IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO: BVIHCM (COM) 2012/0113, 0116, 0114 and 0115

In the matter of

FuturesOne Diversified Fund SPC Ltd.

And in the matter of

FuturesOne Innovative Fund SPC Ltd.

And in the matter of

Phi R (squared) Investment Fund SPC Ltd.

In the matter of

Anchor Hedge Fund Limited

And in the matter of

The Insolvency Act 2003

Applicants:

(1) John J Greenwood and Hadley J Chilton, as Joint Liquidators of FuturesOne Diversified Fund SPC Ltd, FuturesOne Innovative Fund SPC Ltd, Phi R (squared) Investment Fund SPC Ltd, Anchor Hedge Fund Limited

(2) FuturesOne Diversified Fund SPC Ltd, FuturesOne Innovative Fund SPC Ltd, Phi R (squared) Investment Fund SPC Ltd, Anchor Hedge Fund Limited

Respondents:

(1) FuturesOne Diversified Fund SPC Ltd.
(2) FuturesOne Innovative Fund SPC Ltd.
(3) Phi R (squared) Investment Fund SPC Ltd.
(4) Anchor Hedge Fund Limited

Appearances:

Mr. Lloyd Tamlin for the Applicants, instructed by Withers BVI
Mr. Jeremy Child and Mr. Jonathan Addo for Mr. Brick Kane, as Receiver appointed by the United States District Court for the Northern District of Illinois Eastern Division by order of 27 September 2012, instructed by Harney, Westwood & Riegels

2013: 7, 20 March

JUDGMENT

(Liquidations – liquidators appointed by members of each of four associated companies under section 159(2) Insolvency Act, 2003 ('the Act") - whether appointments valid – three of the companies each having only one member- whether sole shareholder of member company could bind member unless authorized by its board – whether members resolutions to appoint liquidators valid unless passed at properly constituted meetings - section 159(3) of the Act considered – **Meridian Global Funds Management Asia Ltd**[1] applied – fourth company having more than one member – whether purported appointment by assumed ultimate beneficial owner valid – whether Receiver appointed by the United States District Court on application of US Commodity Future Trading Commission and claiming assets in competition with the companies entitled to be heard on application to consider validity of liquidators' appointments - whether Receiver entitled to make application for relief under Part XIX of the Act – section 466(1) of the Act considered – whether Receiver person aggrieved within meaning of section 273 of the Act – whether Receiver could become creditor by assignment of the companies – sections 9 and 11 of the Act considered)

[1] **Bannister J [ag]:** On 20 February 2013 Mr. Hadley Chilton and Mr. John Greenwood, insolvency practitioners with Baker Tilly here in the BVI applied for relief intended to establish that they have been validly appointed as joint liquidators of each of the four companies mentioned in the title to these proceedings. I will refer to the first two companies indiscriminately as 'Futuresone', since neither exhibits any particular characteristics requiring it to be treated separately: to the second named company as 'Phi R'; and to the fourth named company as 'Anchor.' If I hold that those appointments or any of them were invalid, then and to that extent Mr. Chilton and Mr. Greenwood seek the appointment by the Court of themselves as joint liquidators of the relevant company. I will refer to the applicants for convenience as the Joint Liquidators, but without prejudice, obviously, to the contentions which have been urged before me that they were never validly appointed as such.

[2] The applications are opposed by Mr. Brick Kane ('the Receiver'). The Receiver is President and Chief Operating Officer of Robb Evans and Associates LLC, of Sun Valley, California, USA ('Robb Evans'). On 27 September 2012 the United States District Court for the Northern District of Illinois Eastern Division ('the United States District Court'), on the application of the United States Commodity Futures Trading Commission ('the CFTC'), appointed Robb Evans, to be equity receiver of the defendants to the proceedings in which the appointment was made and over

[1] [1995] AC 500

'their affiliates and subsidiaries, and all of the funds, properties, premises, accounts, businesses, partnerships, sole proprietorships and any other kinds of assets directly or indirectly owned, beneficially or otherwise, managed or controlled by the Defendants, whether held in their own names or in the names of others.'

[3] None of Futuresone, Phi R or Anchor was named as a defendant to the US District Court proceedings, but a gentleman called Nikolai Simon Battoo ('Mr. Battoo') was named as first defendant and there is no doubt that he controlled Futuresone and Phi R. The Joint Liquidators believe that he also controlled Anchor, but they have not as yet been able to establish that with certainty.

The facts

[4] Futuresone, Phi R or Anchor (together, 'the funds') operated as mutual funds. Each is incorporated here in the BVI.

[5] The corporate structure of the four funds at the time when the resolutions appointing the Joint Liquidators were purportedly passed appears to have been as follows:

(a) Futuresone had only one voting member, a company called Innovative Financial Management Limited, incorporated in the Cayman Islands, of which Mr. Battoo was the sole shareholder ('Innovative'). The directors of Innovative at the material time were apparently unwilling to act for the purposes of putting Futuresone into liquidation. Futuresone itself had a sole director, a Mr. Florio;

(b) Phi R similarly had only one voting shareholder, a company called Phi R (squared) Investment Management Limited ('Phi R Management'), also registered in the Cayman Islands, and of which Mr. Battoo was also sole member. The directors of Phi R Management were the same as the directors of Innovative and similarly disinclined to act. Mr. Florio was the sole director of Phi R;

(c) Anchor had only one voting member, a Hong Kong incorporated company called Anchor Hedge Management Limited ('Anchor Management'). At the time winding up resolutions were passed, or purportedly passed, Anchor Management had a sole director. It had two Hong Kong registered corporate shareholders, each of which in their turn had two members, neither of whom was Mr. Battoo. Anchor's own board consisted of Mr. Florio. As I have said, the Joint Liquidators say that they believe that Mr. Battoo is the ultimate beneficial owner of Anchor Management, but have not been able to establish that fact for certain.

[6] Shortly after the appointment of Robb Evans by the US District Court, Baker Tilly was approached by the funds' then legal advisors and agreed to accept appointments as liquidators to each of them. The Joint Liquidators' evidence is that the advice given was that the appropriate course to be taken was for each of the companies to be put into liquidation by way of members' resolutions passed for the purposes of section 159(2) of the Insolvency Act, 2003 ('the Act'). On 11 October 2012 Mr. Battoo signed minutes of (sole) members' meetings of each of the four funds. Each minute recites that the sole director of each of the four funds had recommended that each company be liquidated and dissolved and resolves that Mr. Chilton and Mr. Greenwood be appointed as Joint Liquidators. The appointment was to take effect after the five days notice to the Financial Services Commission required in the case of regulated companies by section 159(5) of the Act had expired. Each minute records Mr. Battoo as attending the meeting 'on behalf of' the relevant voting member (Innovative, Phi R Management and Anchor Management respectively).

[7] Creditors' meetings in respect of each company were advertised and held on 9 November 2012. Creditors attending unanimously approved the appointments.

[8] Finally, I should mention that the commercial background to these applications is that there exist, in bank accounts in the names of the funds at a bank in the Bailiwick of Guernsey called EFG Private Bank (Channel Islands) Limited ('EFG'), substantial balances. Although the Joint Liquidators have received recognition from the Royal Court in Guernsey, EFG declines to turn over these balances, which are also claimed by the Receiver as assets in the receivership. It is said that EFG intends to interplead, but that has yet to happen. The Receiver's object, therefore, appears to be to extinguish, if he can, any standing of Mr. Chilton and Mr. Greenwood as Joint Liquidators to assert claims to the EFG fund - although it is not clear to me how that would defeat such title (if any) that the funds themselves may have to the money, or to some of the money, in the EFG accounts. That, however is a question with which I am not concerned on these applications.

The applications

[9] The applicant Joint Liquidators bring identical applications, dated 20 February 2013, in respect of each fund. In their applications the Joint Liquidators seek, first, declarations that they were validly appointed in respect of each company (with effect from 24 October 2012) pursuant to section 159(2) of the Act. In the alternative, they seek the appointment of themselves as joint liquidators of each company pursuant to section 159(1).

[10] Although various law firms acting for the Receiver were notified and sent all documentation on 21 February 2013, it was not until 7 March 2013, the day of the actual hearing, that the Receiver applied to be added as a party to the Joint Liquidators'

applications, either under the Court's inherent jurisdiction or as an aggrieved person within the meaning of section 273 of the Act, so that he can oppose them. Under section 273 he applies, in case I uphold the appointments of 11 October 2011 or appoint the applicants *de novo*, for orders 'reversing' everything done by the Joint Liquidators to date, on the basis either that the Joint Liquidators have not been validly appointed that their appointments were made in a wrongful attempt to avoid the effect of the order of the US District Court appointing the Receiver. The Receiver also applies under section 467 (3) of the Act for an order in aid of the US District Court proceedings, staying or terminating what he refers to as the purported liquidations of the funds.

Appearances

[11] The Joint Liquidators appeared at the hearing by Mr. Lloyd Tamlyn. The Receiver appeared by Mr. Jeremy Child and Mr. Jonathan Addo. Mr. Child, who did his very best in extremely difficult circumstances, applied for an adjournment in order that a proposed assignment by a company which had provided services to each of the funds could be completed. The proposed assignees are the liquidators of two of the defendants to the US District Court Proceedings, which have been put into liquidation by the Supreme Court of the Bahamas. The Receiver is one of the three Bahamian Court appointed liquidators. The purpose of the assignment was said to be that, once completed, it would have the effect of making the Receiver (together with his co-liquidators) a creditor of each of the four BVI funds in respect of which the Joint Liquidators claim to have been appointed and thus would confer upon him *locus standi* as a creditor to oppose the Joint Liquidators' applications.

[12] I was shown a draft of the proposed assignment. I accept, of course, that it is only a draft, but it is a remarkable document for all that. It purports to be a gratuitous equitable assignment to the Receiver and his Bahamian co-liquidators of all outstanding redemption requests which the service provider might have in relation to each company and of all unredeemed share capital to which the service provider might be entitled. It also purports to assign all unpaid professional or referral fees due from each company to the assignor. In respect of unpaid redemption monies and returns of capital, the assignment, if otherwise effective, would fail in any event to confer upon the Receiver and his fellow Bahamian liquidators the status of creditors, since the proposed assignor never enjoyed such status itself in respect of such rights.[2] So far as concerns unpaid professional fees, no evidence was adduced to show that any such fees were outstanding to the proposed assignor from any of the funds. I shall have to deal later in this judgment with the effect, for present purposes, of an assignment of a claim in the liquidation to outstanding fees, but it is sufficient at this point to note that I agreed to hear

[2] section 197 of the Act and **Westford Special Situations Fund Ltd v Barfield Nominees and ors** HCVAP 28 March 2011

Mr. Child *de bene esse* on behalf of the Receiver and there was therefore no reason to incur the costs and expense of an adjournment in order to permit the assignment to proceed.

[13] Mr Child also asked for an adjournment in order to consider some documents exhibited to a third affidavit put in by the Joint Liquidators. It did not seem to me that the material in question required more than five minutes consideration at most and there was no suggestion (and could have been no suggestion) that the Receiver was in any position to challenge any of it or to put in any evidence to contradict it.

[14] I therefore declined the request for an adjournment.

The Joint Liquidators' applications

[15] Mr Tamlyn accepts that there is no evidence that the *de jure* directors of Innovative and Phi R Management authorized Mr. Battoo to act on these companies behalf for the purposes of passing resolutions at meetings of Futuresone and Phi R (or of Anchor) on 11 October 2012. I wonder, however, if that matters. The minutes of the meeting of each of these three companies record Mr. Battoo as attending on behalf of the respective voting member. It seems to me that as a matter of general principle the documents should be taken at face value – in other words as recording that as a matter of fact Mr. Battoo had the actual authority of Innovative and Phi R Management (and Anchor) to represent each of them at the meeting, which is what the words 'on behalf of' are apt to convey. It seems to me that if a stranger wishes to challenge the authority which a formal document such as the minute of a meeting of the members of a company describes a person as possessing, the burden is upon the stranger to come up with the evidence to contradict it. There is no evidence to suggest that Mr. Battoo did not have the authority, whether or not formally expressed, of the boards of each of Innovative and Phi R Management, (or, for that matter, of Anchor Management), to represent those companies at the meetings. Left to myself I would have decided the applications in favour of the Joint Liquidators on that ground alone, but that is not how Mr. Tamlyn put it and that was not how the case was argued.

[16] Mr. Tamlyn submits that in the case of Futuresone and Phi R, where it is common ground that Mr. Battoo is the sole owner of the sole voting member, the position is covered by the decision of the Privy Council in **Meridian Global Funds Management Asia Ltd**[3], approving[4] the following passage from **Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd**[5]:

[3] [1995] AC 500
[4] at 506C-E
[5] [1983] Ch 258

'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company.'

[17] Mr. Child did not and could not dispute this proposition, which, in my judgment, is a complete answer to any challenge to the Joint Liquidators' appointments in Futuresone and Phi R, but he relied upon an affidavit made by Ms Rosie Whittaker-Myles, a Cayman Islands lawyer, which deposes to the fact that Mr. Battoo required the actual authority of each of the companies directors, pursuant to its Articles of Association, to sign resolutions on behalf of Innovative or Phi R Management (or Anchor Management) and that she had seen no evidence that he was so authorised. What the affidavit does not and could not say is that the decision in **Meridian** has no effect in the Cayman Islands. That evidence therefore gets Mr. Child nowhere.

[18] Mr. Child further submitted that the appointments of the Joint Liquidators at the instance of Mr. Battoo amounted to fraudulent attempts to circumvent the United States District Court receiverships. Leaving aside the question whether the Commodities Exchange Act, 7 USC, ('the CEA') or the order of the US District Court has any extra territorial effect, this is an untenable submission. It cannot be said that placing the management and control of a company into the hands of officers of a Court of competent jurisdiction amounts to wrongdoing. A similar submission was made in relation to the assets of each of the four companies. It was somehow suggested that by putting the companies into liquidation Mr. Battoo had extricated them from the reach of the Receiver. This seems to be based upon a misunderstanding of the effect of a liquidation carried out under the Act. The appointment of liquidators has no effect upon the shares in or assets of a company. The shareholders remain the same and the company continues to own its assets as before. If it held assets on behalf of a third party before it went into liquidation, it will continue so to hold them after it has been put into liquidation. Liquidation effects a change in management and, if the company is solvent, imposes a scheme for the protection and distribution of its assets, but it effects no assignment of the company's assets, whether held by the company beneficially or on behalf of others. If it turns out that assets held in its name belong to others, they will be handed over to their rightful owners once their title is established. It is not possible, therefore, to prevent the true owner of assets or its recognized representatives from recovering assets held for it by a BVI company by putting that company into liquidation. There is nothing in this point.

[19] Mr Child relied upon subsections 159(2) and (3) of the Act, which are in these terms:

(2) Subject to subsection (5) and section 161, the members of a company may, by a qualifying resolution, appoint an eligible insolvency practitioner as liquidator of the company.

> (3) For the purposes of subsection (2), a resolution is a 'qualifying resolution' if it is passed at a properly constituted meeting of the company by a majority of 75 percent, or if higher majority is required by the memorandum or articles, by that higher majority, of the votes of those members who are present at the meeting and entitled to vote on the resolution.

[20] Mr. Child submits that the words of subsection 159(2) are mandatory; that a resolution cannot be a 'qualifying resolution' for the purposes of section 159(2) unless it is passed at a properly constituted meeting; and that there is no evidence that the meetings of 11 October 2012 were properly constituted or that the resolutions which are minuted were passed by a majority of 75%. It seems to me that the answer to this point is again to be found in **Meridian**. The business recorded by the minutes as having been decided upon on 11 October 2012 was effected by way of what must be treated as unanimous decisions of the entire membership of Futuresone and Phi R respectively. In any event, each minute records that notice had been given and that the meeting was quorate. It is not for those relying upon such a document to prove that it is accurate. It is for those who seek to attack it to show that it is false. The law presumes that matters said to have been duly carried out have been duly carried out until the contrary is shown. There is no evidence that the meetings were not properly constituted. For these reasons, there is nothing in this point, either.

[21] In my judgment, therefore, there is no reason to treat the resolutions of Innovative and Phi R Management as other than valid and effective unanimous resolutions of the members of Futuresone and Phi R respectively, passed at properly constituted meetings. I should, however, mention that the actions of Mr. Battoo in voting on behalf of Innovative and Phi R Management have subsequently been ratified by those companies' sole director, which puts the matter beyond argument.

[22] The position in relation to Anchor is different only inasmuch as it has not been conclusively demonstrated that Mr. Battoo was the ultimate beneficial owner of Anchor Management, although I find it difficult to see how the Receiver could assert otherwise while at the same time asserting (as he does) that the entirety of the whole enterprise was under his control. That must also have been the view of the lawyers advising Anchor at the time of the October 2012 resolution. In my judgment, therefore it is to be assumed that the **Meridian** principle applies with equal force in the Anchor case.

[23] In any case, it seems to me that when the Court is faced with an uncontradicted document such as the minute of the Anchor general meeting of 11 October 2012, clearly prepared with the benefit of professional advice and purporting to record events which, taken at face value, were sufficient to effect a valid appointment of the Joint Liquidators, it may and should rely upon the document as evidencing a valid appointment.

[24] In my judgment, therefore, the evidence before the Court sufficiently proves that the Joint Liquidators were validly appointed as liquidators of Futuresone, Phi R and Anchor on 11 October 2012.

[25] In these circumstances, it is unnecessary for me to consider the alternative applications for the appointment of the Joint Liquidators as liquidators *de novo* and I say nothing about them.

The Receiver's application

[26] At the hearing a large part of the relief claimed in the Receiver's application simply fell away. What was left, in essence, were the section 467 application and the question of the Receiver's standing to apply under section 273 of the Act. It is convenient to take the section 467 point first.

[27] Section 467 gives the Court power to make orders in aid of 'foreign proceedings' on the application of a 'foreign representative.' Section 466(1) defines 'foreign proceedings' and 'foreign representative' as follows:

> 'foreign proceeding' means a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization, liquidation or bankruptcy and 'debtor' shall be constructed accordingly;
>
> 'foreign representative' means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding;'

The United States is a relevant foreign country for the purposes of section 466(1), so that the first question is whether the receivership being conducted in the US District Court is a collective judicial or administrative proceeding pursuant to a law relating to insolvency. An affidavit of Deborah Thorne, a partner in the firm of Barnes & Thornburg LLP, which is advising the Receiver in the United States, is relied upon by the Receiver. It gives an opinion on the question whether, as a matter of US law, the US District Court proceedings are foreign proceedings within the meaning of section 466. As Mr. Tamlyn pointed out, the relevant question is a question of BVI law, not United States law. Even then, Ms Thorne does not address the question whether the proceedings are being conducted pursuant to a law relating to insolvency. In fact, it seems clear that they are not. If they are being conducted 'pursuant to' any law, they appear to be being conducted pursuant to section 6(c) of the CEA (see paragraph 1 of section I of the

judgment of the Honourable District Judge). So far as I can gather, the CEA is a law relating to investor protection, not insolvency. For present purposes, however, the critical point is that I have no material before me which enables me to conclude that the US District Court proceedings are proceeding pursuant to a law relating to insolvency.

[28] Apart from that, section 466(1) shows that the 'reorganization, liquidation or bankruptcy' there referred to is intended to mean the reorganization, liquidation or bankruptcy of a debtor. That is the only way in which sense or meaning can be given to the words 'and debtor shall be construed accordingly' where they occur at the end of the subsection. It is also the only way in which sense can be given to the references to 'debtor' in section 467. It is quite impossible for me to find that the US District Court proceedings are concerned with the reorganization, liquidation or bankruptcy of the affairs of a debtor and there is nothing in Ms Thorne's affidavit which suggests that they are.

[29] In my judgment, therefore, the Receiver is not a foreign representative within the meaning of subsection 466(1) of the Act and accordingly has no standing to make any application under Part XIX.

[30] I turn to consider the Receiver's standing under section 273 of the Act. Section 273 is in the following terms.

> 'A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reserves or modify the act, omission or decision of the office holder.'

At the hearing Mr Child was unable to point to any act, omission or decision of the Joint Liquidators (who are office holders within the meaning of section 273) by which the Receiver has been aggrieved. His objection is not to any act or omission of the Joint Liquidators, but to the fact that they claim (wrongly, he submits) to have been appointed – an objection which is obviously not within the purview of the section. For the reasons given above, I have held that the appointments of the Joint Liquidators on 11 October 2011 were valid. In any event, their appointments cannot have prejudiced the Receiver. As I have said, their appointments had no effect upon the property of the funds or upon its beneficial owners – whether those beneficial owners are the funds themselves or whether they are persons on whose behalf the funds are holding, or are to be treated as holding, property. The appointments have ensured that the funds have management in place which can assert claims to any property which rightfully belongs to the funds and which can challenge attacks by the Receiver on such property, but that cannot make the Receiver a person aggrieved in the sense in which that term is used in section 273. As a matter of BVI law, the integrity of the US District Court's receivership is not impaired by the appointments of the Joint Liquidators.

[31] In my judgment, the Receiver has no standing in relation to these four liquidations. He has no standing under section 467; he has no standing under section 273; he is not a creditor of any of the funds. Even if the proposed assignments had been entered into and completed (and assuming that the assignor itself is a creditor of one or more of the funds), the Receiver would not have become a creditor in place of the assignor. This is because the Act defines a creditor as a person who has an admissible claim in respect of a company at the time when its liquidation commences. Assuming that the assignor had an admissible claim against one or more of the funds on 11 October 2012, it could not, by assigning it, turn the Receiver and his colleagues in the Bahamian liquidations into persons who had claims against the funds as at 11 October 2012. It follows that the assignment would have been ineffective to give the Receiver standing as a creditor of any funds. It would have given the Receiver the right to have the assignor pay over to the Receiver any distributions which it received in the winding up, but it could not have clothed him with a status which the wording of the Act precludes him from obtaining. The class of creditors of a company going into liquidation under the Act crystallizes on the commencement of the liquidation. It is not possible for a person, such as the Receiver, who was a stranger to and unaffected by the liquidation and who, accordingly, can have no interest in it, to acquire a status to intervene in its conduct by taking an assignment of the sort envisaged in the present case. A stranger wishing to intervene must bring himself within section 273 if he is to be heard at all.

[32] There was therefore never any basis for the Receiver to be joined as a party to the Joint Liquidators' applications.

Conclusion

[33] I will make the declarations sought at paragraph 1 of each of the Joint Liquidators' applications. I make no order under paragraph 2 of each of the applications. I will hear the Joint Liquidators on the question whether I should make orders under the other heads of relief claimed in the applications.

[34] The Receiver's application is dismissed.

Commercial Court Judge
20 March 2013