IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
(COMMERCIAL COURT)
2009: 165

IN THE MATTER OF CLASS K of
NEW STREAM CAPITAL FUND LIMITED

AND IN THE MATTER OF SECTION 20 of
THE SEGREGATED ACCOUNTS COMPANIES
ACT 2000 (AS AMENDED)

Between:

(1)UBS FUND SERVICES (CAYMAN) LTD.

(2) TENSOR ENDOWMENT LIMITED

Applicants

-v-

NEW STREAM CAPITAL FUND LIMITED

Respondent

JUDGMENT
(in Court)

Date of Trial: December 7-9, 2009
Date of Judgment: December 18, 2009

Mr. Andrew Martin, Mello Jones & Martin, for the Applicants
Mr. Thomas Lowe QC of Counsel and Mr. Cameron Hill,
Sedgwick Chudleigh, for the Respondent

INTRODUCTORY

1. The Applicants applied by Originating Summons dated June 10, 2009 for the appointment of a receiver under section 20 of the Segregated Accounts Companies Act 2000 (as amended) ("the Act") in respect of a segregated account linked to Class K shares. The First Applicant is (or was) admittedly only a nominal registered owner of the relevant shares which were beneficially owned by the Second Applicant. In substance there was only one Applicant, therefore, Tensor Endowment Limited ("Tensor"). Tensor was originally incorporated in Bermuda on April 12, 1999, but was apparently continued in the Cayman Islands with effect from December 29, 2005.

2. The Respondent was incorporated in Bermuda as a segregated account mutual fund company on or about October 31, 2005 and registered under the Act. The Respondent is managed by a Delaware corporation, New Stream Capital, LLC ("NSC"). The Respondent is one of several feeder funds, which invested in a single Delaware master fund, New Stream Secured Capital L.P. ("NSSC"). The General Partner of NSSC is NSC. The Respondent's principal investment activity consisted of lending monies to the master fund at rates of interest above most prevailing market rates. The assets held for each segregated account consisted of loan notes which were secured by floating charges over NSSC's assets. The master fund's own business primarily entails investing in "*asset-based loans and equity investments backed by inherently illiquid assets such as real estate , life insurance policies, oil and gas interests, and general corporate assets such as accounts payable, inventory and property, plant and equipment*", according to NSC's President[1].

3. The present application arises from the liquidity crisis which swept through the financial markets in 2008. Tensor sought to redeem its Class K shares in January 2008, and expected redemption to be completed as of May 31, 2008. However, the Respondent, swamped with redemption requests, declined to pay out redemption proceeds and in April 2009 promoted an out of court plan ("the Plan") purportedly designed to (a) create a two-year forbearance period during which time it was hoped the markets would recover, and (b) avoid investment losses for all classes of shareholders flowing from a fire sale of the collateralised assets and/or the master fund being forced into bankruptcy. The majority of all the Respondent's shareholders including a majority of Class K (but not a majority of each and every class) appear to have supported the Plan. Nevertheless, Tensor asserts its right to immediate payment through the appointment of a receiver over its segregated account.

4. This appears to be the first occasion that a Court has been required to consider, on a contested basis at least, the legal implications of a segregated account company, a unique offshore corporate vehicle which was apparently born in the Channel Islands and replicated in other jurisdictions, including Bermuda and

[1] First Perry Gillies Affidavit, paragraph 11.

Cayman. Neither side was able to refer the Court to any judicial or text authorities which they considered had any direct bearing on the interpretation of the crucial provisions of the Act.

THE ORIGINATING SUMMONS, THE APPLICANTS' HEADS OF CLAIM AND LIST OF ISSUES

5. On July 16, 2009, the first effective return date of Tensor's Originating Summons, the Chief Justice gave directions for Tensor to file a summary of the grounds upon which it relied and for the filing of evidence. On October 25, 2009, the Chief Justice directed that, *inter alia*, a Case Summary and List of Issues be filed. The matter was also directed to be tried on December 7, 2009, just shy of six months after the commencement of the present proceedings.

6. The Summons and Heads of Claim provide as follows:

> "*(a)The 2nd Applicant was the beneficial owner and the 1st Applicant the registered owner of Shares in Class K issued by the Respondent which is a Segregated Account within the meaning of the Segregated Accounts Company Act 2000 (as amended).*
>
> *(b)The 1st Applicant as nominee redeemed the 2nd Applicant's shares in Class K by Notice of Redemption dated January 22 2008, which redemption was accepted by the Respondent.*
>
> *(c) The Respondent failed to pay to the 1st Applicant as nominee for the 2nd Applicant the redemption price in respect of the shares on the Redemption Date and consequently the 1st Applicant as nominee for 2nd Applicant became a creditor of Class K with effect from that date.*
>
> *(d)Since the Redemption Date, the Respondent and its investment manager has acknowledged the Respondent's liability to pay to the 1st Applicant the 2nd Applicant's Redemption Price out of the assets of Class K, but has stated that the loans in which Class K was invested are illiquid and are unable to be realised.*
>
> *(e)The Respondent has acknowledged that Class K is unable to pay the Redemption Price and has stated that the investments attributable to Class K cannot presently be realised to discharge the obligation to the 1st Applicant as nominee for the 2nd Applicant on US$8,820,838.00*
>
> *(f) Accordingly, the 1st Applicant as nominee for the 2nd Applicant is entitled, as creditor of the Class K Segregated Account, to appoint a Receiver in order to terminate the business of Class K and distribute the*

assets linked to Class K to those entitled thereto pursuant to Section 20 of the Segregated Accounts Company Act 2000 (as amended)...

APPLICANTS' HEADS OF CLAIM

1. The Applicants seek an order appointing Mr. Mark Smith of Deloitte and Touche, Corner House, Parliament Street, Hamilton as Receiver of the Class K assets of the Respondent pursuant to Section 19(a) of the Segregated Accounts Company Act 2000 (the "SAC Act"). The Applicants apply on the grounds that (1) Class K of the Fund is insolvent and (2) it is just and equitable that the appointment should be made for the protection of the Applicants' interests in the assets of Class K. The Applicants summarise the basis of their application for relief as below:

Insolvency of the Segregated Account under section 19(a) of the SAC Act

2. The Applicants served a Redemption Notice on the Respondent in respect of their investment in Class K on January 22, 2008 (the "Redemption Notice").

3.The Respondent accepted the Redemption Notice for the Redemption Price to be paid on the Redemption Date, which was later calculated to be US$8,820,838.00.

4.The Redemption Date was May 31, 2008 and the Respondent failed to pay the Redemption Price on that date.

5.The Redemption has promised to make payment but has failed to do so within the times promised. The Respondent has sought extensions of time from the Applicants in order to realize funds in order to pay the Redemption Price, but has failed to do so to date. (See paragraphs 6-11 of the Affidavit of Mr. Bonanno).

6.The Respondent has sought to enter into a plan of reorganization to defer its payment obligations to all members including the applicants as members of Class K. The proposed restructuring plan appears at pages 46-54 of Mr. Bonanno's exhibit FB1.

7.The Applicants say that the plan of reorganization is ineffective in law and does not entitle the Respondent to defer, postpone, otherwise interfere with or alter the Applicants' rights to receive immediate payment pursuant to the terms of the Prospectus and Bye-laws of the Respondent.

8.The Respondent's Bye-laws (BL 9.1) require the Respondent to pay the Redemption Price as soon as practicable.

9.The Class K assets are represented by a note instrument payable to the Respondent by a related entity called New Stream Capital LP. The note instrument is illiquid.

10.Applying normal tests of solvency, Class K is insolvent in that it is unable to meet the obligation to pay the Redemption Price in accordance with the terms of its Bye-Laws and upon the terms of the investment made by the Applicants as and when that obligation fell due. There is no prospect that the Respondent will be able to meet this obligation in the foreseeable future.

It is Just and equitable to appoint a Receiver

11. The Applicants rely on paragraphs 1-10 above.

12. The Applicants also rely on the Respondent's attempt to reorganize the structure of the Segregated Accounts under its proposed Reorganization Plan. The purported effect of the adoption of the plan by the Directors of the Respondent was to pool all of the assets owned by all of the classes of the Fund to meet the overall obligations of all classes of the Fund on a pro rata basis. This is in breach of both the Respondent's Bye-laws and Sections 17 and 18 of the SAC Act.

13. The Applications rely on the fact the current management has failed to achieve an orderly realization of the underlying assets or otherwise failed to distribute the value of the Class K assets in specie to the Class K Shareholders.

14. The Applicants rely upon the apparent attempt by the Respondent to defer the due date of the payment of the Redemption Price to the Applicants in respect of the Class K investment to defeat the Respondent's obligation to pay the Applicants, despite the Respondent's acknowledgment of its present liability to do so and its failure to pay that obligation.

15. The Applicants rely on the commercially incestuous nature of the structure between the Feeder Funds and the US Fund over which all of the arrangements are controlled by the group of investment managers and the same individuals serve on all of their respective Boards of Directors. This gives rise to an actual or a perceived conflict of interest and prevents a true independent mind being brought to bear upon the interests of the Respondent to the exclusion of the interests of

the other related entities with regard to discharging the debts owed by the Respondent.

16. The Receiver would be better able to act independently from the management and Board of the Respondent in the exclusive interests of the Shareholders of Class K.

b. The Receiver will be better able to investigate steps which may have been taken by the Respondent to meet the obligations to the Class K shareholders and consider whether and what steps the directors took were appropriate.

c. The Receiver will be able to take steps to realize the value of the Class K assets to the same extent as the board of directors of the Respondent."

7. The parties commendably filed a joint List of Issues on December 1, 2009, which provided a useful signpost to the Court of the main issues to be determined in advance of the trial. This List will inform the principal issues addressed below, after the evidence is first summarised.

THE EVIDENCE

8. The Application is supported by the Affidavit of Frank Bonanno, the Chief Financial Officer of Tensor's investment manager, M. Safra & Co. Inc. of New York, New York. Mr. Bonanno was not requested to attend for cross-examination.

9. He deposes that:

(a) Tensor is owed redemption proceeds in the amount of US$8.820,838, pursuant to a Redemption Notice dated January 22, 2008, with effect from May 31, 2008;
(b) when Tensor submitted its redemption request the Respondent was required to take such steps as were necessary to realize sufficient assets to meet the redemption;
(c) the Respondent has repeatedly acknowledged its liability to meet this obligation, for instance on May 23, 2008 and by telephone calls on July 28, 2008 and October 8, 2008;
(d) attempts appear to be under way to restructure the Respondent in a way which ignores the segregated account structure and lacks the requisite managerial independence;
(e) accordingly "*Tensor seeks the appointment of an independent Receiver to take control of the assets represented by Class K of the Fund as a segregated account and realize the Loan Notes attributable to this Class and distribute them for the benefit of all creditors of Class K.*"

10. Perry Gillies responded in his Affidavit of August 28, 2009 and also was cross-examined at trial. As the President of NSC, the Respondent's investment manager, he was able to explain how the monies lent to the master fund by the feeder funds were invested and the economic rationale for the Plan. In addition, he made the following key points in response to the Bonanno Affidavit:

    (a) Class K was not insolvent because Tensor had no accrued claim against Class K and the Respondent would be able to meet the obligation when it falls due;
    (b) The Applicants have not shown that it would be just and equitable to appoint a receiver. Moreover, (i) the Respondent had not breached its Bye-Laws, (ii) was acting in the best interests of the Applicant and investor creditors generally, (iii) was achieving an orderly run-off of Class K and (iv) a receiver would not in any material sense be able to take steps to realize the value of Class K assets.

11. These crucial averments were not contradicted by any evidence filed in response by Tensor, although they were challenged in cross-examination. The Amy Lai Affidavit dated November 17, 2009 and filed in support of Tensor's application merely asserts that the Gottex AB Funds which own 100% of Classes C and I, and approximately 45% of Class B, 50% of Class H and 49% of Class L, have not consented to the Plan. The Respondent's case, as clarified at trial, is that 60% of all investors across all classes supported the Plan, not that 60% of each class consented.

12. The Gillies Affidavit explains why it is contended Tensor is not an actual creditor or a contingent or prospective creditor and why the segregated account is not insolvent. In purely factual terms, however, the deponent explains the background to the Plan. By the spring of 2008, redemption requests representing some 20% of the Respondent's total capital had been received. It was initially planned to honour these requests as funds became available. However, by September with a number of funds failing and the New Stream funds being adversely impacted by the Petters fraud, redemptions approached 100%. It was decided to allow redemptions to be made in the ordinary course and to liquidate all NSSC assets, but in a manner which avoided forced sales in a market with no liquidity. This lack of liquidity was exacerbated in late November when the largest rating agency for life settlements revised its methodology for determining life expectancy. By February 2009, the life settlements market (in which 42% of New Stream fund assets were invested) became inactive.

13. As a result, US attorneys Reed Smith were engaged to develop the Plan, involving the Bermuda, Cayman and US feeder funds. It key elements were:

    (a) a two year forbearance period during which investors agreed to make no redemptions or prosecute any claims for redemptions;

(b) establishing an optional payment in kind programme;

(c) amending the Loan Notes to create a two year forbearance period after which the obligation to pay would be subject to an availability test.

14. The Plan was projected in presentations made to investors to generate a return of US$768 million to investors compared with US$355 if steps were taken to immediately enforce the Respondent's loan notes. A forced sale of life assets would eliminate all value for the Cayman and US feeder funds. Enforcing the Respondent's loan notes against NSSC would likely trigger a Chapter 7 or Chapter 11 bankruptcy filing by NSSC, which in turn would likely further (a) impair the value of asset returns and (b) delay the timing of such returns. All investors in the different feeder companies, irrespective of their class, had broadly common commercial interests, segregation notwithstanding. This was because all loans were secured by what was in effect a floating charge over NSSC's own assets, which constituted a common pool in which all were indirectly interested. There was no security unique to the Class K shares which a receiver could enforce without potentially affecting the commercial rights of investors in all other classes, not to mention investors in the other feeder funds.

15. The rationale for the establishment of the Respondent, it is explained in paragraph 18 of the Gillies Affidavit, was "*to offer investment opportunities in NSCC or NSI*[2] *to non-US investors without subjecting their investments to US taxation by taking advantage of the Portfolio Interest Exemption ("PIE") under US tax law.*" This implied that segregation was not utilized with a primary view to ensuring that in the event of insolvency, each segregated account would have its own distinctive liquidation fortunes, as might well be the case in the insurance context.

16. The Plan was supported by 100% of Cayman investors, 90% of US investors and 60% of Bermuda investors (overall). It was implemented as of May 1, 2009 by the Respondent's independent directors.

17. Jonathan Clipper swore an Affidavit dated August 28, 2009 as one of the Respondent's two independent directors, appointed in August 2008. A confirmatory Affidavit was sworn on the same date by the other independent director, Arthur C. Price. Mr. Clipper also attended for cross-examination and confirmed that he supported the Plan on the basis that it was in the best interests of all of the respondent's investors. The order of priorities for payment were (i) all investors whose redemptions had become effective before October 1, 2008 (most of the Respondent's investors, including Tensor), and (ii) all investors whose redemptions became effective post-October 1, 2008 on a *pari passu* basis within

[2] New Stream Insurance, LLC.

each investor group (i.e. Bermuda, Cayman and US). Moreover, the Respondent's investors in category (ii) were guaranteed a distribution of at least 70% of the total cash available.

18. The economic merits of the Plan, as deposed to by the Respondent's two principal witnesses, was not contradicted by any positive evidence. In addition to these 'party' witnesses, the Respondent adduced affidavits from three other Class K investors who redeemed but were not paid before October 1, 2008 indicating their opposition to the application. These investors' holdings are worth 2.5 times that of Tensor's, it being common ground that the majority of Class K investors support the Plan.

Evidence: summary

19. I found the Respondent's evidence, to the effect that the Class K assets could not in circumstances of market liquidity be realised without recourse to underlying secured assets which formed part of pool of assets in which other segregated accounts were also interested, to be credible. This considered view was, admittedly, wholly inconsistent with my own preconceptions of how segregation under the Act was intended to operate. Similar preconceptions may well have formed, to some extent at least, the basis of Tensor's present application. The Applicant's case appeared to be evidentially based on an assumption that Class K assets could be liquidated in a discrete manner independently of the assets of other segregated accounts.

20. Tensor's case was based in evidential terms on the assertions that it had the legal right to appoint a receiver based on (a) the insolvency of the Class K account, (b) the need for independent management and an orderly run-off of the business of the account, (c) the wrongful refusal of the Respondent to take steps to meet its redemption payment obligations and (d) the legally flawed character of the Plan. The only purely factual assertion, (b), was on its face lacking in substance, failing to articulate in any cogent or particularised way why (i) the independent directors of the Respondent lacked the requisite independence or (ii) why the Plan did not provide for an orderly means of winding-up the business of the Class K segregated account. With the only asset of Class K post-Plan apparently being a consolidated Loan Note with a two-year forbearance period, there was no evidential explanation as to what steps a Class K receiver could immediately and conveniently take to realize the Class K assets in a more expeditious or orderly manner than would otherwise occur if the status quo were to be maintained. No suggestion was made in Tensor's evidence that the Respondent's general account was insolvent or that the management of the Respondent or its affiliates have been guilty of any serious misconduct.

OVERVIEW: THE SEGREGATED ACCOUNTS COMPANIES ACT

21. The issues in dispute largely depend on a legal analysis of corporate constitutional documents and an interpretation of the Act without the benefit of any relevant judicial or other authority. The Act and its British Virgin Islands and Caymanian counterparts is described with almost no editorial comment which is instructive for present purposes in Bickley, '*Bermuda, British Virgin Islands and Cayman Islands Company Law*', 2nd edition[3]. The Act is also considered, albeit through a reinsurance lens, in O'Neill & Woloniecki, '*The Law of Reinsurance in England and Bermuda*', 2nd edition[4]. Nevertheless, the following discussion in *Bickley* is of general assistance by way of introduction to any consideration of the Act:

> "*A segregated accounts company or segregated portfolio company is a company that may create one or more segregated portfolios in order to segregate the assets and liabilities of the company held within or on behalf of a segregated portfolio from the assets and liabilities held by or on behalf of any other segregated portfolio, or the assets and liabilities of the company generally. A segregated accounts structure therefore permits creditors in a liquidation to only have access to those assets in a specific portfolio to which the portfolio is liable and then the assets of the company generally, but not the assets of any other portfolio. A segregated accounts company may also create and issue shares segregated portfolio assets of the relevant segregated portfolio.*
>
> *The advantage of a segregated accounts company therefore is to allow a company to "ring fence" certain of its assets without incurring the expense and complications of incorporating, and in certain cases licensing, a separate company to hold the segregated assets, or having to resort to trust or contractual structures. These types of companies are noticeably becoming more in demand in the insurance, funds and structured finance fields. Bermuda, BVI and the Cayman Islands have all recently introduced legislation to permit these types of companies.*
>
> ***BERMUDA***
> *Bermuda was one of the first offshore jurisdictions to implement protected cell legislation in 1991. The legislation was initially drafted on a case-by-case basis through a Private Act regime to cater for the demands of Bermuda's insurance industry. Bermuda enacted public legislation, the Segregated Accounts Companies Act (the "SACA") in 2000. The Segregated Accounts Companies Amendment Act 2002 amended the SACA and the legislation now establishes a system of registration so that segregated accounts companies ("SACs") may be created speedily and with the flexibility necessary to respond to the needs*

[3]Sweet & Maxwell Asia: Hong Kong, 2007, paragraphs 15001-15-002.
[4] Sweet & Maxwell: London, 2004, paragraphs 16-40-16-48.

of international business. Further tidying up amendments were made by the Segregated Accounts Companies Act 2004."[5]

22. The following description of the principal legal characteristics of segregated accounts in *O'Neill & Woloniecki*[6] is also instructive:

> "*A core concept of the Bermuda public legislation is that the establishment of a segregated account does not create a separate legal person from the SAC. The SAC itself is of course a separate legal entity from its shareholders. Although the SAC Act makes it clear that a segregated account is not a separate legal entity, the legislation confers some of the attributes of separate corporate personality on a segregated account which attributes the legislation provides shall be exercised by the SAC itself acting on behalf of the segregated account. So, the SAC Act provides that the SAC may sue and be sued in respect of a particular segregated account and expressly permits the property of a segregated account to be subject to order of the court as if it were a separate legal person. In addition, the legislation expressly provides that transactions between the company in respect of one party and a third party shall have legal effect as if entered into between the SAC itself and a third party.*"

23. The Act is germane to the present case for two broad reasons. Firstly, Tensor's application is founded on the premise that it is a creditor being denied its right to present payment of an admitted debt in respect of an insolvent segregated account which ought to be placed under independent management. The Act informs how the governing documents of the account ought to be construed and the meaning of insolvency in this specific legal context. Secondly, Tensor invokes a statutory jurisdiction which has never before been defined by this Court. The parameters of the statutory power to appoint a receiver require clarification before the application can be considered on its merits. The concession that Tensor possesses the standing to seek the appointment of a receiver as a contingent creditor in respect of its redemption proceeds claim does not assist the Court in deciding whether there is merit in the Applicant's contentions that a receiver should be appointed because the Plan is wrongly interfering with its right to immediate payment of the redemption proceeds.

Governing instruments

24. Section 11(1) of the Act provides as follows:

> "*(1) The rights, interests and obligations of account owners in a segregated account shall be evidenced in a governing instrument and the*

[5] *Bickley*, at paragraphs 15-001-15-002.
[6] Paragraph 16-42.

rights, interests and obligations of counterparties shall be evidenced in the form of contracts."

25. Section 2(1) of the Act defines "*governing instrument*" as follows:

> " *'governing instrument' means one or more written agreements, instruments, bye-laws, prospectuses, resolutions of directors, registers or other documents (including electronic records), setting out the rights, obligations and interests of account owners in respect of a segregated account…*"

26. It is possible that contracts with third parties may in appropriate circumstances qualify as part a governing instrument is the relevant third parties are "*counterparties*" and the contracts can be said to be documents "*setting out the rights, obligations and interests of account owners in respect of a segregated account*". But section 11(1)'s predominant function appears to be to distinguish between documents defining the relationship between an account owner and a segregated account from contracts entered into by a segregated account with counterparties. So in the present case, as the Applicant's counsel submitted, the rights of Tensor as an account owner in respect of K Class shares fall to be determined by reference not just the bye-laws, but the prospectus and subscription agreement as well.

Solvency

27. Mr. Lowe submitted that a different test of solvency applies with respect to segregated accounts to that which applies to companies generally under the Companies Act. In the context of the present case, the distinctions are not necessarily material.

28. Under section 162 of the Companies Act 1961, a company is deemed to be insolvent if (a) a statutory demand is served and the debt is not paid within three weeks, (b) if execution on a judgment is returned unsatisfied, or (c) if it is proved that the company is unable to pay its debts. Despite the phraseology of section 162, only categories (a) and (b) are really forms of "deemed insolvency". Category (c) requires proof of inability to pay debts, and is generally considered to encompass both commercial or cash-flow insolvency and balance-sheet insolvency. The Act imports no deemed insolvency as far as segregated accounts are concerned, but has a test of solvency which appears limited to the easier to prove cash-flow insolvency. Section 2 provides:

> "*(2) For the purposes of this Act, excluding section 24 (1)* [which relates to winding up a company under the Act]-
>
> *(a)…*

> *(b) a segregated account shall be deemed to be solvent if it is able to pay its liabilities (excluding obligations to account owners in that capacity) as they become due.*"

29. A reasonable starting assumption appears to be that if any monies are owed to a shareholder of a segregated account that are owed to him as a shareholder (e.g. dividends or other profit distributions), such liabilities have no impact on solvency. The position is less obvious when it comes to a shareholder who has redeemed his shares and is merely awaiting payment. If he has ceased to be a shareholder, is the liability to pay redemption proceeds owed to him in his capacity as a creditor even though the proceeds are only due by virtue of his former capacity as a shareholder? Such questions do not arise in the context of corporate insolvency where the statutory test for insolvency does not explicitly provide that liabilities to shareholders do not count. Mr. Lowe submitted that these provisions had the effect that a segregated account could never be rendered insolvent by virtue of redemption claims, particularly as section 2(2)(b) must be read with the following subsection in section 15 of the Act:

> "(*7) A segregated accounts company which is a mutual fund may redeem or repurchase for cancellation shares using the assets linked to the relevant segregated account provided that, on the date of redemption or repurchase, there are reasonable grounds for believing that the relevant segregated account is solvent and would remain so after the redemption or repurchase.*"

30. The latter provision mirrors section 42 (2) of the Companies Act 1981 which provides as follows:

> "*(2) Subject to this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by or determined in accordance with the bye-laws of the company; however, no redemption of preference shares may be effected if, on the date on which the redemption is to be effected, there are reasonable grounds for believing that the company is, or after the redemption would be, unable to pay its liabilities as they become due."*

31. For both segregated accounts and companies, redemptions (and indeed dividends) may only lawfully be declared when the account or company is and would remain solvent after the payment is made. Can section 2(2)(b) of the Act only sensibly be read as amplifying the general rule embodied in section 15(7) that redemptions cannot be paid if the account is or would be rendered insolvent? Or does it simply make explicit what is implicit under the Companies Act for companies generally? In relation to the general account and non-segregated companies, it is explicitly clear that redemption proceeds or dividends cannot be paid if the company is

insolvent. But the standard test of solvency brings into account liabilities not only to third party creditors. Liabilities owed to shareholders in respect of dividends validly declared or shares validly redeemed at a time when the company was solvent would fall to be taken into account as well. It would not be open to an ordinary company to at the same time refuse to pay redemptions and argue that it is solvent.

32. Section 2(2)(b) appears to be designed to ensure that only counterparties or third party creditors entering into transactions linked to a segregated account can complain of insolvency as regards a segregated account. Although the contention that the account is solvent in factual and traditional corporate insolvency terms appears on its face absurd, it is in my judgment tenable, as Mr. Lowe contended, for the Respondent to both (a) refuse to pay redemptions on the grounds that such payments cannot be made even if they are presently due, and simultaneously (b) assert that Class K is legally solvent because liabilities to past or present shareholders do not fall to be taken into account for the purposes of the statutory solvency test.

33. Mr. Martin for Tensor invited the Court to take a broader view and to apply by analogy the principles adopted with respect to the status of redeemers as creditors outside of the segregation context. While certain general principles can be applied by way of analogy, this Court cannot ignore the distinctive statutory solvency test which applies to segregated accounts. In *BNY AIS Nominees Ltd. –v- Stewardship Credit Arbitrage Fund Ltd.* [2008] Bda LR 67, where the redeemers were given notes instead of cash, Bell J held:

> "*52. Given the failure of the Company to meet its obligations to the Gottex Funds pursuant to their redemptions, what then is the status of the Gottex Funds? During the course of his argument, Mr. Martin contended firstly that if the obligation to redeem was not in cash, then the redemption did not create a debt. He conceded that there was an obligation on the part of the Company to settle the redemptions, but once his position as to the efficacy of the payment in kind is rejected, as I have found, I find it impossible to accept Mr. Martin's argument that, there having been neither payment in cash, nor payment in kind for the very large balance of the outstanding redemption monies, there is not a debt obligation imposed upon the Company. Mr. Martin's solution was to suggest that the Gottex Funds were left with a cause of action in specific performance only, but were not creditors. I reject that submission. It seems to me to create an entirely artificial distinction between satisfaction of the debt obligation in cash and satisfaction in kind. Whether the debt representing the redemption monies would be satisfied in cash or satisfied by the distribution of assets in kind, it remained a debt obligation.*

> *53. Mr. Potts referred to authority from the seventh edition of Principles of Modern Company Law by Gower and Davies, and particularly the passages at pages 256 and 257, where the authors consider the remedies of a shareholder if a company did not perform the contract to redeem or purchase his shares. The question was answered with reference to the relevant provision of the U.K. Companies Act, to the effect that the redeeming shareholder will cease to be a member or contributory, and will become a creditor in respect of the redemption price. Mr. Martin argued that that statement in Gower turned on a provision of the English Companies Act which Bermuda does not have. In an effort to shore up his position, Mr. Potts referred me to an Australian authority,* Basis Capital Funds Management Ltd. v BT Portfolio Services Ltd. *[2008] NSWSC 766, a first instance decision of the New South Wales Supreme Court. Mr. Potts relied particularly upon a passage at paragraph 142 of the judgment, where the learned judge, Austin J., said: 'Once redemption has taken place, the position of the former unitholder is "transmuted" from unitholder to creditor, if the redemption price is unpaid'.*
>
> *54. Authority for that proposition was provided by the judge in terms of the case of* MSP Nominees Pty Ltd. v Commissioner of Stamps *[1999] 198 CLR 494. Mr. Martin and Mr. Woloniecki disputed that the authority of* MSP Nominees *justified the conclusion reached by Austin J. in the* Basis Capital *case. At best, I accept that it can be said that the statement is obiter. Mr. Woloniecki also produced the authority of* Heesh v Baker *[2008] NSWSC 711. That case can be distinguished on the facts, because redemption had not occurred, and in any event the comments made in the judgment support the view as to the effect of the judgment in MSP Nominees which was accepted by Austin J. in Basis Capital. Mr. Woloniecki placed great emphasis on the fact that the obligation in the case of* Heesh v Baker *consisted of the payment of money, but with respect I think it is difficult to draw general points of principle from cases where the underlying facts are so clearly different.*
>
> *55. Quite apart from the authorities upon which Mr. Potts relied, it seems to me both sensible and obvious to find that a failure on the part of the Company to discharge its redemption obligations puts the Gottex Funds in the position of creditor, and I so find.*"

34. This reasoning can be transposed into the factual matrix of the present case and relied upon to potentially support a finding that Tensor's status post-redemption and pre-payment is that of a creditor. But the failure to pay Tensor's debt cannot be relied upon as against the Class K account as evidence of the account's insolvency unless the debt is not an obligation to an account holder "*in that*

capacity" (section 2(2) (b)). Although this point may be subject to reconsideration in future cases, I find for present purposes that a segregated account's obligation to pay redemption proceeds is an obligation owed to the claimant account holder "*in that capacity*". The position would be otherwise if the account holder also dealt with the account as counterparty and the debt arose out of an obligation arising not from the governing instruments of the account but from a contract linked to the account.

35. In *Stewardship*, both cash-flow and balance sheet insolvency were in issue, as is to be expected in a petition to wind-up under the Companies Act 1981. The Caymanian cases of *Strategic Turnaround Master Partnership Ltd.*, Cayman Islands Court of Appeal, Civil Appeal 2008: 13, Judgment dated December 12, 2008 and *Matador Investments Ltd.*, Grand Court, 2009: 246, Judgment dated July 31, 2009 (Quin J), also considered the traditional test of corporate insolvency.

36. This construction of section 2(2) (b) of the Act does not leave an unpaid redemption creditor with no enforcement remedies whatsoever. The Act permits ordinary civil proceedings to be brought against a company in respect of one of its segregated accounts. A civil judgment could be enforced against any free assets in the segregated account. Where a segregated account company is unable to pay redemption proceeds and has adopted no broadly acceptable strategy to deal with a liquidity problem, the majority of account owners may well agree a receiver is required on just and equitable grounds. Indeed, a single account holder has the right to seek the appointment of a receiver both (a) where the company itself is in liquidation, and (b) on other just and equitable grounds. If the segregated account is unable to meet the claims of counterparties and is insolvent according to the narrow definition within the Act, account holders may well appoint a receiver on insolvency grounds.

37. I find as a matter of law that the question of whether or not the Respondent's segregated account Class K is insolvent falls to be determined with reference to the account's ability to meet its obligations other than those owed to its account owners such as Tensor in respect of redemptions.

Statutory grounds for appointing a receiver

38. Section 19 of the Act provides as follows:

> "**Receivership orders**
>
> *19 (1) Subject to the provisions of this section, if, in relation to a segregated accounts company, the court is satisfied that—*
>
> *(a) a particular segregated account is not solvent, the general account is not solvent, a liquidation has been commenced in relation to the company, or for other reasons it appears to the court just and equitable that a receiver should be appointed;*

(b) the making of a receivership order under this section would achieve the purposes set out in subsection (3),

the court may make a receivership order in respect of that segregated account.

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

(3) A receivership order shall direct that the business and assets linked to a segregated account shall be managed by a receiver specified in the order for the purposes of—

(a) the orderly management, sale, rehabilitation, run-off or termination of the business of, or attributable to, the segregated account; or

(b) the distribution of the assets linked to the segregated account to those entitled thereto.

(4) No resolution for the winding up of a segregated accounts company of which any segregated account is subject to a receivership order shall be effective without leave of the court."

39. An application to appoint a receiver may, pursuant to section 21(1), be made by the company itself, the directors, any creditor, "*any account owner of that segregated account*" (section 20(1) (d)) and the Registrar[7]. The standing of the Applicant to make the present application was sensibly conceded. Section 19 defines both the grounds on which a receiver may be appointed and the object which the order must achieve. A section 19 applicant must both (a) make out one of the qualifying grounds and (b) satisfy the Court that the requisite purposes for the appointment is likely to be achieved. Under section 19(1) (a), the three grounds for seeking the appointment are (i) insolvency, (ii) the commencement of a liquidation of the company itself, and (iii) "*other*" just and equitable reasons. The phraseology suggests that an applicant must always show that the appointment of a receiver is just and equitable, but that insolvency and the pending liquidation of the company are two special grounds. This would be consistent with the practice in relation to winding-up petitions according to which even petitions relying on other statutory grounds end with the prayer that it would be just and equitable for the company to be wound-up. What is in my judgment distinctive about section 19 is the additional requirement contained in subsection (1) (b) to show "*that the making of the receivership order under this section would achieve the purposes set out in subsection (3)*". Those purposes are, it bears repeating:

[7] Section 20 (3)(b) requires notice of the application to be served on the Registrar. It is unclear whether this apparently manadatory requirement was complied with by the Applicants in the present case.

"*(a) the orderly management, sale, rehabilitation, run-off or termination of the business of, or attributable to, the segregated account; or*

(b) the distribution of the assets linked to the segregated account to those entitled thereto."

40. The submission by Mr. Martin that Tensor need not show how the receivership order would be efficacious as a condition for obtaining the order must be rejected. To this extent, the application is neither analogous to the appointment of a liquidator, as Mr. Martin contended, nor to the appointment of a receiver for execution purposes, as Mr. Lowe contended. This Court's discretionary power to appoint a receiver under the Supreme Court Act 1905 section 19 (c) is far broader, and may be exercised "*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*". Appointments under this general jurisdiction may be made *ex parte*, while under section 20 (3) of the Act, notice must be given to the company which must be afforded an opportunity to be heard before the order is made. Not only are the grounds for appointment open-ended under section 19(c) of the Supreme Court Act; while an ordinary receiver may not be appointed if the appointment is likely to be ineffective, there is no positive duty for an applicant to prove efficacy as a condition for procuring the appointment[8]. In fact the powers and duties of a receiver appointed in respect of a segregated account under the Act suggest that while the office has features of an equitable receiver and a liquidator, the office on balance more closely resembles a liquidator than an 'ordinary' receiver. Section 21 provides as follows (emphasis added):

"*21 (1) The receiver of a segregated account—*

(a) may do all such things as may be necessary for the purposes set out in section 19(3); and

(b) shall have all the functions and powers of the directors and managers of the segregated accounts company in respect of the business and assets linked to the segregated account.

(2) The receiver may at any time apply to the court for—

(a) directions as to the extent or exercise of any function or power; or

(b) the receivership order to be discharged or varied.

(3) In exercising his functions or powers the receiver is deemed to act as the agent of the segregated accounts company in respect of the segregated account, and does not incur personal liability except to the extent that his conduct amounts to misfeasance.

[8] 'Halsbury's Laws' 4th edition, Volume 39(2), paragraphs 330, 356.

> *(4) Any person dealing with the receiver in good faith is not concerned to enquire whether the receiver is acting within his powers.*
>
> *(5) During the period of operation of a receivership order the functions and powers of the directors and managers and any liquidator of the segregated accounts company cease in respect of the business and assets linked to the segregated account in respect of which the order was made.*
>
> *(6) At any time after the appointment of a receiver in respect of a segregated account, the company or any account owner or creditor of that account may, where an action or proceeding against the company in respect of that account is pending, apply to the court for a stay of those proceedings, and, on such an application being made, the court may stay the proceedings accordingly on such terms as it thinks fit.*"

41. Not only may the receiver seek directions from the Court as to the exercise of his powers, he displaces both the directors and any liquidator of the company as regards management of the assets in the relevant segregated account. The Court is also empowered, on the application of the company (presumably acting by the receiver), an account owner or creditor to stay any proceedings against the company in respect of the account which has been placed in receivership. The significant consequences flowing from the appointment of a receiver no doubt explains why the requirements which an applicant must meet under section 19 appear to be more onerous than would apply on an application to appoint a receiver under the Supreme Court Act or a liquidator under the Companies Act. After all, the segregated account structure is clearly defined to create more business-friendly and nimble structure for account owners than they would have if they became shareholders in an ordinary company. This added commercial freedom and flexibility is subject to the usual legal protections being preserved for creditors, who may seek to appoint a receiver on grounds of insolvency on terms analogous to an application to appoint a liquidator in respect of an ordinary company. Yet even this right is diluted to the extent that a counterparty, just like an account owner, must still prove that a receivership would likely achieve the specified statutory goals under subsection (3) of section 19.

42. Where an applicant for an order under section 19 is relying on the general just and equitable ground in the context of an opposed application, clear evidence will ordinarily be required to make out a case for the appointment sought.

The just and equitable ground for appointment

43. Because the appointment of a receiver under section 19 of the Act is in many respects analogous to appointing a liquidator in respect of a company to manage its restructuring or its liquidation, it seems reasonable to construe the "just and

equitable" ground for appointing a receiver in the light of the meaning this legal phrase has acquired in the corporate winding-up sphere. The Respondent's submissions in terms of broad principle were not contested by Tensor. Indeed, Mr. Martin referred the Court to the following discussion of the just and equitable ground for winding-up in Bell J's judgment in *BNY AIS Nominees Ltd. –v- Stewardship Credit Arbitrage Fund Ltd.* [2008] Bda LR 67:

> "*74. Having determined that the Gottex Funds do have standing to pursue a winding up petition on the just and equitable ground, I now turn to the matters put forward by Mr. Potts in support of his submission that there are good prima facie grounds to wind up the Company on the just and equitable ground. The matters which the Gottex Funds pray in aid of such relief are set out in the affidavit of Ms. Lai. She makes a complaint in regard to the relationship between Mr. Quan, Acorn, SIA, and Mr. Petters and his companies, and indicates that Mr. Quan has a fundamental conflict of interest between his duties to the Company and its creditors, his duties to the investment manager, and his duties to Acorn, and points out that it is highly unlikely that the Company will pursue a claim for damages against Mr. Quan, SIA or Acorn while Mr. Quan remains a director of the Company. There are then complaints that the Company has delayed in seeking recoveries against Mr. Petters and his Companies, and there are complaints in regards to the different firms of attorneys instructed by the Company and the conflicts which have prevented any meaningful action being taken. All of this leads to a complaint that the board of directors of the Company has acted inefficiently.*
>
> *75. But the critical complaint to my mind is the one which was emphasised by Mr. Potts in argument, namely that the substratum of the Company has gone. From the time of the 9 June 2008 directors' meeting, the Company has effectively ceased to carry on business, and in practical terms, I have no doubt that the prospect of its carrying on its business in any real way in the future has long since disappeared. It is not just that the Company has suspended its NAV calculation, and suspended redemptions; given that the minutes of the 9 June 2008 directors' meeting of the Company show that there were then approximately $50 million in redemption requests, which of course would not include the Gottex Funds redemptions, and more particularly, given the magnitude of the Petters Fraud, there are no grounds for thinking that the Company will ever be able to do anything other than pursue recoveries where possible, and wind up its affairs as best it can.*
>
> *76. I do, therefore, take the view that the Gottex Funds have established that there is at least a good prima facie case for saying that a winding up order would be made on the just and equitable ground, and I so find.*"

44. Mr. Lowe relied on wider expositions on the just and equitable concept, in particular the following extract from the judgment of Young J New South Wales Supreme Court Equity Division in *International Hospitality Concepts Pty Ltd.-v-National Marketing Inc.* (1994) 13 A.C.S.R 368[9]:

> "*A good analysis of the just and equitable ground for winding-up is to be found in the article by McPherson JA when at the bar in 'Winding Up on the 'Just and Equitable Ground (1964) 27 MLR 282. His Honour then said and what he said remains true to today, that 'The situations in which orders will be made on the ground that it is just and equitable may be reduced fundamentally to three in all. They are as follows: (1) where initially it is , or later becomes, impossible to achieve the objects for which the company was formed; (2) Where it has become impossible to carry on the business of the company; and (3) Where there has been serious fraud, misconduct or oppression in regards to the affairs of the company.' The reason for restricting the remedy to these three broad heads is that the basic purpose of forming a limited liability company is that the quasi partners contribute their money to a venture and commit their funds to the venture without power of withdrawal unless and until the venture comes to a frustrating event.*
>
> *The third of McPherson JA's heads was dealt with in Loch v John Blackwood Ltd. at 788, where Lord Shaw, giving the judgment of the Privy Council said: ' It is undoubtedly true that at the foundation of applications for winding up, on the " just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statutes just and equitable that the company be wound up.*"

45. These principles may usefully be adapted and applied in determining when it is just and equitable to appoint a receiver on respect of a segregated account, particularly in cases to which the other two grounds (account insolvent/ company in liquidation) are not engaged by the applicable facts.

[9] Transcript, page 3.

IS CLASS K OF THE RESPONDENT SOLVENT OR INSOLVENT?

Was the Respondent obliged to redeem Tensor's shares and pay the redemption price on May 31, 2008?

46. If I am right in construing section 2(2)(b) of the Act as rendering irrelevant for solvency purposes any failure to meet redemption claims, no need to consider whether or not Tensor is an actual creditor entitled to appoint a receiver on the grounds of insolvency arises. In case I am wrong, I will record the findings I would have reached on this issue, albeit more briefly than I would have done had this issue plainly been a live one.

47. The Affidavits which dealt with the construction of Tensor's redemption rights exhibited a version of the crucial Bye-law which in the course of the trial it was realised was an amended version of the instrument which governed the relevant redemption request. This error, understandable in light of the accelerated pace of the pre-trial process, did not appear to me or counsel to fundamentally impact on the crucial analysis. However, the amended version of Bye-law 9 (1) gave greater credence to the Respondent's construction than to the Applicant's.

48. There is no dispute that the redemption process initiated by Tensor's January 22, 2008 Redemption Notice was completed save for, *inter alia*, payment on May 31, 2008 at which date the redemption sum was calculated. It is equally agreed that payment could have been suspended during a Suspension Period as defined in the Bye-Laws, save that no suspension of the calculation of the net asset value ("NAV") occurred. The dispute is as to whether the obligation to pay crystallized as of the redemption date, or whether instead the Respondent was not liable to pay until it realised sufficient assets out of which the payment could be made. Bye-Law 9 (as in force at the material time on May 31, 2008) provided as follows:

> "*Subject to the Memorandum, the Bye-laws, the Act and SACA and subject as hereinafter provided, the Company shall, on receipt by its authorised agent of a Redemption Request from a Member (the 'Applicant'), redeem or purchase all or any portion of the Shares requested to be redeemed in the Redemption Request provided that:*
>
> > *(a)subject as hereinafter provided, the redemption or purchase of Shares pursuant to this Bye-law shall be made on the Dealing Day immediately following the day on which the Redemption Request is received provided that such Redemption Request is received in compliance with the notice and other applicable requirements set out in the latest offer document for the time being for the class of Shares concerned;*

> *(b) the redemption or purchase of Shares pursuant to this Bye-law shall be effected at the Redemption Price;*
>
> *(c) subject as hereinafter provided, payment shall be made to the Applicant in the Dealing Currency in respect of the redemption or purchase of Shares.* **Any amount payable as aforesaid to the Applicant shall be payable as soon as practicable after the relevant Dealing Day** *plus (i) the duration of any Suspension Period falling after the receipt of the Redemption Request and before such payment and (ii) any period during which the relevant share certificate, if any, has not been lodged as provided in this Bye-law…*
>
> *(d) on any redemption or purchase the Directors may in their absolute discretion divide in specie the whole or any part of the assets of the Company and appropriate*" [emphasis added]

49. The crucial question of construction is the meaning of the phrase "*as soon as practicable*" in Bye-law 9(1)(c). As a matter of first impression the Bye-law suggests that the right to payment crystallizes on the Relevant Dealing Day, in the present case on May 31, 2008. As Bye-law 9(1)(d) purportedly[10] empowers the directors to pay redemptions out of any assets of the Company, it is difficult to follow the argument that Bye-law 9(1)(c) should be construed as postponing the right to payment until the Respondent has liquidated assets in the segregated account for this purpose. Moreover, while the Bye-law 9(1)(a) expressly indicates that Redemption Requests must be made in accordance with "*the notice and other applicable requirements set out in the latest offer document for the time being for the class of Shares concerned*", there is no cross-reference in 9(1)(c) to any other governing instrument relevant to the payment rights and obligations.

50. It is true that the October 31, 2005 Prospectus gives ample warnings about the illiquid nature of the underlying investments in the context of identifying the investment risks. I found only one passage in the Prospectus which appeared to plausibly support Mr. Lowe's contention that the obligation to pay redemption proceeds was, in effect, contingent upon the Respondent's ability to pay:

> "**Subject to** *the limitations set forth in the Bye-laws, the SAC Act, and* **the Manager's ability to liquidate the Company's investments, if necessary,** *the Shares may be redeemed by the Company as of the last Business Day of any month upon 120 days' prior written notice…*" [emphasis added]

[10] This sub-paragraph of Article 9 was not addressed in argument and may not be consistent with the Act. I place minimal reliance on the terms of Article 9(d), therefore.

51. On careful analysis, however, this is a reference to the conditional nature of the primary right to redeem itself, not the consequential right to demand payment if, after having given 120 days notice of a shareholder's desire to redeem, the Company accepts the request without suspending the redemption process. The notion of a floating charge is a well recognised legal construct with demonstrable business efficacy for creditor and debtor alike. Construing the relevant redemption provisions as creating a right to payment which exists in a state of suspended animation and only crystallizes if the segregated account has sufficient free cash to make the relevant payment would create considerable uncertainty in the redemption sphere. Clear words would in my judgment be required to achieve such an unusual result, having regard to the terms of the governing documents as a whole.

52. I also take into account the fact that the relevant instruments were drafted at a time when the credit crunch which triggered the avalanche of redemptions requests throughout 2008 would not likely have been in the draftsman's contemplation. Moreover, the Respondent is a mutual fund company, and it appears (based on the three cases referred to in argument) to be consistent with the constitutions of such funds in both Bermuda and Cayman for suspension of the NAV to be the predominant means of depriving an unpaid redeemer of the status of creditor. While the cases cited by Mr. Martin do not in any strict sense constitute evidence of market practice, they serve to fortify the view that Tensor's construction is consistent with business efficacy in the mutual fund context.

53. For these reasons I find that Tensor became an actual (redemption)creditor on May 31, 2008 in respect of its Redemption Request in the agreed amount.

Is segregated account Class K insolvent?

54. My primary finding is that by virtue of section 2(2)(b) of the Act, the segregated account is not insolvent. This is because the admitted inability to meet redemption requests which I have found as regards Tensor are presently due is irrelevant in solvency terms in the segregation context. There is no evidence that the Respondent is unable to meet any other liabilities in respect of Class K as they fall due.

55. If, contrary to my primary finding redemption liabilities do fall to be taken into account for solvency purposes, I would find that Class K was clearly insolvent on a cash-flow basis as it is unable to meet these obligations in a timely fashion-if at all.

Is the Plan valid and does it bind Tensor?

56. There is no dispute that the Plan does not bind Tensor because the Respondent denies that it varies Class K share rights and is bound to accept that Tensor did not consent to the Plan. The only issue of substance which arises is whether the

Respondent's conduct in implementing the Plan is an unlawful purported variation of the Applicant's share class rights, which either (a) leaves intact its right to immediate payment and/or (b) constitutes serious misconduct capable of supporting a finding that it is just and equitable to appoint a receiver. Support from three-quarters of all Class K shareholders was required to validly modify share rights. If share rights were not being modified, as Tensor contended, majority shareholder support was required not because of any mandatory constitutional requirement, but because it was sensible management strategy not to take such significant steps without seeking investor support.

57. The Plan was designed to suspend for two years and potentially up to 10 years the right of all investors to receive their redemption proceeds. It is difficult to see how this varied the rights attaching to the shares. In this type of investment vehicle, the Bye-laws do not confer an unfettered right to receive redemption proceeds, and contemplate that redemptions may be suspended indefinitely. The failure to use the suspension of NAV calculation as the constitutional basis for suspending payment might arguably be contrary to the Bye-laws in some technical sense, but in my judgment this did not modify the rights attaching to the Applicant's shares which remained intact. The Plan has impacted adversely Tensor's ability to enforce its payment rights, but share rights and their enforcement are two different things. Even as regards enforcement, the real implications of the Plan, as Mr. Lowe submitted, are economic, as the Plan does not purport to prevent those who did not consent to it from taking whatever legal action by way of collection was otherwise available to them, as the present action demonstrates. More fundamentally still, Tensor's primary case is that it is now a creditor with only residual shareholder rights. The order of priorities prescribed by the Plan envisages all investors who redeemed prior to October 1, 2008 being paid on a priority basis.

58. I find, based on the material before me on the present application, that the Plan did not purport to or have the effect of varying (or varying to any material extent) Tensor's Class K share rights. It follows that the implementation of the Plan motivated, apparently, by the goal of maximizing the returns to all classes of investors with overlapping economic interests in a single pool of collateralized assets does not in and of itself provide grounds for the appointment of a receiver on just and equitable grounds. That said, it is somewhat surprising that the directors appear not to have obtained formal Bermuda law advice on the efficacy of the Plan as regards a Bermuda-incorporated company. Had such advice been sought, it might have been decided to give the Plan greater binding effect on dissenting investors by (a) the Respondent itself seeking the appointment a single receiver in respect of all segregated account, directed by the Court to monitor the implementation of the Plan by NSC, and (b) consequentially seeking a stay of all proceedings against the Respondent. All dissenting account holders would have to have been given notice of such an application, and the commercial validity of the Plan could have been adjudicated by this Court in one proceeding. Instead, the

Respondent is engaged in a fire-fighting exercise, now defending proceedings by Tensor, and soon to be taking on a separate challenge from the Gottex AB Funds.

59. Tensor did not directly challenge the economic way in which the account's business had been arranged from the outset in such as way as to merge the commercial interests of the various investors in the liquidity crisis which occurred in 2008. The assets were duly segregated, and consisted merely of loan notes, and the Act does not seem to require that security obtained by segregated accounts for loan obligations must be segregated as well as the *choses in actions* themselves. Indeed, section 12 expressly permits assets and liabilities to be apportioned amongst two or more segregated accounts, as Mr. Lowe pointed out. While it may be possible to devise other more cogent grounds for impugning the validity of the Plan, the suggestion that its effect was to vary Tensor's Class K share rights was on the material adduced in the present case lacking in substance.

IS IT JUST AND EQUITABLE TO APPOINT A RECEIVER?

60. Tensor's primary case clearly hinged on the premise that the segregated account was insolvent and that as a result it was entitled to appoint a receiver *ex debito justitiae*. Once the insolvency ground falls away, very little remains which is even arguably capable of supporting the just and equitable ground. I am satisfied independent directors are now in place, and that they will exercise their own judgment about the management of the account's affairs independently from the directors of related entities who have potentially conflicting commercial interests. Under cross-examination, one of the two independent directors, Jonathon Clipper stated that he approved the Plan because he thought it was "*blindingly manifestly obvious that the markets were in turmoil and it was in nobody's interest to liquidate the assets*". Perry Gillies of the investment Manager expressed similarly forthright views. These robust and credible commercial judgments were not contradicted by any coherent opposing commercial theory advanced on Tensor's part.

61. There is some substance to the argument that the Respondent's business has come to an end in the sense that no new investors are being sought. But the principal business was passive in nature involving the holding of loan notes which, albeit on modified terms, the various share classes continue to do. And what may happen if market conditions improve is far from clear. Even if this Court accepted that the account was hopelessly insolvent, it would not without more be just and equitable to appoint a receiver.

62. In my judgment the most cogent evidence in support of the Respondent's opposition is that the majority of Class K shareholders do not want a receiver. The views of persons with a common interest in a fund of assets are always relevant, be it in the domain of equitable execution or the context of a creditor's winding-up petition, as Mr. Martin was bound to concede. It is also true that the Court will

not inflexibly follow the views of the majority of creditors opposing a creditor's petition. But in the context of an application to appoint a receiver in respect of a segregated account, the Applicant much reach a far higher bar to simply establish a *prima facie* case.

63. Even if all other points advanced by Tensor were resolved in its favour, I would be bound to find that the Applicant adduced no credible evidence capable of supporting a finding that a receiver would likely (a) achieve the objectives set out in section 19(3), while deploying a strategy which was (b) different to the strategy approved by the Respondent's independent directors. The position might well be otherwise if the collateralized assets linked to Class K were not part of pool of secured assets in which all other investor classes were interested. In such a case, subject to one important qualification, it might conceivably be possible for a receiver to liquidate Class K assets without unleashing a firestorm of litigation in the US and possibly triggering the master fund's bankruptcy.

64. The important qualification is that even in this extremely hypothetical scenario, it appears that the principal asset of the segregated account is a consolidated loan note governed by Connecticut law which is not presently enforceable in any event. This Note is dated May 1, 2009 and issued by NSSC to the Respondent in respect of Class K in the amount of $44,029,487.32, and must be read with the Second Amended and Restated Loan and Collateral Agreement entered into by the same parties on the same date. Under this Agreement, defaults under the previous agreements are waived (Article II-A) and the entire principal and interest are not due until the 10th anniversary of the Agreement (Article III). This long-stop date was seemingly not disclosed when the approval of the Plan was sought. In any event, the crucial terms of the loan are set out in Section 2.2 which provides for (a) a two year forbearance period and (b) thereafter NSSC is obliged to pay only available cash subject to certain unrestricted cash thresholds being met. The payments are required to be made firstly to the pre-October 1, 2008 redeemers (in which class Tensor falls) according to the date order in which redemptions occurred (section 3.1(c)). Article VII (Collateral) creates a floating charge over all of NSSC's assets, it not being disputed that other segregated accounts and other feeder funds have taken the same form of security.

65. No or no coherent theory was advanced as to how these loan arrangements could be set aside facilitating a more orderly liquidation of the Class K account. Even if the status quo before the May 1, 2009 amended arrangements were put into place were to be restored across the board, the core conundrum of a common pool of secured assets which a Class K receiver could not unilaterally liquidate would remain. In these circumstances, this Court is bound to find that the case for a just and equitable winding-up has not been made out.

SUMMARY

66. In summary, I find that Class K is not insolvent for the purposes of the solvency test set out in section 2(2)(b) of the Segregated Accounts Companies Act 2000 (as amended). Solvency under the Act is defined more narrowly for segregated accounts than for companies under the Companies Act 1981; debts owed to investors in respect of liabilities incurred in their capacity as account owners may not be taken into account. No evidence of inability to pay debts owed to counterparties was adduced.

67. Although the out-of-court restructuring implemented with effect from May 1, 2009 and referred to as the Plan is not binding on dissenting Class K shareholders, it is not unlawful for contravening the Bye-laws or otherwise. On the evidence adduced at the substantive hearing of the present application, the Plan appeared to be a creative and commercially rational response to the liquidity crisis of 2008 the implementation of which is being supervised by the Respondent's independent directors. An applicant for the appointment of a receiver on the just and equitable ground must not only make out grounds for such an appointment but must go further and demonstrate that practical benefits are likely to flow from the appointment. The majority of Class K shareholders oppose the appointment of a receiver and Tensor advanced no coherent factual case as to how a receiver might liquidate the account's assets in a more efficacious manner than is likely to occur pursuant to the Plan.

68. Tensor's application is dismissed. It is possible that the disposition of the pending Gottex AB Funds' pending action against the Respondent could impact in ways that are not presently foreseeable on the costs of the present application. Accordingly unless costs are agreed and subject always to the parties liberty to apply for earlier relief in this regard, I will hear counsel as to costs after the conclusion of the trial of the Gottex AB Funds litigation.

Dated this 18th day of December, 2009 _____
KAWALEY J