BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 246 OF 2006

In the Matter of Global Convertible Megatrend Ltd and FE Global Undervalued Investments Ltd
And in the Matter of the Insolvency Act 2003

BETWEEN:

PETER MAXYMYCH

Applicant

AND

(1) GLOBAL CONVERTIBLE MEGATREND LTD
(2) FE GLOBAL UNDERVALUED INVESTMENTS LTD

Respondents

Appearances:

Stephen Dougherty of Appleby Hunter Bailhache for the Applicant
Christopher Young of Harney Westwood & Riegels for the Respondents

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2006: November 21st, December 5th

JUDGMENT IN CHAMBERS

(Company law – appointment of liquidator and provisional liquidator – whether applicant claiming to be beneficial owner of shares in the Funds has standing to bring action – section 2 and 162(2)(c) the Insolvency Act 2003
Appointment of liquidator by a member – whether alternative remedy available and whether applicant acting unreasonably in seeking to have liquidator appointed instead of pursuing that remedy – s. 167(3) Insolvency Act 2003
Civil practice and procedure – Insolvency Proceedings – Procedural irregularities in filing action, one originating Motion and supporting affidavit filed in respect of two companies – Insolvency Rules not complied with – whether action should be struck off or whether court should use its case management powers to rectify the irregularities)

[1] JOSEPH-OLIVETTI, J.: Mr. Peter Maxymych, who hails from the cold northern climes of Quebec, Canada, claims to be a member of the two mutual fund companies who are the Respondents in this matter. He is a former director and it would appear the original founder of the Respondents. Mr. Maxymych is aggrieved at the manner in which the

directors of the Respondents, Mr. Christian J. Diem ("Mr. Diem") and Mr. George M. Scherrer ("Mr. Scherrer"), his former comrades-in-arms, so to speak, are conducting the affairs of the Respondents. Accordingly, he applied to have liquidators appointed and pending the hearing of this application he sought interim relief by way of appointment of a provisional liquidator as he alleges that the Respondents' assets are at risk and that an investigation into their affairs is necessary. He sought this interim relief ex parte in the first instance but was directed to serve it. This he has done. The Court is now concerned with two applications – Mr. Maxymych's for the appointment of a Provisional Liquidator ("PL") of each of the Respondents and an application by the Respondents to strike out the action.

The Factual Background

[2] Global Convertible Megatrend Ltd ("Megatrend") and FE Global Undervalued Investments Ltd.('Global"), together, "the Funds" are International Business Companies incorporated on 17th November 1994 and 29th October 1997 respectively under the International Business Companies Act Cap 291 ("the IBC Act") of the British Virgin Islands and trading as mutual funds licensed under the Mutual Funds Act. As such they are subject to the supervision of the Financial Services Commission ("the FSC").

[3] The Funds are long established, successful, regulated entities with assets estimated at about U.S. $ 90 Million. See T.B. Tab 4 para 52 p. 13 and Tab 7 para 4 p. 2. The Funds allege that the majority of their shares are held by European entities[1] but Mr. Maxymych avers that that these institutions have not invested personally but are merely nominees for a number of beneficiaries. See Tab 9, Maxymych para 4 p. 2.

[4] Mr. Maxymych was the original founder of the Funds. He, with Mr. Scherrer and Mr. Diem, were the only directors until he was removed at extraordinary shareholders' meetings held on 24th August 2006. The current directors are Mr. Scherrer and Mr. Diem.

[5] The Manager of the Funds as at September 2006 was First Equity Bancorp Limited ("FEB"), Isle of Man, Mr. Maxymych's company.

[6] The Investment Advisor of the Funds is First Equity Securities A.G. of Switzerland ("FES"). This was founded by Mr. Maxymych and Mr. Scherrer.

[1] Tab 7 Muller para. 4

[7] FEB owns approximately 50% of the issued and outstanding shares of FES. The other 50% shares are held by Mr. Scherrer and his wife, Galina. Mr. Maxymych, Mr. Scherrer and Mr. Diem are directors of FES. In short, a rather incestuous relationship existed between the Funds, their Manager and their Investment Advisor.

[8] On the 21st September, 2006, FEB's management contract was terminated by the Funds[2], pursuant to resolutions passed at extraordinary shareholders' meetings on the 14th August 2006. The new manager is a company owned and managed by Mr. Scherrer, Mr. Diem and Mr. Markus Muller (the company director of FES). See MM1 p.5 Tab 8. Mr. Maxymych also alleges that Mr. Scherrer's wife, Galina has an interest in that company.

[9] Under the Funds' Private Offering Memoranda, Manager Agreements and Advisor Agreements, FEB and FES were entitled to advisory fees for their roles as Manager and Investment Advisor respectively.

[10] One of the bones of contention which gave rise to these proceeding is Mr. Maxymych's allegation that pursuant to the agreement referred to below, the fees received by FEB and FES from the Funds were supposed to be re-invested into the Funds and that rather than doing that Mr. Diem and Mr. Scherrer have caused the Funds to pay the fees to persons other than FES and FEB for their personal benefit and thus FEB and FES have not met their obligations resulting in prejudice to the Funds. He suspects that this diversion of fees has been taking place since 2001.

[11] He bases this obligation to re-invest the fees on an Agreement dated 26th October 1994, signed by him, FEB, FES and Mr. Scherrer.[3] It is significant that neither of the Funds is alleged to have been a party to this agreement.

[12] He seeks to support this allegation by reference to statements in the Funds' former Auditors reports. In the report for Megatrend for the year ended December 31, 2004 and the two year period ended December 31, 2003 and that for Global for the years ended December 31, 2004 and December 31, 2003 the Auditors state in their narrative that "the Investment Advisor and Manager reinvest all advisory fees payable to them as subscriptions into the Fund(s)".

[2] See Tab 7 para 32 Muller & Tab. 88 MMI p.16&17
[3] See Tab 4 Maxymych paras. 20 & 21

[13] Needless to say the Funds take issue with the alleged agreement to re-invest the fees. Mr. Muller on behalf of the Funds deposes that there has been no misappropriation of fees and that agreement on the ultimate allocation of fees payable by the Funds to FES and FEB was superseded by an agreement of 1st January, 2005.[4] The agreement is at Tab 8 p.1-3. It is noted that the contracting parties are FES and FEB, Mr. Maxymych, Mr. Richter, Mrs. Galina Scherrer, Mr. Scherrer (her husband), Mr. Muller and Mr. Diem.

[14] The other main bone of contention is that Mr. Maxymych made many attempts and requests personally and through his counsel both foreign and local to review the financial documents for the Funds to try to ascertain the amount of fees that had been diverted, and to where, but although he was a director of the Funds at the time, these requests were refused by the Funds' Administrator, Regent Fund Management Ltd. ("Regent"). See Tab 5 p. 148 – 155.

[15] And, at a special meeting of the Board of Directors of Megatrend held on 28th June 2006, which Mr. Maxymych did not attend although the Minutes show he was given notice, Megatrend passed a resolution preventing Regent from disclosing any information on the Funds to a director, in effect Mr. Maxymych, without the consent of two directors. See T.B. Tab 5 p. 156 – 158. A similar resolution was passed on the same day by Global – See Tab 5 p. 159. Mr. Maxymych alleges that he did not attend those meetings as it would have been futile to do so being in the minority.

[16] The final bone of contention is to do with the re-structuring and change of domicile of the Funds. At a special meeting of the board of directors of Megatrend held on 14th July 2006, the directors resolved that notices be sent to shareholders of an extraordinary general meeting to be held on 14th August to (1) approve the restructuring of the company and (2) to remove Mr. Maxymych as a director. See Tab 5 p. 162-168.

[17] It is noted that the Minutes of that meeting reflect that only Mr. Scherrer and Mr. Diem were present and that Mr. Maxymych was absent despite having been notified.

[18] A similar resolution was passed by the directors of Global on the same day in similar circumstances. See Tab 5 p. 164 – 165.

[4] Tab 7 Muller paras 9-12

[19] It is also noted that at both meetings Mr. Muller and Mrs. Galina Scherrer were in attendance as witnesses. One wonders in passing at the necessity of having witnesses at board meetings and in any event these two persons could hardly be deemed independent.

[20] On 14th August 2006 both Funds at general meeting passed resolutions to remove Mr. Maxymych as a Director and re-domicile the Funds in St. Vincent and the Grenadines and remove the voting rights of the shares in a new restructured fund(s) with a management company holding all the voting rights. This management company is to be owned by Mr. Scherrer, Mr. Diem and Mr. Muller. Mr. Maxymych questions whether these resolutions were valid having regard to the fact that no member attended in person but gave proxies to the directors.

The Procedural Background in Brief

[21] On 12th October 2006 Mr. Maxymych filed an Originating Application for the appointment of a Liquidator of the Funds on the just and equitable ground. This was supported by his first affidavit.

[22] At the same time Mr. Maxymych made an application, ex parte, for the appointment of a P.L. The basis of this application was his fear that its directors had fraudulently diverted the assets of the Funds and that the Funds were in jeopardy because of the imminent re-structuring and re-location of the Funds to St. Vincent and the Grenadines.

[23] The ex parte application came before the court on 16th October. The Court ordered that the Application should not be heard ex parte and that the Funds should be served and given an opportunity to be heard on the application for interim relief. The matter was accordingly adjourned to 20th October.

[24] Mr. Young for the Funds takes issue with that short time frame as being contrary to Rule 17(4) of the Insolvency Rules 2005, as amended, which provides that 14 days notice of the hearing of an application should be given. However, Rule 17(4) itself provides for this general time frame to be varied by use of the introductory words, "unless the Act or the Rules provide otherwise" and section 496(1)(b) of the Act empowers the Court to abridge or extend any time stipulated by the rules or the Act on such terms as it considers fit if neither the Act nor the Rules 'expressly' provide against extension or abridgement. Further, section 496(2) gives the court a discretion to hear urgent matters with or without

notice or to authorize a shorter period than that provided for by the Act or the Rules. This accords with modern concepts of law and justice as enshrined in the concept of the overriding objective in CPR 2000, which is not excluded from insolvency matters. No litigant should, merely by failing to adhere strictly to timelines, be driven from the judgment seat otherwise we would be harking back to the harsh concepts of the common law so memorably portrayed by the immortal Dickens in the fictional case of Jarndyce v. Jarndyce in Bleak House.

[25] On 20th October both parties appeared and the Court gave directions for the filing of evidence and submissions and listed the hearing of the Applicant's Application for the appointment of a P.L. for 21st November.

[26] On the 7th November the Funds filed an application to strike out the Originating Application. This was supported by the affidavit of Mr. Diem and was likewise listed for hearing on the 21st November.

The Form of the Evidence

[27] The significant evidence before the Court consists of, for Mr. Maxymych, his two affidavits, that of 28th September with Exhibit PM1 and that of 31st October with Exhibit PM2; and for the Funds, the affidavit of Mr. Muller of 19th October with Exhibit MM1 and that of Mr. Diem of 10th November with Exhibit CD1.

[28] No one was subjected to cross-examination – a not unusual situation in matters of this nature.

Main Issues Arising

[29] Whether Mr. Maxymych has standing to bring the Originating Application for the appointment of liquidators of the Funds on which the interim application for a Provisional Liquidator is founded.

[30] Whether there are procedural irregularities in the Originating Application and if so whether they are of such moment that the Court should strike out the proceedings.

[31] Whether the application for appointment of liquidator has any real prospect of success and if not should the claim be struck out in its entirety.

Whether Mr. Maxymych has standing to bring the Originating Application for the appointment of liquidators of the Funds

[32] Mr. Young, learned counsel for the Funds, submitted in a nutshell that Mr. Maxymych has no locus standi to seek the appointment of a liquidator and, a fortiori, to obtain the leave of the court to apply for the appointment of a P.L. as to do so he must be a member and he is not a registered member of either of the Funds[5]. Counsel says that as a matter of BVI law, shares in a company may either take the form of registered shares or bearer shares depending on the Memorandum and Articles of Association of the particular company. Under their Memoranda and Articles of Association the shares in the Funds are issued as registered shares and Mr. Maxymych does not hold shares in either of the Funds in that he is not on the register of members.

[33] Further, he is not "a person to whom shares in a company have been transferred or transmitted by law" in accordance with the definition of "member" in s. 2(1) of the Insolvency Act.

[34] With regard to Mr. Maxymych's claim that he is the beneficial owner of certain shares held by Credit Suisse, Counsel says that he may or may not be the ultimate beneficial owner of these shares but that irrespective of where the ultimate beneficial interest may lie, he is not a member for the purposes of s.165 of the Act. Accordingly, the claim should be struck out as it was issued by a person who on 12 October 2006 (the date on which the Originating Application was issued) had no locus standi.

[35] Learned Counsel for Mr. Maxymych, Mr. Dougherty, in substance, submits that by virtue of Section 170(2) (d), of the Insolvency Act the Court may appoint a P.L. of a company on an application by a member and that Mr. Maxymych is a member of the Funds. Counsel contends that his shares in the Funds which were previously held by Credit Suisse London Nominees Ltd. as nominees for him as the beneficial owner have been transferred to him. (See Tab 10 page 1 of Exhibit "PM2" and para. 8 of the Applicant's Second Affidavit – Tab 9). Accordingly, the Applicant has locus to apply for the appointment of a Liquidator and Provisional Liquidator.

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[5] See Muller Tab.7 para. 6 and Diem Tab.11para.3.

Court's Analysis

[36] The primary challenge mounted by the Funds is the issue of standing and I am guided by the Privy Council in Deloitte & Touché AG v. Christopher Johnson and Anr,[6] a case from the Cayman Islands as to the approach to be taken where a litigant's standing is called into question.

[37] Lord Millett had this to say:-

> "In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction."

[38] Lord Millet went on to explain that in the second kind of case to determine whether the applicant has standing one must have regard to the nature of the relief which is sought, to see whether the applicant has a legitimate interest in it but this is not so of the first category of cases which is concerned with the Court's jurisdiction. I consider that this case falls within the first category of cases mentioned as the appointment of a liquidator is a

[6] Privy Council 10th June 1999

statutory remedy granted by the Insolvency Act, not a common law remedy and the Act restricts the category of person who may apply. Thus, it is a question of the Court's jurisdiction. Therefore, I must perforce consider at the very outset the relevant provisions of the Insolvency Act.

The Statutory Jurisdiction to Appoint a Liquidator

[39] The Court's jurisdiction to appoint a liquidator is founded on section 162(1) and the grounds are the usual well known ones namely, that the company is insolvent, that it is just and equitable to appoint a liquidator and that it is in the public interest to appoint a liquidator. Section 162(2) restricts the categories of persons who can apply for that relief to the company, a creditor, a member[7], the supervisor of a creditors' arrangement in respect of the company, the FSC and the Attorney General.

[40] It must be remembered that Mr. Maxymych claims to be a member because he says that he is the beneficial owner of certain shares held by Credit Suisse and that those shares have been transferred to him. He does not assert that he is a registered member of the Funds.

[41] Now, what is a "member" for the purposes of the Insolvency Act? Section 2, the definition section, defines 'member' thus:-

> "'member,' in relation to a company, includes
>
> a. a member of a company limited by guarantee; and
>
> b. a person to whom shares in a company have been transferred or transmitted by law, even though that person is not a member of the company within the meaning of the Companies Act."

[42] The two categories mentioned are not exhaustive as is readily apparent from the use of the word "includes" as the ordinary meaning of "include" means "to have as contents or

[7] See s.162 (2)(c)

part of it contents; be made up of or contain; to add as part of something else; put in as part of a set, group or category"[8] and its derivatives must signify likewise. From this one can infer that in addition to the categories specified in the section that persons who are generally considered in company law to be members of a company are also contemplated. This can also be inferred from the second limb's reference to the meaning of member in the Companies Act.

[43] For a better appreciation of this definition then we must look at the definition of 'member' in the Companies Act Cap. 285. The relevant section is section 46 which reads:-

> "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and, upon the registration of the company, shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act and whose name is entered on the register of members shall be deemed to be a member of the company."

[44] From this is it is clear that a member under the Companies Act is a person whose name is entered in the company's register of members. There is no such requirement for registration under the Insolvency Act. However, it can be implied that the definition of member under the Insolvency Act includes a member under the Company's Act. This is obvious from the use of the word "include" as already referred to and from the second part of the definition.

[45] As the Funds are IBC's it is useful to look at the definition of "member" under the IBC Act. Section 2 says, "member" means a person who holds shares in a company. This accords with the general concept of member in company law.

[46] However, we are specifically concerned with the second branch of the definition. This speaks of a person being treated as a member if shares are transferred or transmitted to him by law even if that transfer or transmission does not qualify him as a member under the Companies Act. From this it can be deduced that "member" under the Act has a

[8] Collins English Dictionary complete and unabridged 6th Edn 2003

broader meaning than that stipulated for by the Companies Act in so far as transfers and transmissions of shares are concerned. It is well established that a transferee of shares is not treated as a member unless his or her name is entered on the register of members[9]. To my mind this provision seeks to give effect to transfers or transmission even though the necessary step of having the transferee's name entered on the register has not yet been taken and so to treat an unregistered transferee as a member for the purposes of the Insolvency Act.

[47] Mr. Maxymych claims that the nominees of the shares transferred them to him. The Act does not define transfer or transmission. However, the ordinary meaning of "transfer" is "to change or go or cause to change or go from one thing, person or point to another."[10] And "transmit" denotes, "to pass or cause to go from one place or person; transfer; to pass on or impart to another".[11] The concept of transmission of shares on death to a deceased shareholder's administrators or executors is an all too familiar one.

[48] Is Mr. Maxymych a member for the purposes of the Insolvency Act? Let us examine the evidence. First, he does not refute that he is not a registered member of either of the Funds as deposed to by Mr. Muller[12] and Mr. Diem[13]. His evidence is that he holds 285 shares in Global Megatrend and 75 shares in FE Global. See Tab 4 page 13 para 52. This, according to the Funds, is a miniscule holding, about 0.158% and 0.06% respectively in each of the Funds.[14] He relies on a statement by Credit Suisse dated 4/8/06. See Tab 5 p. 227. He says further that the registered owner of those shares is Credit Suisse and that Credit Suisse has transferred those shares to him. See para. 8 of his second affidavit, Tab 9, p. 3.

[49] Mr. Maxymych says:- "The shares that I have purchased in the Funds were held by Credit Suisse London Nominees as nominees for me. I was the beneficial owner of the shares and Credit Suisse Nominees Ltd have duly transferred the shares into my

[9] see for example s. 30 (3) of the IBC Act.
[10] Collins English Dictionary complete and unabridged 6th edn 2003
[11] Collins English Dictionary op.cit

[12] Tab 7 Muller para 6.
[13] Tab 11 diem para 3.

[14] Tab 7 Muller para 4.

name. There can be no question that I am a member of the Funds and thus have the requisite locus standi to bring this claim. I believe that legal submissions will be made as to this question. At page 1 of the Exhibit hereto, now produced and shown to me marked "PM-2" is a copy of the Credit Suisse statement confirming that the shares in the Fund are held in my name." See Tab. 9 para. 8 of his second affidavit.

[50] PM-2 at Tab 10, p. 1 is a copy of a Statement of Investments from Credit Suisse dated as per 27/10/06 and it refers to 285 shares in Megatrend and 75 shares in Global. At the bottom of that statement, in manuscript, is a note addressed to Mr. Maxymych which reads as follows –" Dear Mr. Maxymych, as per our todays phone conversation, we like to confirm that the above 2 funds (sec. No. 336958 and 847739) are in your name (Peter Maxymych) in the above mentioned safekeeping account. For any further information, please do not hesitate to contact us." The note is signed by Patrick Haid and Mischa Gruber, apparent officers of Credit Suisse.

[51] These words on their face, to my mind, do not amount to a transfer or transmission of the shares held by Credit Suisse to Mr. Maxymych but merely serves to confirm that on Credit Suisse's own accounts the shares are held for his benefit. At the most, this note is only evidence that Credit Suisse holds those shares on behalf of Mr. Maxymych and that it can be inferred from this that Mr. Maxymych is the beneficial owner of those shares. Mr. Maxymych is therefore not a person to whom shares have been transferred or transmitted and is not a member of the Funds within the second limb of the definition.

[52] However, this is not the end of the issue, as I must now go on to consider whether Mr. Maxymych as beneficial owner of the shares, which on a balance of probabilities he appears to be, qualifies him as a member for the purposes of the Insolvency Act. In my judgment, the definition of member does not, by its express provisions that are clear and unambiguous, encompass beneficial owner of shares and the Court cannot construe the definition as extending to a beneficial owner.

[53] The concept of member in company law does not include beneficial owners but only registered owners.[15] Invariably, companies are forbidden by law from registering notice of

[15] Every company is composed of members, though the law regards the company as an entity distinct from its constituent members. In the case of a company limited by shares, a member is a person holding shares in the company; there can be no membership, *i.e.* proprietary relationship to a company, otherwise than through the medium of shareholding. Consequently the terms "member" and "shareholder" are

any trust, express or implied, on their register[16] and that is likewise true of IBC's. Accordingly, I am of the view that Mr. Maxymych is not a member of the Funds for the purposes of the Insolvency Act and therefore he has no standing to bring an application to appoint a liquidator or to seek interim relief for the appointment of a P.L.

[54] Having reached that conclusion it is not necessary for me to consider the other issues raised as this conclusion effectively disposes of the action in its entirety.

[55] However, I should say briefly, for the sake of completeness, that I agree with Mr. Young's submissions that the proceedings do not have any real prospect of success even if Mr. Maxymych were a member. The Funds are not parties to the alleged agreement for the re-investment of the Manager and the Investment Advisor's fees and any breach of that agreement would be a matter for the parties to the agreement to take up with the defaulting parties without more. Furthermore, and most significantly, on a Member's Application for winding up, the court is obliged by law to consider whether the aggrieved member has an alternative remedy[17]. Here, Mr. Maxymych is not locked into the Funds as he can avail himself of the provision in the Articles of both funds to redeem his shares to the fund at a fair value[18]. He does not dispute that. The Privy Council have stated that if an applicant for a winding up order receives an offer to buy his shares at a fair value he is simply not entitled to pursue his claim for a winding up order in the face of such an offer as the unfairness which would entitle a member to relief lies not in the prejudicial conduct itself but in the prejudicial conduct combined with the lack of a reasonable offer for the oppressed member to redeem his shares at a fair value (See *CVC Opportunity v Demarco Almeida [2002] CILR 77* per Lord Millett at para 39). In this case any member has the opportunity to redeem his shares at a fair value through the redemption rights given in the Articles of the Funds.

[56] Thus, Mr. Maxymych has an alternative remedy available to him and he appears to be acting unreasonably in seeking an application for the appointment of a liquidator rather than pursuing that remedy.

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synonymous, apart from the now exceptional case of the bearer of a share warrant who is a shareholder but is not a member because he is not registered in the register of members. (See **Palmer's Company Law Vol. 2** para. 7.001)

[16] See Companies Act s.53

[17] see Insolvency Act s. 167(3)

[18] See Tab 5 Global's Articles #17 p. 02 and Tab 5 Megatrend's Articles #17 p. 181

[57] With respect to the re-structuring and change of domicile of the Funds, again on the face of it, these are matters for the shareholders and if they, or any of them is dissatisfied then he or she can have his shares bought out at a fair value or can seek the aid of the FSC if they have well-founded fears that the affairs of the Funds are being conducted irregularly, improperly or fraudulently.

[58] I note his motives as expressed in T.B. Tab 9 para 7 p. 3 of his affidavit which appears to be altruistic albeit, rather late in him acting on them as when he was a director he apparently failed to be as vigilant as he ought to have been. I sympathise with his position to some extent as no doubt he is also aggrieved that he as a founder has been so unceremoniously ousted from office and treated with apparently such scant regard. However, the alleged fraud in relation to the fees of which he speaks has been going on for years, if we are to believe him, yet he as director took no steps to vigorously investigate it neither did he bring his concerns to the attention of the FSC. I note that he cannot now take any action via FEB as its management contract was terminated by the Funds. In effect it appears that all power and authority over the Funds is now concentrated in the hands of Mr. Scherrer, Mr. Diem, Mr. Muller but that is a matter for the shareholders who apparently have approved the re-structuring. If the shareholders have concerns they are at liberty to take the matter up through the channels available to them. I note that from the Funds' evidence only one dissatisfied shareholder has redeemed his shares after the proposed re-structuring[19] was sanctioned. I also note paragraph 37 of his second affidavit where he states that certain action is being or will be taken by him in Switzerland with respect to FES's dealings with the funds.[20]

[59] I must also comment on the irregularity in the proceedings. Again the submissions of Mr. Young are well-founded. This is not an ordinary claim as it is not an individual remedy but a class remedy. The Insolvency Rules provide for a separate affidavit to be sworn in support in respect of each company (Insolvency Rules 156 (5)). It is not permissible to seek to combine two companies in a single Originating Application for the appointment of a liquidator over both companies (see *French, Applications to wind up companies 2.1.1*); Strictly speaking Mr. Maxymych ought to have filed separate actions with separate

[19] Tab7Muller para.23

[20] Tab9 p.11&12

affidavits. There is no good reason to vary this time honoured practice and I would have been averse to employ the court's case management powers to rectify these irregularities without more having regard to the harsh nature of the remedy sought and to the clear rules governing procedure.

Conclusion

[60] For the foregoing reasons I have determined that Mr. Maxymych is not a member of either of the Funds and accordingly that he has no standing to bring the action under section 162(2) of the Insolvency Act and therefore his action is dismissed. This matter, for the purposes of costs is deemed to have been concluded at case management. The Respondents are to have their prescribed costs. They have made an application for the court to determine the value of the claim and the court will hear counsel on this application at a convenient time to be fixed by the court if agreement cannot be reached.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands