In The Supreme Court of Bermuda

COMMERCIAL COURT
COMPANIES (WINDING-UP)
2016: No. 209

BETWEEN:-

CBM AGENTE DE VALORES SA

Petitioner

-v-

PPF LIFE ASSETS FUND LTD

Respondent

RULING

Date of hearing: 20th May, 27th May and 3rd June 2016
Date of ruling: 22nd July 2016

Mr Nathaniel Turner and Ms Kehinde George, ASW Law Limited, for the Petitioner

Mr Scott Pearman, Conyers Dill & Pearman Limited, for the Respondent (20th May 2016 only)

Mr Alexander Potts, Sedgwick Chudleigh Ltd, for Iain Stamp, an interested party (27th May and 3rd June 2016 only)

Winding up petition – just and equitable grounds – application for interlocutory relief pending hearing of petition – whether to appoint provisional liquidators – whether to make freezing order – whether good arguable case – whether failure of sub-stratum – whether abuse of control – whether alternative remedy – whether real risk of dissipation – path of least irremediable prejudice

Dramatis personae

1. The Respondent, PPF Life Assets Fund Ltd ("PPF"), was incorporated on 9th September 2014 as a Bermuda exempted company. Its authorised share capital is US$10,001.00, comprising one voting management share of par value $1.00 and 10 million non-voting participating shares of par value $0.001. The share capital is fully paid up or credited as being paid up.

2. The Petitioner, CBM Agente de Valores SA ("CBM"), is a limited liability company with its registered office in Uruguay. It holds 50 participating shares in PPF, for which it subscribed on 13th February 2015. All the holders of participating shares had subscribed for them by the end of March 2015.

3. The holder of the single management share is Iain Stamp. He is the principal of a financial consultancy, PP Financing Limited ("PP Financing"), through which he has spent what he describes as a very significant amount of time and resources providing set-up, structuring and consultancy services for PPF. PP Financing has yet to reclaim these costs from PPF.

4. Mr Stamp is also a director and shareholder of PPF Capital Source Lending Company 4 Limited ("PPF Capital"). It was incorporated in Ireland for the purpose of issuing bonds to investors in order to recapitalise a company known as Lifetrade Life Settlements Limited ("Lifetrade") and refinance a loan secured against Lifetrade's assets.

5. The administrator of PPF is a Bermuda registered company known as Equinoxe Alternative Investment Services Ltd ("Equinoxe").

6. The original directors of PPF were Mr Stamp, Pedro Nowald, and Rodrigo Vila. Mr Nowald is also a director of PPF Capital. The Petition describes Mr Nowald and Mr Vila ("the Outside Directors") as intermediaries on behalf of certain of the investors. They have fallen out with Mr Stamp, who has appointed two further directors, Max Belbin and Paul Burrell ("the New Directors"), although the Petitioner disputes the validity of their appointment. The New Directors are both employed by PP Financing.

Corporate documents

PPF Prospectus

7. The Prospectus of PPF was published in December 2014 and underwent several revisions. The version which was in force when the Petitioner subscribed was dated 10th February 2015. I was referred to the following extracts:

"***Summary***

The Fund's investment objective is to provide returns to Members by way of subscribing for a bond or bonds in an Irish Section 110 special purpose vehicle, PPF Capital Source Lending Company 4 Limited (the 'Irish Section 110'). The Irish Section 110 is a single-member company, whose sole member is Mr Iain Stamp (also one of the three Directors of the Fund, and one of the five Directors of the Irish Section 110), and a segregated securitization structure. The bonds ('the Irish Section 110 Bonds') will have a 5 year term, are callable and are designed to provide a 6% annual yield.

The Fund shall subscribe for Irish Section 110 Bonds, which are discounted bonds and which are designed to allow for a capital withdrawal annually. These capital withdrawals from the discounted bonds shall provide the Fund with dividends to the equivalent value of 6% per annum (please refer to Dividends section below).

The Irish Section 110 blocks subscribed funds in a bank account in its own name. This bank account shall be opened at a bank (a) whose long-term unsecured, unsubordinated, unguaranteed debt is rated at least 'A' by Standard & Poor's, 'A' by Fitch or 'A2' by Moody's; or (b) whose short-term unsecured, unsubordinated, unguaranteed debt is rated at least 'A' by Standard & Poor's, 'F-1' by Fitch, or 'P-1' by Moody's; or (c) a

bank or financial institution ranked by a reputable rating agency as a top 100 financial institution on a worldwide basis and acceptable to the Board of Directors of the Irish Section 110.

The subscribed funds at the Irish Section 110 are held at all times at a bank account with its directors as signatories. Movement of the subscribed funds or any portion thereof shall require the unanimous consent of all directors of the Irish Section 110 (which include two of the Directors of the Fund). The Irish Section 110 will not enter into an arrangement pursuant to which the subscribed funds are capable of being withdrawn by any third party from an account in the Irish Section 110 name or under its control. The subscribed funds will only be used for the purposes of redeeming the bond issued by the Irish Section 110, and paying any necessary fees or expenses related thereto.

The Irish Section 110 shall receive funding originating from a series of simultaneous buy/sell debt instruments transactions to provide structure financing to Lifetrade Life Settlements Limited. In the unlikely event that the Irish Section 110 fails to perfect such financing within 60 days of entering into the respective agreements and bond redemption is necessary, the full subscription price of the Fund shall be returned to its Members.

The Fund is a 5 year closed ended fund and will not make any other subscriptions or investments outside of the bond subscriptions envisaged. It is the intent of the Board of Directors to wind up the Fund following the completion of its investment program and once all net assets have been distributed to investors.

The Directors of the Fund will ensure that the Fund follows its sole investment objective. The Directors will be responsible for carrying out the Fund's investment program, by majority consent. Hence, the appointment of a fund manager for the Fund was considered not necessary, as it would constitute an unnecessary expense for the Fund.

. . . . .

Investment objective

The Fund's investment objective is to provide returns to Members by way of subscribing for a bond or bonds in the Irish Section 110. The Irish Section 110 is a segregated securitization structure. The bond or bonds will generally have a 5 year term.

The Fund's aim is to provide Members with the return of their investment amount at year 5 as well as a 6% per annum yield. The bonds subscribed for by the Fund and issued by the Irish Section 110 are discounted bonds which allow for a capital withdrawal annually. These capital withdrawals from the discounted bonds allow the Fund to

provide dividends to the equivalent value of 6% per annum. There can be no guarantee that the Fund will achieve this objective.

Investment approach

The Directors of the Fund will ensure that the Fund follows its sole investment objective of subscribing for bonds in the Irish Section 110. The Fund's portfolio will solely consist of either one bond or multiple bonds which have been subscribed for and issued by the Irish Section 110. The Fund may also hold cash from time to time to pay its running expenses. The Directors will not be making any other investments in any other type of asset.

. . . . .

Proviso

Applicants for Shares should note that the Shares are issued and redeemed subject to the provisions of the Memorandum of Association and Bye-Laws of the Fund and the terms of this Prospectus ... Notwithstanding the place where the Subscription form is executed or the citizenship or residency of the subscriber, the rights and obligations of the Members shall be governed by and construed in accordance with the laws of Bermuda. The courts of Bermuda shall have exclusive jurisdiction over any dispute Members may have relating to their Shares.

. . . . .

Redemption or transfer Shares

Shares are redeemable only at the option of the Fund and are not redeemable at the option of Members. ....

. . . . .

Constitution

The constitution of the Fund comprises its Memorandum of Association and Bye-laws. The Memorandum of Association sets out the objects of the Fund. The Bye-Laws set out the internal regulations in terms of which the directors are required to manage the Fund. Copies of the Memorandum of Association and copies of the Bye-laws are available for inspection at the Fund's registered office, situated in Bermuda. This Prospectus is subject to, and should be read together with, the Memorandum of Association and Bye-laws."

[Emphasis added.]

8. In a subsequent version of the Prospectus dated 7th October 2015 the underlined paragraph in the Summary was amended to read as follows:

"*The Irish Section 110 shall receive funding originating from a series of simultaneous buy/sell debt instruments transactions to provide structure financing to Lifetrade Life Settlements Limited. In the unlikely event that (i) the Irish Section 110 fails to perfect such financing within 60 days of entering into the respective agreements; or (ii) the Irish Section 110 and Lifetrade Life Settlements Limited have not entered into the respective agreements within 314 days of the date of the bond purchase agreement, and bond redemption is necessary, the full subscription price of the Fund shall be returned to its Members unless the directors decide otherwise.*"

[Emphasis added.]

PPF Bye-laws

9. Bye-law 3 deals *inter alia* with the redemption of shares. Bye-law 3.1 provides that PPF is authorised to issue shares which are to be redeemed or are liable to be redeemed at the option of PPF only. Bye-law 3.2 authorises the Board of Directors to determine the manner or any of the terms of any redemption or repurchase. Bye-law 3.5 provides that the redemption price of each participating share shall be the Net Asset Value ("NAV") of each such share or class of shares. Bye-law 3.6 provides that the redemption of participating shares shall be deemed to take place immediately after their redemption price is determined. Bye-law 4 provides a mechanism for the calculation of NAV.

10. Bye-law 36 deals with the election of Directors. Bye-law 36.2 provides that the voting members (i.e. Mr Stamp) may in a general meeting or by a written resolution in accordance with the Bye-laws, and subject to and in accordance with Bermuda law, appoint any person to be a Director or remove any Director from office.

Side letter

11. Mr Stamp and the Outside Directors signed a side letter, simply dated 2014, which stated in material part:

"*Each of the Fund [ie PPF], the Management Shareholder [ie Mr Stamp] and the Outside Directors agree that notwithstanding the terms of the Fund Documents [ie the Bye-laws and Prospectus], (i) the Board of Directors of the Fund shall consist of three (3) Directors, and (ii) in the event the Management Shareholder determines to remove a Director of the Company (each a Removed Director), such removal shall require the prior written consent of both the Management Shareholder together with one Outside Director in order to be effective.*"

These provisions were stated to be subject to certain exceptions. However, these are not material.

12. The letter was stated to be governed by the laws of Bermuda. In the event of any dispute arising in relation to the letter the parties agreed to proceed to arbitration.

Subsequent developments

13. On 20th March 2015 PPF and PPF Capital executed an agreement ("the Bond No 1 Purchase Agreement") for the purchase of a 5 year, 6% yield bond ("the Bond No 1"). The subscription price was $15 million. This sum, which was raised from the participating shareholders in PPF, was placed in escrow, originally with a firm called Robinson & Associates in the USA, and subsequently with the law firm McFaddens LLP ("McFaddens") in London. The bond was not in fact issued and the monies remained in escrow until, as explained below, they were returned to PPF.

14. As stated in the Summary to the Prospectus, the purpose of the bond was to provide finance for a company called Lifetrade Life Settlements Limited ("Lifetrade"). The bond was only ever intended to form one part of the financing arrangements. Another part was a loan agreement ("the Loan Agreement") which PPF Capital had offered to Lifetrade. Addendum 1 to Exhibit B to the Loan Agreement provided at para 5.1(d):

"*In the event the Loan Agreement has not been executed by LLL [ie Lifetrade] within Ninety (90) Days of the date of this Agreement, which execution shall not be unreasonably denied or delayed, the Subscription Price less any funds already paid in*

redemption of the 5 Year, 6% Yield Bond No. 1, excluding the Capital Encashments [ie dividend payments], shall be paid to the Purchaser [ie PPF], unless the Parties agree in writing otherwise. Payment of such Subscription Price less any funds already paid in redemption of the 5 Year, 6% Yield Bond No. 1, excluding the Capital Encashments, shall be deemed redemption in full of the 5 Year, 6% Yield Bond No. 1."

15. The Loan Agreement was not executed by Lifetrade within 90 days as PPF Capital was unable to raise the monies payable under the Loan Agreement. PPF agreed to several extensions to the 90 day period to give PPF Capital a further opportunity to do so. In April 2016 PPF agreed to a further extension, but one of the directors of PPF Capital, who was based in Japan, was unable to sign the necessary documents before the previous extension expired. McFaddens therefore returned the $15 million subscription monies to PPF's bank account in Bermuda.

16. The Outside Directors advocated for the return of the $15 million to the participating shareholders but Mr Stamp disagreed. Having taken legal advice from a prominent local law firm, he took steps to ensure that a majority of the Board reflected his opinion on this matter.

17. On 10th May 2016, the Secretary sent a notice to the Outside Directors and Mr Stamp, who was the sole voting member, of a special general meeting to be held on 25th May 2016 to consider and if thought appropriate approve the removal of the Outside Directors as directors of PPF and appoint Mr Belbin as a director in their place. In the event, the special general meeting did not take place.

18. On 11th May 2016, PPF sent a letter to the participating shareholders explaining both the proposed changes to the Board and Mr Stamp's intention that PPF should continue to pursue its investment opportunities as part of the Lifetrade refinancing.

19. However, by a written resolution dated 13th May 2016 Mr Stamp, having taken the advice of PPF's attorneys, purported to appoint Mr Belbin and Mr Burrell as directors. Although CBM disputes the validity of their

appointment, in light of Bye-law 36.2 the appointment was on the face of it valid.

20. At a Board meeting of PPF on 16th May 2016, which was attended by all five directors, Mr Stamp and the New Directors passed resolutions, which were opposed by the Outside Directors:

    (1) approving the purchase of a further bond from PPF Capital in line with PPF's investment objectives; and

    (2) rescinding the existing instructions to Equinoxe regarding the disbursement of PPF's monies, which required the signatures of Equinoxe, Mr Stamp and one of the Outside Directors to transfer monies in excess of US$10,000, and replacing them with instructions authorising Equinoxe to make disbursements from PPF's monies on the instructions of Mr Stamp plus one of either of the New Directors.

21. On 18th May 2016, PPF and PPF Capital executed an agreement ("the Bond No 2 Purchase Agreement") for the purchase of a 3 year 10 month, 6% yield bond ("Bond No 2"). The subscription price was $15 million. Pursuant to that Agreement, PPF transferred the $15 million subscription monies from its bank account in Bermuda to be held in escrow by McFaddens in London.

22. By an email dated 18th May 2016 to Equinoxe, CBM requested the redemption of its shares, having lost confidence in PPF.

Proceedings to date and relief sought

23. On 20th May 2016, CBM filed a Petition seeking to wind up PPF on the grounds that it would be just and equitable to do so, together with an *ex parte* summons seeking the appointment of provisional liquidators of PPF. The Petition stated that more than 80 per cent of the participating shareholders had requested the redemption of their shares since the Board meeting on 16th May 2016.

24. That same day the *ex parte* summons came on for hearing before me. CBM was represented by Nathaniel Turner and Kehinde George. PPF was put on notice and through its counsel, Scott Pearman, appeared at the hearing and resisted the application. As little time was available that day, I adjourned the hearing to 27th May 2016, gave directions for the filing of further evidence, and made an order prohibiting PPF from dealing with the $15 million in the interim.

25. Mr Pearman, who was instructed on short notice, initially represented to the Court on instructions that the monies were still in Bermuda. On discovering from further enquiries that they had in fact been remitted to McFaddens to hold in escrow, he quite rightly had the matter brought back before me so that he could correct his earlier statement. I have no reason to conclude that Mr Pearman was deliberately misled by Mr Stamp or anyone else and I am satisfied that somewhere along the line there was most likely a genuine misunderstanding. I directed that the monies should be returned to PPF's bank account in Bermuda, which they were.

26. The substantive hearing of the *ex parte* application took place on 27th May and 3rd June 2016. While not resiling from his application to appoint provisional liquidators, Mr Turner argued in the alternative for a continuation of the freezing order.

27. PPF did not attend, having decided on legal advice to take a neutral role for the present. However, Mr Stamp appeared as an interested party to oppose the application, and was represented by Alex Potts. By the 3rd June hearing, and in addition to CBM, Mr Turner was instructed on the *ex parte* summons by four intermediaries. Taken together, his clients comprised roughly half of the participating shareholders.

28. From PPF, I had the benefit of affidavit evidence from Alejandro Dolan, an officer of CBM; Mr Nowald; and John Marcum, a manager of Lifetrade. Mr Marcum states that, under the assumption that no deal is going to be achieved, Lifetrade is currently pursuing other refinancing options. He states that it is important to Lifetrade that the subscription monies are

returned to the investors, as if they are not that might negatively impact the ability of Lifetrade to secure such options.

29. I also had affidavit evidence from Federico Candiolo, a lawyer employed by CBM's attorneys, exhibiting documentation from Equinoxe. This stated that as at 23rd May 2016, Equinoxe had received redemption requests from 74.1 per cent of the participating shareholders (so the 80 per cent figure in the Petition was an overstatement). There were numerous additional redemption requests, but Equinoxe had yet to determine what investor interest they represented. Mr Turner informed the Court that as of the date of the hearing on 3rd June 2016 Equinoxe had confirmed receipt of redemption requests for 78.89% of the shares.

30. Mr Stamp filed affidavits explaining his position and answering Mr Nowald's affidavit. In particular, he helpfully set out the background to Bond No 2 and confirmed that, so far as he was aware, the investment opportunity for PPF with PPF Capital continued to exist within the scheme of the larger refinancing transaction for Lifetrade. He observed that as the holder of the sole management share in PPF, with sole voting rights and powers, he had always had control of the company in general meeting and by way of shareholder resolution.

31. Mr Stamp explained the safeguards that were in place to prevent him or anyone else from misappropriating the $15 million, and confirmed that the sole purpose of transferring the funds to the UK would be to effect an investment in furtherance of, and in the ordinary course, of PPF's business. This would, he believed, be in the best interests of the company.

32. On 2nd June 2016, Mr Stamp had written to the participating shareholders in PPF to explain the Bond No 2 transaction and to warn (threaten might be a more accurate word) that if the winding up petition were to succeed PPF would be faced with a number of claims from creditors and a "*very substantial*" action for damages from the PPF Group of companies which may exceed $15 million, leaving investors with nothing but legal costs to pay.

33. I reserved my ruling. I ordered that in the interim the injunction should remain in place, but stated that while it remained in place I was in principle prepared to allow the $15 million to be transferred to the escrow account in the UK upon the provision of appropriate undertakings.

Discussion

Appropriate relief

34. The relief sought by CBM on the *ex parte* summons was not an injunction but the appointment of provisional liquidators. I was referred to HMRC v Clayton Egleton [2007] 1 All ER 606. In that case HM Revenue and Customs ("HMRC") presented a creditors' petition for the winding up of a company based upon unpaid VAT amounting to more than GB Pounds 35 million. The company's liability allegedly arose in consequence of its participation in a large scale VAT missing trader fraud. HMRC sought and obtained on a without notice application freezing orders against four named third parties. Their only alleged liabilities were to the company which was the subject matter of the petition, or to the liquidator under statutory claims arising only in the event of liquidation.

35. The respondents argued *inter alia* that the court had no jurisdiction to make the freezing orders sought as HMRC was not pursuing a cause of action for a money judgment. However, Briggs J (as he then was) held at para 17 that the particular nature of the relief sought by means of the presentation of a creditors' winding up petition did not disable the petitioner from asserting that it was pursuing a cause of action sufficient to confer jurisdiction on the court to grant a freezing order or other interlocutory relief.

36. In reaching this conclusion, Briggs J considered various authorities on freezing orders in general. These included the observation of Sir Thomas Bingham MR (as he then was) in Mercantile Group (Europe) AG v Aiyela [1994] QB 366 at 377E that their purpose is so that the court can "*ensure the effective enforcement of its orders*".

37. Briggs J also considered two cases in which petitioners alleging unfair prejudice under section 459 of the Companies Act 1985 had obtained a freezing order or similar relief in relation to the property of the subject company pending the hearing of the petition: Re Premier Electronics (GB) Limited [2002] 2 BCLC 634 and Re Ravenhart Service (Holdings) Limited [2004] EWHC (Ch). In the latter case there was a combined contributories' winding up and section 459 petition. The judge stated at para 20:

"*It is of course correct, as Miss Smith submitted, that neither of those cases concerned a creditors' petition. Both concerned section 459 petitions and the Ravenhart case was also concerned with a contributories' winding up petition. But that is in my judgment a distinction without a difference. It is a common feature of winding up petitions both by creditors and contributories and of section 459 petitions that none of them is concerned in essence with the obtaining of a monetary judgment by the petitioner (albeit that there may be circumstances in which such an order might be made on the hearing of a section 459 petition). All three types of proceedings consist of an invocation of the power of the court to intervene in the affairs of a company for the benefit of its different classes of stakeholder. For my part, using the analysis of Sir Thomas Bingham MR to which I have already referred, I can see no reason why the grant of appropriate interim relief, including if necessary orders freezing the assets of the company itself should not in a proper case be made so as to ensure the effective enforcement of the court's orders.*"

38. Briggs J stated at para 51, when considering whether HMRC could obtain freezing orders against potential judgment debtors of the company:

"*51. For all of those reasons [which relate specifically to applications against third parties] I consider that where an application is made by a petitioning creditor for a freezing order in advance of the hearing of a winding up petition the court should in general require cogent reasons why that course is to be preferred to the ordinary and well established alternative of seeking the appointment of a provisional liquidator.*"

What constitutes a cogent reason for the court to make such an order will be highly fact specific.

39. In the present case, the purpose of the *ex parte* application was to preserve the $15 million subscription monies pending the determination of the winding up petition. In my judgment, this purpose could be achieved less intrusively and more cost effectively by an order prohibiting PPF from

dealing with those monies pending the determination of the petition than by the appointment of provisional liquidators. Under section 19(c) of the Supreme Court Act 1905:

"*an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made*".

40. I am satisfied in light of the above authorities and the broad language of section 19(c) that such an order would in principle be a proper exercise of the Court's discretion. I am therefore satisfied on the basis of what I regard as cogent reasons that, if the Court were to grant CBM interlocutory relief, it should be by way of injunction and not the appointment of provisional liquidators. For as stated by King CJ in the Australian case of Zempilas v JN Taylor Holdings Ltd (No 2) (1990) 55 DASR 103 at 106:

"*The appointment of a provisional liquidator pending adjudication upon the petition for winding up is a drastic intrusion into the affairs of the company and is not to be contemplated if other measures would be adequate to preserve the status quo*."

Good arguable case

41. The question before me is whether the grounds for making a freezing injunction are made out. As in Egleton, an injunction is sought for the effective enforcement of a winding up order, should the Court be persuaded to make one. In the language of Mr Turner, it is sought to enforce a substantive right asserted by CBM against PPF, namely the right to wind up PPF on just and equitable grounds. An injunction would do this by ensuring that PPF's principal asset, namely the $15 million subscription monies, remains available for distribution to creditors or shareholders in the liquidation.

42. The applicant for a freezing order must show at least a good arguable case. As Kerr LJ, giving the judgment of the Court of Appeal of England and Wales in The "Niedersachsen" [1983] 1 WLR 1412, stated at 1417 F:

"*A 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction. But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction.*"

43. Kerr LJ held at 1426 F that the judge at first instance, Mustill J (as he then was), had correctly applied this test. Mustill J, as reported at [1983] Lloyd's LR 600 at 612, had adopted the test of a "good arguable case":

"*... in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success.*"

44. In the present case, CBM, with the support of participating shareholders holding no more than roughly half the participating shares, seek a freezing order for the purpose of enforcing not only their own rights but the rights of all the participating shareholders. Thus, they seek to prohibit PPF from dealing with the totality of the $15 million subscription monies. Moreover, they seek the freezing order in aid of a petition seeking the collective enforcement mechanism of a winding up order.

45. In those circumstances, Mr Potts submits, the threshold test for making a freezing order should be the same as for appointing provisional liquidators prior to the hearing of a winding up petition. In Bermuda, the courts have held that the applicant must at least make out a good *prima facie* case that a winding up order will be made. Once that threshold has been passed, the court must then go on to consider whether in the circumstances of the case it is right that provisional liquidators should be appointed. See Discover Reinsurance Company v PEG Reinsurance Co Ltd [2006] Bda LR 88 *per* Kawaley J (as he then was) at para 17 and BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd [2008] Bda LR 67 *per* Bell J at para 36.

46. This test was based on English case law. In the subsequent case of HMRC v Rochdale Drinks Distributors Ltd [2013] BCC 419 EWCA. Rimer LJ, with

whom Lewison LJ and Pill LJ agreed, stated at para 77 that the phrase "*good prima facie case*" was unsatisfactory in that it was too elusive:

"*Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition.*"

47. In my judgment, the threshold test for the making of a freezing order being well established, there is no basis for introducing a different test for the making of such an order in the present case. However, Kerr LJ's formulation of the threshold test in "The Niedersachsen", in which he stated that a good arguable case was a *minimum,* allows for a degree of flexibility in the application of that test. The stronger the applicant's case, the stronger the case for a freezing order. The more far-reaching the terms of the freezing order sought, the stronger the case the court is likely to require. If CBM can demonstrate that it is likely to obtain a winding up order, then, given the breadth of the freezing order sought, the case for such an order will be stronger than if it cannot.

48. As stated by Lord Hoffmann, giving the decision of the Privy Council in National Commercial Bank of Jamaica v Oliver Corp Ltd [2009] 1 WLR 1405 at para 19:

"*What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that the injunction was rightly granted'.*"

Just and equitable

49. Section 161(g) of the Companies Act 1981 ("the 1981 Act") provides that a company may be wound up by the Court if the Court is of the opinion that it is just and equitable that the company should be wound up.

50. CBM in its petition relies on two headings for winding up PPF on just and equitable grounds: failure of sub-stratum and what might conveniently be described as abuse of control. The headings are relied on both individually and cumulatively.

51. Although abuse of control does not fall neatly under any of the established headings, the case law is merely illustrative, not exhaustive, of what might constitute just and equitable grounds. As Bell J observed in BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd:

> "*... the section providing for the appointment of a provisional liquidator ... is in general terms and does not restrict the power of appointment to certain categories of cases.*"

Failure of sub-stratum

52. The term was coined by Lord Cairns in In re Suburban Hotel (1866-67) LR 2 Ch App 737 at 750:

> "*It is not necessary now to decide it; but if it were shewn to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the Court might, either under the Act of Parliament, or on general principles, order the company to be wound up.*"

53. Impossibility, or at least impossibility in a practical sense, remains the test. See In re Harbinger Class PE Holdings (Cayman) Ltd in the Grand Court of the Cayman Islands, unreported, 10th November 2015, which reviews the subsequent case law, and French, Applications to Wind Up Companies, Oxford 2015 at para 8.260. There is conflicting authority as to whether in

the case of open ended funds a less stringent test applies.[1] One of the features of an open ended fund, unlike a close ended fund, is that the fund will generally buy back shares from investors who wish to sell. As PPF is a close ended fund, the test in relation to an open ended fund is not material.

54. The question arises as to what constitutes the business which the company was incorporated to carry on. The authorities draw a distinction between the general powers of a company and the specific purpose or purposes for which it was incorporated. Thus, in Re Red Rock Gold Mining Limited (1889) 61 LT 785 Ch D, Kay J stated at 787:

> "*The principle of this court is, that where an association is formed for a particular purpose, it does not matter that it has large powers in addition to that particular purpose; if that particular purpose fails, any shareholder has a right to say, 'Put an end to it, pay me my money'.*"

55. The court, when ascertaining whether there is such a purpose or purposes, is not limited to the objects clause in the memorandum. Eg it may, as it did in Re Red Rock Gold Mining Limited, look at the prospectus. What is required, as stated by Clifford J in In re Harbinger Class PE Holdings (Cayman) Ltd at para 65, is that the court:

> "*... ascertain on the particular evidence in the case the principal or main object of a company in line with the reasonable expectations of its participating shareholders.*"

56. The Petition avers that PPF has failed to achieve its objective of providing a five year investment for the participating shareholders and cannot achieve that aim within the five year period from the date of the final subscriptions for the participating shares, if at all. It notes that whereas the Prospectus stated that there could be no guarantee that PPF would achieve its objectives, it did not state that there would be any possibility of this objective failing due to PPF's failure to complete any investments at all.

[1] Cf In re Belmont Asset Based Lending Limited [2010] 1 CILR 83, Grand Ct (test is "*impractical, if not actually impossible*") with Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund Ltd, unreported 15th December 2010, Supreme Court BVI (test is "*impossibility*").

57. Mr Turner relies *inter alia* on the statement in the Prospectus:

> "*In the unlikely event that the Irish Section 110 fails to perfect such financing within 60 days of entering into the respective agreements and bond redemption is necessary, the full subscription price of the Fund shall be returned to its Members.*"

He submits that it gives rise to a reasonable expectation on the part of the participating shareholders that, as no bond pursuant to the Bond No 1 Purchase Agreement was ever issued and that in consequence the $15 million subscription monies were returned to PPF, PPF would in turn return the subscription monies to the participating shareholders or at least redeem their shares.

58. Mr Potts submits in reply that the investment objective of PPF, as stated in the Prospectus, was to provide returns for participating shareholders by subscribing for a bond "*or bonds*" in PPF Capital which will "*generally*" have a five year term. Thus, the failure of the Bond No 1 Purchase Agreement does not mean that it is impossible for PPF to carry out the purpose for which it was formed. Eg this purpose could be achieved through the Bond No 2 Purchase Agreement.

59. As to reasonable expectation, Mr Potts submits that the participating shareholders could never obtain the return of their subscription monies but only the redemption of their shares at a redemption price determined in accordance with the Bye-laws. It is a basic principle of company law that capital subscribed to a company may not be returned to shareholders otherwise than as prescribed by statute. See Culross Global SPC Ltd v Strategic Turnaround Master Partnership Ltd [2010] UKPC 33 *per* Lord Mance at para 8. The 1981 Act provides at section 156C that mutual fund companies can redeem their shares but not that they can return the full subscription price to their members by some other means. The redemption price would fall to be calculated in accordance with the Bye-laws. As both the Prospectus and the Bye-laws state in express terms, redemption is (as to be expected in a closed end fund) at the option of the company and not the participating shareholders.

60. As to the statement in the Prospectus about returning the full subscription price to the members, Mr Potts submits that if and insofar as this gave rise to an expectation that PPF would exercise its discretion in favour of redemption, that expectation cannot reasonably be said to have survived the various extensions for the signing of the Loan Agreement or the rider to the most recent edition of the Prospectus, to which the Outside Directors agreed, that the subscription price would not be returned to the participating shareholders if the directors decided otherwise.

Change/abuse of control

61. The Petition alleges in so many words that Mr Stamp has misused his position as management shareholder to appoint two crony directors to give him majority control of the Board of PPF. It emerged at the hearings that in so doing he acted in breach of the 2014 side letter.

62. The Petition alleges further that Mr Stamp has misused that control to cause PPF to pursue the Bond No 2 transaction. He has done so notwithstanding the failure of sub-stratum and the fact that he is acting contrary to the wishes of the overwhelming majority of shareholders, who wish to have their shares redeemed.

63. Mr Potts submits in reply that the 2014 side letter is not legally binding upon the signatories as it is unsupported by consideration. In any case, the signatories do not include the participating shareholders. As management shareholder, it was always open to Mr Stamp to appoint fresh directors.

64. Mr Potts further submits that both in appointing fresh directors, and in pursuing the Bond No 2 transaction, Mr Stamp has acted *bona fide* in what, in the independent exercise of his judgment, he believes to be the best interests of PPF. The fact that a number of the participating shareholders wish to be relieved of what they judge to be a bad investment, or desire to realise that investment, does not justify a winding up order. See French, Applications to Wind Up Companies at paras 7.7.6.6 and 7.7.6.7 and the authorities there cited.

Alternative remedy

65. A compulsory winding up order is a nuclear option. Mr Potts submits that CBM has a variety of alternative remedies available to it which would be more appropriate given PPF's solvent status, even assuming (which is disputed) that the matters of which PPF complains are established to be both true and actionable. He suggests a petition under section 111 of the 1981 Act alleging that the affairs of the company had been conducted in a manner oppressive or prejudicial to the participating shareholders, or alternatively an action seeking relief in relation to PPF's contractual, common law or statutory obligations to CBM and the supporting shareholders.

66. Mr Turner's response is that the focus of any proceedings would be the $15 million subscription monies, which are PPF's only significant asset. It matters not what route CBM and the supporting shareholders pursue to get at them, and a winding up petition is a convenient means to do this. Section 164(2) of the 1981 Act, which deals with the presentation of a winding up petition on just and equitable grounds by members of a company as contributories, presents a potential obstacle. It provides that the Court shall not make a winding up order if it is of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. There is no such restriction on the exercise of the Court's discretion to wind up a company on just and equitable grounds in other cases.

67. CBM asserts that it brings the petition as a contributory. At first sight that might seem surprising. Section 159(1) of the 1981 Act provides that the term "*contributory*" means every person liable to contribute to the assets of a company in the event of its being wound up. Section 158(d) provides that in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a member. As the share capital of PPF is fully paid up or credited as being paid up, on the company being wound up none of the participating shareholders would be liable to pay anything.

68. However, a fully paid-up shareholder may present a petition as a contributory if, after full payment of all the debts and liabilities of the company, he can demonstrate that there will remain a surplus divisible among the shareholders of sufficient value – ie something "*tangible*", more than merely *de minimis* – to authorize him to present a petition. See In re Rica Gold Washing Company (1879) 11 Ch D 36 *per* Lord Jessel MR at 42 – 43. A surplus of $15 million or thereabouts in subscription monies would certainly satisfy that requirement. On the other hand, in light of Mr Stamp's letter of 2nd June 2016, there may be no or at least no tangible surplus, in which case CBM would arguably not have a sufficient interest to support the petition. But as that point was not developed before me, it is an argument for another day.

69. Assuming that CBM is a contributory, Mr Turner submits that section 164(2) of the 1981 Act would not preclude the Court from winding up PPF on just and equitable grounds. He relies upon In re Deep Sea Fisheries PTY Ltd, an unreported 1984 decision of the Supreme Court of Victoria, in which a contributory successfully petitioned to wind up a company. Starke J rejected the submission that the Victoria equivalent to section 164(2) of the 1981 Act could defeat the petition. He stated that even if there were alternative remedies:

> "*... I certainly do not think that the petitioner was acting unreasonably in presenting this petition. In resolving the present dispute it seems to me that it was the quickest, easiest, and probably the least expensive procedure.*"

Conclusion

70. I am satisfied that there is a good arguable case, to the degree of cogency appropriate on these particular facts, that PPF should be wound up on just and equitable grounds. In so finding, I attach particular importance to:

    (1) When winding up a company on just and equitable grounds it is not necessary to shoehorn the facts of the case into any pre-existing categories, although the Court will, of course, take notice of them.

(2) The representation in the Prospectus concerning the return of subscription monies to participating shareholders. Although I take the point that the mechanism for the return of share capital would be the redemption of shares at a price calculated in accordance with the Bye-laws, there is a compelling argument that participating shareholders were entitled to place reliance upon this statement when choosing to invest in PPF and that it is reasonable to infer that they did so.

(3) The fact that Equinoxe has confirmed receipt of redemption requests for 78.89% of the shares. There is a compelling argument that, viewed objectively, the interests of PPF should be regarded as closely aligned with the interests of the substantial majority of its participating shareholders who have made those requests, and that those shareholders are the best judges of where their best interests lie. This provides powerful support for the abuse of control argument, as Mr Stamp has chosen to pursue a course diametrically opposed to their views. Mr Potts submits that Mr Stamp wishes to be satisfied by cogent and direct evidence of the true wishes of the participating shareholders. The fact of the redemption requests strikes this Court as extremely cogent.

(4) Whatever litigation route CBM and the supporting shareholders pursue, its object will be to obtain the distribution of the $15 million share capital to the participating shareholders. Once stripped of that share capital (to which I realise there are likely to be other, competing claims), PPF would likely have very little value. In those circumstances, the issue of a winding up petition does not appear to me to be unreasonable.

71. Although the point was not argued, and I do not base my decision upon it, as events have developed there is on the face of it a conflict between Mr Stamp's duty as director to act in the best interests of PPF, which I regard as closely aligned with the best interests of the participating shareholders, and his other business interests. I have in mind Mr Stamp's letter of 2nd June 2016. Any such conflict would strengthen the abuse of control argument.

Risk of dissipation

72. Mr Turner seeks a freezing order so as to prevent the dissipation of PPF's major asset, namely the $15 million subscription monies, pending the hearing of the winding up petition. In this context, dissipation can only sensibly mean the purchase of Bond No 2, and any subsequent bonds should that deal prove abortive. Mr Turner submits, in effect, that this would count as dissipation because it would be using PPF's assets for an improper purpose, the sub-stratum having failed.

73. At the hearing on 20th May 2016 Mr Turner submitted there was also a real risk that Mr Stamp would misappropriate the $15 million subscription monies for his own personal use. On the limited material available to the Court at the time that possibility did concern me. However, having had the benefit of Mr Stamp's evidence and Mr Potts' submissions my concerns on that point have been allayed. I am satisfied that there is no material before the Court from which I can properly conclude that there is any such risk. I note in this regard that the subscription monies were returned to Bermuda when so ordered by this Court. I also remind myself that the applicant must establish the existence of a risk by adducing "*solid evidence*". See Locabail International Finance Limited v Manios and Transways Chartering SA [1988] Bda LR 26, CA, *per* da Costa J at 13. The more serious the allegation, the more solid the evidence likely to be required.

74. Mr Potts submits that the proposed use of the $15 million subscription monies would not be dissipation but a profitable investment made by PPF in the normal course of business. There is a dispute as to the likelihood (and hence the risk) of PPF Capital being in a position to issue the No 2 Bond for PPF to purchase. Ironically, on CBM's case there is very little likelihood (and therefore very low risk) of such a purchase, whereas on PPF's case there is a strong likelihood (and therefore high risk) that such a purchase would take place.

75. In my judgment there is a good arguable case that pursuit of the No 2 Bond transaction would count as dissipation of PPF's assets in the sense of

improper use: the No 1 Bond transaction has failed and the Prospectus represented to the participating shareholders that in that event they would get their money back.

76. I am not in a position to assess whether PPF Capital is likely to issue the No 2 Bond, but if it does then, pursuant to the No 2 Bond Purchase Agreement, PPF will no doubt wish to complete the purchase. But there is an obstacle. As Mr Potts rightly submits, section 166(1) of the 1981 Act provides:

"*In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.*"

77. Section 167 provides that the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up. Thus, as Briggs J stated in HMRC v Clayton Egleton at para 21:

"*The reason why freezing orders are not in practice sought or obtained in relation to the assets of companies the subject of creditors' winding up petitions is probably that statutory provisions such as those invalidating transactions after the presentation and/or advertisement of the petition generally afford appropriate protection to the company's creditors.*"

78. Thus, the purchase of Bond No 2 would be void unless PPF first obtained the permission of the Court to complete the purchase. I am therefore satisfied that the provisions of section 166(1) of the 1981 Act provide CBM with adequate protection against the risk of dissipation. For that reason, I shall order that the freezing order be discharged. That is dispositive of CBM's application.

Irremediable prejudice

79. If I had been satisfied that CBM had established that there was a real risk of dissipation, then I should have gone on to consider whether granting or discharging the injunction would have been least likely to cause

irremediable prejudice to one or other party. As stated by Lord Hoffmann in National Commercial Bank of Jamaica v Oliver Corp Ltd at paras 17 – 18:

"*17. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. …*

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

80. In the present case I should have attached particular weight to the interests of the participating shareholders, with which I have found the interests of PPF are closely aligned. As at the most recent hearing the petition was supported by roughly half of the participating shareholders and more than 78 per cent of the participating shareholders had filed redemption requests. They are the best judges of where their interests lie, and an overwhelming majority wish to redeem their shares. In those circumstances, I should have judged the course which best facilitated that outcome as being the one least likely to cause irremediable prejudice to the parties. I would therefore have allowed the injunction to stand.

Summary and disposition

81. The *ex parte* application is resolved thus:

(1) Were interlocutory relief to be granted, it would be by way of freezing order and not the appointment of provisional liquidators.

(2) CBM has made out a good arguable case that on the hearing of the winding up petition the Court should appoint provisional liquidators.

(3) Had CBM established that there was a real risk of dissipation, I should have held that the maintenance of the freezing order until the hearing

of the winding up petition would have been the course least likely to cause irremediable prejudice to the parties.

(4) However, CBM has not established that there is a real risk of dissipation. The freezing order must therefore be discharged, and I so order.

82. I shall hear the parties as to costs and any consequential orders.

83. The pursuit of a contested winding up petition has the potential to embroil the parties in costly litigation for some years to come. I would strongly encourage the parties to investigate the possibility of a more commercial solution.

Dated this 22nd day of July, 2016

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Hellman J