



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

CAUSE NO FSD 268 of 2023 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF MTBL GLOBAL FUND

Before: The Hon. Mr Justice Segal

Appearances: Tom Lowe KC with Andrew Jackson and Will Porter of Appleby for the Petitioner

Heard: 18 March 2024

Further evidence and submissions filed: 21-26 March 2024

Draft judgment circulated: 27 March 2024

Judgment delivered: 28 March 2024

HEADNOTE

Application to restore company to the register and to make a winding up order on restoration – the petitioner had previously brought proceedings against the company in Singapore – the company was struck off thereby preventing the petitioner from continuing those proceedings – the company’s management failed to take steps to restore the company to the register – the petitioner sought restoration to enable it to continue the proceedings and a winding up order to ensure that company would not be struck off again – the company’s management did not oppose the relief sought - whether the petitioner had standing to present the winding up petition and whether a winding up order should be made in the circumstances particularly where the petitioner’s claims were disputed in the Singapore proceedings and having regard to the need to avoid a winding up order stifling the company’s defence of those proceedings

JUDGMENT

Introduction

1. This is the hearing of the Amended Petition dated 4 March 2024 (the *Amended Petition*) presented by AI MTBL SPV, LLC (the *Petitioner*) against MTBL Global Fund (the *Company*). At the hearing, Mr Tom Lowe KC appeared for the Petitioner. The Company, which as I shall explain has been struck off, its fund manager and former director were not represented.
2. The Petitioner applies as a creditor of the Company for the following orders, which are sought pursuant to sections 159 and 94 of the Companies Act (2023 Revision) (the *Act*) and GCR O.102, r.18:
 - (a) that the Company be restored to the Register of Companies;
 - (b) that the Company be wound up by the Court; and
 - (c) that Ms Angela Barkhouse and Mr Luke Furler be appointed as joint official liquidators (*JOLs*) of the Company.
3. The filing of the Amended Petition follows a hearing of the original petition dated 7 September 2023 before me on 26 October 2023 (the *October Hearing*) and the making of an order of the same date (the *October Order*). I was not at that stage prepared to make the orders sought by the Petitioner as I was concerned to ensure that proper notice of the original petition and the hearing had been given to the Company's management (prior to the Company being struck-off) and gave directions for further steps to be taken to give notice to management in Singapore. It appears that notice has now been given to these parties. A copy of the notice of hearing giving details of this hearing together with the Petitioner's evidence filed for the purpose of the hearing was sent on Friday 8 March 2024 to the legal advisers in Singapore to the Company's fund manager and to the individual who before the Company was struck-off was the Company's director and held all the management shares in the Company, Mr. Sun (Joe) Quan (*Mr. Sun*). They had also previously been sent copies of all other documents filed in these

proceedings. However, neither Mr. Sun nor the fund manager have applied to oppose or made any representations (or had any communications with the Court) regarding the relief sought by the Petitioner.

4. In support of the Amended Petition the Petitioner has adduced evidence from Mr Lawrence Cutler. He is an authorised representative and signatory of the Petitioner. He has provided four affirmations. Further affidavits were also filed giving evidence of service, procedural matters and correspondence relating to certain proceedings in Singapore (discussed below).

Background

5. The Company was incorporated and registered on 20 July 2017 and registered as a mutual fund on 6 October 2017. Mr. Sun, who is a Chinese national and a Singapore Permanent Resident, holds all the management shares in, and was prior to the strike-off a director of, the Company. China Capital Impetus Asset Management Pte. Ltd (the **Fund Manager**) was the fund manager of the Company (and is incorporated in Singapore). Mr. Sun is the CEO of the Fund Manager.
6. In May 2021, the Petitioner subscribed for 146.3028 Series 1 Class D participating shares (the **Class D Shares**) in the Company on the terms set out in various documents. These included a subscription agreement dated 6 May 2021; a side letter dated 6 May 2012; a side letter dated 25 May 2021 (the **Second Side Letter**); a confidential information memorandum dated February 2021 and the Third Amended and Restated Articles of Association adopted on 26 March 2020 (the **Articles**).
7. Under the Second Side Letter the Company agreed to distribute US\$8,411,000 (the **Tranche A Distribution**) by 8 August 2021 and to pay by the effective date US\$25 million less any sums already paid in respect of the Tranche A Distribution (the **Return Amount**). The Company was also required to effect a redemption of all the Class D Shares held by the Petitioner “(i) immediately (and in any event no later than two (2) Business Days) after an Event of Default has occurred, or the Investor notifies the Fund in writing of a Potential Event of Default or (ii) before the first anniversary of the Effective Date.” The Petitioner says that the effective date was 25 May 2021 (so that the

first anniversary was 25 May 2022). In addition, the Second Side Letter provided that failure by the Company to effect this redemption would entitle the Petitioner to assume control of the Company by terminating the appointment by the Company of the Fund Manager; effecting a transfer to itself of all management shares held by the Fund Manager; replacing the Company's director(s) with its own and taking any further necessary steps, including in respect of any regulatory matters.

8. On 12 August 2021 the Petitioner submitted a redemption request to the Company for the redemption of US\$8,411,000 of the Class D Shares. On 19 October 2021 the Company paid the Petitioner US\$1 million leaving US\$7,411,000 outstanding. On 14 December 2021 the Petitioner served a statutory demand on the Company in respect of that redemption request.
9. The parties subsequently negotiated a settlement agreement. On 23 December 2021 the Petitioner, the Company, Mr Sun and Lecca Group Pte Ltd (*Lecca*) entered into the Framework Agreement (the *Framework Agreement*). The settlement in the Framework Agreement was conditional on the Petitioner submitting a redemption form (request) in respect of all is remaining Class D Shares (which as I understand it, it did).
10. The Framework Agreement is a complex document (as the Company acknowledges in its defence in the Singapore proceedings at [21(m)]). It was governed by Singapore law and contained an exclusive jurisdiction clause requiring that disputes be determined by the Singapore courts. Under its terms, the Company and Lecca agreed, in some cases subject to the satisfaction of certain conditions, to pay sums to the Petitioner in discharge of the Company's outstanding liabilities. As Mr Lowe KC explained, the Framework Agreement was designed to allow the Company to dispose of its assets and pay sums to the Petitioner out of the proceeds of sale. The Company in its defence in the Singapore proceedings said that the Framework Agreement "*set out a framework for the repayment of a total fixed sum of US\$24million*" (see [21(f)]).
11. The Company agreed to procure that its subsidiary AEI Corporation Ltd (*AEI*) would purchase (and enter definitive documentation for the purchase of) the shares in the Octopus Group before 25 February 2022 (the *Octopus Acquisition*). In the period before the completion of the Octopus Acquisition, the Company (a) was required to transfer all

its shares in AEI (the *AEI Shares*) into escrow; (b) agreed to sell to Lecca for US\$5 million 5,617,978 of those AEI Shares, and pay that sum to the Petitioner and (c) agreed, if the acquisition by AEI of 100% of the share capital of MTBL Global Pte Ltd (the *MTBL Acquisition*) closed on or before 31 March 2022, to pay US\$10 million to the Petitioner. If however the MTBL Acquisition did not close on or before that date, Lecca agreed to pay US\$10 million to the Petitioner (and in consideration the Company would sell to Lecca an equivalent number of its shares in AEI). If the Octopus Acquisition went ahead and completed, then Lecca was required to pay a further US\$5 million to the Petitioner (once again in consideration of the Company selling to Lecca an equivalent number of its shares in AEI) and the Petitioner would become entitled to AEI Shares to a value that would mean that it had had been paid a total of US\$24 million after taking into the other sums paid to it pursuant to the Framework Agreement. The parties agreed to use their best endeavours to obtain the approval of third parties and that none of them would be liable for any delay in completion of the transactions by such third parties.

12. The Framework Agreement stated that completion of all these steps and transactions would represent a full and final settlement of all sums owed by the Company to the Petitioner and that the Petitioner agreed to refrain and forbear from pursuing all legal proceedings against the Company and Mr Sun arising under of in connection with the various previous agreements. Clause 9 stipulated that save as expressly provided in the Framework Agreement, nothing contained in it affected or prejudiced the Petitioner's rights under the subscription agreement or any other ancillary agreements. However, notwithstanding these terms, the Company had the right exercisable up to 30 June 2022 to redeem all of the Petitioner's Class D Shares for US\$25 million.
13. It appears that the Petitioner was paid Singapore \$10 million by the Company on 22 or 23 March 2022 (being approximately US\$7,366,483.32). The basis of this payment and the liabilities to be discharged are in dispute in the Singapore proceedings (see [23] of the Petitioner's statement of claim and [22] and the Company's defence).
14. On 20 May 2022, the Petitioner submitted a further redemption request to the Company for the sum of US\$16,633,540.66 (the *Redemption Proceeds*).

15. The Petitioner accepts that if the Company had complied with its obligations under the Framework Agreement the Framework Agreement would have operated as a full and final settlement of all claims the Petitioner against the Company. However, the Petitioner asserts that the Company was in material breach of its obligations thereunder.
16. On 2 June 2022 the Petitioner's Singapore legal advisers, Drew and Napier, wrote to the Company and Mr Sun stating that the Company had committed various repudiatory breaches of the Framework Agreement, asserting that the Petitioner's agreement to forbear was no longer in force or applicable and that the Petitioner had elected to accept the Company's repudiatory breaches and to terminate the Framework Agreement. By a letter dated 13 June 2022 the Company, in response, indicated that it elected to affirm the Framework Agreement.
17. The Petitioner claims that, as a result of the termination of the Framework Agreement, its earlier rights under the various documents regulating its subscription for the Class D Shares revived and became enforceable again. These included its rights under the Second Side Letter. Under that agreement, the Redemption Proceeds were to be paid to the Petitioner before 25 May 2022. The Petitioner claims that this sum is due and owing and that the failure to pay it resulted in an event of default under the Second Side Letter.
18. On 4 July 2023, the Petitioner's Cayman Islands attorneys (Appleby) gave notice to the Company (at its registered office) and to its administrator on behalf of the Petitioner calling (in exercise of its rights under the Second Side Letter) for the transfer of the Company's management shares and for the Company to update its registers of members and directors as requested therein (the *Demand Letter*).
19. On 19 July 2022, the Petitioner commenced proceedings in the High Court of the Republic of Singapore against the Company and the Fund Manager seeking, *inter alia*, a declaration that the Petitioner had validly terminated the Framework Agreement and an order that the Company pay to the Petitioner the sum of US\$16,633,540.66 (that is the Redemption Proceeds). On 9 September 2022, the Company filed a defence in the Singapore proceedings *inter alia* denying that the Framework Agreement had been terminated. On 21 February 2024 Prolegis LLC, the Fund Manager's legal advisers in Singapore, wrote to the Petitioner's legal advisers in Singapore, Drew & Napier, that the

Fund Manager intended to make a submission to the Singapore court that “*there is no case to answer in the Singapore Proceedings.*” Mr Lowe KC explained that this would in substance be an application to strike out the Petitioner’s claims. The Petitioner said that the hearing of this application was to be listed for a hearing on 21 March 2024 (the parties had agreed to vacate the trial date in respect of the Petitioner’s claims which had been listed for 5-7 March 2024).

20. The Company was struck off the Register on 31 August 2023, ostensibly for having failed to maintain a registered office (**RO**) in the Cayman Islands. The Petitioner says that at the time of the striking off, the Company was carrying on business as an exempt open-ended investment company and was an active party in the Singapore proceedings.
21. The Petitioner’s evidence is that it appears that the Company has been unrepresented in the Singapore proceedings since from around 1 November 2023. On 28 October 2023, Appleby had delivered certain documents required to be provided to the Company’s Singaporean legal advisers (Duxton Hill Chambers) but no response was received. Instead Mr. Sun had replied directly to Appleby stating that the Company’s Singaporean lawyers had forwarded Appleby’s correspondence to him. The Company did not participate in hearings in the Singapore proceedings on 6 or 21 to 27 November 2023 or on 5 February 2024. On 5 March 2024 Appleby received an email from the Company’s Singaporean legal advisers confirming that they no longer act for the Company or Mr. Sun.
22. The Petitioner says that from 1 November 2023 to the date of the Amended Petition, Mr. Sun and the Fund Manager have made repeated representations (including through the Fund Manager’s Singaporean legal advisers, Prolegis LLC, to the Singapore court) that they were taking advice on the steps required (and costs involved) in restoring the Company to the Register but have failed to take any action to obtain the restoration of the Company. The Petitioner noted in particular that representations concerning the Company’s impecuniosity, the unsuccessful search for funding and the failure to regularise the Company’s position were made in a letter from the Fund Manager’s Singaporean legal advisers dated 2 February 2024 stating that “... *MTBL Global Fund (“Fund”) has always had liquidity issues. We are instructed that since end October 2023, the Fund along with the fund manager... has been trying to raise funds for the*

purposes of inter alia retaining legal counsel from the Cayman Islands to advise on the steps moving forward and restoring the Fund to the Cayman Islands Register. However, the fundraising efforts have not been fruitful to date... Our instructions are that the Fund Manager nevertheless remains committed to restore the Fund to the Cayman Islands Register. The Fund Manager is still trying to find alternative means to raise funds for the Fund, including the possibility of some of Mr Sun Quan's personal contacts assisting to restore the Fund to the Cayman Islands Register at minimal costs."

Restoration to the Register – the Petitioner's submissions

23. The Petitioner sought an order under section 159 of the Act as a creditor. Under that section the Court on the application of a creditor has jurisdiction "*if satisfied that the company was, at the time of the striking off thereof, carrying on business or in operation, or otherwise, that it is just that the company be restored to the register, [to] order the name of the company to be restored to the register.*"
24. The grounds relied on by the Petitioner were set out at [25]-[28] of the Amended Petition. These were that the Company had not appointed a replacement RO service provider or maintained a RO in the jurisdiction; remained struck-off; was admittedly insolvent; remained a defendant albeit unrepresented in the Singapore proceedings and had failed to provide the Petitioner with an updated certified copy of its register of members reflecting the transfer of the management shares.
25. The Petitioner relied on *In re OVS Capital Management* [2017] 1 CILR 232, *In re Margara Shipping* (unrep., 6 Dec. 2021, Doyle J) and *In re Oak Palm Fund Ltd* (unrep., 8 Sept. 2022, Richards J). The Petitioner argued that it was undoubtedly legitimate for a creditor to seek the restoration of a company in order to pursue a claim against that company. In *Oak Palm Fund* at [86] Richards J had cited with approval the following passage from the judgment of the English Court of Appeal in *City of Westminster Assurance Co Ltd v Registrar of Companies* [1997] BCC 960:

"The respondent's object is to enforce a liability against a guarantor. In my judgment that is not outside the scope of the section. The section is intended to provide a remedy for a person who has a claim, whether against the company or a third party, which can be enforced only if the company is restored to the register."

He is a person who, being a creditor of the company, has a legitimate grievance if the company is dissolved and he is no longer able to enforce the liability. It does not matter whether he seeks to enforce the claim against the company itself or whether he needs to establish the company's liability in order to make a claim against a third party such as the company's insurer or guarantor” (emphasis added).”

26. The Petitioner argued that it was a creditor of the Company (for the purpose of section 159 of the Act) aggrieved by the striking off of the Company from the Register. The Petitioner is at least a contingent or prospective creditor by virtue of its claim for the Redemption Proceeds and it did not matter that the claim was being defended by Mr. Sun and the Fund Manager in the Singapore proceedings. Being a contingent creditor was sufficient to give it standing to apply for restoration. The Petitioner relied on the judgment of Mr Justice Doyle in *Magara Shipping* at [6] where he had noted that the word creditor was to be construed widely and included contingent creditors, citing *Re Harvest Lane Motor Bodies Ltd* [1969] 1 Ch. 457. In that case Mr Justice Megarry had considered the position of widow who was suing a company for damages relating to the death of her husband when the company was struck off. Megarry J had said this at page 462:

“... we have the case of a petitioner who, at the time when the company was struck off, had an action in being against the company which was rendered ineffective by the disappearance of the company from the register. Where one is concerned with those who might feel a legitimate grievance because a company has been struck off, it seems to me that one should look somewhat generously at the word "creditor" which precedes the phrase "feels aggrieved." Put another way, I doubt very much whether in using the word "creditor" simpliciter the legislature can have been intending thereby to differentiate between those creditors whose debts are fixed and ascertained and those whose debts are contingent or prospective, providing redress for the grievances of the former but ignoring the grievances of the latter”.

27. The Petitioner submitted that the Court had jurisdiction under the first limb of section 159 of the Act which was satisfied since the Company was, at the time of striking off, carrying on business as an exempt open-ended investment company and was an active defendant in the Singapore proceedings. The Company was plainly not “*completely dormant*” (see *OVS Capital Management* at [22]).
28. Further and in the alternative, the Petitioner argued that the Court also had jurisdiction under the second limb of section 159 of the Act which was satisfied in this case since it

was just in the present circumstances that the Company be restored to the Register. Restoration of the Company was necessary to enable the Petitioner to preserve and vindicate its legal rights. Should the Company not be restored to the Register, this would frustrate the enforcement of its rights and remedies (the Singapore proceedings against the Company would have to be discontinued) and prevent the Petitioner obtaining or enforcing orders in the Singapore proceedings.

Application for a winding up order – the Petitioner’s submissions

29. In the Amended Petition, the Petitioner set out its grounds for winding up at [29]-[35]. There were two grounds relied on. First, that the Company was unable to pay its debts. Secondly, that the Petitioner had justifiably loss confidence in the management of the Company.
30. As regards inability to pay its debts, the Petitioner relied on the statements made by the Fund Manager’s Singapore legal advisers in their email dated 2 February 2024 (quoted above) and the statements they had made to the Singapore court and argued that in all the circumstances the Court could infer that the Company had no cash resources out of which to discharge its liabilities, including the liabilities to the Fund Manager and the small amounts that would be due on its restoration. The Petition avers (at [6]) that the Company is indebted to the Petitioner in the sum of US\$16,633,540.66. But the Petitioner does not rely on the Company’s failure to pay that sum as evidence of its inability to pay its debts (because it accepts that the Company has denied that is so liable and disputed the Petitioner’s claim in the Singapore proceedings).
31. As regards loss of confidence, the Petitioner relied on the failure of the Company’s management to take steps to restore the Company to the Register despite having given assurances to the Petitioner and the Singapore court (through the Fund Manager’s legal advisers) that appropriate steps were being taken. The Petitioner said that the Court could and should infer that the failure to act, and to act as had been promised, was wilful and designed to frustrate the Petitioner’s efforts to enforce its rights. While Mr. Sun had said in an email that this was not so, he had failed to provide any reasonable explanation or to file evidence explaining the position in these proceedings. This conduct amounted, the Petitioner claimed, to a serious lack of probity on the part of the Company’s management

(including Mr. Sun and the Fund Manager). The Company was a CIMA regulated entity and Mr. Sun and the Fund Manager had failed to ensure that basic regulatory requirements and proper governance had been observed.

32. The Petitioner submitted that:

- (a). the Company was plainly and admittedly cash flow insolvent and was likely to have been cash flow insolvent for some time. As noted above, on 2 February 2024 the Fund Manager's Singaporean legal advisers had informed the Petitioner that the Company has "*always had liquidity issues*" and that the Fund Manager's attempts to raise funds for the purposes of restoring the Company to the Register had "*not been fruitful to date.*" Furthermore, on 5 February 2024 the Fund Manager's Singaporean legal advisers had informed the Singapore court that (i) the Company was having "*liquidity issues*" because it had illiquid assets in the form of shares but not liquid assets and that (ii) the Company owed the Fund Manager management fees and that the Fund Manager was concerned whether to "*sink more money*" into the restoration. The evidence therefore indicated that the Company upon being restored was subject to liabilities which were due and payable (albeit in the case of the Fund Manager debts the payment of which was not being demanded) and had no funds out of which to pay any of debts (including the amount of the restoration fee payable which was CI\$3,325.00). The Petitioner submitted that the Court could be satisfied that the Company (if restored) would be unable to pay its debts.
- (b). the management of the Company plainly could not be trusted to manage its affairs and conduct its business properly. They had failed to prevent the Company from being struck off the Register, even though the Company was (and remains) a litigant in the Singapore proceedings and indebted to the Petitioner for a significant sum. There had been no proper explanation for that failure. In the absence of any such explanation (which the Petitioner had requested since October 2023) the Court could be satisfied that management of the Company had wilfully permitted the Company to be struck off in order to frustrate the Petitioner's recovery of the significant debt owed to it, whether by enforcement of any judgment in the Petitioner's favour in the Singapore proceedings or otherwise.

- (c). it was unjust that the Company be permitted to continue to defend the Singapore proceedings by reason of the representations by Mr. Sun and the Fund Manager to the Singapore court that the Company's de-registration would be remedied whilst, on the other hand, not expeditiously arranging for that restoration and the appointment of a replacement RO provider.
- (d). further and in any event, to restore the Company to the Register without appointing JOLs would return the Company to the position where it was without an RO and therefore immediately liable to be re-listed for striking off on the next strike off date. The Petitioner noted that it was unable to secure the appointment of an RO service provider for the Company because it could not provide any prospective provider with the client due diligence material that the prospective provider would require (on existing members, directors, etc.) before accepting the proposed appointment.
33. The Petitioner accepted that if a winding up order was made the JOLs should have permissions to continue (to defend) the Singapore proceedings and proposed that the order so stipulate.

The position of the Petitioner as a creditor – discussion and decision

34. The Company, before it was struck off and subsequently, the Fund Manager, and the Company's director are disputing in the Singapore proceedings the Petitioner's claim that the Framework Agreement has been terminated. They claim that the agreement remains in force and effect. But, so far as I can tell, they do not assert that if the Framework Agreement subsists, as they claim, and the Company is restored, it would have no outstanding obligations and potential liabilities to the Petitioner (under the Framework Agreement). My brief review of the terms of the Framework Agreement above indicates that the Company was subject to a variety of continuing obligations and no evidence has been filed to show that there will if the Company succeeds be no such obligations and liabilities on restoration. From my review of the Company's defence in the Singapore proceedings, there appears to be no denial of any continuing obligations or liabilities. Of course, had the Company chosen to explain its position (even without filing evidence) it might have been possible to form a different view.

35. Neither the Fund Manager nor Mr. Sun have opposed the applications to restore and for a winding up order or challenged the Petitioner's standing as a creditor. Indeed, the Fund Manager and the Company's (former) director have remained silent concerning the Amended Petition and the question of standing. They have not asserted that the Court should refuse the relief sought on the basis that the Petitioner's debt (on which the Amended Petition is based) is bona fide disputed on substantial grounds or sought an adjournment of the hearing of the Amended Petition to give them an opportunity to make submissions (despite having been clear notice by email of the continuation of the Petitioners' applications and of the new hearing date). They have also given no explanation for the radio silence. It may be that they do not wish to submit or risk submitting to the jurisdiction. If that is a concern it is not one they have expressed. But their refusal to engage with these proceedings and oppose the relief sought substantially weakens and undermines any claim they may subsequently make that the relief should not have been granted. This is particularly the case where evidence as to the financial position of the Company and as to the nature and extent of its continuing obligations under the Framework Agreement (assuming that continues in force) would have assisted the Court in determining whether the Company will be on restoration unable to pay its debts and whether the Petitioner can show that in any event it will at least be a contingent creditor of the Company. I infer that the Company, the Fund Manager and Mr. Sun do not have the evidence that would contradict the Petitioner's case on these issues.
36. Accordingly, there is no dispute as to the Petitioner's standing, inability to pay debts or the Petitioner's claim to be a contingent creditor. However, the Court itself must still be satisfied that it has jurisdiction to make a restoration order and a winding up order (particularly a winding up order which is an onerous remedy). In the circumstances, it seems to me that the Court should conclude that the Petitioner has established that it is a creditor for the purpose of section 159 and the winding up jurisdiction. As I have said, even if the Company is right, and the Framework Agreement remains in force and effect it will remain subject to continuing contractual obligations and the Petitioner will be a contingent creditor in respect of liabilities which may accrue in the event of a subsequent breach. If the Company is wrong, it appears that substantial sums will be due and owing to the Petitioner.

37. It is of course the Court's normal practice to dismiss a creditor's winding up petition where there is a dispute on substantial grounds about the existence of the petitioner's debt. The Petitioner must then establish its standing in other proceedings. While, as I have explained, the Fund Manager and Mr. Sun have not challenged the Petitioner's standing on this ground, the dispute as to the Petitioner's claim to be owed a sum equal to the Redemption Proceeds raised in the Singapore proceedings does not prevent it from having standing as a creditor, for the reasons I have given. On the evidence, even if it cannot show that this sum is due and owing it will still be able to show that the Company remains liable to perform obligations under the Framework Agreement and that in the event of a breach of those obligations it will become a creditor (see for example *Re Compania Electricidad de la Provincia de Buenos Aires Ltd* [1980] Ch 146).
38. While on this basis the Petitioner can pass the threshold and be treated as a creditor, the nature of the Petitioner's interest does have to be taken into account when the Court comes to consider whether to exercise its discretion, in particular to make a winding up order.

The application to restore – discussion and decision

39. It seems to me that the Petitioner has established that the Company was (a) at the time of the striking off carrying on business or in operation and (b) that it is just that the Company be restored to the register.
40. I accept the Petitioner's submissions as to the first point. The evidence indicates that the Company was actively engaged in the Singapore proceedings and that these proceedings relate to the performance of its business-related obligations incurred in the course of conducting its business.
41. I also accept the Petitioner's submissions as to the second point. The Petitioner "*has a claim [against the Company] which can be enforced only if the [Company] is restored to the register.*" If the Company is not restored to the register the Petitioner's proceedings for relief in respect of the Framework Agreement, which must and can only be brought in Singapore, will have to be discontinued (at least as against the Company) and the Petitioner will be unable to obtain the declaratory relief it claims and seek to protect its

rights (as a creditor). The Company needs to remain a party to the Singapore proceedings (and was in fact doing so prior to being struck-off). The fact that the Petitioner's claims are disputed in the Singapore proceedings does not prevent it from having a legitimate interest, as a *bona fide* claimant, from being able to prosecute those proceedings and to seek to establish and enforce its rights.

The application to wind-up – discussion and decision

Inability to pay debts

42. The evidence of the Company's inability to pay its debts is limited. For the purpose of establishing inability to pay debts, as the Petitioner accepted, the Petitioner cannot rely on a failure to pay sums which it claims to be owed (nothing has been established as being due and payable). Instead, the Petitioner relies on the statements made by the Fund Manager's counsel. It seems to me that these, for this purpose, can be taken to be made on behalf of the Company or at least as evidence of the Company's position if and when restored to the Register. There are two issues. First, what liabilities are due and payable or about to become due and payable? Secondly, what cash resources does the Company have to pay such liabilities? The Amended Petition only relies (at [30]-[31]) on liabilities associated with (and perhaps consequential upon) restoration. The sums required to be paid to the Registrar on restoration are not currently but are imminently due and payable and in my view can be taken into account (even if these are to be paid by the Petitioner the Company would be ordered to reimburse the Petitioner). The evidence also indicates that sums are currently owing to the Fund Manager which may become payable on restoration but there is no suggestion that the Fund Manager is seeking immediate payment (one would obviously expect that it would not do so). As regards cash, the evidence shows that the Company has no cash or funds at all or that funds will shortly be available. So it can be said that the Petitioner has shown that the Company will have a small liability to pay on restoration and is unable to discharge that sum from its own funds and that since it has no cash at all it will be unable to discharge *any* liabilities that fall due following restoration if the relevant creditors press for payment. But there is no evidence, beyond the evidence relating to the sums owing to the Fund Manager, as to whether there are other liabilities and if so how much is owed and to whom. In the absence of such evidence I am not prepared to find that the Company is unable to pay its

debts. To do so, the Court is required to have regard to the Company's total financial position and the evidence adduced by the Petitioner does not allow me to do so. There is insufficient evidence from which to form a reliable view (and so the Petitioner has failed to prove) that the Company is generally unable to pay its debts. As Owen J said in *Bell Group Ltd Westpac Banking Group Corp* (No.9) (2008) 70 A.C.S.R. (Supreme Court of Western Australia quoted on *Goode on Principles of Corporate Insolvency Law*, 5th ed., 2018, edited by Kristin van Zwieten, at 4-16) "*Insolvency is to be judged by a proper consideration of the company's financial position, in its entirety, based on commercial reality. It is not to be found or inferred simply from evidence of a temporary lack of liquidity.*"

Lack of probity or other serious misconduct in the management of the Company and the Petitioner's loss of confidence in management

43. The evidence as to the basis for a loss of confidence in the Company's management is also limited but in my view more substantial. The Petitioner avers in the Petition (at [34]) that there has been a serious lack of probity on the part of the Company's management and (at [32]-[33]) that the failure to avoid or remedy the striking-off of the Company, without a proper justification or explanation, must be taken as evidence of wilful misconduct by Mr. Sun and the Fund Manager to frustrate the Petitioner's enforcement of its rights as a creditor.
44. It is necessary for the Petitioner to show a lack of confidence by reason of fraud, serious misconduct or serious mismanagement of the affairs of the company. It is clear from the authorities that it is not necessary for a petitioner to establish conduct connoting dishonesty or a want of integrity. But conduct that is wrongful and deliberate is at least required. It seems to me that the Amended Petition needs to refer to facts (and contain averments), and there needs to be some evidence, from which it can be inferred that the Company's management has deliberately acted in a manner that is wrongful and inconsistent with their duties to the Company. I am, on balance, prepared to accept, that this test is satisfied in the present case. A deliberate failure to conduct the Company's affairs in accordance and compliance with the procedures and requirements prescribed by the Act may be sufficient and has occurred here. Despite and giving weight to Mr Sun's denial (see his email of 1 November 2023) of deliberate wrongdoing (and his

assertion that he only found out about the striking-off of the Company in November 2023), the conduct of Mr Sun (and of the Fund Manager) has in my view been in breach of duty and wrongful. There has been a failure to ensure that the Company remained in good standing and on the register. Mr Sun as a director had a responsibility (perhaps with the Fund Manager) to monitor the Company's position and ensure that it complied with the requirements of the Act. He (and they) failed to do that. On receiving notice of the striking-off, action was required to protect the Company. If, as has been claimed, the Company was without funds and unable to secure the services of a new corporate service provider and to pay the costs of restoration, then Mr. Sun (and the Fund Manager) should either have used their own funds for this purpose (if they considered it to be in their interests to do so because they believed that the Company would successfully resist the Petitioner's claims and have real value) or cooperated with the Petitioner to arrange for the restoration and winding up of the Company. This seems to me to represent the responsible action which could reasonably be expected of directors of a regulated fund.

45. The Petitioner I think also implies but does not say explicitly that the story told by Mr. Sun and the Fund Manager to the Petitioner and the Singapore court was deliberately misleading and designed to give a false impression that genuine efforts with a realistic prospect of success were being made to have the Company restored promptly. However, that is a serious allegation which requires specific facts to be clearly set out (albeit that the petition is not a pleading) with sufficient evidence to support the allegations and I do not consider that it has been made out.
46. The Petitioner has said (and the Amended Petition avers) that Mr. Sun (and the Fund Manager) deliberately permitted the Company to be struck off in order to frustrate the Petitioner's enforcement of its rights as a creditor. It seems to me that this is a reasonable inference to draw in the circumstances and in the absence of a proper explanation given in evidence to this Court. But it is not sufficient that the Petitioner can show that the misconduct of the Company's management prejudices its interests as a litigant in proceedings against the Company and was designed to gain an improper tactical advantage in that litigation. Winding up on a creditor's petition is a class remedy. Even where the just and equitable ground is relied on by a creditor it must be just and equitable to wind up the Company to protect the interests of the Petitioner in its capacity as a (contingent) creditor and the interests of all other creditors. In the present context a

winding up order can only be justified if it can be shown to be needed to ensure that the Company is properly managed, its liabilities properly ascertained and established and its assets realised to best advantage in the interests of all creditors (and shareholders).

47. In my view, the Petitioner's allegation against Mr. Sun and the Fund Manager of a lack of probity (and of misconduct) is more widely framed than just a complaint about litigation tactics that affect its particular interest as a litigant. The Petitioner's complaint can be understood as being directed to the prejudice that management's failures have had to its position and prospects for recovery as a creditor (the Company it claims is "*indebted to the Petitioner for a significant sum*"). The problem is that Mr. Su and the Fund Manager have failed to act to protect the position of the Company and that a failure to maintain the Company in good standing is damaging to creditors and all stakeholders. The failure to ensure that the Company maintained a RO and remained registered was in the short term prejudicial to the Petitioner as litigant but is also prejudicial to the Petitioner as at least a contingent creditor who will wish to see that the Company is properly managed and complies with its regulatory obligations so that its assets are preserved and protected for the benefit of creditors (and if the Company is solvent, shareholders). Every other creditor or stakeholder will have a similar concern and interest. So I accept that the Petitioner's lack of probity allegation and claim of mismanagement relates to conduct by Mr. Sun and the Fund Manager which affects its position and interests as a creditor (and not just its interests as an adverse party in litigation) and the interests of other members of the creditor class are also engaged.
48. It does seem to me that the conduct of Mr. Sun as director can be characterised as involving a persistent disregard of his obligation to act in the interests of the Company (which is sufficient to establish a lack of probity for the purpose of the just and equitable ground). He has allowed the Company to be struck-off with the result that its assets have passed to the Minister of Finance and put the interests of its creditors (and shareholders at risk). Despite being on notice of the issue from at least November last year, he has failed to remedy the problem. He (and the Company) have failed to adduce any evidence to show that he has taken reasonable and proper steps and acted in accordance with his duties as a director in this jurisdiction. I take into account what has been said to the Singapore court and in correspondence but give it limited weight. If Mr. Sun wished to rely on the action he had taken and to show that he has acted reasonably and in

compliance with his duties as a director, he has had (and I have taken steps to give him) plenty of opportunity to put in evidence in these proceedings (or at least explain the position to this Court) but he has consistently failed to do so. This conduct, and Mr. Sun's failure and apparent refusal to take his responsibilities as a director seriously, indicates that the Petitioner (in its capacity as a contingent creditor) does have a justifiable lack of confidence in the conduct and management of the Company's affairs.

Is a winding up order justified in the present circumstances?

49. Accordingly, I am satisfied that the Petitioner has shown that the Court has jurisdiction to make a winding up order on the just and equitable ground. The question then becomes whether the Court should exercise its discretion to do so in the circumstances of this case, having in mind in particular the Petitioner's position as a party (a) who has not yet established that it is a creditor for an undisputed debt which is due and payable (and therefore cannot take the benefit of the strong *prima facie* right to a winding up order which such a creditor has) and (b) to active litigation against the Company in Singapore.
50. I have considered whether it would be appropriate to adjourn the Amended Petition and make an order to restore the Company to the register and exercise the Court's power under section 159 of the Act to give directions that will ensure that the Company has a registered office (by directing Mr. Sun, as a director of the Company, to engage a new service provider to the Company to act as the RO). This would give Mr. Sun (and the Fund Manager) an (a further) opportunity to take all necessary action to have the Company put in good standing and demonstrate that the Company is being properly managed.
51. However, I concluded that this would not be the right course and would not protect the Petitioner's legitimate interests. Restoration alone does not offer a solution. The Company needs to pay the restoration fee (which the Petitioner could be required to pay subject to a right of indemnity by the Company) and to engage a service provider to act as the RO. It is unlikely, as the delays may evidence, to be able to do that. It also needs active and responsible management of its assets. Furthermore, the Company has already been given a considerable period of time in which to take remedial and appropriate action. I have already adjourned the petition and required further notice to be given to

Mr. Sun and the Fund Manager to give them an opportunity to appear or at least make representations to the Court and they have continued to ignore these proceedings. Accordingly, such an approach seems very unlikely to work and likely only to add further delays for no material benefit. It is not as though Mr. Sun or the Fund Manager have requested (and the position would be very different if they had requested) the Court to take such an approach. There is also an issue as to whether such a direction could be made effective since Mr. Sun is not currently a party to the Amended Petition and is out of the jurisdiction.

52. The Court is faced with a Company which needs to be restored to protect the short and long term interests of at least one party who claims to be a large creditor, which Company has no money, whose director and Fund Manager before striking off have failed to take remedial action despite having been given months to do so, which Company needs to be able to engage and pay for a new service provider, which needs to be properly managed, which appears to have valuable assets which may be put at risk if proper governance is not restored and if management is not assumed by a responsible party (that will not show the apparent neglect exhibited to date by the current management) and where it is not possible for directions to be made that would be effective to ensure that the position of the Company is regularised. In these circumstances I am satisfied that a winding up should be made provided that proper arrangements can be made to ensure that the Company's defence of the Petitioner's Singapore action is not stifled.
53. I note, as the Petitioner pointed out, that the GCR make special provision for the making of a winding up order at the same time as the Company is restored to the Register. GCR O. 102, r. 18 provides as follows:

“(1) An application by a creditor under Section 159 of the Law may be combined with an application under Section 94 of the Law and may be made by petition in Form No. 68 of Grand Court Rules - Vol II - Forms (as amended and revised), in which case O.3 of the Companies Winding Up Rules (as amended and revised) shall apply.

(2) A petition under this rule shall be served on —

(a) the last known registered office of the company...

54. The petition in Form 68 (whose use is not mandatory) states as follows:

“6. *[Where the petitioner is a creditor] The Company is indebted to your petitioner in the sum of [state amount and give particulars of the circumstances in which the debt arose].*

[In cases where the petitioner is a claimant]. Your petitioner has a claim against the Company for [state the nature of the claim and the circumstances in which it arose].

7. *In the circumstances, it is just and equitable that the Company be restored to the register of companies and wound up under the provisions of the Companies Act (as amended and revised).”*

55. Interestingly, this petition recognises that it is sufficient for the petitioner only to be a claimant rather than an established creditor and relies on the just and equitable ground as the basis for the Court’s jurisdiction to wind-up. This seems to me to suggest and confirm that the position of the Company at the time of its restoration and the need to protect the interests of the petitioner and other creditors can be relied on to show that it is just and equitable to make a winding up order. It will often be the case that the company has been struck-off for some time and that the former directors are no longer on the scene or active so that there is no-one who on restoration could manage the company and take steps to protect its assets and maintain it in good standing. A liquidator is *needed* to take control of the company in the interests of its creditors (and shareholders). The need for a liquidator to protect the interests of the petitioner and other members of the class of which he/she is a member can make it just and equitable to make a winding up order. This is not precisely such a case since Mr. Sun and the Fund Manager are still active but Mr. Sun’s failure to act either to have the Company restored or to demonstrate to the Court that he will engage and perform his duties as a director upon and following restoration make this an analogous case. It seems to me that a liquidator is needed in the present case because Mr. Sun cannot be relied on to take the necessary action following restoration. Restoration without an assurance of proper custodianship and management of the Company’s assets and affairs is likely to be futile as it will be impossible to establish a new RO and the Company will once again be struck-off and the Company’s rights and assets will not be protected. This is a sufficient basis for exercising the just and equitable jurisdiction independently of (although it is connected with) the loss of confidence in management ground.

56. Because a winding up order can only be justified if the Petitioner is pursuing a class remedy and seeking to protect the class interest it would be wrong to make a winding up order which had the effect of stifling the Company's defence of the Petitioner's claims in the Singapore proceedings. That would permit a litigant to use the winding up jurisdiction to undermine a company's ability to defend itself. It would involve using the winding up jurisdiction for a collateral purpose. If the Company has a good defence it will be in the interests of creditors as a class for the defence to be run and maintained and the Petitioner would not be acting in the interests of the class but for a collateral purpose were it to seek a winding up in order to disable (or which had the effect of disabling) the Company from continuing a bona fide and reasonable defence of the Singapore proceedings. Were a winding up order to be made, the interests of all creditors can only be protected if the JOLs are able independently and properly to assess whether the Petitioner's claims are justified and whether to continue the defence of the Singapore proceedings.
57. At the hearing I indicated to Mr Lowe KC that in view of these considerations, before making a winding up I would need to be satisfied that arrangements were in place to ensure that the order would not stifle the Company's defence. This would require sufficient committed funding to the JOLs that would ensure that they were in a position independently to assess and to obtain independent advice on whether to continue the defence of the Singapore action. It would need to be established that as a practical matter the Petitioner could not interfere with the JOLs' independent decision making or turn off the funding tap in order to prevent the Company from continuing the defence. I also said that it would be necessary to ensure that the JOLs acted independently of the Petitioner and did not, for example, give the Petitioner privileged access to information to assist in the prosecution of the Singapore action. It may be that the Company's role in defending the proceedings can be co-ordinated with and be to support the defence of the Fund Manager (I note that the most recent development in the Singapore proceedings is that the Fund Manager has given notice that it intends to proceed with an application to strike out the Petitioner's statement of claim) but that will be a matter for the JOLs to consider in light of what is in the interests of the Company's creditors (and shareholders).
58. In response to these concerns and points, Mr Lowe KC said that he had just been instructed that in fact the Petitioner had proposed to enter into a funding agreement with

the JOLs and that a draft funding agreement had been prepared. Mr Lowe KC confirmed that the Petitioner accepted that funding needed to be provided to the JOLs and that it would need to be committed and available to the JOLs so that they could act without interference by the Petitioner and that the JOLs must instruct legal and other advisers who are independent of and have not acted and do not act for the Petitioner and that the winding up order would need clearly set out the position.

59. In these circumstances I told Mr Lowe KC that before making a final decision on whether to make a winding up order I would require the Petitioner and the JOLs to file further evidence dealing with these matters. In particular, (a) the Petitioner would need to file further evidence explaining the proposed funding arrangements and exhibiting the proposed funding agreement with the proposed JOLs; (b) the JOLs would need to file evidence that the proposed funding will be sufficient to enable them to obtain properly considered advice from independent legal and if required other advisers without interference by the Petitioner and to form a considered view on whether the defence should be continued and (c) the proposed form of winding up order needed to be amended and filed with the further evidence. I explained that I would need to review these so I could be satisfied that they were sufficient to ensure that a winding up order could be justified and would not stifle the Company's defence of the Singapore proceedings and as protecting the interests of all creditors. I said that I would adjourn the hearing to allow this to be done and decide whether to restore the Amended Petition and list a further hearing after having reviewed these further documents.
60. There is a further consideration that is relevant to the exercise of the Court's discretion. That is the international element in this case. The proceedings to which the Company is a party are in Singapore and its rights and assets may also largely be there (although there is no evidence before the Court as to this). The Petitioner has not filed any evidence as to Singapore law as to whether the appointment of the JOLs will be recognised in Singapore so that the Singapore court will permit them to act on behalf of the Company in the conduct of the proceedings if they should choose to do so. Mr Lowe KC confirmed to me, in response to a question I asked, that his understanding was that the Company's COMI was in Singapore. It seems to me that the absence of evidence of the likelihood of recognition is not a basis for refusing to make the winding up order. First, because the JOLs will still be able to perform a useful role by acting in this jurisdiction. Secondly,

because the JOLs will be able to seek to have their powers to act for the Company recognised in Singapore if that is necessary and there is a challenge to their standing. As liquidators appointed by the court in the Company's place of incorporation the normal private international law rule is that their agency and authority to act for the Company would be recognised and the fact that the Company's COMI is in Singapore would not be a bar to such recognition. Of course, this will be a matter for the Singapore court to rule on if an application to that court is needed.

Post-hearing evidence

61. After the hearing the Petitioner (at my direction) notified Mr. Sun and the Fund Manager that I had directed that the Petitioner file further evidence and that the hearing of the Amended Petition had been adjourned for a short period to allow this to be done. The Petitioner then filed that further evidence (and sent copies to Mr. Sun and the Fund Manager on 22 March). This showed that there had been further discussions with the proposed JOLs regarding the level and terms of the funding that the Petitioner was prepared to provide to allow the JOLs to be able to review and decide whether it would be in the interests of the Company and all its creditors (and shareholders) to continue the defence of and participate in the Singapore proceedings. A copy of the draft funding agreement was exhibited to Mr Cutler's Fourth Affidavit and the proposed JOLs filed affidavits to confirm that they had consulted with the Singapore legal advisers whom they intended to instruct if appointed, that these legal advisers were independent and had no connection with the Petitioner, and that they were satisfied that the proposed funding would enable them to obtain properly considered advice from the legal (and if required other) advisers without interference from the Petitioner.
62. Upon reviewing this further evidence and the draft funding agreement I required that a number of amendments be made to the funding agreement, including an increase in the amount of the funding, a requirement that the funding be advanced immediately after the making of the winding up order, a requirement that the funding only be repayable at the end of the winding up unless the JOLs decided to repay it earlier and a requirement that the Petitioner confirm that it would not exercise its rights in a manner that would or could interfere with the Company's defence of the Singapore proceedings. These changes were necessary, in my view, in order to ensure that the JOLs would be in a position to undertake

a proper assessment of whether it was in the Company's interests to continue to defend the Singapore proceedings, to instruct their legal advisers to take at least some substantive steps and action in the Singapore proceedings if appropriate, to have discussions with Mr. Sun and the Fund Manager and to be able to report back to this Court. These amendments have now been agreed by the Petitioner (and the proposed JOLs) and the funding agreement is in agreed form.

63. In these circumstances, I am satisfied that the position of the Company is protected and that there is no risk that the making of the winding up order will stifle and interfere with the Company's defence of the Singapore proceedings. In fact, the arrangements made for the provision of funding for the JOLs represents an improvement in the Company's cash position. It clearly makes sense to give permission for the Singapore proceedings to continue, at least for the time being, and it is to be hoped that the JOLs will be able independently to determine, after consultations with Mr. Sun and the Fund Manager, the position of the Company and what action is needed in the best interests of the Company and all its creditors (and if solvent, members).



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
28 March 2024