receiving what amounted to a preferential payment. The Affidavit goes on to complain about a lack of consultation about the restructuring plans for EFI SP, but the application does not purport to rely on a debt restructuring plan alone but multiple factors, one of which includes the Judgment Creditors’ attachment of accounts containing assets unconnected to the portfolio they contracted with.

The Applicant's legal submissions

21. The Applicant's written legal submissions added greater, but less than complete, clarity to the legal and commercial basis for the application. The jurisdictional ground was explained as follows:

"24. The Company submits that the jurisdictional gateway for the appointment of Provisional Liquidators is fulfilled on the facts of this case, whether by reference to the broad discretion under section 104(3), or the more precise set of conditions under section 91B(1) and/or section 104(2) of the Act.

25. The Petition has been presented by the Company, and the Company has given affirmation evidence that the EFI SP is in financial distress, and that the Company intends to pursue a restructuring, or present a compromise or arrangement, with respect to each of its segregated portfolios, including the EFI SP, mindful of the statutory and contractual principles of segregation.

26. The appointment of JPLs is also likely to assist to prevent any potential alleged misuse of the Company's assets; to prevent any potential alleged oppression of minority investors; and/or to prevent any potential alleged mismanagement or misconduct on the part of the Company's directors.

27. The Court's attention is also drawn to Order 4, Rule 6(1) of the Companies Winding Up Rules, 2023 ("CWR"), which provides as follows:

'Whenever a winding up petition is presented by the company itself, the company may apply by summons for an order for the appointment of a provisional liquidator on the grounds contained in section 104(3) of the Law.'

22. The purported reliance on section 91B(1), and the jurisdiction to appoint restructuring officers, was not coherent and was not pursued in oral argument. However, three important strands of the case for an appointment were identified:
- (a) reliance was placed on section 104 (3) of the Act;

- (b) this was a segregated portfolio company with three portfolios, all of which the Company wished to restructure (i.e. the application was not seeking to solely implement an insolvent restructuring nor was it based solely on the insolvency ground); and
 - (c) the appointment would ensure that no misconduct on the part of the Company's directors would take place or be alleged.
- 23. Reliance was placed on a broad jurisdiction to appoint provisional liquidators and the grounds relied on were in materially significant respects unrelated to what one immediately associates with a case for the appointment of restructuring officers. I accordingly indicated to Mr Potts KC that I did not need to hear from him fully and allowed Mr Faulkner to advance his jurisdictional objection. The Applicant's counsel's *caveat* was that little weight should be given to the Judgment Creditors' submissions because their interests were not aligned with those of the majority stakeholders in the portfolio they had invested in.
- 24. The Judgment Creditors' submissions may be viewed as falling into two parts. First their jurisdictional challenge, and secondly their arguments on the merits of the application. In most legal contexts, the standing of a party will be relevant to both (a) their right to oppose an application to which they are not directly joined, and (b) the weight to be attached to their submissions on the merits of that application. Where an objection is raised to the Court's jurisdiction to grant any relief at all, particularly in the case of a statutory jurisdiction, there may often be good reason to place considerable weight on the arguments that a party of dubious 'merits' standing may advance.
- 25. I saw no need to place any weight whatsoever on the 'merits' arguments advanced on behalf of the Judgment Creditors because their interests were so manifestly:
 - (a) adverse to the interests of other redemption creditors of EFI SP; and
 - (b) adverse to the interests of investors in Greater China SP and Multi-Strategy SP (because of the attachment they had obtained. Otherwise, they had no connection whatsoever with the application as it related to those portfolios).
- 26. However, as regards the proposition that the Court simply had no statutory jurisdiction to appoint provisional liquidators to restructure an insolvent company or segregated portfolio, I

did not feel I could properly consider granting the application without rejecting that argument (insofar as it applied at all to the present case). Mr Faulkner submitted in summary as follows:

- (a) section 104 (3) of the Companies Act (2022 Revision) formerly empowered the Court to appoint provisional liquidators where a company was insolvent and it was proposed to promote a compromise;
- (b) when the new section 104 (3) was introduced to replace the repealed section 104 (3) by section 8 of the Companies Act (Amendment) Act 2021, the restructuring officer regime was introduced with section 91B(1) adopting the same language of the old section 104 (3);
- (c) where a company proposed to restructure itself on the grounds of insolvency, the only statutory route was via section 91B(1);
- (d) reliance was placed on the principles of statutory interpretation summarised by Lady Arden in *Shanda Games Ltd -v-Maso Capital Invs. Limited* 2020 (1) CILR 293 at paragraph 27;
- (e) reliance was also placed on the Hansard Report on the Second Reading of the Bill when Mr Andre Ebanks, then Minister for Financial Services and Commerce said in relation to the draft new section 104 (3):

“Clause 7-also a key amendment. The existing provisional liquidator under section 104 (3) has been used to restructure companies. This function will be performed by the new restructuring officer introduced in the amendment, thus the restructuring provisional liquidator is no longer needed; however, the company may still wish to or need to appoint a provisional liquidator for other commercial reasons”¹[emphasis added];

- (f) *“other commercial reasons”* clearly meant other than restructuring.

27. This was a very cogent and persuasive argument as regards the narrow proposition that a company wishing to pursue an insolvent restructuring could only use the new restructuring officer regime. In reply, Mr Potts KC protested that the point deserved fuller argument, but

¹ Edited Hansard Excerpt, Wednesday 8 December 2021, page 439.

ultimately argued that, having regard to the nature of the present application, the point was an entirely academic one. Various authorities were referred to the Court, but only one was of direct relevance to the jurisdictional issue. In *Re Kingkey Financial International (Holdings) Ltd.*, FSD 56 of 2024 (JAJ), Judgment dated 12 April 2024 (unreported), where Mr Potts KC also appeared but without opposition, Asif J appointed joint provisional liquidators under section 104 (3) without finding it necessary to consider the present jurisdictional issue. His reasons for doing so, considered below, were highly pertinent to the relevance of the jurisdictional issue to the present case.

28. Somewhat less relevant in a direct way was my own decision in *Re Holt Fund SPC*, FSD 309/2023 (IKJ), Judgment dated 26 January 2024 (unreported). There I had considerable difficulty, in the context of an unopposed application, apprehending how the Act's winding-up regime applied to segregated account portfolio companies. I ultimately appointed restructuring officers in relation to two insolvent portfolios, it being implicitly assumed that this was the appropriate restructuring mechanism under the Act.
29. Finally, Mr Potts KC clarified the bespoke nature of the present application by reference to the terms of the draft Order itself.

Decision and Order

30. Following the half-day hearing on 29 October 2024, I reserved judgment. On 31 October 2024, the following decision was communicated to counsel by email:

“For reasons which will be provided later, the Judge grants the application heard on 29 October 2024 for the appointment of JPLs, substantially on the terms of the draft Order submitted by the Petitioner as of 31 October 2024. However, he is only willing to grant a short adjournment of the Petition to allow the JPLs to take soundings from creditors of EFI SP as to the merits of a longer adjournment to investigate a debt restructuring. He also considers (unless otherwise agreed between the parties) that costs should be reserved as the application was opposed and reasons for his decision have yet to be delivered.”

31. The relevant portions of the draft Order to the disputed jurisdiction question were as follows. Firstly, as regards investigative and general management powers in relation to the Company as a whole:

“4. Without restricting the generality of paragraph 3 above, the JPLs shall have the following powers in relation to the Company:

- (a) conducting investigations into the Company’s affairs, segregated portfolios, subsidiaries or such joint-ventures, associated companies or other entities in which the Company has an interest;
- (b) obtaining documents and information concerning the Company and its business dealings, accounts, assets, liabilities or affairs from third parties;
- (c) retaining and employing barristers, solicitors or attorneys and/or such other agents or professional persons as the JPLs reasonably consider appropriate for the purpose of advising or assisting in the execution of their powers and duties;
- (d) seeking recognition of the provisional liquidation and/or the appointment of the JPLs in any jurisdiction the JPLs consider necessary, together with such other relief as they may reasonably consider necessary for the proper exercise of their functions within that jurisdiction, including but not limited to potential applications for recognition in Hong Kong and the People’s Republic of China.”

32. This suite of powers was designed to ensure the JPLs could ensure the Company’s affairs overall were and had been properly managed, most broadly, and more narrowly to enable them to deal with the conundrum created by the attachment obtained by the Judgment Creditors in Hong Kong. As regards EFI SP:

“5. The powers of the JPLs concerning the assets and liabilities of the Company held within or on behalf of its segregated portfolio, Enhanced Fixed Income SP (**‘EFI SP’**) shall be limited to the following:

- (a) Carrying on the business of the Company attributable to the EFI SP so far as may be necessary;
- (b) Selling or otherwise realising any of the Company’s assets attributable to the EFI SP (including any of its investments);

- (c) *Raising or borrowing money and granting securities over the property of the Company attributable to the EFI SP;*
- (d) *Engaging staff (whether or not as employees of the EFI SP) to assist them in the performance of their functions;*
- (e) *Consulting with the directors of the Company and the creditors and members of the Company attributable to the EFI SP on an ongoing basis to attempt to formulate a viable debt restructuring plan to maximize returns so as to satisfy the Company's liabilities attributable to the EFI SP;*
- (f) *Doing all things reasonably necessary to obtain the approval of the creditors and members of the Company that are attributable to the EFI SP to any proposed debt restructuring plan, and to implement any approved debt restructuring plan in respect of the EFI SP;*
- (g) *Distributing the assets attributable to the EFI SP to the creditors of the EFI SP;*
- (h) *Engaging such counsel, attorneys and/or other professional advisors, whether in the Cayman Islands or elsewhere, as they may consider necessary to advise and assist them in the performance of their duties;*
- (i) *Giving evidence in and making decisions in relation to:-*
 - (i) *...the 'HK Action'; and*
 - (ii) *...FSD 329 of 2022 (the 'Cayman Action');*
- (j) *Doing all acts and executing in the name of and on behalf of the Company, all deeds, receipts and other documents reasonably necessary in exercising their powers set out in this Order, and, for that purpose only, using the Company's seal;*
- (k) *For the purpose of reporting to the Court, ascertaining and conducting investigations into the affairs of the Company."*

33. The JPLs' proposed powers in relation to EFI SP essentially entailed their replacing the directors altogether. And while they explicitly empowered the JPLs to attempt to achieve a restructuring, their powers in relation to this SP were proposed to be broader than that, including selling and realising assets and making decisions in relation to litigation concerning the SP. In contrast the position as regards Greater China SP and Multi-Strategy SP was proposed to be as follows (supplemented by oversight powers similar to those seen in light-touch provisional liquidation orders):

*“6. Notwithstanding the appointment of the JPLs, the affairs and businesses concerning the assets and liabilities of the Company held within or on behalf of its segregated portfolios Greater China High Yield Income SP (“**Greater China SP**”) and Multi-Strategy Growth and Income Fund SP (“**Multi SP**”) are to continue in the usual manner under the management and control of the Company’s board of directors (the “**Board**”) and executive management teams.”*

34. The draft Order also proposed to adjourn the advertised hearing date of the Petition in December 2024 for a period of three months for the JPLs to prepare a Report to the Court. My proposed revision of this direction was designed to ensure that the other stakeholders in EFI SP, notably CMBI, had an early opportunity to provide input on the proposed course of the provisional liquidation. I summarily rejected the Judgment Creditors' criticisms about the lack of specificity about the proposed restructuring on the grounds that such concerns were not relevant in the present context. I considered it tempting but inappropriate to regard their failure to positively object at the *ex parte* stage as assent. I proposed adjourning the Petition to a date to be fixed in the week of 6 January 2024 for the JPLs to present a preliminary report. The perfected Order ultimately provided:

“15. The winding up petition presented by the company on 24 September 2024 and currently listed for hearing is adjourned to a date to be listed (the “Adjourned Hearing”) on the first available date on or after 6 January 2025, subject to the Court’s availability and the availability of Counsel.

16. At the Adjourned Hearing, the JPLs shall, in particular, provide a summary report on whether, based upon preliminary consultations with the creditors of EFI SP, a further adjournment should be granted to enable them to prepare a report on the status

or viability of any debt restructuring plan they have been able to formulate for the EFI SP.”

Findings: did the Court have the jurisdictional power to appoint the JPLs under section 104 (3) of the Act?

35. Section 104 of the Act provides so far as is relevant as follows:

“104. Appointment and powers of provisional liquidator

(1) Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) ...

(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company and on such an application the Court may appoint a provisional liquidator if it considers it appropriate to do so.”

36. Section 91B provides:

“91B. Appointment of a restructuring officer

(1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company —

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring...

(3) The Court may, on hearing a petition under subsection (1) —

(a) make an order appointing a restructuring officer;

(b) adjourn the hearing conditionally or unconditionally;
(c) dismiss the petition; or
(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.”

37. Section 91B is clearly creating a bespoke jurisdiction for insolvent restructuring which runs parallel to the winding-up regime which can only be accessed through a winding-up petition. It is accordingly obvious that if one wants to appoint Court officers to do the sort of things that provisional liquidators do, on the grounds that the company is *prima facie* liable to be wound-up, one would not appoint restructuring officers under a regime dedicated to restructuring alone.

38. How, pithily, does one approach statutory construction? Lady Arden in *Shanda Games Ltd - v-Maso Capital Invs. Limited* 2020 (1) CILR 293 said this:

“27...the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.”

39. Applying this approach commended to the Court by Mr Faulkner, it is impossible to construe the broad jurisdiction conferred by section 104 (3), “the Court may appoint a provisional liquidator if it considers it appropriate to do so” as not embracing an application such as the present one which:

- (a) seeks to impose independent management over a segregated portfolio company in circumstances where its management accepts (by virtue in part of a Court of Appeal Judgment) that the governance of the Company has been brought into question;
- (b) seeks to explore a restructuring in relation to both solvent and insolvent portfolios; and
- (c) is an application made in support of a petition based on both just and equitable and insolvency grounds.

40. It requires creative writing skills rather than statutory interpretation skills to formulate the form of words that must be read into section 104 (3) if they are to exclude a Petition such as this.

But, framing the issue broadly, the subsection would have to be read as including a proviso to the following effect: ‘provided that provisional liquidators may not be appointed in any case where their powers are to include the pursuit of the implementation of an insolvent restructuring in relation to the whole or any part of a company’s business. Only restructuring officers appointed under section 91B can implement any form of corporate restructuring’. Not only would this lead to absurd results, provisional liquidators appointed in relation to companies with different books of business would arguably be required to appoint restructuring officers to restructure those parts of the business they wished to restructure and would only be able to “liquidate” those parts requiring liquidation. There is nothing in the statutory language, context or legislative history which points to such an improbable legislative purpose.

41. This conclusion finds the most persuasive possible support from the legal and factual analysis of Asif J in *Kingkey* where he appointed the same individuals as joint provisional liquidators for reasons including the fact that they were needed both to pursue a restructuring and also to impose independent management on the company:

“35. It seems to me to be implicit from the wording of these subsections [91B (5) (b) and (c)] that there is a built-in presumption in s. 91B that the company’s board of directors will retain at least some powers and functions to continue to control the company...

37. In this case, there are ongoing unresolved disputes within Kingkey’s management which mean that it is unrealistic to proceed on the basis that the directors will be able to continue to manage the day-to-day operations of the company. The appointment of a restructuring officer is therefore unlikely to be inadequate to address the current issues within Kingkey.”

42. In short, the entirely plausible construction contended for by Mr Faulkner (that section 91B (1) governs dedicated insolvent restructuring proceedings) simply does not arise for determination in the present case. The contention is that if one is proposing to commence the equivalent of a light-touch provisional liquidation where the appointees’ primary function is overseeing the directors’ implementation of a restructuring, section 91B is the sole statutory gateway. That scenario was simply not the present case. Whether joint provisional liquidators can be appointed under section 104(3) for the sole purposes of pursuing an insolvent restructuring with the directors continuing in place is an intriguing question, but one which must await determination in an appropriate future case.

43. It is noteworthy that no challenge was made to the proposition that the winding-up jurisdiction applied to a segregated portfolio company. It clearly did, and more obviously so when the Petition sought to wind-up the entire Company. In *Re Holt Fund SPC*, a restructuring officer petition was presented by the company in relation to some, but not all, of its segregated portfolios. I heard the unopposed application on 22 November 2023 and reserved judgment to receive supplementary submissions on the jurisdiction to appoint restructuring officers over less than the entire company. Nearly four weeks later, on 19 December 2022, I granted the application, having required some time to reach the conclusion that my strong provisional view, that the receivership jurisdiction was the exclusive gateway for liquidating individual portfolios, was wholly misconceived. On reflection my “*weeping and gnashing of teeth*” in that case was uncalled for, because a straightforward reading of the restructuring officer regime suggests that it can be deployed in relation to specific classes of creditors and is not only available where the entirety of a company’s business would benefit from a restructuring. The automatic stay of all proceedings against the applicant company (section 91G(1)) can surely be modified by Court order.
44. The reasons for my decision in *Re Holt Fund SPC* were not delivered until 26 January 2024. Prior to that, there was no clear authority for the proposition that restructuring or winding-up proceedings could be commenced in respect of some but not all segregated portfolios. In *ABC Company (SPC)-v- J and Company Limited* 2012 (1) CILR 300, the Cayman Islands Court of Appeal declined to express a view on whether a single segregated portfolio could be wound - up otherwise than under the section 224 receivership regime. The only necessary holding was that an entire SPC could be. In *Re Coinful Capital Fund SPC*, FSD 86/2023 (IKJ), Judgment dated 5 July 2023 (unreported), Doyle J confidently held, in an *ex tempore* judgment delivered after the trial of the Receivership Proceedings involving the Company, that the creditor of the company’s sole segregated portfolio could apply for the appointment of provisional liquidators on a winding-up petition. There was only one case considered in *Re Holt Fund SPC* which I considered supported the proposition that the winding-up jurisdiction could be invoked in relation to less than the entire SPC, and that was in far from crystal clear terms.
45. *Re Performance Insurance Company SPC*, FSD 70/2021 (RPJ), Judgment dated 6 April 2022 (unreported) more clearly supported the present Company’s jurisdictional argument. Regrettably, its context was not described in *Re Holt Fund SPC* with complete precision. It only indirectly supported the proposition that the winding-up jurisdiction could be engaged in relation to some insolvent portfolios because the judgment concerned appointing an additional

liquidator to deal with conflicts between the solvent and insolvent portfolios. This in fact suggests that although fraud allegations in relation to some portfolios was the primary rationale for the appointment of official liquidators, their appointment gave them at least some authority over the solvent ones as well. Indeed, Parker J observed:

“9. It was the JOLs’ stated intention to wind-up the Company and the (insolvent) SPs affected by the fraud, but to novate the unaffected SPs...Novation would result in the transfer of the unaffected (solvent) SPs ...to new structures of their own choosing.”

46. This was remarkably similar to the approach proposed for the provisional liquidation in the present case, save that it was proposed to consider the viability of a restructuring of the insolvent portfolios first, rather than winding them up. As I recall, in the course of the hearing in *Re Holt Fund SPC*, I was also referred to an Order made in another winding-up matter (where no reasoned decision was given) where the title of the cause clearly indicated that a winding-up petition had been presented in relation to specific portfolios, rather than the company as a whole².
47. With all of these authorities being placed before me in advance of the hearing of the present *ex parte* application, and building on my relatively recent experience in *Re Holt Fund SPC*, I was able to confidently conclude at the end of the half-day hearing that the JPLs could be appointed in relation to the Company as a whole but with different powers in relation to its solvent and insolvent portfolios in light of differing legal and commercial concerns.
48. I should also add that the above review of previous cases appears to explain why CMBI’s advisers presumably formed the view a section 224 receivership petition was the only straightforward liquidation route for a creditor to pursue in relation to a claim against one of many segregated portfolios in an SPC. In *Re Coinful Capital Fund SPC*, the petitioner (relying on a statutory demand served in relation to a debt owed by the Company in respect of the only segregated portfolio) sought, alternatively, the appointment of a receiver under section 224 of the Act. That reveals the uncertainty which existed prior to that decision about the availability of the winding-up jurisdiction. Properly analysed, this decision provides clear and valuable authority for the proposition that the winding-up jurisdiction is indeed available to creditors (and companies) on the insolvency ground when a single portfolio is insolvent.

² I have been unable to confirm the accuracy of this recollection.

49. Whether or not there are other solvent portfolios ought as a matter of principle to be irrelevant to the question of whether the winding-up jurisdiction is available to a stakeholder with interests limited to a single portfolio. It would potentially be relevant to the separate question of whether or not a winding-up order ought ultimately to be made, but as *Re Performance Insurance Company SPC* demonstrates, liquidators of entire SPCs are legally required to recognise the segregation structure and adopt a ‘horses for courses’ approach. Because a segregated portfolio has no separate existence and the SPC is liable for its debts, the insolvency of a portfolio results in the insolvency of the SPC as a matter of law. This is why Doyle J was clearly correct to hold in *Re Coinful Capital Fund SPC*:

“16. I am satisfied that the Petitioner is a creditor and has standing...

20. I am satisfied that I should exercise my discretion in favour of making a winding up order...

21. In particular, I note the advantages of a winding up order and the limitations of a receivership order and the difficulties that may be encountered in that respect. I am satisfied that in the particular circumstances of this case, a winding up order is the most appropriate form of relief. The evidence before me indicates that the Company has a single portfolio.”

50. This decision, albeit reached on an unopposed basis, clearly establishes that creditors of insolvent segregated portfolios wishing to circumnavigate the treacherous waters of the section 224 balance sheet insolvency test have another potential route to follow. It provides additional admittedly indirect support for the proposition that an SPC ought itself to be able to invoke the insolvency winding-up jurisdiction, even if it is proposed to explore a restructuring as part of the winding-up process.

Findings: merits of the application

51. The merits of the application to appoint the JPLs can be dealt with shortly, because the application was made by the Company and it was solely opposed by stakeholders who might arguably be viewed as *de facto* debtors of the Company. Mr Potts KC aptly placed general reliance on *Re United Medical Protection & Ors* [2002] NSWSC 413 where Austin J observed:

“16...The fact that a provisional liquidator is sought by the company is not conclusive in favour of appointment, but it is a relevant and frequently persuasive consideration...”

52. In my own experience, the fact that a company's management is willing to voluntarily cede significant control to independent officeholders will typically be very persuasive indeed. This is because when companies sail into troubled waters and lose the confidence of stakeholders, many managers are unable to accept that "*the gig is up*". Creditors or contributories are compelled, with no clear visibility of the inner workings of the company, to make a positive case for appointing independent management. Where a company's management, perhaps belatedly and under pressure, itself proposes the appointment of independent officeholders, that will usually be very powerful evidence indeed that the appointment is genuinely required. Here it was proposed to cede full control of the troubled EFI SP to the JPLs. That helps to make the point that this was not a restructuring petition alone where the directors would still retain significant control over the troubled business.
53. In oral argument, Mr Potts KC indicated that the Receivership Proceedings formed an important part of the background to the decision to make the present application. The merits of that argument were readily apparent. CMBI, EFI SP's largest redemption creditor, commenced the Receivership Proceedings in 2022. The Petition was heard on 11 May 2023. A central controversy was whether the balance-sheet insolvency test in section 224 (1) (a) of the Act applied to segregated account companies. Whether that test was met or not was obscured by the absence of audited financial statements. Doyle J was told that audited financial statements would be forthcoming, possibly by the end of May 2023. The Judge delivered judgment before the end of May and dismissed the Petition. CMBI appealed against that decision. In *CMBI-v-Oakwise Value Fund SPC*, CICA (Civil) Appeal No. 9 of 2023, Judgment dated 13 June 2024 (unreported), the Court of Appeal (Field JA) set aside that decision and ruled that (at paragraph 71):

"(2) the appellant's receivership petition be re-heard by another FSD judge with liberty to adduce further evidence to take account of relevant events occurring since 11 May 2023 and to amend the petition accordingly..." [Emphasis added]

54. An important aspect of post-trial events was recorded in the same Judgment. The appeal was heard on 7 November 2023 and by that date the audited financial statements (which were supposedly imminent in May 2023) had still not materialised. More than that, Field JA:
- (a) observed: "*In the course of the hearing, Ms Ter-Berg, counsel for CMBI, handed up a letter dated 7 November 2023 (the date of the hearing) addressed to her from CIMA*

that stated that the date by which the audited financial statements (“AFS”) of Oakwise should have been issued was 15 October 2023 and as of the date of the letter, Oakwise’s AFS were outstanding” (paragraph 44); and

- (b) held that the unaudited financial statements relied upon in evidence by Mr Wang, director and witness (in those proceedings and these), were unreliable.

55. Post-trial events decisively tipped the scales in favour of CMBI and against the Company. The Cayman Islands Court of Appeal judgment was clearly a pivotal factor in the Company’s decision to present the Petition and seek the JPLs’ appointment. Mr Wang should be applauded for having the wisdom to appreciate the objective picture portrayed by the Court of Appeal’s decision, putting stakeholder interests ahead of personal pride and accepting (in effect) that “*the gig is up*”. The suggestion that this application was designed to prejudice stakeholders could only be advanced by parties who, because they hoped to recover their investment through a process of judgment enforcement, no longer perceived they had a stake in the Company. That said, their jurisdictional challenge has, perhaps fortuitously, indirectly assisted the Company and its stakeholders through generating a judgment which:

- (a) provides a far firmer basis to the 31 October 2024 Order than would have accrued from an unopposed Order unsupported by any reasoned judgment; and
- (b) deals with a very novel legal and factual matrix and seeks to provide guidance for future similar cases in relation to a commercial and legal situation which is likely to recur.

Conclusion

56. For these reasons, on 31 October 2024 I appointed the JPLs and reserved costs. However, my provisional view is that no adverse costs order should be made. If any costs Order is required, it should probably be as originally proposed in the draft Order submitted before the hearing, namely that the (Applicant’s) costs of the application should be recoverable as an expense of the provisional liquidation.



THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

241216 Re Oakwise Value Fund SPC - FSD 303 of 2024 (IKJ) - Reasons for Decision