IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD NO: 72 OF 2019 (IKJ)

IN THE MATTER OF SECTION 131 OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF ADAMAS ASIA STRATEGIC OPPORTUNITY FUND LIMITED (IN VOLUNTARY LIQUIDATION)

IN COURT

Appearances:	Mr Tom Smith QC of counsel and Mr Chris Keefe and Ms Siobhan Sheridan of Walkers on behalf of the Public Institution for Social Security for the State of Kuwait (the "Petitioner")
	Mr Stephen Cogley QC of counsel and Mr Marc Kish and Mr Shaun Maloney of Ogier on behalf of Adamas Capital Partners Limited (the "Manager")
	Mr Sam Dawson on behalf of the Joint Voluntary Liquidators of Adamas Asia Strategic Opportunity Fund Limited (in Voluntary Liquidation) (the "Company")
Before:	**The Hon. Justice Kawaley**
Heard:	**20 June 2019**
Draft Judgment Circulated:	**15 July2019**
Judgment Delivered:	**23 July 2019**

HEADNOTE

Petition for Supervision Order in respect of a solvent company in voluntary liquidation-petition presented by participating shareholder claiming to represent 100% of the economic interests in the company-articles vested sole management powers and shareholder voting powers in the Manager-whether views of participating shareholder or management shareholder should prevail in relation to a solvent winding-up-standing of petitioner to seek Supervision Order-construction of Companies Law (2018 Revision), s. 131(b)-whether statutory requirements for Supervision Order met in circumstances of present case

JUDGMENT

Introductory

1. Section 131 of the Companies Law (2018 Revision) ("*Winding up subject to supervision of the Court*") (the "Law") provides as follows:

> "*131. When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that-*
>
> ***(a)*** *the company is or is likely to become insolvent; or*
>
> ***(b)*** *the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.*"

2. The Company was incorporated in the Cayman Islands on November 10, 2005. It is registered with the Cayman Islands Monetary Authority as a mutual fund.

3. The Petitioner, a Kuwaiti public institution responsible for implementing a social security scheme, invested $75 million in the Company and redeemed approximately $31 million of such investment.

4. On or about January 14, 2019, overriding the wishes of the Petitioner (the sole remaining Participating Shareholder), the Manager passed a resolution placing the Company in voluntary liquidation and appointing the Manager's preferred Joint Voluntary Liquidators, Margot McInnis of Grant Thornton Specialist Services

(Cayman) Limited and David Bennett of Grant Thornton Recovery & Reorganization Limited, as Joint Voluntary Liquidators ("JVLs").

5. On April 18, 2019, the Petitioner presented the Petition seeking a Supervision Order under section 131(b) of the Law.

6. The Petitioner was agreed to be the sole Participating Shareholder and the Manager was the sole holder of Founder Shares ("Founder Shareholder"). The Manager opposed the Petition on the grounds that: (a) the Company's Articles gave it sole or primary shareholder authority over the Company as long as it was solvent (a subsidiary point), and primarily that (b) the grounds relied upon by the Petitioner did not meet the requirements of section 131(b) of the Law in any event. The Court is accordingly required to decide:

   (a) whether the Petitioner's or the Manager's views as to the choice of liquidators should prevail in relation to a solvent winding-up generally and for the specific purposes of an application for a Supervision Order in relation to the (solvent) Company; and

   (b) whether the requirements of section 131(b) of the Law are made out on the facts presently before the Court.

7. In my judgment it is helpful to deal with the issue of 'whose interests should be given greater weight' as a threshold point as it shapes how the evidence and supporting arguments for and against the Supervision Order should properly be assessed.

Findings: whose interests should the Court have regard to in relation to a solvent winding-up of a company with articles which confer sole management authority upon a professional manager?

The Articles

8. There was no suggestion that the Company's Articles were remarkable for a Cayman Islands fund. Founder Shares enjoyed the right to vote at general meetings and a right to the return of capital but no right to dividends (Article 16); and Participating Shareholders had no voting rights at general meetings but did enjoy a right to dividends and a right to participate in surplus assets (Article 17). In the result, the Manager had sole control over the Company's management. Article 194 provides:

   "*The Company may be wound-up voluntarily and dissolved by special resolution of the holders of the Founder Shares.*"

9. This power is expressed in permissive terms and obviously does not purport to oust statutory rights or to address the rights of the various classes of shareholder in a

voluntary liquidation. Those rights are addressed firstly by the following Article (Article 195 requires the liquidator to firstly pay creditors claims):

> "*196. The assets available for distribution among the Members shall then be applied in the* following *priority:*
>
> *196.1 firstly, to the holders of Participating Shares, an amount equal to the par value of such* Participating *Shares;*
>
> *196.2* secondly, *to the holders of Founder Shares, an amount equal to the par value of such Founder Shares; and*
>
> *196.3 thirdly, the* balance *shall be paid to the holder of the Participating Shares…*"

10. This confirms the obvious proposition that the Participating Shareholders are the primary economic stakeholders in relation to a voluntary (solvent) liquidation.

11. The threshold controversy in the present case is to what extent, if any, a Participating Shareholder has any right to influence the choice of voluntary liquidators and to decide what type of winding-up is appropriate.

12. The stark position of the Manager as advanced in oral argument was that, in effect, the Petitioner had no such rights as it would be paid in full and sole management power (including the power to appoint voluntary liquidators) was vested in the Manager.

13. This, at first blush, surprising proposition is inconsistent with the next provision of the Articles dealing with winding-up:

> "*197. If the Company shall be wound up (whether the liquidation is voluntary or by or under the supervision of the Court) the liquidator may, with the authority of a resolution or resolutions passed by the holders of Participating Shares , divide among the Members in kind the whole or any part of the assets of the Company…The liquidator may, with the like authority, vest any part of the assets in trustees upon such trusts for the benefit of the Members as the liquidator, with the like authority, shall think fit…*" [Emphasis added]

14. Article 197 confirms that the Participating Shareholders are the main stakeholders in any form of liquidation, despite the fact that the power to commence a voluntary liquidation is placed in the hands of the holders of the Founder Shares.

The statutory regime: voluntary liquidations

15. A voluntary liquidator may be appointed and removed by a special resolution of the company in general meeting: sections 116(c) and 121(1) of the Law. However, section 121 of the Law also provides:

> *"(3) Whether or not a general meeting has been convened in accordance with subsection (2), any contributory may apply to the Court for an order that a voluntary liquidator be removed from office on the grounds that he is not a fit and proper person to hold office."*

16. In the present context, therefore, the Manager as Founder Shareholder has sole authority to appoint and a broad unfettered power to remove the JVLs while the Participating Shareholder has a more circumscribed right to apply to Court for their removal. However, the Participating Shareholder may refer specific questions to the Court in a voluntary liquidation under section 129 of the Law, which provides:

> *"(1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court."*

17. The statutory regime, in my judgment, presupposes an alignment between those members who have an economic interest in the voluntary liquidation and those members who have the right to appoint and remove the JVLs in general meeting. The Law makes no further express provision in relation to whose interests predominate in a voluntary liquidation. Because this traditional governance structure is modified by the Articles in relation to the Company, it is in the Articles that one finds express reference (in Article 197) to the authority of Participating Shareholders to dictate the course of the voluntary liquidation.

The statutory regime: liquidations under the supervision of the court

18. Section 133 of the Law crucially provides that: "*A supervision order shall take effect for all purposes as if it was an order that the company be wound up by the Court...*"

19. Once a Supervision Order is made, the statutory provisions applicable to an official liquidation are brought into play. In terms of whose interests the Court must have regard to in an official liquidation is concerned, section 115(1) of the Law pivotally provides:

> *"(1) The Court shall, as to all matters relating to the winding up, have regard to the wishes of the creditors or contributories..."*

20. The first reference to a Supervision Order appears to be found in section 124(1) of the Law, which requires the liquidator to apply for such an order if the declarations of solvency are not provided by the directors within 28 days of the commencement of the winding-up. Section 131 of the Law then provides that: "*the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124*".

21. Again, it seems to me, the starting assumption must be that section 131 of the Law is drafted with the traditional corporate structure in mind and cannot be viewed as limiting the right to apply for a Supervision Order to those contributories who were empowered to vote in general meeting and excluding even those contributories who are the real economic stakeholders in the company. Indeed, the Manager tacitly conceded that the Petitioner had standing to petition for a Supervision Order, and focussed its attack on the sufficiency of the grounds relied upon for seeking such Supervision Order.

22. The starting assumption must also be that the Court entertaining such an application would give greater weight to the views of the majority of economic stakeholders, as is typically done when entertaining a petition for the winding-up a company by the Court. This principle is indirectly supported by various provisions in the Law, for example:

(a) an unfettered discretion is conferred on the Court to remove an official liquidator on the application of any creditor or contributory (section 107);

(b) section 110(1) provides:

> "*It is the function of an official liquidator-*
> ***(a)*** *to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and*
> **(b)** *to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up*"; and

(c) section 110(3) provides for a "sanction application" by creditors or contributories in relation to powers which an official liquidator may only exercise subject to the control of the Court. Section 110(4) then provides that in the case of:

> "*(a) a solvent company, a sanction application may only be made by a contributory and the creditors shall have no right to be heard...*"

The submissions

23. Mr Smith QC placed an abundance of authority before the Court which supported the proposition, set out in the Petitioner's Submissions, that:

> "*19. ...the Court should place considerable weight on the views of those with an economic interest in the liquidation, i.e. the Petitioner in this case, when it comes to assessing whether or not a court supervised liquidation would be likely to facilitate a 'more effective, economic or expeditious liquidation in the interests of the contributories and creditors'.*

20. In the context of both solvent and insolvent winding up, a key guiding principle is that a winding up is conducted for the benefit of the creditors or members (as the case may be), and that the creditors or members are ordinarily the best judges of what is in their best interests. In this respect, the present case is very unusual in that a person with no economic interest in the liquidation – the Manager – is seeking to frustrate the wishes of the person with 100% of the economic interest in the liquidation."

24. Because these authorities were not contradicted or effectively undermined, it is only necessary to refer to some of the clearest and most persuasive judicial statements. In Omni *Securities Limited* [1996 CILR 202], Smellie CJ (after extensively considering the issue of the *locus standi* to apply for the removal of a liquidator at page 225) concluded:

> "*[I]t is recognised that the interests of those having a positive financial stake in the liquidation may be regarded as paramount and the court may yet defer to those wishes.*"

25. The Petitioner also submitted (at paragraph 27(a) of the Petitioner's Submissions) that:

> "*In Deloitte and Touche A.G. v. Johnson and Dinan [1999 CILR 297], the Privy Council noted that:*
>
> *'They show that impropriety is not necessary; that it is sufficient to satisfy the court that removal of the liquidator will be for the general advantage of the persons interested in the liquidation; that in the absence of impropriety, the court will have regard to the wishes of the majority of those interested; but that where impropriety is shown the court may override their wishes. The cases do, however, show that the courts have consistently regarded the creditors (in the case of an insolvent liquidation) and the contributories (in the case of a solvent liquidation) as the proper persons to make the application, being the only persons interested in the liquidation.' [Emphasis added]*"

26. The most recent and cogent exposition on the reason why stakeholders' views have high status in a liquidation cited by the Petitioner was the judgment of Snowden J in *Re Longmeade* [2017] BCC 203 where he stated:

> "*[53]... if all the persons having an interest in the insolvent company are fully informed and of the same view, then it seems to me that the liquidator would ordinarily be obliged to give effect to that view. That follows from the fact that liquidation is a statutory scheme under which the property of the company can [sic] is to be realised and distributed for the benefit of those entitled under the IA 1986: see Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] A.C. 167. The persons*

interested under the statutory scheme will be the unsecured creditors of the company, and, if there is a possibility of a surplus, the contributories. There is a clear analogy with the principle under which all of the beneficiaries of a trust can, if sui juris and together entitled to the whole beneficial interest, agree to put an end to the trust and direct the trustees to hand over the trust property (Saunders v Vautier (1841) 4 Beav. 115 aff'd, Cr. & Ph. 240); or all of the members of a solvent company bind the company by their unanimous agreement in a matter which is intra vires and lawful (Re Duomatic Ltd [1969] 2 Ch. 365 at 373)."

27. The only discernible riposte to these arguments was the oral submission advanced by Mr Cogley QC to the effect that the Company's constitution did not contemplate a Participating Shareholder's views taking precedence as to the choice of who should be voluntary liquidator and how the liquidation should be run when it would be paid in full. This argument was advanced in answer to my own suggestion from the Bench that the Manager's initial agreement to appoint voluntary liquidators nominated by the Petitioner was an instinctively correct response in light of the true legal position. The Manager's counsel argued that the correct legal analysis was that the Petitioner had no right at all to impose its wishes on the Manager as far as the choice of joint voluntary liquidators was concerned.

28. The Skeleton Argument of the Manager did not suggest that the Founder Shareholder's views trumped those of the sole Participating Shareholder's. Far more modest submissions were advanced in support of the principal argument that no sufficient grounds for making a Supervision Order had been made out:

> "7. *The Manager is the sole party with power to place the Company into VL - which is why, obviously, the Petitioner asked it to do so...*
>
> *11. As the sole holder of the Founder Shares issued by the Company, the Manager has standing to object to the Petition...*
>
> *15. ... In other words, whilst section 131(b) presupposes the continued solvency of the company, nevertheless when deciding (a) whether the grounds are made out by the Petitioner and then (b) whether the 'interest' requirement is also satisfied, the Court has to take into account the views of creditors, and not just the contributories. Thus, the mere fact, for example, that there is one major/sole participating contributory/shareholder – the Petitioner – is not actually to the point.*"

29. Section 131(b) of the Law does indeed suggest, as Mr Cogley QC contended, that when considering whether to grant a Supervision Order in relation to a solvent company, the wishes of the contributories are not necessarily decisive.

30. It is also convenient to address at this point a separate strand of the Petitioner's submissions on the relevance of its views as to the choice of liquidator, which relied on principles which again could not credibly be controverted. The Manager sensibly focussed its arguments on whether in the present circumstances changing

horses at this juncture made practical sense. The most significant of the Petitioner's submissions were the following:

> "*44. Generally, when exercising its discretion to determine the identity of the official* liquidators, *the Court should take into account the views of the stakeholders with an interest in the liquidation. As stated by Jones J In re AJW Master Fund [2011] 1 CILR 363:*
>
> > *'[B]ut the choice of the 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.'*
>
> *45. In Bay Capital Asia Fund, LP (Unreported, Grand Court) FSD 116 of 2015, 1 October 2015, Smellie CJ said, at [24]:*
>
> > *'[T]he Court must be guided primarily by what is in the best interest of those having the real and ultimate economic interest in this Fund, namely the creditors; not by what is in the best interests of PWC as the prospective liquidators.' [Emphasis added]*
>
> *46. In Bay Capital, the fund was insolvent and therefore the creditors were the stakeholders with the real and ultimate economic interest in the liquidation of the fund. However, as set out above, in the instant case, the Petitioner is the only party with an economic interest in the solvent liquidation of the Company and, accordingly, the Petitioner respectfully submits that the Court must be primarily guided by the Petitioner's views in respect of the identity of the official liquidators.*
>
> *47. The importance of the views of those with an ultimate economic interest in the company was further reinforced in The Wimbledon Fund, SPC (in voluntary liquidation) (Unreported, Grand Court) FSD 111 of 2017 where Parker J referred, with approval, to Smellie CJ's judgment in Bay Capital (see paragraph 45 above), and further noted, at [32], 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.*"

31. However, these submissions were supplemented in oral argument by reference to the April 2006 Law Reform Commission report, '*Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law*', which preceded the enactment of the current version of Part V of the Companies Law. The most pertinent part of the Report for present purposes was the following paragraph to which Mr Smith QC referred:

> "*8.1 The liquidation process should be driven by those having an economic interest in its outcome. Section 105 of the draft bill provides that the liquidator nominated by the petitioning creditor (or shareholder) will hold office only on an interim basis. The general body*

of creditors (or shareholders in the case of solvent companies) are given an opportunity to elect a liquidator of their own choice."

Findings: whose interests should be shown the greatest deference?

32. Subject to considering the weight to be given to the Petitioner's concerns when considering the merits of the Petition below, I find that the Participating Shareholders' interests are *prima facie* paramount as regards the liquidation of the Company on a solvent basis. The correct legal position is that, subject to particular factual circumstances which might properly justify a departure from the general rule, where there is a sole Participating Shareholder who nominates a fit and proper person as a proposed voluntary liquidator, the holder of the Founder (or Management) Shares should ordinarily appoint such nominee.

33. The position in relation to a fund in which the equity shareholders do not control the management of the company through voting in general meeting may be summarised as follows.

34. When the fund company is being wound-up on a solvent voluntary basis or by or under the supervision of the Court and/or when a winding-up is in contemplation, the rights of participating shareholders are substantially aligned with the rights of shareholders in traditional companies. This is because in both legal contexts the predominant function of the winding-up will be to serve the commercial interests of those who have a financial interest in the liquidation process.

35. There is to my mind a 'bright dividing line' between the position when a fund similar to the Company in this case is engaged in ordinary business activities and when its affairs are being wound-up. The Articles (as read in conjunction with the Private Placement Memorandum) clearly indicate that the Participating Shareholders have no right to appoint directors or otherwise be involved in supervising the investment decisions made on behalf of the Company. When those activities are at an end, there is a complete change of scene, as it were. Even a solvent voluntary winding-up is conducted on terms that the Participating Shareholders assume the mantle of 'supervising' the way the liquidator winds-up the Company.

36. Notwithstanding the fact that the Articles conferred sole power on the Founder Shareholders to resolve to wind-up the Company, that power was conferred not for their own benefit but the benefit of the Participating Shareholders who had (according to the same Articles, especially Article 197) the predominant financial stake in any form of winding-up. The starting assumption should accordingly be, as the Manager initially accepted in correspondence in December 2018, that where the majority of Participating Shareholders nominate a suitable voluntary liquidator, their wishes should be acceded to by the holder of the essentially nominal Founder (or Management) Shares. If the corporate structure is properly understood and applied in spirit as well as in letter, the "*disconnect between those who have the economic interest in the fund-the investors-and the manager who holds the voting rights*" (Petitioner's Submissions, paragraph 30) should not in my judgment ordinarily arise.

37. The true legal position must not be obscured by the predominant practice in relation to voluntary liquidations. The archetypal solvent voluntary liquidation is, from an insolvency lawyer's standpoint, a sadly short, smooth and uncomplicated affair; a very unpromising source of engaging (and lucrative) legal challenges. The fund manager's choice of liquidators is generally unlikely to be questioned by the shareholders many of whom will (perhaps) have been redeemed before the process begins; and those who are unpaid will hardly be eager to place roadblocks in the way of a promise of payment in full. The impression may well develop based upon an almost uniform practice in uncontroversial cases that the solvent liquidation falls within the fund manager's domain. In my judgment, however, the present case is a classic illustration of the exception which proves the rule.

38. Accordingly, I find that on an application under section 131(b) of the Law when it is common ground that the Petitioner as sole Participating Shareholder has standing to apply, the interests of the Petitioner clearly trumps the interests of the Manager qua Founder Shareholder in general terms. In the event of a conflict between the views of the Participating Shareholder and the Manager as to who the official liquidators should be pursuant to a Supervision Order, the starting assumption would again be that the Petitioner's wishes would prevail.

The interpretation of section 131(b)

The statutory provision

39. Section 131of the Law provides as follows:

> "*131. When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that-*
>
> *(a) the company is or is likely to become insolvent; or*
>
> *(b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.*"

40. The Petitioner relied upon section 131(b) of the Law and the main controversy in terms of construction turned on the meaning of the words "*a more effective...liquidation*", the main limb of the sub-paragraph which was engaged by the facts of the present case. A subsidiary issue was what the term "*in the interests of the contributories and creditors*" meant in the context of a company which was not said to be likely to become insolvent.

41. In addition, reference was made to Order 15, rule 3 of the Companies Winding-Up Rules ("CWR"). I do not consider this rule is relevant to the construction of the

statutory provision it is designed to support; however it does potentially shed some light on the view the Rules Committee took of the purpose of section 131. The Rules Committee is established by section 154 of the Law. It is merely empowered by section 155(1) "*to make rules and prescribe forms for the purpose of giving effect to Parts IV, V and XVI*", Part V being the main Part of the Law dealing with winding-up.

42. Order 15, rule 3 of the CWR provides so far as is relevant for present purposes as follows:

> "*(4) Upon hearing the summons for directions, the Court shall either –*
>
> *(a) make a supervision order, if the Court is satisfied that the company's members consent or do not object to an order being made; or*
>
> *(b) fix a hearing date and make such directions as the Court thinks appropriate in respect of the following matters...*"

The submissions

43. The Petitioner's Submissions advanced the following arguments as to why section 131(b) of the Law, a *sui generis* local provision, should be interpreted in a flexible manner:

> "*16. When the Companies Law was amended in 2009, the 'more effective, economic or expeditious liquidation' test for the making of a supervision order was introduced for the first time. There is relatively little authority as to how this test is to be applied. The principal decisions referring to Section 131(b) of the Companies Law are:*
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> *(a) Re Exten Investment Fund (Unreported, Grand Court) FSD 96-99 of 2017, 23 June 2017.In this case, the voluntary liquidators had filed their final report and the funds would have been dissolved three months thereafter. A stakeholder in the funds petitioned for the dissolution of the funds to be deferred, for the liquidation to be continued under the supervision of the court, and for different (independent) liquidators to be appointed. The petitioner contended that there was a need for an investigation to occur into the affairs of the fund. In that case it was submitted by the petitioner that Section 131(b) was satisfied because:*
>
> *(i) Unlike the voluntary liquidator, official liquidators can exercise the compulsory powers to require the delivery up of documents and property belonging to the funds from former directors and professional service providers and to examine such persons pursuant to Section 103 of the Companies Law.*

(ii) *Unlike the voluntary liquidator, should it be necessary to do so, the official liquidators can apply to the court for the issue of a letter of request to the courts of a foreign jurisdiction and grant cross-border judicial assistance to the liquidators within that jurisdiction.*

In granting the supervision order, Mangatal J described the language of Section 131(b) as 'wide'.

(b) *In the matter of Consistent Return Limited [2012] 1 CILR 445. In this case, the Court declined to make a supervision order. However, the basis of that application was very narrow - and very different to the present case. In essence, the voluntary liquidators had sought supervision in order to access the 'bar dates' for claims which are only available for official liquidation. Jones J held that the same result could be readily achieved without supervision, by the voluntary liquidators simply notifying potential creditors, and if those creditors did not take action within a reasonable time, distributing the assets without reference to those potential claims. The conclusion in this case turned very much on its facts.*

(c) *In the matter of Asia Private Credit Fund Limited (in voluntary liquidation) (Unreported, Grand Court) 19 March 2019. In this case...the Petitioner sought to bring the voluntary liquidation of APCF under the supervision of the Court under Section 131(b). McMillan J, granting the Petitioner's application for supervision, agreed with Mangatal J that the language used in Section 131(b) was 'wide' and held that the 'approach of the Court should be broad and purposive'. McMillan J further held that in 'considering whether to make such an order it is for the Court alone to decide whether the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of a company.'*

17. A plain reading of Section 131(b) does indeed lead to the conclusion that the circumstances in which it will be 'effective, economic or expeditious' to bring a liquidation under the supervision of the Court are (understandably) broad and flexible. That stands to reason: the cases above illustrate the diverse range of circumstances in which voluntary liquidation may no longer be appropriate, such that a supervision order should be made....

32. ... Section 131 can be seen as fulfilling a very important role by enabling investors in a fund to have a right of recourse to the Court to have a supervision order made when the manager of a fund has, for its own reasons, ignored the wishes of investors and appointed its own choices as

voluntary liquidators. These important considerations support a broad and flexible approach to the construction and application of Section 131."

44. The Skeleton Argument of the Manager significantly pointed out that any discretion to make a Supervision Order was a narrow one, and only arose once the grounds were made out. Having regard to the wider statutory context, and the ability of voluntary liquidators to seek an order if the need arose, compelling reasons were needed to make a Supervision Order at the outset:

> *"13. Section 131(b) provides that a Supervision Order may be made 'on the grounds that – (b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors' (emphasis added). The effect of a Supervision Order is not to create some sort of hybrid liquidation because section 133 provides "a supervision order shall take effect for all purposes as if it was an order that the company be wound up by the Court..."... In other words, an OL.*
>
> *14. It is submitted that the construction that arises as a matter of the clear, unambiguous and express language of section 131(b) means that:*
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> *(a) The Court can only convert a VL into an OL via a Supervision Order under section 131(b) if (and only if) the grounds within section 131(b) exist; and*
>
> *(b) Those grounds have to exist at the date of the hearing; and*
>
> *(c) The Court has to actually determine that there will be at least a more effective, or a cheaper (more economic) or speedier (expeditious) liquidation of the Company, and that that outcome would be in the interests of the contributories and the creditors: and*
>
> *(d) The party with locus to petition has the burden of demonstrating the grounds exist.*
>
> *15. It can be noted that section 131(b) applies where the company is still solvent. Thus, it is able to pay its creditors. This is to be contrasted with the "insolvency" ground under section 131(a) – which permits the Court to make a Supervision Order with the effect that the liquidation then continues on an involuntary / compulsory basis, if the company is insolvent. Thus, it is important to note that the draftsman must have deliberately intended the views of the creditors and the contributories to be taken into account – even though the creditors would be (ultimately) paid before the contributories – because this is a natural consequence of the company remaining solvent coupled with the words 'in the interests of the contributories and creditors' (emphasis added). In other words, whilst section 131(b) presupposes the continued solvency of the company, nevertheless when deciding (a) whether the grounds are made out by the Petitioner and then (b) whether the*

'interest' requirement is also satisfied, the Court has to take into account the views of creditors, and not just the contributories. Thus, the mere fact, for example, that there is one major/sole participating contributory/shareholder – the Petitioner – is not actually to the point.

Discretion only arises once 'through the gateway'

16. The provision actually has no discretionary element at all. The grounds are either made out or not."

Findings: section 131(b)'s primary meaning and scope of application generally

45. I accept the submission of Mr Cogley QC that section 131(b) of the Law must not only be construed in its wider statutory context but also in light of the fact that the section by its terms does not confer a broad discretion on the Court to make a Supervision Order where the grounds for so doing are made out. He sensibly conceded that where the grounds are made out, the Court must have some discretion but in my judgment he rightly argued that any such residual discretion should be viewed as narrow rather than broad. As the Manager's counsel rightly submitted, the language of section 131 of the Law clearly signifies that the Court must primarily determine whether the grounds "*are either made out or not*". But any residual discretion is narrow because the exercise of determining whether the grounds for making a Supervision Order have been made out itself involves making judgments of a discretionary character, a point which McMillan J illuminated in a case considered below.

46. By way of illustration of an explicitly broad discretionary power conferred by Part V of the Law, section 95(1) of the Law spells out four types of orders which the Court "*may make*" on hearing a winding-up petition, the last of which is "*(d) any other order that it thinks fit*". The power to stay a winding-up is equally broadly framed (section 111(1)). In stark contrast is another provision alluded to above: the power conferred on the Court to remove a voluntary liquidator conferred by section 121 of the Law is quite narrow:

> "*(3) Whether or not a general meeting has been convened in accordance with subsection (2), any contributory may apply to the Court for an order that a voluntary liquidator be removed from office on the grounds that he is not a fit and proper person to hold office.*"

47. The fact that it is only the shareholders in general meeting who can remove a voluntary liquidator without cause is an important aspect of the statutory scheme upon which Mr Smith QC relied. Assuming again that the statutory scheme contemplates that in the standard company the members who vote in general meeting to appoint and/or remove a voluntary liquidator will have a financial stake in the liquidation section 131(b) of the Law is indeed likely, in practice, to serve a more important role in the Cayman Islands. There are many fund companies here the constitutions of which have a non-alignment of the power to appoint and remove a voluntary liquidator in and out of circumstances of solvency. This will increase the likelihood that section 131(b) of the Law will be invoked in circumstances

where the management shareholders and the equity shareholders disagree about how a solvent liquidation should be conducted. This is a consideration which impacts on the construction of section 131(b) of the Law in a somewhat nuanced but important way.

48. At the heart of section 131(b) are the following jurisdictional requirements which any applicant for a Supervision Order must meet. It must be demonstrated that the relief sought will facilitate:

(a) "*a more effective, economic or expeditious liquidation of the company*" ; and

(b) the content the prescribed liquidation outcomes must be defined by reference to "*the interests of contributories and creditors*".

49. The proposition that liquidation proceedings, whether insolvent or solvent, should be conducted in the interests of those persons who are financially interested in the liquidation process may be viewed as the golden thread which runs through liquidation law in those parts of the world whose statutory winding-up concepts have been transplanted from British legal soil. Accordingly, when one is considering what is likely to be a more "*effective, economic or expeditious*" liquidation of a company, in any particular case that broad concept must be moulded like clay to fit the shape of the particular stakeholder interests which hold sway in the case before the Court. The statutory terms are fixed but their meaning is not cast in stone. And while the Court should never be a 'rubber stamp' when it comes to making commercial judgments in particular, the Court should be slow to second-guess the stakeholders as to how efficacy and/or economy is likely best to be achieved. The Court's evaluative function is likely to be enhanced where stakeholders have different views or their views are not clearly known or easily ascertainable. The rigour of Court's evaluative function is likely to be properly diminished where all stakeholders speak with the same voice.

50. In the fund company context, the views of the management shareholders will seldom outweigh those of the equity or participating shareholders in terms of identifying where "*the interests of the contributories*" lie. Unless of course the management shareholder is representing the majority of participating shareholders, and the section 131(b) petitioner is a 'rogue' shareholder seeking to achieve a collateral purpose and not seeking a class remedy. The need to consider creditor interests does not directly arise for consideration in the present case, but it is easy to imagine that applications might be made in circumstances where the granting of a Supervision Order might result in some delay in settling creditor claims in full, and the need to have regard to such prejudice to their interests would properly arise.

51. In short I accept the submission of Mr Smith QC that "*the circumstances in which it will be 'effective, economic or expeditious' to bring a liquidation under the supervision of the Court are (understandably) broad and flexible*". But I also accept the submission of Mr Cogley QC that a petitioner must demonstrate that a Supervision Order is required to achieve in practical terms one of the statutory outcomes specified in section 131(b), taking into account the wider statutory

context as a whole. These conclusions are supported, most clearly, by only one of the five local the authorities placed before the Court, only three of which were actually referred to in oral argument.

52. *In the matter of Consistent Return Limited* [2012(1) CILR 445] was a case where a Supervision Order was sought by the joint voluntary liquidators so as to benefit from making a pro rata distribution pursuant to CWR Order 18, rules 6 and 7. Jones J, with the liquidators consent, dismissed the petition on the central grounds that:

> "*11 ... it seemed to me, on the basis of the evidence presently before the court, that it would serve no useful purpose to continue this liquidation under the supervision of the Court. It is hard to see how the involvement of the court will enable this liquidation to be brought to a conclusion more effectively or expeditiously....*"

53. Mr Cogley QC warmly endorsed the practical and rigorous approach which was adopted by Jones J in analysing the merits of the application in this case.

54. *In the Matter Exten Investment Fund and Others,* FSD 96, 97, 98 and 99 of 2017 (IMJ), Judgment dated June 2, 2017 (unreported) is more relevant to how the discretion is exercised than how the jurisdiction is defined by section 131(b) of the Law. Mangatal J's comments (at paragraph 64, upon which Mr Smith QC relied) about the width of section 131(b) of the Law were made in the context of considering the standing issue. However, it is noteworthy that the petitioner in that case was the "*sole investor*" (paragraph 14) and the voluntary liquidator who opposed the petition seemingly did so primarily on the grounds that because the petitioner's shares had been redeemed it lacked standing to petition (paragraphs 54-55) and that the standing asserted was that of a contingent creditor (paragraph 64). No analysis of what "*effective*" meant in the context of a solvent liquidation was carried out because the point did not directly arise.

55. The third section 131 case was *In the Matter of The Wimbledon Fund, SPC,* FSD 111 of *2017* (RJP), Judgment dated January 29, 2018 (unreported), a case where the petition was presented by the voluntary liquidators obligatorily because declarations of solvency were not signed by the directors and it was "*common ground that a supervision order should be made in due course. The only outstanding question is the identity of the liquidators*" (paragraph 4). The dispute centred on the impartiality of the joint voluntary liquidators and Parker J rejected the complaints over the objections of the sole creditor on evidential and costs grounds in a presumed insolvency context.

56. The fourth case involved a similar conflict dispute in an insolvency context: *In the Matter of Bay Capital Asia Fund, LP*, FSD Cause No. 116 of 2015, Smellie CJ, Judgment dated October 1, 2015 (unreported). These two cases did not deal with section 131(b) at all.

57. The fifth *and* most important case did involve the same Petitioner and managed by an affiliate of the Manager in the present case. In terms of the leading human actors involved, the present case may perhaps be viewed as an instance of "*déjà vu all*

over again". At this stage of the analysis, however, all that is relevant is the analysis undertaken by McMillan J of section 131(b) of the Law in *In the Matter of Asia Private Credit Fund Limited (in voluntary liquidation)*, FSD 232 of 2018 Judgment dated March 19, 2019 (unreported) ("APCF"). The Petitioner herein sought a Supervision Order by petition dated December 18, 2018 in respect of APCF. The Petitioner herein was also the sole participating shareholder of APCF and petitioned only four days after the manager appointed joint voluntary liquidators. The manager opposed the petition which also sought to replace the joint voluntary liquidators with professionals chosen by the Petitioner. At this point the broad similarities between the two cases end (so far as can be ascertained from McMillan J's concise judgment). In *APCF*, the Petitioner has suffered a "*very significant loss to its original investment*" (paragraph 32); no such complaint is made in the present case. Be that as it may, a Supervision Order was made and one of the joint voluntary liquidators was replaced with one of the petitioner's nominees.

58. In light of the fact that there is no discernibly great overlap between the grounds relied upon in *APCF* by McMillan J and the present case, I declined the invitation of the Manager's attorneys to postpone delivering the present judgment until the Cayman Islands Court of Appeal disposed of the appeal against the *APCF* decision. Leave to appeal was apparently obtained from the Court of Appeal after I had reserved judgment in the present case. That development notwithstanding, I have no hesitation about endorsing the general approach McMillan J adopted to construing the scope of the jurisdiction conferred upon this Court by section 131(b) of the Law.

59. Firstly, I concur that the Court must form its own independent view as to whether the preconditions for granting the Petition are met and should not simply uncritically accept the case advanced by the parties before the Court. For reasons set out above, I also agree that section 131(b) leaves no room for any broad discretionary considerations untethered from the statutory provisions themselves. In a concise but cogent passage in his judgment, McMillan J implicitly accepted the argument advanced by Mr Cogley QC in the present case; the only real question to decide is whether the grounds for making a Supervision Order have been made out:

> "*In considering whether to make such an Order, it is for the Court alone to decide whether the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of a company in the interests of the contributories and creditors. In other words, facilitating these broadly expressed factors is not simply a precondition for making the order but the actual reason or reasons for exercising the discretion to do so.*" [Emphasis added]

60. Although I respectfully disagree with the weight McMillan J gave to the observations of Mangatal J in *In the Matter Exten Investment Fund and Others*, FSD 96, 97, 98 and 99 of 2017 (IMJ), Judgment dated June 2, 2017 (unreported) about how widely section 131(b) of the Law is drafted, I fully endorse the conclusion he reached. The preconditions for making a Supervision Order are

indeed expressed in broad terms, flexible enough to be deployed in an infinite variety of circumstances even though the essential characteristics of each precondition (or ground) are clearly defined. In deciding whether or not a Supervision Order should be made, and in assessing whether the circumstances a petitioner relies upon qualify for relief, I agree with Mc McMillan J's judgment that "*the approach of the Court should be broad and purposive*" (paragraph 15). Finally, and consistently with his earlier reasoning, McMillan J firmly rejected the argument that the petitioner had to show that supervision was "necessary":

> "*27. The Manager then redefines the legal issue by stating that for the present application to succeed the Petitioner 'must demonstrate that supervision is necessary'. This proposition is entirely misconceived. Necessity is not a requirement for section 131 to be activated...*"

61. The term "necessary" in my judgment would have been used expressly if it was intended to restrict the scope of section 131(b) of the Law to such an extent. The general scheme of Part V of the Law is to confer broader jurisdiction on the Court in respect powers that are by their nature broad e.g. making a winding-up order (sections 92, 95). It is usually clear when powers are intended to be restrictively used. For instance, section 104 (2) of the Law provides:

> "*(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the Authority, on the grounds that-*
>
> *(a) there is a prima-facie case for making a winding up order; and*
>
> *(b) the appointment of a provisional liquidator is necessary in order to* ..." [Emphasis added]

62. On reflection it seems obvious that while the grounds for making a Supervision Order are widely drafted in the sense that they can be deployed to meet a variety of factual circumstances, the outer parameters of the jurisdiction are very clearly demarcated. Section 131(b) of the Law is intended to be used to engage the legal machinery which operates in relation to an official liquidation in the case of a liquidation which may be solvent but which would function more effectively, economically or expeditiously with access to those enhanced statutory powers. A high level question to ask when considering whether a posited ground for a Supervision Order is valid or not is the following. What is the overarching statutory function of an official liquidation and what central role does the Court play? This may help to clarify how to deal with borderline cases where the more practical enquiries about efficacy, economy and/or expedition fail to produce a satisfactory answer. Because the central object and purpose of section 131(b) of the Law is to impose 'full-blown' supervision over a liquidation that would otherwise take place without any mandatory oversight by this Court.

Findings: the Petition and the evidence in support of and in opposition to the Petition

The Petition

63. The Petition is verified by the First Affidavit of Dr. Ayman Bader Al Buloushi, the Petitioner's Head of Governance and Compliance. The Petition avers that a redemption request was made on December 5, 2017 and that on March 14, 2018 the Manager advised that a suspension of redemption payments might be necessary on or before the October 2018 'Redemption Day'. On August 31, 2018, the Manager advised that redemption payments would be suspended as of October 2, 2018. A Special (partial) Redemption was promised and then cancelled due to an "emergency" involving the Underlying Funds which was never explained.

64. Two areas of concern are then set out expressed in very dispassionate terms. Firstly, the Petitioner was concerned about possible fee multiplication through the common control and/or ownership of the Manager and the Underlying Fund. These concerns were expressed in correspondence beginning in September 2018. An offer to waive fees after December 1, 2018 was admittedly made by the Manager, but documentation relating to the Underlying Funds was not supplied. The second area of concern relates to the Petitioner's investment in other funds managed by the Manager including APCF. It is averred:

> "*26. One of the Petitioner's key concerns in respect of its investment in APCF was that a major restructuring appears to have been completed in 2014 without any formal documentation between Adamas and the Petitioner and the former Director-General of the Petitioner, Fahad Al Rajaan, a Kuwaiti national, was involved in negating and approving this restructuring.*
>
> *27. The Public Prosecution in Kuwait filed criminal charges against Mr Al Rajaan in Kuwait in or around November 2015 alleging that Mr Al Rajaan is responsible for the misappropriation and embezzlement of Kuwaiti state funds at the time he was employed as the Director-General of the Petitioner between 14 January 1984 and 30 January 2014. The Petitioner understands that Mr Al Rajaan has been sentenced to a 10-year prison term in absentia and the government authorities in Kuwait have submitted an extradition request to the government of the United Kingdom to extradite Mr Al Rajaan to Kuwait in order to face criminal charges in Kuwait. The extradition request remains pending as at the date of the Petition and Mr Al Rajaan's alleged criminal activities are the subject of an ongoing investigation by the relevant government authorities in Kuwait.*
>
> *28. Whilst, based on current facts, it does not immediately appear that Mr Al-Rajaan was directly involved in the Petitioner's investment in the Company, the Petitioner considers that this serious issue merits further detailed investigation by duly appointed officers of this honourable Court.*

Furthermore, the Petitioner has wider concerns with respect to the management of the Petitioner's investments in various funds managed by the Manager and its affiliates which the Petitioner considers warrants comprehensive and independent investigations into each of these funds."

65. These hyperbole-free averments made by a Public Institution established by the laws of a friendly nation set public policy alarm bells ringing loudly. Dr Buloushi exhibits to his First Affidavit[1] an Initial Offer Subscription Application dated May 1, 2006 and a Supplementary Subscription Application dated May 21, 2008, each of which is in relation to the Company and signed by Mr Al-Rajaan as Director-General of the Petitioner.

66. The Petition then sets out the background to the commencement of the voluntary liquidation. The crucial averments may be summarised as follows:

(a) on December 9, 2018, the Petitioner requested the Manager to wind-up the Company immediately and appoint independent liquidators;

(b) on December 14, 2018, the Manager agreed to this course stating: "*we note that the JVLs should be from a reputable firm of PIFSS' choosing*";

(c) on December 23, 2018, the Petitioner wrote the Manager nominating David Griffin, John Batchelor and Andrew Morrison of FTI Consulting as proposed joint voluntary liquidators and warning that if they were not appointed by December 28, 2018 the Petition would file a petition to wind-up the Company on just and equitable grounds;

(d) on January 14, 2019, the Manager advised the Petitioner that it had passed resolutions for the voluntary winding-up of the Company and had appointed the JVLs (which the manager had selected); and

(e) in paragraph 40 it is averred that: "*To date, the Manager has never provided any proper explanation as to why the Proposed JVLs were not appointed and why the express views of the Petitioner were completely ignored.*"

67. The requirement for Court Supervision pleaded in the Petition did not expressly rely on the transparency concerns, the Kuwaiti public policy concerns or on the general principle that the sole investor should be able to nominate independent liquidators of its choice. These matters received more emphasis in argument. Nonetheless, they form part of the background which forms an important part of the basis of the case for supervision, which was unambiguously based on the central thesis that there was a need for an independent investigation under the supervision of the Court. It was specifically averred (at paragraph 42) that Court supervision would:

[1] At pages 120 and 132 of Exhibit "AAB-1"

"a. allow the liquidators to carry out a comprehensive investigation into the Company's affairs;

b. provide the liquidators with power to apply to the Court for an order to examine any relevant person (as defined in section 103(1) of the Companies Law) (a "Relevant Person") for the purpose of investigating the Company's affairs, including the Manager;

c. provide the liquidators with power to apply to the Court to compel any Relevant Person to transfer or deliver up to the liquidators any property or documents belonging to the Company; and

d. assist in the orderly realisation and distribution of the Company's assets."

68. The case for appointing FTI was clearly explained as follows:

"44. Furthermore, in light of the recent appointment of representatives from FTI Consulting as the joint official liquidators of APCF, the Petitioner considers that the appointment of FTI Consulting as the joint official liquidators of the Company will facilitate a more effective, economic or expeditious liquidation of the Company in the interests of the contributories and creditors as a result of the potential for overlap in some of the work streams in the respective liquidations. Given the intention is that all Management–related investments (where possible) are to be liquidated through a Court process and official liquidators appointed in respect of all relevant investment funds, it is important (to ensure continuity of liquidator-thereby avoiding duplication of work, amongst other matters) that FTI consulting are appointed as official liquidators at this juncture.

45. The current JVLs are from a well-respected firm. However, the Petitioner considers that FTI Consulting should be centrally involved in this liquidation (as they will be on APCF) given the wider context of the issues related to the Manager and the strategy that is to be deployed across all the relevant investment funds."

69. Carefully read, the Petition presents a cogent case for a Supervision Order promoting a more effective and economic liquidation of the Company and related entities based on:

(a) the immediate need for the Petitioner's nominee firm to be appointed in respect of the Company as it already is in relation to APCF (efficiency and economy). The Manager having declined to appoint FTI as voluntary liquidators, the only clear legal route for the Petitioner to do so is via section 131(b) of the Law. Obviously

the cogency of this ground has since been weakened by the fact that the decision in APCF is subject to appeal; and

(b) the likely future need for the statutory powers available in support of investigations the Petitioner believes should be carried out to be deployed by joint official liquidators (primarily efficiency).

The Evidence

70. As the Petition is verified by an Affidavit and exhibits which on their face support the central averments of the Petition, it only falls at this point to consider the evidence in opposition to the Petition. Such evidence must be viewed in light of the legal findings I have now reached as to the obligation of the Manager when placing the Company into liquidation and selecting voluntary liquidators to have regard to the wishes of the sole financial stakeholder in the liquidation.

71. Because the Manager's opposition to the Petition is fundamentally based on legal propositions which I have rejected, in essence that the Participating Shareholders have no right to direct the course of a solvent liquidation, it is important to identify carefully what strands of the evidence are properly relevant to assessing the merits of the case for a Supervision Order. In the First Affidavit of Barry Lau Wang Chi ("First Lau Affidavit"), a director of the Manager with highly impressive professional credentials, he explains the Manager's opposition to the present Petition as follows:

> "*6. The Manager opposes the Petition on the bases that i) the Company is solvent, ii) independent joint voluntary liquidators...are already in place; iii) there is no factual basis rendering it more effective, economic or expeditious for the liquidation of the Company to be supervised by the Court; and iv) it is an abuse, forming part of a pattern of conduct of the Petitioner, intended to circumvent provisions of the constitutional documents of the Company.*"

72. Grounds (i), (ii) and (iv) are all essentially based on the legal hypothesis, which I reject, that the Manager as the holder of 100 Founder Shares, and not the Petitioner as the sole Participating Shareholder, is the relevant stakeholder for whose benefit a solvent voluntary liquidation should be conducted. These grounds presuppose that the Petitioner despite being the sole investor had no right to nominate voluntary liquidators and was seeking to circumvent the Company's constitution by so doing. I accept that these grounds were advanced in good faith based on Mr Lau's genuine understanding as to what the correct legal position was. I decline the invitation of Mr Smith QC to infer from the Manager's opposition an improper desire to stifle an independent investigation into the Company's affairs.

73. However, based on my view of the applicable law and the way in which the Company's Articles should be interpreted, it regretfully follows that little weight can be attached to the evidence of the Manager, whose conduct forms the basis of

the Petition, on the question of whether a sufficient factual basis exists for a Supervision Order. The Supervision Order is fundamentally sought to enable joint official liquidators answerable to the Court (as opposed to the JVLs who can be removed at the Manager's whim) to investigate the way the Manager has managed the Petitioner's investments. Little weight can be attached to the views of the target of a proposed investigation that no need for an investigation exists, especially when that target has rebuffed the "softer" option of a voluntary liquidation run by liquidators nominated by the Petitioner.

74. The First Lau Affidavit does not attempt to engage with the Petitioner's substantive complaints on their merits and confines itself to advancing its case which is implicitly based on now rejected legal principles. The deponent's Second Affidavit is far more substantive and sets forth the following pertinent evidence:

(a) the Manager is a creditor in respect of performance fees in the amount of US$13,611.10 (a proof of debt dated February 26, 2019 is exhibited);

(b) the JVLs say they do not presently need statutory powers and the Company and the Manager have offered to cooperate voluntarily with the JVLs. No practical need for the statutory powers has been demonstrated;

(c) the APCF appointment of FTI has not actually been made and McMillan J's decision is under appeal. Economy would be better achieved by retaining the JVLs in office;

(d) various points of detail about the First Buloushi Affidavit are made. It is contended, in effect, that the complaints about a lack of transparency are misconceived;

(e) information about the Underlying Funds was not supplied to the Petitioner because it was not legally entitled to it;

(f) the Petition undermines the Manager's strong reputation by an unmerited application for Court supervision: "69. *It appears to the Manager that the Petitioner is trying to get its house in order following alleged misconduct by its own Executive (Mr. Al Rajaan) by instigating a campaign of action, regardless of whether there is any evidence of improper conduct by Mr Al Rajaan in relation to specific investments or not and that the traducing of the Manager's reputation (and indeed the reputation of well-established and reputable liquidators) is being disregarded as mere collateral damage in the pursuit of that campaign*";

(g) redemptions were suspended due to "*lock-up provisions*" in the constitutional documents of the Underlying Funds. Good progress is being made in efforts to advance the redemption process which should be completed in seven months. Although this evidence was somewhat indefinite, it seems clear that the proposed liquidation under this Court's Supervision will likely not facilitate a more expeditious winding-up than the fast-track voluntary process contemplated by the Manager. However, it is far from clear that the JVLs would not in the present circumstances be compelled to pursue to some extent the investigations the sole investor seeks. The Manager's view of the timeline is neither dispositive nor very persuasive.

75. Paragraph 69 of the Second Lau Affidavit is reproduced because it highlights how the Manager's opposition is based on a surprisingly self-centred view of the present dispute and an excessively narrow view of the benefits of Court supervision for a solvent company when such supervision is sought by the sole investor. The suggestion that the Petition impugns the integrity of the JVLs is wholly misconceived. It explicitly makes clear that their professionalism is not in doubt. Secondly, the suggestion that the Petition involves "*traducing the Manager's reputation*" wholly ignores the moderate and careful way in which the Petitioner's case is advanced. The most cogent complaint which I find has been vindicated is that the Manager has improperly sought to assume the mantle of the economic stakeholder and ignored the wishes of the true stakeholder. Thirdly, and most significantly, the Manager implies that reputable fund managers should, in effect, be exempted from the normal operation of Part V of the Companies Law. Section 131(b) of the Law expressly contemplates that solvent companies may be wound-up under this Court's supervision. The judgment as to whether this is desirable is quintessentially for the financial stakeholders and ultimately the Court to decide, and no right thinking persons (let alone sophisticated investors) can properly infer that the mere making of a Supervision Order casts some doubt on the *bona fides* of the Manager. The suggestion that positive evidence of wrongdoing is required to justify an investigation misconstrues the breadth of an official liquidator's investigative powers. Insolvency apart, section 102 confers the following powers on an official liquidator:

> "*102. (1) Where a winding up order is made by the Court, the liquidator shall be empowered to investigate-*
>
> ***(a)*** *if the company has failed, the causes of the failure; and*
>
> ***(b)*** *generally, the promotion, business, dealings and affairs of the company, and to make such report, if any, to the Court as he thinks fit.*" [Emphasis added]

76. In summary, the Manager's evidence unsurprisingly did not raise any convincing grounds for opposing a Petition which essentially sought a Supervision Order to *achieve* an independent investigation into the Manager's management of the Company's investments. The fact that the Petitioner is a public institution concerned about possible improprieties on the part of its former Executive only adds weight to the legitimacy of its concerns that the winding-up of the Company be seen to be conducted in a credible manner, an outcome which the Manager itself torpedoed by its legally erroneous obstructive stance. In the Second Buloushi Affidavit, the following important averments are made:

> "*17. In paragraph 32 of Lau 2, the Manager states that the JVLs are unlikely to require any additional statutory powers to be able to obtain information concerning the Company from either the Company or the Manager. The conclusions which the Manager reaches in Lau 2 are premature and such one-sided views need to be carefully evaluated. In circumstances where the Petitioner is the only shareholder in the Company, the Petitioner has a duty to its stakeholders (namely the people of Kuwait) to ensure that the liquidation of the Company is conducted with its best interest at heart...*"

Findings: a Supervision Order should be granted

77. I have found above that the scope of section 131(b) of the Law is sufficiently broad to accommodate an infinite variety of factual and legal scenarios and that supervision is not merely available where the object sought to be achieved is shown to be necessary. The purpose of sub-paragraph is to make the supervision of this Court available where it is demonstrated that such supervision will, having regard to the interests of the relevant financial stakeholders, "*facilitate a more effective, economic or expeditious liquidation of the company*". The Court must independently assess the case put before it, but as is the general rule in winding-up matters, the Court will give due weight to *bona fide* views of the financial stakeholders as to where their best interests lie. I would add to these findings for the avoidance of doubt that the Petitioner must make out this case by discharging the usual civil standard of proof.

78. Mr Cogley QC rightly submitted that whether the preconditions for granting a Supervision Order had been made out fell to be determined at the date of the hearing of the Petition. However, I reject as a *non-sequitur* the proposition that the preconditions can only be met by showing, when such grounds are relied upon, that the statutory investigative powers are immediately and definitely needed. Context is everything. Clearly, where voluntary liquidators are in place and are seeking the supposed benefits of Court supervision, it would be odd for them to make an application without having formed a view that they actually propose to deploy such powers. Were they to make a premature application, prematurity might be a ground for dismissing or adjourning the petition. The Manager's counsel was also correct to point out that the case for deploying such statutory powers lacks detail and particularity at this point; further, that the real objective of the Petitioner is to obtain the appointment of its nominees as liquidators. That is not a satisfactory objection either. The Petitioner warned at the outset that it would seek a winding-up by the

Court if the Manager did not place the Company in voluntary liquidation and appoint its proposed liquidators, so there is nothing inconsistent about its present position.

79. Where the sole investor in a company seeks to appoint its nominees as voluntary liquidators, it does not have the voting power to rescind that appointment nor the legal power to seek the removal of admittedly fit and proper voluntary liquidators save by replacing them with alternative but more suitable official liquidators, this objective standing by itself is a valid ground for making the liquidation more effective. The Petitioner in the present case has satisfied me that FTI Consulting would also probably produce economic benefits as well although in my judgment the case on efficacy grounds is more clearly made out and quite compelling. In light of the Manager's refusal to recognise the Petitioner's right to nominate voluntary liquidators, and taking into account the Petitioner's particular interest as a public authority concerned about satisfying its own public stakeholders that a liquidation process in a distant land is credible, a winding-up under the supervision of the Court is obviously likely to be both more effective and consistent with the interests of the sole contributory.

80. Effectiveness in the present context takes into account not simply an immediate need to deploy investigative powers, but the appointment of official liquidators who are manifestly more independent than voluntary liquidators because they cannot be removed by the shareholders eligible to vote in general meeting. Liquidators who will be free without more to engage the full panoply of statutory powers should they see fit to do so. Liquidators who will also, if necessary, be able to seek recognition and assistance overseas[2]. The economy ground is largely a neutral consideration in cases such as the present when the Petitioner is the only party with standing to complain about any additional expense. As Mangatal J noted in *Re Exten Limited*:

> *"67...the Petitioner has indicated its willingness to fund the costs of court supervised liquidation of the Companies and thus there is no detriment or prejudice that could be occasioned to any other party if the orders sought are made."*

81. Expedition is also a neutral consideration from the contributory perspective for the same reasons. I do accept there is a potential concern about delay of payment to creditors but it is common ground that they will be paid in full and it is reasonable to assume that the size of their claims will be on the modest side, as suggested by the quantum of the Manager's own claim. The JVLs Report, which I assume was prepared without input from the Petitioner (which essentially asked the JVLs to adopt a holding position until the present proceedings were concluded), understandably does not contemplate pursuing the investigation the Petitioner seeks. I have no doubt that the JVLs would, if their present position was continued

[2] It seems clear that voluntary liquidators administering a solvent liquidation will not be recognised abroad, at common law at least, as Mr Smith QC contended: *Re Supreme Tycoon Ltd (in Liq)* [2018] 2 HKC 485 at paragraph [17] (Harris J); *Singularis Holding Ltd.-v-PricewaterhouseCoopers* [2015] AC 1675 at paragraph 25 (Lord Sumption).

have regard to the Petitioner's interests and consider what investigative efforts it was appropriate to pursue. If section 131(b) of the Law required the Petitioner to demonstrate an immediate need for the statutory investigative powers to be deployed, I would have accepted Mr Cogley QC's submission that no such immediacy had been made out. But I have rejected that argument as matter of construction of the statutory provision. When this Court winds-up a company on the grounds that it affairs need to be investigated, it is usually on the basis that a sufficient case has been made out to justify appointing official liquidators who will carry out preliminary enquiries rather than unquestioningly immediately deploying statutory powers based on the concerns which have supported the winding-up order. In any event, the main reason why supervision is required in this case is that official liquidators expressly empowered by this Court to investigate the public policy and commercial concerns of the Petitioners will lend a credibility-based efficacy to the liquidation that voluntary liquidators will not. It seems obvious that their official status will make it easier for them to obtain information voluntarily from persons who might be inclined to decline to assist the JVLs on the basis that they lack the formal powers to demand cooperation.

82. If the Petitioner was a 'rogue' contributory seeking on dubious grounds to override the views of the majority of his class, or if there was even a more or less equal division of stakeholder views, the grounds relied upon might warrant critical scrutiny and the Court might properly be required to adopt a more restrictive approach. Here, a Kuwaiti public authority has invested substantial amounts of public money in a Cayman Islands company while that authority was led by an officer who has since been convicted of misusing public funds. It does not have tangible reasons for suspecting that any wrongdoing occurred, but it wants to ensure that the Company is wound-up in a credible way. It also has unsubstantiated concerns about the way in which its investment was managed and the partially explained suspension of redemptions. These concerns have been exacerbated rather than alleviated by the Manager initially agreeing to appoint the authority's nominees as voluntary liquidators and then adopting an adversarial position based on a somewhat obtuse view of the law which has not been vindicated[3].

83. In my judgment the need for the voluntary liquidation to be continued under the supervision of the Court to ensure the credibility of the liquidation process has been clearly made out. It is well recognised that the need for an investigation into the affairs of a company by official liquidators is a freestanding ground for making a winding-up order on the just and equitable ground[4]. The Petitioner has satisfied me that on these grounds a Supervision Order should be made and JOLs appointed for the specific purpose of investigating the Petitioner's concerns. The main benefit of their appointment is that even if they conclude that the Petitioner's concerns are entirely unfounded, such findings will carry greater weight because of their independence as official liquidators appointed with that specific investigative charge.

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[3] I express no view on the entitlement of the Petitioner to documentation relating to the Underlying Funds and assume for present purposes that the Manager is correct in denying access.

[4] See e.g. *In the Matter of GFN Corporation* [2006 CILR 135 at 151; *In re Parmalat Capital Finance Ltd* [2006 CILR 171] at paragraph 18.

84. While I have described the Manager's view of the law as "somewhat obtuse", it is only fair to acknowledge that the legal conclusions which I have reached are expressed in a reserved judgment based on the extrapolation of general principles of winding-up law. There was no previous case directly on point which made it obvious that that the holder of management shares in a Cayman Islands fund company is required, in the context of a contemplated solvent liquidation, to defer to the wishes of the participating shareholders. It is also only fair to acknowledge that in the vast majority of solvent liquidations, the management shareholder will invariably nominate the voluntary liquidators without any input or intervention from the participating shareholders. The predominant practice is unlikely to be affected by my legal conclusions, because commercial discipline and logic will be a natural restraint on participating shareholders seeking active involvement in a process which will meet their commercial needs in any event.

85. The Court's role in an insolvent or solvent winding-up is most narrowly to provide independent judicial oversight designed to vindicate the statutory rights all of the parties interested in the liquidation. More broadly still, the Court's duty is to uphold the integrity of the Cayman Islands' commercial law framework and the reputation of the jurisdiction as a leading offshore domicile. As McMillan J observed in explaining why he had decided to grant the Supervision Order sought in the *APCF* case (admittedly, it appears, based on somewhat different commercial concerns of a substantial loss):

> "*...it is particularly important in the interest of justice and in order to maintain the reputation and standing of this jurisdiction that supervision should be ordered. At the same time, this decision is no reflection whatever on the professional standing and proficiency of the current JVLs, who have acted entirely impeccably.*"

86. The reputation of this jurisdiction requires the Court not simply to ensure that investors' legitimate desire for an investigation of the affairs of a company being wound-up be vindicated. This Court must be equally protective of the professional reputations of service providers such as the Manager and protect them from unjustified character attacks. I hope that on reflection, and in the fullness of time, the Manager will come to accept the view that the Supervision Order that I find must properly be granted involves no adverse judgment on its professionalism either. It is an unavoidable hazard of commercial life that concerns about the management of fund companies will, from to time, arise on the part of participating shareholders who have agreed to keep their hands off the management wheel during the normal business life of the company. But once a liquidation proceeding is in contemplation or is in train, those with a financial stake in the liquidation are clothed with authority to direct the course of that process to the extent permitted by the relevant winding-up law regime and as contemplated by the Company's Articles. In the words of Tennyson: "*The old order changeth yielding place to new.*"

Findings: the identity of the joint official liquidators

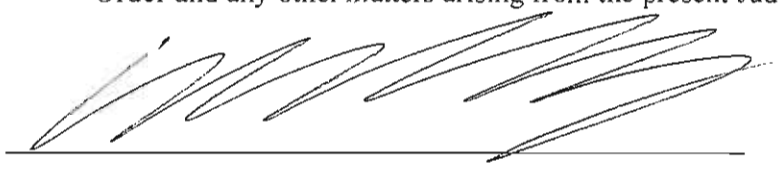
87 In my judgment the usual considerations about wasted effort and costs when consideration is being given to replacing voluntary liquidators with new official liquidators does not arise in the present case. The Petitioner's wishes ought to have been acceded to from the outset as it is the sole stakeholder. It was not for the Manager to purport to save the Petitioner's own money (one justification for the choice made was lower hourly rates). The Petitioner's nominees have no conflict, are qualified and will be more independent as officers of the Court than they would be if appointed as voluntary liquidators by the Founder Shareholder with no real security of tenure. There is no justification for finding that the Manager ought to have appointed the Petitioner's nominees in January and for the Court itself to thwart that outcome in July. The Petitioner's nominees from FTI Consulting (Messrs David Griffin, John Batchelor and Andrew Morrison) should be appointed as Joint Official Liquidators ("JOLs").

88. Subject to hearing counsel if required, and as a condition of making that appointment, I would propose to require the Petitioner to undertake that the JVLs' fees and expenses will be paid on an indemnity basis within 28 days of the date of delivery of the present judgment.

Conclusion

88. For the above reasons, and subject to the giving of the undertaking just mentioned above, I find that that the Petitioner is entitled to an Order that the winding-up of the Company shall continue under the supervision of the Court. Mr David Griffin and Mr Andrew Morrison of FTI Consulting (Cayman) Ltd and Mr John Batchelor of FTI Consulting (Hong Kong) Ltd shall be appointed as JOLs substantially on the terms set out in the prayer to the Petition as modified by any subsequent draft Order which may be submitted for my consideration.

90. I will hear counsel if required as to costs but it is difficult to see why costs should not follow the event. If required, I will also hear Counsel on the terms of the Order and any other matters arising from the present Judgment.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT