

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

Cause No.: FSD 111 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

**AND IN THE MATTER OF THE WIMBLEDON FUND, SPC (IN VOLUNTARY
LIQUIDATION)**

IN CHAMBERS

Appearances: Mr. Nick Hoffman and Mr. James Elliott of Harneys on behalf of the
Petitioner
Ms. Kate McClymont and Mr. Kyle Broadhurst of Broadhurst LLC
on behalf of the Wimbledon Financing Master Fund Ltd (in official
liquidation), a creditor

Before: The Hon. Justice Raj Parker

Heard: 7 September 2017 and 10 January 2018

**Draft Judgment
Circulated:** 29 January 2018

Judgment Delivered: 5 February 2018



HEADNOTE

Petition for voluntary liquidation to continue under the supervision of the court - identity of the liquidators - objection to voluntary liquidators on the basis of apparent conflict of interest- test to be applied

JUDGMENT

Introduction

1. Wimbledon Fund, SPC (In Voluntary Liquidation) (the “**Fund**”) is a segregated portfolio company registered in the Cayman Islands on 17 May 2006.
2. On 23 May 2017 the Fund’s shareholders appointed Michael Pearson of FFP Ltd as voluntary liquidator of the Fund (“**the VL**”) and, together with Andrew Childe, (“**the FFP nominees**”).
3. The directors informed the VL by email dated 23 May 2017 that they would not be prepared to provide declarations of solvency in respect of the Fund. The VL duly petitioned the court requesting that an order be made on the papers in accordance with section 124 of the *Companies Law* (2016 Revision) (the “**Companies Law**”) and in compliance with Order 15 of the *Companies Winding Up Rules* (“**CWR**”).
4. It is common ground that a supervision order should be made in due course. The only outstanding issue is the identity of the official liquidators.
5. Christopher Johnson and Russell Homer are the Joint Official Liquidators (“**JOLs**”) of the Master Fund having been appointed in July 2014. The Master Fund is a judgment creditor of the Class C portfolio of the Fund and is the only creditor (apart from the Cayman Islands Monetary Authority) which is not a service provider. It is the largest creditor on behalf of Class C segregated portfolio (“**Class C**”) of over US\$1 million which represents well over 90% of the total liabilities of Class C.
6. There are disputes that need to be dealt with in the liquidation concerning claims in relation to various frauds allegedly committed by different parties and multiple cases in litigation in the US including litigation involving the Master Fund.



7. The JOLs' would like to have Mr. Declan Magennis and Mr. Russell Smith of BDO CRI (Cayman) Ltd ("**BDO**") appointed as joint official liquidators of the Fund in the place of the FFP nominees. They had previously nominated Graham Robinson on the basis that the FFP nominees were conflicted. However they subsequently withdrew that nomination for essentially the same reason.

Summary of Master Fund case

8. Ms. McClymont appeared on behalf of the JOLs' of the Master Fund. She submitted that the VL was selected by the Fund's former directors and the appointment was supported by one minority shareholder only on 23 May 2017. This she said was the first and only opportunity for interested parties in the liquidation to be heard on who should be appointed as official liquidators. The candidates that are proposed in opposition to the FFP nominees are clearly independent and experienced and should be appointed. As the sole creditor which has put in evidence on this application and the only major creditor of the Fund she submits that the Master Fund has a greater interest in the ultimate outcome of the liquidation than any other stakeholder and accordingly its views should be given considerable weight.
9. Moreover she submits that it is not open to the VL to advocate for himself to be appointed and that the court should pay greater attention to those who have the greatest economic interest in the outcome of the liquidation.
10. As to the real point of objection she submits that the FFP nominees have a conflict of interest arising from investigations into certain transactions which involve retained attorneys. In particular Cole Schotz ("**CS**") as US counsel has been engaged for some time concerning litigation between the Fund and the Master Fund in the US and are adversarial to the Master Fund. She argues that since Mr. Pearson continues to engage CS he cannot be independent. She argues that the main stakeholder in the liquidation, the Master Fund cannot be expected to accept that the attorneys who have acted against their interests for

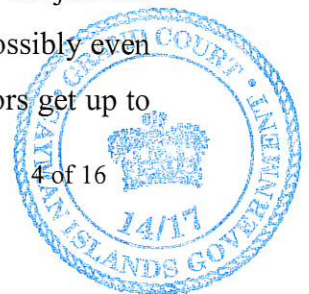


years are now acting neutrally in their best interests as attorneys for the VL in respect of the same subject matter.

11. There are issues concerning fees paid to the VL's attorneys both in the US and the Cayman Islands arguably made allegedly after the fund was insolvent and it is argued in circumstances where Class C was subject to an order of the New York Court requiring it to pay the Master Fund, which Mr. Pearson will need to investigate. Even though those monies have been refunded by the relevant attorneys and are held on account she argues that that does not resolve the appearance of bias as the payments should never have been made.
12. Ms. McClymont submits that together with his attorneys, the VL appears to be continuing an adversarial approach which those attorneys had previously adopted when they were instructed by the Fund's former directors in the litigation against the Master Fund.
13. Whilst certain other points appear in the evidence submitted on behalf of the Master Fund relating to the VL's alleged conduct and competency, uncooperative and aggressive approach (leading to an unnecessary escalation of costs) some of which were repeated in written argument, those points were not pursued in oral submissions by Ms. McClymont. She focussed on the main legal basis for objection: because of his relationship with the retained attorneys there was a clear perception of bias concerning the VL which meant that the court could not appoint FFP nominees and should appoint the Master Fund's nominees against whom no objections have been raised.

Summary of the Fund's case

14. Mr. Hoffman appeared on behalf of the Fund. He argued that the court should have no hesitation in appointing the FFP nominees since to do otherwise would be to subject the stakeholders in the liquidation to enormous additional costs and delay (and possibly even more serious consequences if deadlines were missed) by having new liquidators get up to



speed. He rejected the allegations made concerning the alleged conflict of interest of the FFP nominees which he submitted was not made out on the evidence before the court. He argued that the fact that the Master Fund is the largest creditor of one of the Fund's three portfolios (Class C) does not entitle it to dictate the course of the liquidation of that aspect, let alone the entire estate. He argued that it attempts to do so by proposing new nominees in place of an incumbent VL who was performing a professional, independent and thorough job, which has been ongoing since May 2017.

15. He submitted that the arguments relating to a conflict of interest are not only without substance but are on analysis an attempt to criticise the VL's work in the liquidation to date. He submits that the decision is effectively a straight choice between on the one hand the incumbent VL and his team who have carried out significant amounts of work and a brand new team who have no knowledge of any of the issues facing any of the three portfolios making up the Fund. He argues that from the reasonable position of a fair-minded stakeholder there is nothing to show that Mr Pearson is engaged in or has been engaged in a relationship that is capable of impairing the appearance of independence and in any case there is nothing to show that the matters complained of are sufficiently material on the facts of the liquidation to cause a fair-minded stakeholder to reasonably object to the VL.

The approach of the court

16. Under section 124 (1) of the *Companies Law* where a company is being wound up voluntarily its liquidator shall apply to the court for an order that the liquidation continue under the supervision of the court unless, within 28 days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form. Since they did not, the VL duly applied for a supervision order and in due course the liquidation will proceed under court supervision.
17. Order 15 Rule 1 of the *CWR* confirms the position that an application for a supervision order must be made by company's voluntary liquidator in accordance with section 124 of



the *Companies Law* if its directors fail to make and deliver their declaration of solvency to the voluntary liquidator within 28 days of the commencement of the liquidation.

18. Under Order 15 Rule 2 of the *CWR* the procedure for an application under section 124 is set out. It prescribes various things which should be contained within the Petition, including:

“(3).....

- (e) *if the voluntary liquidator is a qualified insolvency practitioner, a statement that he consents to being appointed as official liquidator; or*
- (f) *if the voluntary liquidator is not a qualified insolvency practitioner or is unable to comply with the independence requirements of the Regulations or is unwilling to be appointed as official liquidator, the name and address of a qualified insolvency practitioner nominated for appointment as official liquidator.”*

19. The Petition dated 2 June 2017 set out at paragraph 12 that the FFP nominees satisfied these requirements:

“Michael Pearson and Andrew Childe

- a. are qualified insolvency practitioners as defined in section 89 of the Companies Law and as prescribed by regulation 4 of the Insolvency Practitioners Regulations 2008 (as amended) (the Regulations);*
- b. meet the residency requirements contained in regulation 5 of the Regulations;*
- c. meet the independence requirements prescribed by regulation 6 of the Regulations;*
- d. meet the insurance requirements prescribed by regulation 7 of the Regulations and FFP holds a trade licence which authorises its staff to carry on business as professional insolvency practitioners; and*



e. *consent to their appointment as official liquidators of the fund, if so appointed by the court.*”

20. This is supported by Mr. Pearson’s first affidavit of 2 June 2017 and by Mr. Childe’s first affidavit of 2 June 2017.
21. Matters relating to the hearing of a section 124 petition are set out at Order 15 Rule 5 of the *CWR*. If the voluntary liquidator is a qualified insolvency practitioner who has sworn an affidavit verifying that he is willing and properly able to accept an appointment as official liquidator, a Judge may make a supervision order under section 124 of the *Companies Law* without the need for a hearing providing notice has been given to the company’s creditors and there is no reason to believe that there is any objection. Accordingly the matter may be dealt with, in the absence of objection, administratively.
22. There is of course an objection made in this case and in such circumstances under sub paragraph (4) of Rule 5 such an objection may be heard upon the question of who should be appointed as official liquidator.
23. The *Insolvency Practitioners Regulations* 2008 (as amended) provide at 6:

“Independence requirement

- 1) *A qualified insolvency practitioner shall not be appointed by the court as official liquidator of the company unless he can be properly regarded as independent as regards the company
.....”*

24. In *Hadar Unreported 13 August 2013*, Jones J made it clear that it would not be appropriate for individuals to nominate themselves for appointment unless they can be properly regarded as independent in accordance with the *Insolvency Practitioners Regulations* (as amended). He formed the view in that case that it was not appropriate to make a supervision order and appoint official liquidators’ *“on the papers”* and directed that any persons wishing to appear at the hearing and oppose should do so.



25. In the event there was opposition on the basis of a lack of independence. On such an application he made it clear that the voluntary liquidators should adopt a neutral position setting out all the relevant factual circumstances in an even handed way for the benefit of the court and all the stakeholders and that it would be improper for a voluntary liquidator to adopt the role of advocate on behalf of a class who support their appointment as official liquidators and against a class who support other candidates. The voluntary liquidators in question came to their own conclusion that client relationships in their firm were not material in the circumstances of the liquidation. Jones J said this was relevant evidence which he took into account, but it was not conclusive.
26. The learned Judge came to the conclusion on the facts of that case that a fair-minded stakeholder would reasonably object to the appointment of the voluntary liquidators as official liquidators and he duly did not appoint them. Indeed as a result of regulation 6 of the *Insolvency Practitioners Regulations* (as amended) he recognised that the court was not able to appoint them as official liquidators once it had formed the view that they could not be regarded as independent as regards the particular fund. The fact that they had done an enormous amount of work over a two-month period in their capacity as voluntary liquidators was therefore irrelevant once that view had been formed.
27. Jones J said this at paragraph 17:

“Whether or not a firm of insolvency practitioners can be regarded as independent as regards any particular company in liquidation depends upon the existence or nonexistence of professional or economic relationships which are regarded by the court as creating a situation in which the appearance of complete impartiality is compromised. Appearances matter.”

28. And at paragraph 18:

“Whether or not any particular kind of professional or economic relationships will lead to the conclusion that an insolvency practitioner can or cannot be properly regarded as independent must depend upon the factual circumstances of each case which will vary in an infinite variety of



ways. The court must first identify the relationship and determine whether it is capable of impairing the appearance of independence. If the answer is yes, the court must then consider whether its existence is sufficiently material in the factual circumstances of the liquidation in question that a fair minded stakeholder would reasonably object to the appointment of the nominee in question. ...”

29. In an earlier case *AJW Master Fund [2011] (1) CILR p 363 Jones J*, recognised that the decision to bring an insolvent voluntary liquidation under the supervision of the court is often a formality:

“.. but the choice of official liquidator is not a formality. In this regard, the court is exercising a discretion in respect of which it should take into account the views of the stakeholders.”

30. Clearly the court must be guided primarily by what is in the best interests of those having a real and ultimate economic interest in the fund, namely the creditors; not by what is in the best interests of the prospective liquidators - see *Bay Capital Unreported 1 October 2015: Chief Justice Smellie applying Hadar*.

Analysis

31. First I should make it clear that I have come to the clear view that this case is not like that which confronted Jones J in *Hadar*. I find that the FFP nominees’ evidence has been submitted to assist the court and is suitably neutral. They deal with the various strands of opposition from the Master Fund fully and fairly. They have not been advocates in their own or any other partisan cause. I would not expect them to behave in that way as they are fiduciary office holders operating under the aegis of the court.
32. Second I am conscious that I should give due weight to the objection made by the Master Fund in circumstances where it is clear that they have a substantial economic interest in the outcome of the liquidation.



33. Applying the relevant legal analysis, the question I have to consider in the exercise of my discretion is: whether FFP nominees can properly be regarded objectively as independent.
34. Is there evidence to show that the appearance of complete impartiality is compromised? If there is a relationship which is capable of impairing the appearance of independence I need to consider whether its existence is sufficiently material to cause a fair-minded stakeholder to reasonably object on the basis of a conflict of interest.
35. To answer that question it is necessary to review certain parts of the evidence submitted by both parties.

The evidence

36. I have carefully reviewed the affidavit evidence in this case (including exhibits) submitted by Michael Pearson - 1, 2, and 4 and Andrew Childe - 1. I have also carefully reviewed the affidavit evidence (and exhibits) submitted by Graham Robinson - 1, 2 and 3; Christopher Johnson - 1, Russell Smith - 1 and Declan Magennis - 1.
37. The critical factual issue raised by Ms. McClymont's submissions are whether the VL's relationship with the two firms of attorneys in question, namely Cole Schotz and Harneys and the investigations he will need to carry out into payments made to them, results in a material impairment of the appearance of his independence, looked at objectively and from a standpoint of reasonableness.
38. Mr Robinson who is an insolvency practitioner with Chris Johnson Associates Ltd in his first affidavit on behalf of the Master Fund of 10 July 2017 at paragraph 41 states:

“ Despite the insolvency of the fund substantial transfers were made between December 2016 and 24 April 2017 effectively stripping all funds from the class C account. From the information available it appears that payments were made to the former directors, unnamed consultants, Fund administration, LLC, Cole Schotz and Harneys. Further, on 24 April 2017 one month prior to the appointment of Mr Pearson, US\$ 85,526.28 was



transferred to a different bank which appears to have an account in the name of class C. This account is located outside of New York. It may well have been that this was an attempt to avoid the NY Supreme Court's jurisdiction. The JOLs have not yet been able to obtain information as to what became of those funds....”

39. At paragraph 44 he goes on to state:

“ In light of the foregoing, I believe it is necessary for an investigation to be undertaken into the transfers made by the fund in apparent preference to parties other than [the Master Fund]. Given that investigation involves payments being made to parties currently advising Mr Pearson I question whether it is appropriate for Mr Pearson to perform that investigation.”

40. Mr. Pearson answered in this way at paragraph 49 of his second affidavit of 11 July 2017:

“ I note Mr Robinson's comments as to the alleged transfers of money to various service providers on or about the date of the judgment award... I am in the process of investigating the same and I will of course provide a summary of my findings to the court in the ordinary course of the official liquidation. However, having considered Robinson 1 and certain of the transfers alleged to have been made by the Fund, it appears to me that the transfers to Cole Schotz and Harneys were made in those firms' capacity as legal advisers to the Fund in order to progress the funds voluntary liquidation for the benefit of its stakeholders.”

41. Mr. Johnson in his first affidavit dated 14 July 2017 on behalf of the Master Fund identified at paragraph 9 the specific payments to the attorneys that Mr. Pearson would need to investigate and asserted that he was not the right person to conduct those investigations as his own attorneys (engaged to act for him in his capacity as voluntary liquidator of the fund) are the recipients of the funds in question.

42. He states at paragraph 11:

“ This is a very clear conflict of interest that prevents Mr. Pearson and Mr. Childe conducting investigations that are necessary in the liquidation and



therefore, they have a conflict of interest that prevents their joint appointment as official liquidators of the fund....”

43. Mr. Pearson in his fourth affidavit dated 1 September 2017 states at paragraph 8 that he has taken various decisions in relation to the liquidation:

“ One of these has been to appoint new, independent US Counsel to advise in relation to class C to assuage the accusations from [the Master Fund JOLs] regarding the role of previous counsel causing me to be conflicted.”

44. He goes on to state at paragraph 21 that he has been advised by the new US counsel appointed for Class C on 4 August 2017 that it has a strong breach of contract claim against the Master Fund for a failure to pay US\$ 700,000 under an agreement with third party. He says that he has been advised that the net effect such a claim if successful may be to substantially or completely cancel out the judgment award made in favour of the Master Fund.

45. He also says in that paragraph that the former directors terminated the engagement of previous counsel for Class C, Cole Schotz on 2 May 2017 before the commencement of voluntary liquidation.

46. He goes on to state:

“ Accordingly I would imagine that any claim that I have a conflict of interest in this regard must be moot and fall away”.

47. In paragraph 30 he confirms that he will approve the Master Funds proof of debt in the official liquidation if he is appointed, but he reserves the Fund’s right to pursue any right of appeal which it may have against the decision of the New York Court.



48. At paragraph 58 taking issue with Mr. Robinson's assertion that those attorneys continue to advise him, he denies as untrue the allegation made by Mr. Robinson that he has an ongoing association with the US attorneys Cole Schotz in relation to Class C which would cloud his professional judgment in adjudicating the claim of the Master Fund. He repeats that their representation of Class C had been terminated by the former directors prior to his appointment.
49. He confirms in paragraph 67 that their engagement has never been renewed by him in relation to that class and he goes on to assert that in any event there is no basis to suggest that Cole Schotz would conduct itself anything less than professionally.
50. At paragraph 68 he confirms that the attorneys have agreed not to pay themselves any cash from the amount held on account until there is sanction by the court so that it cannot reasonably be suggested that the liquidator has acted improperly or that he would have a conflict bringing the question of fees before the court in due course.
51. In Mr. Robinson's second affidavit of 1 September 2017 at paragraph 20.2 he refers to two payments made to the VL's Cayman legal counsel Harneys in the sum of US\$20,000 on 21 April 2017 and US\$ 55,000 on 4 May 2017 from Class C's account. He says that this raises a question as to whether it was appropriate for funds to be transferred from Class C to pay for general legal expenses of the Fund. Also he says it raises a question as to whether it was appropriate for funds to be transferred to attorneys in circumstances where Class C was subject to an order of the New York Court and "*where the Fund was insolvent*".
52. At paragraph 20.3 he makes reference to US\$25,000 paid to Cole Schotz on 26 January 2017. This he says relates to services provided to Class C in relation to the New York litigation but it raises the same question as to whether it should have been made "*when the Fund was insolvent*". In passing I note that any payment by the Fund in January 2017 was likely to have been made at a time when liquidation was not imminently in prospect.
53. He goes on to state at paragraph 20.6:



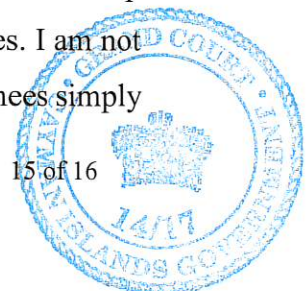
“Mr Pearson in his second affidavit accepts that investigations into such transfers are required. He, however, suggests that he is the appropriate party to perform such an investigation. In the circumstances, where he will be investigating payments made to his own legal counsel (both Cayman and US counsel) and may well need to take steps to recover those payments, [the Master Fund] does not believe that he is the appropriate party to perform that function. It is the view of [the Master Fund] that an obvious conflict arises.”

54. Having reviewed the relevant passages from the evidence, I will now answer the question I posed concerning whether FFP nominees can properly be regarded as objectively independent. Is there any evidence to suggest as a matter of appearance that their complete impartiality is compromised such that a reasonable person would object to their appointment?
55. In passing I note that both firms of attorneys have agreed not to pay themselves anything before sanction by the court. That is made clear at paragraph 68 of Mr. Pearson's fourth affidavit.
56. Taking the position of each firm of attorneys separately it seems to me that the Cole Schotz relationship is not capable of impairing the appearance of independence of FFP nominees. I accept Mr. Pearson's evidence that as far as he was concerned that relationship has been terminated in respect of Class C and was indeed terminated before he was appointed as VL (although there is a suggestion in the evidence - see third exhibit of Mr Robinson's affidavit - that in July 2017 they had not removed themselves from the record and corresponded with the Court). In any case he has now quite properly retained new US counsel to advise in relation to the litigation. Whatever long history of litigation Cole Schotz was involved in for the Fund (which Ms. McClymont submitted was brought to frustrate the Master Fund's attempts to enforce their judgment,) it does not seem to me to impugn FFP nominees' appointment.
57. In any event a liquidator who works with firms of attorneys and takes adverse positions to certain parties does not simply because of that relationship become inevitably conflicted



so that a fair-minded stakeholder would reasonably object to their appointment. It all depends on the circumstances. Attorneys will exercise independent judgment in relation to the legal advice they are giving and the liquidator (in the position of a client) will exercise his own professional judgment in what is in the best interests of the all stakeholders of the Fund (in all three Classes in this case), and will choose whether to accept or reject that advice. I accept that being part of a ‘team’ might give an appearance or perception that they all are interested in a particular outcome against a particular adversary, but unless that outcome conflicts with the best interest of all the stakeholders of the Fund I do not see why that inevitably gives rise to a material conflict.

58. I do not accept that a fair-minded stakeholder, from an objective standpoint, would reasonably object to the appointment of Mr. Pearson because of an investigation he needs to make into payments made to former US Counsel who had advised the Fund in litigation involving a major creditor, before his appointment and which he personally was not involved in. There is nothing in the evidence to suggest that the FFP nominees have an interest or even an appearance of an interest which conflicts with achieving the best outcome for the Fund as a whole. There is nothing in the evidence to suggest the FFP nominees are incapable of acting professionally, impartially and fairly in relation to – any investigation into payments made to Cole Schotz.
59. As to Harneys, Ms. McClymont did not argue the conflict was as clear as she submitted that it was with Cole Schotz.
60. Again in passing I note that in relation to the payments made to Harneys Mr. Pearson makes clear at paragraph 19 of his fourth affidavit that the relevant sums are being held on trust for him in his capacity as voluntary liquidator of the Fund.
61. The relationship with Harneys continues but I do not detect anything in the relationship which is capable of impairing the appearance of independence of FFP nominees. I am not persuaded that a fair-minded stakeholder would reasonably object to FFP nominees simply



because they will need to investigate payments made to a law firm which has advised and continues to advise the Fund in Cayman. FFP nominees are independent of Harneys and are in a client relationship on behalf of the Fund. There is no evidence to suggest that they are not capable of fairly, impartially and independently investigating any payments which have been made to Harneys (allegedly in breach of any law or obligation) and reporting to the court and stakeholders in due course. None of the evidence adduced by the Master Fund raises the appearance that the impartiality of FFP nominees has been compromised in this regard.

62. It follows that I reject the relief sought by the Master Fund and grant the relief sought in the Petition to appoint Michael Pearson and Andrew Childe of FFP Ltd as joint official liquidators of the Fund.



THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT