IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 188 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF INCOME COLLECTING 1-3 MONTHS T-BILLS MUTUAL FUND (IN OFFICIAL LIQUIDATION)

Appearances:	Mr Guy Dilliway-Parry and Mr James Dixon of Priestleys Attorneys-at-Law for the Joint Official Liquidators of the Company
Before:	The Hon. Justice David Doyle
Heard:	21 January 2022
Extempore Judgment delivered:	21 January 2022
Draft transcript of Extempore Judgment circulated:	2 February 2022
Draft transcript of Extempore Judgment approved:	4 February 2022

HEADNOTE

Court's sanction for Joint Official Liquidators to enter into a compromise order with the Securities and Exchange Commission of the United States of America and pay an interim dividend to creditors

JUDGMENT

Introduction

1. There is before the Court an application (by way of summons dated 22 December 2021) by Keiran Hutchison and Igal Wizman of EY Cayman Ltd and EY Bahamas Ltd respectively acting in their capacity as the Joint Official Liquidators ("JOLs") of Income Collecting 1-3 Months T-Bills Mutual Fund (in Official Liquidation) (the "Company") for an order that sanction is given for them:

   (1) to enter into a compromise and consent order with the Securities and Exchange Commission of the United States of America ("SEC") dated 13 January 2022;

   (2) to enter into an agreement with Mosaic Financial Limited ("Mosaic") dated 6 January 2022; and

   (3) to pay an interim dividend to such creditors whose proofs of debt, having been lodged with the JOLs by 24 December 2021 in accordance with the interim dividend notice, have been admitted by the JOLs or will be admitted by the JOLs in due course and a direction that they pay a dividend to Mosaic in a specified minimum sum.

2. I would like at the outset of this judgment to acknowledge the hard and skilled work of the JOLs and their attorneys in the Cayman Islands and in the United States of America in expertly progressing matters to this stage in a relatively short space of time, noting that the Supervision Order was made on 11 October 2021. The cooperation and sensible agreement of the SEC should also be acknowledged. There were obvious tensions in this case and they have been very well dealt with in the best interests of the creditors and other stakeholders of the Company. It is right that the considerable amount of cooperation and skilled work put into this case by the relevant entities and their attorneys is acknowledged.

Documentation and submissions considered

3. I record that I have considered the contents of the hearing bundle. I have also considered the skeleton argument of the Company and the authorities bundle. I have considered the well-focused oral submissions so eloquently and persuasively put before the Court by Mr Guy Dilliway-Parry for the Company. I am most grateful to him for his valuable assistance to the Court in respect of this fascinating case.

4. I should also record that at 1.58 pm this afternoon, 32 minutes before the hearing was due to begin, correspondence between Priestleys who act for JOLs and Broadhurst (who act for the former joint voluntary liquidators) dated 20-21 January 2022 was brought to my attention and I have considered those letters. I take into account the position of the former joint voluntary liquidators of the Company who are obviously keen to secure their fees. I note that they are "generally supportive of an agreement being reached with the SEC" and a dividend being declared and paid subject to an apparent priority issue which is not before the Court today. They say they are "generally supportive of the application". At paragraph 11 of Broadhurst's letter dated 21 January 2022 they state that "we respectively submit that it is appropriate for a direction to be given from the Court that, in the event the JOL's application is granted, if the JOLs propose to make any payments to themselves or their service providers in advance of the fees and expenses of the former JVLs they will, prior to doing so, make a corresponding application to the Court." I am not minded to make such a direction. I consider it unnecessary. The JOLs are well aware of their obligations and will no doubt make any appropriate and necessary applications, if any, at the appropriate time as they see fit.

The functions of the JOLs and the SEC

5. One of the functions of an official liquidator is 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 (see section 110 (1) of the Companies Act (2021 Revision) (the "Companies Act")).

6. One of the functions of the SEC is to exercise its right to seek and obtain disgorgement, i.e. a judgment ordering a defendant to return funds and assets obtained in connection with fraud or other violations of the securities law. See the US Supreme Court case of *Liu v. SEC*, 140 S, Ct. 1936 (2020), 22 June 2020 opinion delivered by Justice Sotomayor, who I had the privilege and pleasure of meeting in person at her chambers in Washington after her appointment as a Supreme Court Justice.

7. In *Liu*, the Supreme Court considered the SEC's right to seek and obtain disgorgement as equitable relief in civil enforcement proceedings. In *Liu* the Supreme Court held that it is permissible for the SEC to seek and obtain disgorgement provided, amongst other things, it is awarded for the benefit of victims of the defendant's misconduct. Justice Sotomayor at page 7 of the report refers to the way in which, in the past, the American courts have occasionally awarded disgorgement in ways that test the bounds of equity "by ordering the proceeds of fraud to be deposited in Treasury funds instead of dispersing them to victims". Justice Sotomayor felt that the SEC's disgorgement remedy "is in considerable tension with equity practices". Justice Sotomayor felt that the lower courts were "well equipped to evaluate the feasibility of returning funds to victims of fraud". Justice Sotomayor stated: "The general nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit" adding "the SEC's equitable profit-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains". Justice Thomas dissented holding that: "Disgorgement is not a traditional form of equitable relief" adding that "The majority's treatment of disgorgement as an equitable remedy threatens great mischief". Justice Thomas, in the minority, would have reversed "for the straightforward reason that disgorgement is not equitable relief".

8. Warren E. Gluck, a US attorney, in his helpful and well-written affirmation, affirmed on 15 January 2022 at New York, New York, at paragraph 16 states: "Recent case law has provided that *Liu* may be satisfied by establishing a mechanism for identifying harmed investors and returning funds directly to them, such as by use of a "Fair Fund" in which the SEC acts as "de facto trustee" of the funds for the ultimate distribution directly to investor victims. See *SEC v Blackburn* No. 20-30464 (5th Cir. Oct. 12, 2021)."

9. On the face of it there is a clear tension between the obligation of the JOLs to collect in assets and the SEC's judicial mandate to act as a "de facto trustee". They do, however, as is rightly stated in the papers before the Court, share a common interest in maximizing recoveries for and distributions to the creditors of the Company. The consent judgment and the agreement with Mosaic is the product of the parties attempting to fairly and properly resolve this tension and apparent conflict.

10. It is in such circumstances that the JOLs seek the sanction of this Court in effect to the compromise they have arrived at.

The relevant law in respect of sanction applications

11. Under section 110 (2)(a) of the Companies Act an official liquidator may, with the sanction of this Court, exercise any of the powers specified in Part 1 of Schedule 3. Paragraphs 5 and 7 of such Schedule read as follows:

> "5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable…
>
> 7. Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it."

12. In respect of the relevant law, Mr Guy Dilliway-Parry refers to Lightman J's comments in *Re Edennote Ltd (No 2)* [1997] BCLC 89 and closer to home, Malone CJ's comments in *Universal and Surety Company Limited* 1992-93 CILR 149.

13. In the well-known case of *Edennote*, Lightman J at page 92 stated:

> "Where a liquidator seeks a sanction of the court and takes the view that a compromise is in the best interests of the creditors, in any ordinary case, where (as in this case) there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so or that for some reason or other his view is flawed."

14. In *Universal and Surety* Malone CJ agreed that it was not for him to exercise the official liquidator's discretion but to consider the correctness or otherwise of the official liquidator's discretion by the criteria cited from the judgment of Plowman J in *Leon's* case. Malone CJ had earlier in the judgment referred to the following passage from the judgment of Plowman J in *Leon v York-o-Matic Ltd* [1966] 3 ALL E.R. 277 at 280-281:

> "Here, as I have said, there is no question of fraud and having considered all the evidence I am not satisfied that the liquidator did not exercise his discretion bona fide; nor am I satisfied that he acted in a way in which no reasonable liquidator could have acted."

15. Malone CJ also felt that he should, in the words of Hoffmann J, as he then was, in *In re Palmer Marine Surveys Ltd* [1986] 1 WLR 573: "have regard to the general principles of fairness and commercial morality which underlie the details of the insolvency law as applied to companies".

The application of the relevant law

16. It is well established that in sanction applications a court should not unwisely attempt to second guess a liquidator's commercial judgment. The professional and well-experienced office holders in this case are far better placed at arriving at decisions in the best commercial interests of the Company, its creditors and other interested parties than this Court is.

17. There is no suggestion that the liquidators in this case lack good faith or are partisan and it is well established that absent bad faith the court should attach considerable weight to the liquidator's views on the compromise unless there are substantial reasons why it should not do so.

18. The compromise in this case does not strike me as a compromise that offends principles of fairness or commercial morality.

19. I should also record that Mosaic, of course, agreed to the relief requested by the JOLs. Shameka Fernander in her affidavit of 31 August 2021 described Mosaic as "the sole party with a financial interest in the liquidation of the Company". Warren Gluck in his affirmation of 15 January 2022 describes Mosaic as "the Fund's largest and only remaining investor". At paragraph 18 of the JOLs' skeleton argument Mosaic is described as "by far the largest creditor in the liquidation".

20. The compromise appears to this Court to be in the best interests of all interested parties including Mosaic and the JOLs have done very well to secure it.

The solution achieved in this case

21. Guy Dilliway-Parry and James Dixon of Priestleys (the authors of the skeleton argument of the JOLs) put it well when at paragraph 23 of that skeleton they say that the JOLs: "have sought to achieve a pragmatic and innovative solution which recognises the ultimate authority of the Cayman Court in the supervision of the liquidation and … permits the SEC to comply with its obligations

under the laws of the USA while simultaneously ensuring that the JOLs remain at all times in compliance with their statutory and fiduciary duties".

22. I have considered in detail the documentation placed before the Court and on a very minor point of detail note that the undertaking signed by Walden Macht & Haran LLP is undated. The undertaking is governed by the laws of the State of New York so I do not know if anything turns on that. If it does, no doubt the JOLs will arrange for it to be duly dated and I note the undertaking given to the Court this afternoon in that respect.

23. I agree with attorney Warren Gluck when he says at paragraph 17 of his affirmation that the JOLs have in substance achieved "a very positive result indeed for the Fund's creditors without a costly court dispute".

24. I note Mr Gluck's comment at paragraph 21 that it also: "preserves the integrity and jurisdiction of both the Grand Court and the SEC, and embodies the highest ideals of investor and creditor protection that both regimes are designed to achieve."

25. Mr Gluck at paragraph 24 states that "the SEC has implicitly recognized the claim of Cayman liquidators and the jurisdiction of this Court over US-based assets frozen in connection with a US-based SEC enforcement action."

26. Mr Gluck at paragraph 24 of his affirmation describes the agreements among the JOLs, the SEC and Mosaic as constituting: "a creative and first-of-its-kind solution to the issues that arise due to the *Liu* decision and natural jurisdictional tensions between office holders and agencies like the SEC."

27. Mr Gluck reveals expert knowledge and experience of dealing with SEC office-holder conflict and recognizes the good sense of compromises of the nature of the one put before this Court.

28. I congratulate the SEC for also seeing the good sense of such compromise. Such a refreshing and pragmatic attitude on their behalf will greatly assist in creditors being properly protected. I would wish to encourage more cooperation between the SEC and Cayman office holders in the future but for present purposes simply wish to thank the SEC for their assistance in this case. Such assistance reflects well upon the international reputation of the SEC and the Cayman Islands.

29. This case marks a significant and progressive step in the constructive cooperation and dealings of both jurisdictions with each other in the best interests of international creditor investor protection. Hopefully this case will enable further cooperation and compromise to take place in the future.

The interim dividend issue

30. I should also briefly deal with the interim dividend issue. I have considered Order 18, Rule 6 of the Companies Winding Up Rules, 2018 ("CWR"). I note that the interim dividend declaration notice was issued on 1 November 2021 and duly advertised indicating a cut-off date of 24 December 2021. I note the significant and comprehensive steps that have been taken to ascertain the existence of creditors.

31. I have considered Order 18 Rule 4 of the CWR and Smellie CJ's judgment in *Re Sphinx* 2010 (1) CILR 234. I have also considered Kawaley J's judgment in *Herald Fund SPC (in official liquidation)* 2018 (2) CILR 162. I agree with Kawaley J that the exercise of calculating an appropriate reserve is "an imprecise science" but I am comfortable with the figure of the reserve arrived at by the JOLs in this case.

32. Having considered the facts and circumstances of the case presently before me and the way in which the position is dealt with in the skeleton argument and the helpful oral submissions put before the Court this afternoon, I am content to approve the making of an interim dividend to creditors as contemplated by the JOLs.

Concluding remarks

33. I agree with Mr Guy Dilliway-Parry when he submits that the proposed mechanism in this case:

(1) represents an innovative and pragmatic solution to the tension between the JOLs' duties to collect the assets of the Company's estate and the SEC's mandate to act as "de facto trustee" for the Company's investors which avoids the significant risk of expensive litigation;

(2) makes appropriate allowances for costs and claims in the liquidation;

(3) permits the JOLs to further the liquidation by way of an appropriate reserve in respect of such future recovery efforts in the interests of all stakeholders;

(4) is supported by the major creditor in the liquidation, namely Mosaic; and

(5) is substantially in the best interests of all stakeholders in the liquidation.

34. In such circumstances and in conclusion I have no hesitation in granting relief in the form of the Order which was helpfully provided to the Court with the minor amendments specified during my exchanges with counsel.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT