IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD. 112 OF 2022 (IKJ)
CAUSE NO. FSD. 113 OF 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF GREEN ASIA RESTRUCTURE FUND SPC
AND IN THE MATTER OF GREEN ASIA RESTRUCTURE SP
AND IN THE MATTER OF GREEN ASIA RESTRUCTURE SP II

Appearances:	Mr Harry Shaw, Campbells, on behalf of Applied Investment (Asia) Limited (the "Petitioner") Green Asia Restructure Fund SPC (the "SPC") did not appear
Before:	The Hon. Justice Kawaley
Heard:	In Court
Date of Decision:	6 July 2022
Draft Reasons circulated:	15 July 2022
Reasons Delivered:	3 August 2022

HEADNOTE

Segregated portfolio company-petition by redemption creditor and sole investor in two segregated portfolios to appoint receivers-balance sheet insolvency test- approach to evidence- appropriate form of order-Companies Act (2022 Revision), sections 224-226

REASONS FOR DECISION

Introductory

1. By Petitions dated May 13, 2022 in FSD 112 and 113 of 2022, respectively, the Petitioner (a redemption creditor and sole participating shareholder in two portfolio managed by the SPC) sought to appoint receivers to wind-up their business on the grounds of their insolvency. The SPC was served with each Petition, the supporting Affidavits and an undated form of the Summons for Directions on May 20, 2022.

2. A Notice of Hearing for each Summons for Directions was served on the SPC on June 17, 2022 and the hearing bundles were served on June 20, 2022. The SPC did not attend the scheduled hearings on June 23, 2022 when the following principal directions were ordered by the Court (the "Directions Orders"):

   (a) advertisement of the Petitions was dispensed with;

   (b) it was directed that the Petitions would be heard concurrently;

(c) a deadline was fixed for giving notice of intention to appear at the July 6, 2022 hearing of each Petition; and

(d) it was directed that the Directions Orders be served forthwith on the SPC.

3. The Directions Orders were served on the SPC on June 24, 2022, as were all other documents, at its registered office. At the hearing of the Petitions on July 6, 2022 the SPC again elected not to appear. Counsel for the Petitioner addressed the Court fully on the insolvency ground for appointing receivers in respect of segregated portfolios, because the legal test was different to that applicable to companies and there appeared to be only one decision on the relevant jurisdictional test. That was the decision of Justice Raj Parker in *Re Obelisk Global Fund SPC* (considered fully below), where the petition debts were paid after the jurisdictional ruling had been delivered.

4. In the present case I decided to follow the broad conceptual approach formulated in *Re Obelisk* as regards creditor standing and appointed Mr. Lai Kar Yan (Derek) and Mr. Chan Man Hoi (Ivan) of Deloitte Touche Tohmatsu and Mr. Michael Green of Deloitte & Touche LLP as receivers of each portfolio. In the absence of any available precedents for the form of Order appropriate for such appointments, some bespoke drafting was required.

5. I now give brief reasons for the decisions and Orders made on July 6, 2022.

The jurisdiction to appoint receivers over segregated portfolios on insolvency grounds

The statutory framework relevant to the creditor standing issue

6. A central feature of segregated portfolio companies is that they conduct business through segregated portfolios so that participating shareholders and creditors contracting with one or more portfolios or accounts are subject to the fortunes of the

relevant portfolio rather than the company as a whole. Although these portfolios do not possess full legal personality, if the business conducted through the vehicle is no longer viable, it can be wound-up by analogy with a liquidation through the receivership regime prescribed by Part XIV of the Companies Act (2022 Revision) (the "Act"). Other segregated portfolios will be unaffected by this failure and can carry along their merry way, assuming that the SPC itself continues to be viable.

7. Section 225, most pertinently to the standing to petition issue in the present case, provides:

"*(1)An application for a receivership order in respect of a segregated portfolio of a segregated portfolio company may be made by —*

(a) the company;

(b) the directors of the company;

(c) any creditor of the company in respect of that segregated portfolio;

(d) any holder of segregated portfolio shares in respect of that segregated portfolio; or

(e) *in respect of a company licensed under the regulatory Laws, the Cayman Islands Monetary Authority where the segregated portfolio company is regulated by the Authority.*" [Emphasis added]

8. Absent any special definition in Part XIV ("*Segregated portfolio companies*") of terms such as "creditor" and "liabilities", the phrase "*any creditor*" must be construed as embracing actual and contingent creditors. The other important limb of the creditor's standing to apply for a receivership order is the event which triggers the remedy, namely the solvency test. Section 224 provides:

"*(1) Subject to subsections (2) to (5), if in relation to a segregated portfolio company, the Court is satisfied —*

(a) *that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims*

of creditors in respect of that segregated portfolio;…"

(2) A receivership order may be made in respect of one or more segregated portfolios.

(3) A receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of —
(a) the orderly closing down of the business of or attributable to the segregated portfolio; and

(b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

(4) A receivership order —

(a) may not be made if the segregated portfolio company is in winding up; and

(b) shall cease to be of effect upon commencement of the winding up of the segregated portfolio company, but without prejudice to prior acts of the receiver or that person's agents.

(5) No resolution for the voluntary winding up of a segregated portfolio company of which any segregated portfolio is subject to a receivership order shall be effective without leave of the Court." [Emphasis added]

9. The scheme of Part XIV justifies one in assuming that exceptional (or at least atypical) circumstances will be required for creditors of segregated portfolio to have claims against the company's general assets. Where a petitioner can establish its status as a creditor, the critical question generally will be whether "*the assets attributable to a particular segregated portfolio…are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio*". A receivership order is clearly analogous in general terms to a winding-up order in that it involves "*the orderly closing down of the business*" and "*the distribution of the segregated portfolio assets*". So even if the solvency test is met by a creditor, it must also demonstrate that the business of the segregated portfolio as a whole should be brought to an end.

10. Because the Petitioner also mentioned its status as the sole investor in relation to each portfolio or fund, brief mention should be made of participating shareholders' right to apply for a receivership order. Section 225(1) (d) confers a right to apply to appoint a receiver on "*any holder of segregated portfolio shares in respect of that segregated*

portfolio". The language of section 224(1), read literally, suggests that even on an application by the holder of segregated portfolio shares, insolvency is the only ground upon which a receivership order can be made[1]. One might instinctively assume that it ought to be possible for the holders of the economic interests in relation to a segregated account to apply to have the business "wound-up" simply because that is what they consider it is appropriate to do. The same assumption might well be made in relation to applications by directors, in both cases assuming the winding-up jurisdiction would be mirrored to some extent in the segregated portfolio receivership scheme. However, the wording of section 224, whether by accident or design, leaves room for some doubt as to whether all applicants must rely upon the insolvency ground. This may explain why the Petitioner merely alluded to its status as sole portfolio shareholder of each fund, rather than relying upon this status as an alternative basis for obtaining the relief which it sought.

11. After referring to the just quoted statutory provisions, Mr Shaw advanced the following cogent submissions as to the nature of solvency test and how it should be applied, having regard to section 224(3):

"*19. The threshold test as to whether the Court has jurisdiction to make a receivership order in respect of a segregated portfolio is therefore two fold. First, the Court must be satisfied that the assets of the segregated portfolio are or are likely to be insufficient to discharge the claims of creditors in respect of that portfolio. Second, the Court must also be satisfied that the appointment of receivers will achieve the purposes of section 224(3) i.e. to facilitate the orderly wind down of the portfolio's business, and enable the distribution of the portfolio's assets to those entitled to same.*

20. The first limb of the test was discussed by Parker J in Re Obelisk Global Fund SPC (Unreported, 12 August 2021, FSD 87 of 2021, RPJ) [HB/21], where he

[1] This language is to be contrasted with the provisions of section 19(1) the Bermudian Segregated Account Companies Act 2000, which permits the appointment of a receiver on grounds of insolvency of the account, the winding-up of the company or where "*for other reasons it is just and equitable that a receiver should be appointed*". This provision was considered by this court in the context of an application for the recognition of Bermudian receivers in *Re Silk Road M3*, FSD 234/2017 (ASCJ), Judgment dated February 8, 2018 (unreported) at page 30 (Anthony Smellie CJ).

confirmed at [35] – [39] that the test is a 'balance sheet' test, rather than a cash flow test. His Lordship confirmed at [36] that the test 'involves a determination on the available evidence of whether the assets are sufficient now, or are likely to be in the reasonably near future, when assessed against its liabilities (as well as its' prospective and contingent liabilities), and are held in a form where they may be used to pay the claims of creditors."

12. I accept that the proper construction of the relevant statutory provisions justifies the view that a somewhat fluid balance sheet solvency test applies under section 224(1) of the Act, for the purposes of establishing a *prima facie* case at least. The reasoning of Parker J in *Re Obelisk Global Fund SPC*, FSD 087/2021 (RPJ), Judgment dated August 12, 2021 (unreported) merits recitation in full:

"35. *I do not accept Mr Kennedy's submission that s.224 equates to a cash flow test of insolvency. The sub section, on a plain reading, clearly provides that the test is whether the assets of the company are or are likely to be sufficient to discharge the claims of creditors. The claims of its creditors can be regarded as its liabilities.*

36. By referencing 'assets' the section is similar in wording to section 123 (2) IA in the UK, albeit that the UK statute has the words 'value' added to assets and 'amount' added to liabilities. In my view these words do not materially change the meaning of the section. Both sections establish in my view what may be called a 'balance sheet' test albeit 'the discharge of claims of creditors' wording in the Cayman statute adds something more than simply assessing the relative values of two sides of a balance sheet. <u>The court has jurisdiction to make a receivership order when the portfolio's assets are or are likely to be insufficient to discharge those claims. That involves a determination on the available evidence of whether the assets are sufficient now, or are likely to be in the reasonably near future, when assessed against its liabilities (as well as its prospective and contingent liabilities), and are held in a form where they may be used to pay the claims of creditors.</u>

37. I therefore accept Mr Wingrave's submission that on a plain reading of section 224 one does not derive a traditional cash flow test of insolvency with language as to debt and timing of payment. There is no deeming provision, and the differences have been made plain in ABC Company v J & Company where reference was made to the

proposed recommended Law Reform Commission's revisions not being adopted by the legislature in respect of segregated portfolios.

38. I accept that a stand-alone test more akin to a traditional balance sheet test for segregated portfolios may set a different bar to clear for creditors, with no deeming provision, but that is what the statute plainly provides. I also acknowledge that there may be practical difficulties for creditors accessing information in relation to segregated portfolios and situations where assets may appear to be more valuable than in fact they turn out to be.

39. However, as a practical matter it is to be noted that section 224 does provide two alternative bases of satisfying the court. First the court may make a receivership order if the assets attributable to a particular segregated portfolio of the company are insufficient to discharge the claims of creditors in respect of that segregated portfolio. In the alternative if the assets are likely to be insufficient. Difficulties in the precise valuation of assets may not be a particularly high hurdle when creditors' claims for relatively modest amounts are accepted, as they are in this case, and are not discharged. The starting point in such a situation is that petitioner may legitimately say that the assets, presently realisable or liquid, are insufficient to discharge the claim. That is not in dispute in this case.

40. The court is able to assess the evidence before it as to whether the Fund has assets sufficient to discharge the claim of a creditor now, or is likely to have sufficient assets in the reasonably near future. There is no evidence whatsoever in this case as to the asset position of the segregated portfolio Fund, save for the amounts said to be due from third parties.

41. As there is no dispute that the Fund currently has insufficient assets to meet the claims of its creditors, the court has jurisdiction to make a receivership order. The only argument has been as to third party realisable assets which it is said makes it likely that the Fund will have sufficient assets in a reasonable period of time in the future. This does not provide the Fund with a defence as to the court's jurisdiction." [Emphasis added]

13. This approach is both principled and practical and accords with the purposive rule of statutory construction, which requires the interpreter to ascertain what the underlying

legislative purpose of a particular statutory provision is, viewed in its wider legislative context. Parker J's construction:

(a) extracts the balance sheet test from the natural and ordinary meaning of the statutory language which speaks of an insufficiency of assets to meet liabilities; and

(b) identifies a flexibility in the basic balance sheet, based on the actual words used but understood by reference to how a rigid traditional balance sheet test could make the jurisdiction unworkable in practice;

(c) ultimately concludes that a *prima facie* case of insolvency can be made out for the purposes of section 224 (1) (a) if a creditor of a segregated portfolio can demonstrate that there is a deficiency of assets relative to liabilities or there is likely to be such a deficiency.

14. Bearing in mind that positive factual findings in the civil law context are established on the balance of probabilities, classically explained as "more likely than not", these two phrases "are" and "are likely to be", expressed as alternatives, must indeed mean something different. Statutory language is invariably assumed to be far more precise than casual conversation, so the idea that the draftsman was simply expressing the same idea in different ways can confidently be rejected. A creditor must therefore be entitled to prove either that (a) it is probable that a deficiency exists (in which case a positive finding in this respect is justified) or that (b) the evidence establishes a risk of deficiency so cogent and real that a receiver should *prima facie* be appointed in any event. A narrower construction of the solvency test would, as Parker J observed, mean that creditors would only be able to avail themselves of the requisite standing as creditors of an insolvent segregated portfolio in the rare circumstances where they had full visibility of the portfolio's financial status.

15. This consideration could only be ignored if there was something in the wider legislative scheme which justified the conclusion that the only potential creditors of a segregated portfolio would be participating shareholders who had redeemed (in whole

or in part) and who could therefore be expected to have current information about the portfolio's financial status. In my judgment there is no justification for such an inference for two principal reasons. First, there is nothing in the wider statutory scheme which precludes third parties such as banks from providing credit to a special purpose company linked to a segregated portfolio's assets as opposed to the company's general assets. Second, it is a notorious fact that when a business entity of any description enters choppy financial waters, the free flow of information about its true financial status is often interrupted. The position is frequently much the same whether one is considering communications between management and creditors or communications between management and investors.

16. So Parker J was clearly right to conclude that the difficulties creditors would have in accessing the receivership jurisdiction if they were required to meet a traditional balance sheet test and positively prove a deficiency of assets in relation to liabilities is a powerful consideration justifying concluding that Parliament must be presumed to have intended to create a more flexible and functional solvency test. Building on the important conceptual foundations laid by Justice Raj Parker in *Re Obelisk Global Fund SPC as to* the solvency test applicable to the appointment of receivers on the application of creditors of a segregated portfolio, I would add two refinements of my own.

17. Firstly, the case for a more flexible balance sheet solvency test than would apply in the winding-up context is supported by the important ways in which a receivership order granted in relation to a segregated portfolio is a less drastic remedy than that of a winding-up. Taking a high-level view, the investment vehicle is clearly intended to be more nimble than a limited company and easier to both get into and get out of, even though it borrows many features from the company law regime. For present purposes, the most noteworthy overarching distinctions between a winding-up order and a receivership order under Part XIV of the Act are the strikingly contrasting levels of finality and flexibility. For instance:

    (a) the Court is empowered to vary the terms of a receivership order, as well as to discharge the order (section 226 (2) (b));

(b) the Court is empowered to discharge a receivership order not just when its purpose has been carried out, but also where that purpose is "*incapable of achievement*"(section 227(1))

(c) where the affairs of a portfolio have been wound-up, the directors of the company can terminate the portfolio by resolution (section 228A(1)), without any involvement of the Court; and

(d) the directors may by resolution reinstate a segregated portfolio which has been terminated, again with no involvement of the Court (section 228A(2)).

18. Secondly, the potential risk of harm or prejudice flowing from an overly flexible solvency test is counterbalanced by another important characteristic of the solvency test and its interrelationship with the jurisdiction to make a receivership order. Even an unpaid creditor with a presently due undisputed debt is not entitled to a receivership order as of right. This is in marked contrast with the position as regards to the winding-up jurisdiction. For example, in *Re Suning Sports Group Limited*, FSD 107/2022 (MRHJ), Judgment dated June 15, 2022 (unreported), Justice Margaret Ramsey-Hale recently opined as follows:

"*22. Although winding up is a discretionary remedy where a debt is indisputably due, a petitioning creditor is entitled to an order, ex debito justitiae, directing a winding up by the court. As the House of Lords said in Bowes v. Directors of Hope Mutual Life Insurance and Guarantee Co. [1865] 11 HL Cas 389 (HL) where there is a valid debt, "it is the duty of the court to direct the winding up.*"

19. Even if a creditor of a segregated portfolio establishes an unpaid undisputable debt and a mere likelihood of the assets being less than the liabilities, the solvency test requires the Court to have regard to the sufficiency of assets measured against the "claims of creditors in respect of that segregated portfolio". So the overall financial state of the portfolio must be taken into account. Furthermore, what Mr Shaw described as the second limb of the jurisdictional test must be taken into account. The central statutory

purpose of a receivership order is "(a) the orderly closing down of the business of or attributable to the segregated portfolio; and (b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto" (section 224(3)). As already noted above, it must always be demonstrated by an applicant for a receivership order that the business of the segregated portfolio ought properly to be closed down.

20. In the vast majority of cases, therefore, no matter how 'light' the balance sheet solvency test which is contended for in any particular case may be, an application for a receivership order made by creditors is unlikely to succeed save in circumstances where that relief is also (a) consistent with the express or implied wishes of the majority of creditors and/or (b) there is no room for serious doubt that the segregated portfolio is hopelessly insolvent. How the solvency test operates in practice therefore will likely be a fact-sensitive matter, highly dependent upon both (1) the nature and extent of the claims which are asserted in each creditors' receivership application in relation to a particular segregated portfolio or group of portfolios, and (2) the extent to which (if any) the application is opposed by either the segregated account company or other stakeholders.

Factual Findings: the merits of the application

21. The Petitioner's Skeleton Arguments summarised the facts relied upon in support of the application for a receivership order as follows:

"*6. The investment objective of both of the Funds is capital appreciation. The Funds seek to achieve this by engaging in the business of originating, underwriting, acquiring and trading debt securities and loans in listed and unlisted companies, which may be publically traded or privately placed.*

7. The Funds are the only known segregated portfolios within the SPC, and the Petitioner is the sole investor in each of the Funds (Shan 112/113, at [7] and [9]]. The Petitioner is therefore presumed to have the entire economic interest in each Fund…

14. Luk Shan's Affirmations each particularise the demands and requests for updates which have been sent to Mr Koh on behalf of the Petitioner in relation to the Funds following the Redemption Day.

15. On 10 March 2022, Mr Koh appeared to acknowledge that the Funds did not have assets sufficient to pay the Redemption Proceeds due to the Petition, stating in an email to Luk Shan on behalf of the Petitioner: 'I am running out of solutions for the time being. The companies are dragging on this matter.'

16. The Petitioner subsequently instructed its Hong Kong attorney's, ONC Lawyers, to make further written demands to the SPC, via its Investment Manager, on 29 March 2022 and 25 April 2022. Despite the Petitioner's repeated demands, the Funds have failed to pay the Petitioner the Redemption Proceeds and they remain outstanding in full.

17. It is against that background that the Petitioner seeks the appointment of receivers over the Funds."

22. Although the direct evidence only supported a finding of cash-flow insolvency, I was willing to infer from the failure of SPC to respond in any evident way to the application to appoint receivers on the grounds of insolvency that the requisite statutory balance sheet insolvency test had been met. I was satisfied on the balance of probabilities that the Petitioner was not only the sole holder of shares in each of the segregated portfolios, but that it was also more likely than not the sole or by far the most commercially substantial creditor as well.

Findings: form of order

23. Having heard Mr Shaw in relation to the terms of the Orders, and dealing with the form as a matter of first impression having regard to the relevant statutory scheme, I granted Orders in the following material terms:

"1. *Pursuant to section 224 of the Companies Act (2022 Revision) (the **'Act'**) , Mr. Lai Kar Yan (Derek) and Mr. Chan Man Hoi (Ivan) of Deloitte Touche Tohmatsu and Mr. Michael Green of Deloitte & Touche LLP (the '**Receivers**') be appointed jointly and severally as receivers of each Fund.*

2. The business and segregated portfolio assets of each Fund shall be managed by the Receivers for the purposes specified in section 224(3) of the Act.

3. *The Receivers are authorised, in accordance with section 226(1) of the Act, to do all such things as may be necessary for the purposes of:*

3.1 the orderly closing down of the business of or attributable to the Funds; and

3.2 the distribution of segregated portfolio assets attributable to the Funds to those entitled to have recourse thereto,

and in so doing, the Receivers shall have all the functions and powers of directors in respect of the business and segregated portfolio assets of or attributable to the Funds.

4. The Receivers' fees and expenses (including the fees and expenses of those engaged pursuant to paragraphs 3.6 and 3.7 above) be paid out of the segregated assets of each Fund pursuant to section 228 of the Act in priority to all other claims.

5. No suit, action or other proceeding may be instituted against the SPC in relation to the Funds except with the leave of the Court pursuant to section 226(5) of the Act.

6. Any act required or authorised to be done by the Receivers may be done by any one of them.

7. The Receivers have liberty to apply for further directions pursuant to section 226(2)

of the Act and generally.

8. The Petitioner's costs of the Petitions be paid out of the segregated assets of the Funds, and shall be paid in priority to all other claims save for the Receivers' fees and expenses properly incurred."

Summary

24. For the above reasons, on July 6, 2022, the Petitioner's applications (made in its capacity as redemption creditor) for the appointment of receivers in relation to the business of two segregated portfolios was granted on an unopposed basis.

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