IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 0009 of 2023
(Formerly Cause No. FSD 0329 of 2022 (DDJ))

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF OAKWISE VALUE FUND SPC

AND IN THE MATTER OF ENHANCED FIXED INCOME SP

BETWEEN:

CMB INTERNATIONAL SECURITIES LIMITED

Appellant

-and-

OAKWISE VALUE FUND SPC

Respondent

BEFORE:

The Rt Hon Sir John Goldring, (President)
The Hon Sir Richard Field, JA
The Rt Hon Sir Alan Moses, JA

Appearances: **Ms Harriet Ter-Berg of Walkers (Cayman) LLP for the Appellant**
Mr Matthew Hardwick KC and Ms Grainne King and Ms Sarah Sussman of Harney Westwood & Riegels for the Respondent

Heard: **7 November 2023**

Draft circulated: **10 May 2024**

Judgment delivered: **13 June 2024**

JUDGMENT

FIELD, JA

Introduction

1. This is an appeal from the orders dated 2 and 30 June 2023 made by Justice David Doyle ("the judge") dismissing with costs the petition dated 23 December 2022 presented by the appellant ("CMBI") under sections 224 and 225 of the Companies Act (2023 Revision) ("the Act") for the appointment of receivers over a segregated portfolio ("the SP")[1] of the respondent company ("Oakwise").

2. Oakwise is a Cayman Islands exempted segregated portfolio company ("SPC") incorporated under Part XIV of the Act. It is also registered as a mutual fund with the Cayman Islands Monetary Authority ("CIMA").

3. The SP's main investment objective was to invest in bonds and fixed and floating securities issued by Chinese real estate developers in Greater China, Hong Kong and the Asia Pacific Region.

4. In the period 25 June 2021 – 17 October 2022, CMBI subscribed for a large number of redeemable Participating Shares issued by Oakwise in respect of the SP, all of which were redeemed in the period 21 July 2022 – 1 November 2022, giving rise to very large sums of redemption proceeds payable within 30 days of the applicable Redemption Day and fixed on the basis of NAVs issued by the SP's Administrator, Apex Fund Services Ltd ("Apex Services"). Oakwise has paid a portion of these proceeds but, at the time the petition was presented, CMBI was a creditor in respect of unpaid redemption proceeds which it claimed totalled US$91,385,352.69 and RMB 10,558,045.07. At the date of the hearing, the unpaid redemption proceeds were of the order of US$90,981,444.24 and RMB 10,522,851.59, totalling approximately US$92,346,800.00.

5. On 24 November 2022, Oakwise sent an email to investors announcing that redemptions were suspended from 2 November 2022.

6. At the time of the hearing of the petition on 11 May 2023, a large part of the redemption proceeds due to CMBI had been outstanding for over a year.

[1] Known as "The Enhanced Fixed Income SP".

7. On 16 February 2023, after presentation of the petition, Oakwise gave notice that it was suspending payment of redemption proceeds under Article 15 (c) of the company's Articles.

8. The petition made reference to the SP's financial statements dated 31 December 2021[2] audited by Ernst & Young ("EY") and issued on 28 April 2022. The audited Statement of Financial Position disclosed that the value of the SP's net assets attributable to holders of redeemable participating shares at the reporting date was US$759,589,372, which took into account a liability to pay redemption proceeds of US$39,803,932.

9. It is stated in Note 5 to the audited financial statements that the SP measures its investments in financial instruments at "fair value" at each reporting date. The fair value for financial instruments traded in active markets is based on their quoted price and, for all other financial instruments not so traded, the fair value is determined "using valuation techniques deemed to be appropriate in the circumstances". Note 7 to the financial statements discloses that the great majority of the SP's assets consisted of bond issued PRC property development companies, none of which were quoted in active markets as at 31 December 2021 and which, in large part, were valued by reference to "significant observable inputs" and, in smaller part, by reference to "significant unobservable inputs". It is stated in Note 6 that where the SP holds financial instruments not quoted in active markets, the fair value thereof is determined "by using reputable pricing sources such as pricing agencies or indicative prices from market makers", which can be assumed in my view to include publicly available information about actual events or transactions that reflect the assumptions that market participants would use when pricing the asset. By definition, "significant unobservable inputs" are inputs for which there is no market data available.

10. CMBI referred in the Petition to a letter dated 22 November 2022 from Oakwise and to an email from Apex Services dated 24 November 2022. The aforesaid letter stated in relevant part:

> 1. *"We regret to inform you that the Segregated Portfolio is experiencing challenges in liquidating its assets to satisfy your redemption request due to its investments in certain notes issued by real estate companies in the PRC ("**Real Estate Notes**"). The Real Estate Notes, especially when traded in large amounts, may not be liquid in all circumstances, so that in volatile markets the Segregated Portfolio may not be able to close out a position without incurring a loss. As the housing market slid*

[2] "Profit or Loss and other comprehensive income" and "Statement of Financial Position"

rapidly into deep depression during this year due to the tighter borrowing requirements for housing and other restrictive policies imposed by the government of PRC, causing more and more property developers to default on their debts, the market prices for the Real Estate Notes held by the Segregated Portfolio are extremely low at this stage. Accordingly, the Directors will have no choice, but to sell the portfolio investments of the Segregated Portfolio at a significantly low price if the redemption request from you is to be further processed, which will inevitably result in a great loss to all Participating Shareholders.

2. [……]

3. [….] *[t]he Directors in good faith determine that it is for the best interest of the Segregated Folio and all the Participating Shareholders [and have] decided to suspend redemptions from all Participating Shareholders …*

4. *That said, we would like to draw your attention to the latest developments in the real estate sector in the PRC. The Central Bank of the PRC and China Banking and Insurance Regulatory Commission have jointly released a 16 – point plan recently which significantly eases the crackdown on lending to the real estate sector. Key measures in such plan include allowing banks to extend maturing loans to property developers, supporting property sales by reducing the size of down payments and cutting mortgage rates, ensuring the delivery of pre-sold homes to buyers, and boosting other funding channels, such as bond issues. Shares and bonds in Chinese real estate companies rose sharply in the week of such news. We believe that PRC's real estate market will bottom out and the Net Asset Value of* the *Segregated Portfolio will increase gradually with the improvement of the property market".*

11. Paragraph 1 of the email dated 24 November was in very similar terms to paragraph 1 of the 22 November 2022 letter. In paragraph 3 it was stated that the Directors of Oakwise had decided to suspend redemptions from all Participating Shareholders as from 2 November 2022.

12. The principal contention advanced in the petition was that, although the SP was solvent as at 31 December 2021, the SP's assets were or were likely to be insufficient to discharge the claims of creditors for the following reasons: (i) there was good reason to believe that the figures in the 2021 financial statements were out of date particularly in light of Oakwise's acknowledgement in its letter of 22 November 2022 of the very poor state of the bond market;

(ii) Oakwise's suspension of redemptions on 22 November 2022; (iii) the long period of time over which a significant part of the debt due to CMBI had remained unpaid; and (iv) despite repeated requests, Oakwise had failed to provide full particulars of the SP's latest asset and liability position.

13. At the hearing, CMBI also sought to rely on criticisms of Oakwise's management, including the suspension of the payment of redemption proceeds and the way in which a stop loss mechanism provided for in the Articles was retroactively amended after the NAV of the SP fell below 75% of the Benchmark NAV (see paragraph 17 below). These matters were advanced: (i) in an attempt to argue that receivers be appointed on just and convenient grounds; and (ii) as matters going to the discretion of the Court. Contention (i) was not proceeded with because it had not been pleaded; and, in respect of contention (ii), the judge stated in his judgment that he had disregarded the matters relied on by CMBI having concluded that they did not assist him in determining the petition.[3]

14. CMBI's petition was supported by another redemption proceeds creditor, Lokka Inc, which claimed that it was owed approximately US$1.7 million.

15. On 16 February 2023, Oakwise suspended payment of redemption proceeds otherwise due and owing.

16. Oakwise responded to the petition through the first affirmation of Mr Wang Fengyu, one of its directors, sworn on 24 February 2023 ("Wang 1") who deposes therein that notwithstanding the crash in bond prices in December 2021, which had negatively impacted the liquidity of the SP's investments making it extremely difficult to dispose of the SP's assets in large volumes and at a reasonable price, the SP was not insolvent nor bordering on insolvency at the time the petition was presented or at the time of his affirmation. Whilst independent financial statements for the SP were not due to be released until April 2023, NAV statements had been provided on a monthly basis to all investors holding redeemable shares in the course of which CMBI had been provided with a final NAV dated 24 November 2022 and the balance sheet, "as of 30 December 2022". This latter document showed: (a) net assets of US$284,550,606.26 including, US$42,631,096.52 held in bank accounts; the investment in bonds was valued at US$531,457,834.85 based on "cost": and (b) liabilities totalling US$572,191,612.49, including US$188,139,596.96 in respect of redemption payable.

[3] See para 42 of the judgment.

17. In paragraph 50 of Wang 1, in the course of referring to a complaint made by CMBI to the SFC that Oakwise had failed to implement the stop loss mechanism triggered if the NAV of the SP fell below 75% of the Benchmark NAV, Mr Wang states that, on 14 June 2022, the NAV did indeed fall below 75% of the Benchmark NAV which led to more than two thirds of the investors in the SP agreeing retroactively that the stop loss trigger be reduced to 60% of the Benchmark NAV.

18. It appears not to be disputed that Mr Wang is also a director of Oak Brilliant Limited, a BVI company of which he is the sole owner and which, at 31 December 2021, held Class B Participating Shares in Oakwise.

19. Mr Wang also deposes in Wang 1 that: (i) "Bond prices did indeed hit rock bottom in November 2022 and since December 2022 there has been an appreciable rebound in the PRC property market and increasing indicators of recovery which are expected to gather momentum particularly given the lifting of all COVID-19 related restrictions and policies measures" (see para 32 (b); (ii) all of the SP's "third party creditors" oppose the petition and that a number of investors representing in excess of 50% in value of the SP had informed him of their opposition to the appointment of receivers; (iii) pursuant to the SP's Private Placement Memorandums ("PMs") and Article 11.6 of Oakwise's Articles, whilst redemption proceeds will generally be paid within 30 days of the Redemption Day, there is no absolute obligation on Oakwise to meet this deadline since the manner and terms of payment are ultimately for the Directors of Oakwise; (iv) further and in the alternative, as a result of a course of dealing between CMBI and the SP, CMBI is now bound by a course of dealing under which it is obliged to accept that Oakwise can pay redemption proceeds in such amounts and on such date as is determined by Oakwise's directors.

20. In the event, assertions (iii) and (iv) were abandoned at the hearing on the ground that they were unarguable but Oakwise proceeded to contend that, pursuant to Article 15 of its Articles, payment of the outstanding redemption proceeds otherwise due to CMBI was validly suspended by its Directors on 16 February 2023, in consequence of which CMBI was not a creditor and therefore had no standing to seek a receivership order.

21. Article 15 reads:

> *"15.1* ***Declaration of Suspension.*** *The directors may, in such circumstances, as they may deem to be appropriate, declare a suspension of:*
>
> > *(a) the redemption by a Member of Participating Shares of any Class … and/or*
> > *(b) the determination of the Net Asset Value per Share of any Class … and/or*
> > *(c) the payment of redemption proceeds.*
>
> *15.2* ***Period of Suspension.*** *Any suspension declared pursuant to this Article shall take effect at such time as the Directors shall determine and shall continue until the Directors shall declare the suspension to be at an end.*
>
> *15.3* ***Notice to Members.*** *Whenever the Directors declare a suspension under the provisions of these Articles the Directors shall, as soon as may be practicable after any such declaration, give notice of the suspension to Members holding Participating Shares of any affected Class. At the end of any period of suspension the Directors shall give notice to Members".*

22. On 2 May 2023, nine days before the hearing, Oakwise served out of time a second affirmation sworn by Mr Wang ("Wang 2"). In paragraph 7 of this affirmation, Mr Wang states that in about February 2023, the SP's annual financial statements for the year ended 31 December 2022, that had been prepared by Apex Services, were sent to EY for completion of the audit.

23. Paragraphs 8, 9, 10 and 11 of this affirmation continue as follows:

> *"8. As part of its usual audit process, on 21 April 2023, I attended a meeting with EY at Oakwise's offices to discuss the 2022 Financial Statements. One issue raised by EW during the meeting was the impact of these Proceedings on completion of the audit. EY suggested that completion of the audit be delayed until 31 May 2023. However, Oakwise requested that EY complete the audit before 11 May 2023 being the date of the hearing of the Petition (Hearing). Whilst EY was willing to bring forward its anticipated date for completion of the audit to 15 May 2023, it was firm that completion of the audit must await the outcome of the Hearing of the Petition. As such I was informed by EY that the audit of the 2022 Financial Statements will not be completed until 15 May 2023, at the earliest.*

> *9. As a result, the audit of the 2022 Financial Statements will not be finalised in advance of the Hearing.*
>
> *10. […] I do not anticipate that there will be any material differences between the unaudited and audited 2022 financial statements*
>
> *11. The 2021 audited Financial Statements were received from the auditors on 28 April 2022. As such, although the timing indicated by EY for finalisation of the audit for the 2022 Financial Statements is not dissimilar to the previous financial year, due to the Hearing there will be a delay to completion of the audit for the 2022 Financial Statements".*

24. At paragraph 10 of Wang 2, Mr Wang exhibited a copy of the SP's unaudited financial statements for the year ended 30 December 2022. The exhibited Balance Sheet as at 30 December 2022 mirrored precisely the Balance Sheet provided to CMBI in November 2022 with (a) the values of the investments in financial instruments including bonds expressed as "*Cost of investment*", with bonds being valued at US$531,457,834.85; (b) the sum in bank accounts stated to be US$42,631,096.52; and (c) US$188,139,596.96 in respect of payable redemption payments listed as one of the liabilities. The Profit & Loss Statement for the period 1 December 2022 to 30 December 2022 showed a YTD[4] loss on bonds of (US$358,961,501.00).

25. On the day before the hearing, Oakwise served, out of time, an affidavit sworn by Ms Sarah Sussman, an associate with Oakwise's Cayman attorneys, which exhibited a letter dated 10 May 2023 ("the BSP letter") sent to Oakwise by Blue Sailing II Limited Partnership Fund ("BSP") and Golden Leap Partnership Fund ("GLP") in which they stated that: (i) based solely on the Financial Statement of the SP as of 30 December 2022, they collectively held 36.33% of the SP's total Participating Shares; (ii) they supported the SP in defending the Petition; (iii) the SP had made investments in certain notes issued by developers in the PRC and it was widely known that the PRC real estate industry was facing financial difficulties; (iv) key PRC real estate developers had been taking steps to restructure their operations and debts to resolve liquidity issues; (v) the People's Bank of China had announced it would lower interest rates on mortgage loans amidst the global upward trend for interest rates; (vi) despite these measures, more than likely it would take considerable time for the PRC developers' note market to

[4] Year To Date

improve and therefore, if the SP were to be wound up, this could result in a significant loss for its stakeholders; (vii) the SP should be allowed some time to maximise returns and resolve its liquidity issues, which was in the best interest of its stakeholders, including its creditors; and (viii) if there were an immediate liquidation of the SP the recovery value for stakeholders would be extremely low.

The judgment below

26. In paragraphs 9 and 10, the judge referred to Oakwise's letter dated 22 November 2022 and the email from Apex Services dated 24 November 2022, the contents of which are set out hereinabove at paragraphs 10 and 11.

27. In paragraph 13 the judge stated that he had considered the written and oral submissions of the petitioner and the respondent segregated portfolio, to which he had had full regard but which he did not propose to set out in detail, "since it should be obvious from the determination section of this judgment, the submissions I have rejected and those I have accepted".

28. In paragraphs 14-18, the judge dealt with the law, referring to sections 224 and 225 of the Act and citing at length the key passages in the judgments of Justice Raj Parker in *Re Obelisk Global Fund SPC*, FSD 87 of 2021 (unreported 12 August 2021) and Justice Kawaley in *Re Green Asia Restructure Fund SPC*, FSD 112 and 113 of 2022 (unreported 6 July 2022).

29. In relevant part, sections 224 and 255 provide:

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

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

(b) that the making of an order under this section would achieve the purposes set out in subsection (3), the Court may make a receivership order under this section in respect of that segregated portfolio.

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

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

(a) the orderly closing down of the business of or attributable to the segregated portfolio; and
(b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

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

(a) the company;
(b) the directors of the company;
(c) any creditor of the company in respect of that segregated portfolio;
(d) any holder of segregated portfolio shares in respect of that segregated portfolio; or
(e) in respect of a company licensed under the regulatory Laws, the Cayman Islands Monetary Authority where the segregated portfolio company is regulated by the Authority."

30. In *Re Obelisk Global Fund SPC* a segregated portfolio ("the Fund"), maintained by Obelisk Global Gold Focus Fund SPC, admitted that it was indebted to an unpaid creditor who applied for a receivership order on the ground that the Fund was insolvent. It was submitted by counsel for the Fund, Mr Wingrave, that if the portfolio were deemed to be balance sheet solvent in the long term, the court may not order the appointment of receivers. Mr Kennedy, counsel for the petitioning creditor, submitted that it would be surprising if the draftsman of section 224 of the Act had intended that a receivership petition could be refused purely on the basis that the portfolio was balance sheet solvent in the sense contemplated in section 123 (2) of the UK Insolvency Act i.e. that the value of its assets exceeded its liabilities taking into account contingent and prospective liabilities) when the portfolio was unable to pay its debts). Instead, the test should focus on the ability of the segregated portfolio to discharge (i.e. pay) claims rather than on assessing the relative values on either side of the balance sheet.

31. The key paragraphs of Parker J's judgment are 36-41:

"36. *By referencing 'assets' the section is similar in wording to section 123 (2) IA in the UK, albeit that the UK statute has the words 'value' added to assets and 'amount'*

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

37. *I therefore accept Mr Wingrave's submission that on a plain reading of section 224 one does not derive a traditional cash flow test of insolvency with language as to debt and timing of payment. There is no deeming provision, and the differences have been made plain in ABC Company v J & Company where reference was made to the proposed recommended Law Reform Commission's revisions not being adopted by the legislature in respect of segregated portfolios.*

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

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

> 40. *The court is able to assess the evidence before it as to whether the Fund has assets sufficient to discharge the claim of a creditor now or is likely to have sufficient assets in the reasonably near future. There is no evidence whatsoever in this case as to the asset position of the segregated portfolio Fund, save for the amounts said to be due from third parties.*
>
> 41. *As there is no dispute that the Fund currently has insufficient assets to meet the claims of its creditors, the court has jurisdiction to make a receivership order. The only argument has been as to third party realisable assets which it is said makes it likely that the Fund will have sufficient assets in a reasonable period of time in the future. This does not provide the Fund with a defence as to the court's jurisdiction."*

32. In *Re Green Asia Restructure Fund SPC,* Justice Kawaley ordered the appointment of receivers over two segregated portfolios on the unopposed application of a redemption creditor who was also the sole participating shareholder therein. Although the direct evidence only supported a finding of cash-flow insolvency, Kawaley J was willing to infer from the failure of the SPC to respond to the application that the requisite statutory insolvency test had been met.

33. In giving his reasons for making the order, Kawaley J first observed that, in the absence of any special definition in Part XIV of the Act the words "any creditor of the company in respect of that portfolio", in section 225 (1) (c) must be construed as embracing actual and contingent creditors. He then went on to consider the event which triggers the remedy of insolvency provided for in section 224 (1) (a). In paragraph 9 of his judgment, he expresses the view that having regard to the wording of section 224 (3) (a), even if the solvency test is satisfied, a petitioning creditor must also demonstrate that the business of the segregated portfolio as a whole should be brought to an end. In paragraph 10, he states that the wording of section 224 (1) "whether by accident or design, leaves room for some doubt as to whether all applicants, including participating shareholders and directors must rely upon the insolvency ground," notwithstanding that, the provision read literally suggests that for an application by a holder of segregated portfolio shares, insolvency is the only ground upon which a receivership order can be made.

34. In paragraph 12, Kawaley J accepts that the proper construction of the relevant statutory provisions justifies the view that "a somewhat fluid balance sheet solvency test applies" and he sets out in full paragraphs 35-41 of Parker J's judgment in *Re Obelisk Global Fund SPC*, noting that Parker J's construction of section 224 (1):

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

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

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

35. Paragraphs 14-20 of Kawaley's judgment read as follows:

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

15. *This consideration could only be ignored if there was something in the wider legislative scheme which justified the conclusion that the only potential creditors of a segregated portfolio would be participating shareholders who had redeemed (in whole or in part) and who could therefore be expected to have current information about the portfolio's financial status. In my judgment there is no justification for such an inference for two principal reasons. First, there is nothing in the wider statutory scheme which precludes third parties such as banks from providing credit to a special purpose company linked to a segregated portfolio's assets as opposed to the company's general assets. Second, it is a notorious fact that when a business entity of any*

description enters choppy financial waters, the free flow of information about its true financial status is often interrupted. The position is frequently much the same whether one is considering communications between management and creditors or communications between management and investors.

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

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

> *(a) the Court is empowered to vary the terms of a receivership order, as well as to discharge the order (section 226 (2) (b));*
> *(b) the Court is empowered to discharge a receivership not just when its purpose has been carried out, but also where that purpose is "incapable of achievement" (section 227(1))*
> *(c) where the affairs of a portfolio have been wound-up, the directors of the company can terminate the portfolio by resolution (section 228A(1)), without any involvement of the Court; and*
> *(d) the directors may by resolution reinstate a segregated portfolio which has been terminated, again with no involvement of the Court (section 228A(2)).*

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

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

19. *Even if a creditor of a segregated portfolio establishes an unpaid undisputable debt and a mere likelihood of the assets being less than the liabilities, the solvency test requires the Court to have regard to the sufficiency of assets measured against the "claims of creditors in respect of that segregated portfolio". So the overall financial state of the portfolio must be taken into account. Furthermore, what Mr Shaw described as the second limb of the jurisdictional test must be taken into account. The central statutory purpose of a receivership order is "(a) the orderly closing down of the business of or attributable to the segregated portfolio; and (b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto" (section 224(3)). As already noted above, it must always be demonstrated by an applicant for a receivership order that the business of the segregated portfolio ought properly to be closed down.*

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

particular segregated portfolio or group of portfolios, and (2) the extent to which (if any) the application is opposed by either the segregated account company or other stakeholders."

36. Having reviewed the judgments in *Re Obelisk Global Fund SPC* and *Re Green Asia Restructure Fund SPC*, the judge stated in paragraph 17 of his judgment that he was applying what Kawaley J referred to as "the somewhat fluid balance sheet solvency test" and, in paragraph 22, he found that CMBI had failed to prove on a balance of probabilities that the SP's assets were or were likely to be insufficient to discharge the claims of the creditors. In paragraph 23, he further said that he had "not been persuaded that this Court would be justified in exercising its discretion in favour of the Petitioner".

37. In paragraph 24, the judge noted that CMBI and Lokka Inc respectively claimed that they were owed approximately US$94 million and US$1.7 million and in paragraph 25 he set out in full the BSP letter.

38. Paragraphs 26 and 27 read:

"26. On the basis of the evidence before the Court, the Segregated Portfolio is not insolvent on the basis of the flexible balance sheet test. I can deal with this quite concisely. The Segregated Portfolio's audited financial statements for the year ended 31 December 2021 disclose net assets of US$ 759,377,462. It appeared to be common ground that the deterioration of the notes issued by real estate companies in the PRC occurred from December 2021. The Segregated Portfolio's balance sheet as at December 2022 discloses net assets of US$284,550,606.25. The Segregated Portfolio's unaudited financial statements for the year ended 31 December 2022, disclose net assets in the same sum of US$284,550,606.25. Mr Wang Fu … a director of Oakwise, has affirmed that the audited statements "will corroborate the Segregated Portfolio was solvent as at the date of the presentation of the Petition …".

27. There is no financial evidence before the Court which contradicts the Segregated Portfolio's financial statements for the year ended December 2022. There is no cogent evidence that the financial position of the Segregated Portfolio has significantly deteriorated since the end of December 2022 to justify a judicial conclusion that the assets of the segregated portfolio are or are likely to be insufficient to discharge the claim of the creditors, including the Petitioner.

28. Indeed, the evidence before the Court (see for example the [PLP letter] indicates that the market may be improving but it will take some considerable time."

39. Then, in paragraphs 32 and 34, the judge referred to: (i) paragraph 32 (b) of Wang 1, *"since December 2022 there has been an appreciable rebound in the PRC property market"* and noted that this statement, and that in the BSP letter recited in paragraph 28 of his judgment, had not been evidentially contradicted; (ii) paragraph 59 of Wang 1, *"[E]ven if the Segregated Portfolio were insolvent, which it is not, the appointment of joint receivers would not achieve the orderly close down of the business of the Segregated Portfolio. The outcome would be the opposite and would, in my opinion, come at great financial detriment to the shareholders and third party creditors of the Segregated Portfolio, all of whom vehemently oppose the Petitioner's application".*

40. In paragraph 35, the judge recites paragraphs 7-12 of Wang 2 that are set out in paragraph 23 hereinabove and in paragraph 36, he states that he found it unnecessary to decide the question of whether the suspension of payments of redemption proceeds was valid or not because, even if he were to conclude that there had been no valid suspension, this would not lead him to conclude that it was otherwise appropriate to exercise the Court's discretion to make a receivership order.

41. In paragraph 37, having noted Mr Wang's statement that, in his opinion, receivership over the SP would be to the great financial detriment of the shareholders and third party creditors and the opposition to the petition expressed in the BSP letter, the judge stated: *"I am simply not satisfied on the insolvency ground. Moreover, even if the insolvency test had been made out, I am not satisfied that the making of a receivership order would achieve the statutory purposes. The closing down of the business under receivers would not in my judgment based on the evidence and arguments put before the Court be in the best interests of the investors/creditors".*

42. In the concluding paragraph of the judgment (para 45), the judge said:

"During exchanges with counsel at the hearing, I had noted that the audited financial statements could on the evidence perhaps be made available by 15 May 2023 and towards the end of the hearing having reserved judgment I expressed the wish that if and when they were made available they be brought to the attention of the Court. They were not immediately forthcoming and I decided to proceed to deliver judgment rather than delay matters further (having indicated I would deliver judgment as soon as possible) as, upon reflection, I took the view that it was not essential that they be made

available before the Court delivered judgment. I record that I did not feel able to draw any adverse inference from the Respondent's failure to provide the Court with audited financial statements".

Post-trial developments

43. This Court was informed by Mr Hardwick KC, counsel for Oakwise, that: (i) Oakwise terminated EY's engagement as auditors of the company and the SP in mid-July 2013 in response to EY's declaration that they would not finalise the audit pending the outcome of this appeal; (ii) on 28 July 2023, Oakwise appointed Berman Fisher as its auditors in place of EY; and (iii) draft accounts were sent to Oakwise on 24 October 2023 and it was anticipated that the accounts would be finalised by the end of November 2023.

44. In the course of the hearing, Ms Ter-Berg, counsel for CMBI, handed up a letter dated 7 November 2023 (the date of the hearing) addressed to her from CIMA that stated that the date by which the audited financial statements ("AFS") of Oakwise should have been issued was 15 October 2023 and as of the date of the letter, Oakwise's AFS were outstanding.

The parties' cases on appeal

CMBI's case

45. CMBI submits that the judge erred in law and in fact in that he:

(1) (a) Did not apply the flexible balance sheet test adopted by Parker J in *Re Obelisk Global Fund SPC* (para 36) and Kawaley J in *Re Green Asia Restructure Fund SPC* (paras 12 & 17) in respect of section 224 (1) (a) despite stating that that was the approach he was taking, but instead applied a literal (or at the very least a strict) balance sheet test which was the wrong test.

(b) Properly construed in the context of the Act overall, including in particular Part V, section 224 (1) (a) provides for a cash flow insolvency test, not a balance sheet insolvency test. In contrast to the winding up provisions in the UK Insolvency Act 1986 which apply both a cash flow and a balance sheet insolvency test[5], there is only one insolvency test applicable for the winding up of companies under Part V of the Act and that is the cash

[5] See sections 122 (1) (f) and 123 (1) (e) and 123 (2)

flow test specified in section 92 (d). It makes no sense to construe section 224 as imposing what is basically a balance sheet test where it will routinely be more difficult for a petitioner to obtain the financial information necessary to satisfy such a test than will be the case in respect of the cash flow test. Further, a balance sheet test for segregated portfolios, many of which are mutual funds subject to the Mutual Funds Act, would also be out of keeping with that Act's regulatory provisions found in sections 17, 30 and 35 (1) of that Act which apply where "the fund is unable or likely to become unable to meet its obligations as they fall due."

(2) Wrongly failed to determine whether the post-petition suspension of redemption payments applied to the debt owed to CMBI when he should have proceeded to find that on the appropriate strict construction of Article 15 (a), (b) & (c) (as per *Culross Global Ltd v Strategic Turnaround Master* [2010] UKPC 33), the power to suspend payment of redemption proceeds did not apply to redemption proceeds that had previously become due following completion of the redemption process. Article 15 (1) (c) had to be read in conjunction with Article 15 (3) which requires the Directors to give notice of the suspension and lifting thereof to "Members holding Participating Shares of any affected Class" which did not include *former* shareholders who had ceased to be Members holding Participating Shares following the conclusion of the redemption process, as was the case in respect of CMBI. Oakwise's interpretation of Article 15 is also at variance with the statement on page 33 of its Private Placement Memorandum ("PPM")[6]: "The Directors may suspend … (d) the payment of redemption proceeds to a redeeming Participating Shareholder" and makes no mention of a power to suspend payment of redemption proceeds to a *former* shareholder who has already redeemed and has not been paid beyond the 30 day period in which payment has to be made.

(3) Failed to draw an adverse inference against Oakwise as to its financial position as he should have done because, in accordance with the approach approved in *BTU Power Management Company v Hayat* [2011] (1) CILR 315 at paras 15-16[7], each of the following constituted a prima facie case of flexible balance sheet insolvency which the judge should have held had not been rebutted by Oakwise: (i) the failure to pay the majority of the redemption proceeds (c. US$ 800 million) for as long as a year; (ii) the crash in or around December 2021 in the value of the real estate bonds treated as assets of the SP and the uncertainty as

[6] Restated March 2022: [HB/15/1107]
[7] Citing Cockburn, C.J in *M'Queen* v. *Great W. Ry. CO.* (10 Q.B. at 574) and *Wisniewski* v. *Central Manchester Health Auth* ([1998] P.I.Q.R.324 (Court of Appeal of England & Wales).

to when the bond market might recover; (iii) Oakwise's failure to produce evidence as to its financial position in the absence of audited accounts for the year ended 31 December 2022; and (iv) the suspension of redemptions followed by the attempted suspension of payment of redemption proceeds.

(4) (a) Misunderstood, or failed to apply his mind to the wording of section 224 (1) (b) regarding the statutory purposes of the making of a receivership order under section 224 (3) (a) and (b), namely -- (a) "the orderly closing down of the business of or attributable to the segregated portfolio"; and (b) – "the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto" and instead purported to exercise a discretion that illegitimately had regard to the opposition to the petition advanced by Participating Shareholders who claimed that they would be severely prejudiced by the collapse in the value of the SP's real estate bond investments.

(b) Erred to the extent that he may have intended to exercise a discretion not derived from section 224 (3) (a) & (b) in that: (i) he had in any event decided that the SP's assets were not insufficient to discharge and therefore no such discretion fell to be exercised; and (ii) in accordance with the decision of the Privy Council in *Pearson (Appellant) v Primeo Fund (Respondent)* [2017] UKPC 19 at paras 19 -22, he should not have had regard to the interests of the shareholders in preference to CMBI which was owed the huge sums of US$90,981,444.24 and RMB 10,522,851.59[8].

(5) Failed to give sufficient reasons for his decision generally.
In the event this ground was not pursued as a free-standing ground but featured incidentally in grounds (3) and (4).

Oakwise's case

46. Oakwise submits as follows:

1 (a) It is manifest that the judge applied the flexible balance sheet test approved in *Re Obelisk Global Fund SPC* and in *Re Green Asia Restructure Fund SPC* which, it was common ground at the hearing, was the appropriate test and his conclusion, after having considered the evidence adduced by the parties, that CMBI had not established that the

[8] This is an amalgam of CMBI's 4th and 5th grounds argued at the hearing.

assets attributable to the SP were insufficient to discharge the claims of SP's creditors, based on; (i) the audited financial statements for the year ended 31 December 2021 showing net assets of US$760 million odd: (ii) the November 2022 balance sheet prepared by Apex Services, and the unaudited financial statements as at 30 December 2022 prepared by Apex Services each showing net assets of US$$284,550,606 after taking account of a liability in the sum of US$188,139,596.96 in respect of payable redemption fees which Apex Services had sent to EY for auditing; and (iii) Mr Wang's statement in Wang 2 that he did not anticipate that there would be any material difference between the unaudited and the audited 2022 financial statements, was an unchallengeable finding.

(b) The explanation for the failure to pay the US$900 million odd due to CMBI was not an insufficiency of assets but the expectation that if the bonds held by the SP were sold to pay the debt, this would crystallise losses at the bottom of the market which would have a devastating effect on other creditors and the remaining participating shareholders. Thus, the point at issue was not that the bonds were unsaleable (i.e. unrealisable) but a crystallisation of devastating losses.

(c) It is plain when the language used in section 224 (1) (a) in Part XIV dealing with Segregated Portfolios is contrasted with the language of sections 92 (d)[9] and 93 (c)[10] in Part V dealing with the Winding Up of Companies, that it was not the intention of the legislature in enacting section 224 (1) (a) to adopt a cashflow insolvency test as submitted by CMBI. As noted by Chadwick, P. in *ABC Company (SPC) v J & Company* [2012] (1) 300 at paras 20-24, the legislature must be taken to have decided not to give effect to the Cayman Islands Law Commission's 2006 recommendation that a segregated portfolio should be liquidated in just the same way as if it were a company when enacting the new Part V of the Companies Law by Law 15 of 2007. Accordingly, it was correctly decided in *Re Obelisk Global Fund SPC* and *Re Green Asia Restructure Fund* that the test set by section 224 (1) (a) is a flexible balance sheet test. A cashflow insolvency test is not appropriate in the case of segregated portfolio because this construct lacks legal personality and therefore cannot incur debts whether in the course of trade or otherwise.

[9] "A company may be wound up by the Court if — (a) ….; (b) … ; (c) … ; (d) the company is unable to pay its debts; or (e) …;

[10] "A company shall be deemed to be unable to pay its debts if — (a) …; (b)… ; or (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts".

2 (a) Article 15.3 is a general notification requirement for suspensions – such that in relation to Article 15.1(a) (suspension of redemption) and Article 15.1(b) (suspension of determination of NAV), the required Article 15.3 notice to "Members holding Participating Shares" makes sense.

(b) Whilst Article 15.3 does not refer in terms to notification to "creditors", the generality of the notification requirement "whenever the Directors declare a suspension" is clearly stated – and was certainly understood by Oakwise who made notification to both "Participating Shareholders" and "Redeeming Participating Shareholders". See also the language of Article 9.8 which provides: *"From the Redemption Day, the redeeming Member shall cease to be entitled to any rights in respect of that Participating Share except the right to receive the redemptive proceeds and any Distribution which has been declared prior to the relevant Redemption Day (in respect of which the redeeming Member shall be treated as a creditor of the Company."*

(c) The omission in Article 15.3 to refer expressly to "redeeming" is capable of straightforward cure by an implied term to the effect that the Article 15.3 notification should be to Members holding "or redeeming" Participating Shares.

3 By section 20 (3) of the Court of Appeal Act, CMBI is debarred from raising its third ground of appeal since it is not pleaded anywhere in the Grounds of Appeal. Further and in any event, in concluding that the CMBI had not proved that the SP's assets were insufficient to discharge the debts due to creditors, the judge had regard to all the relevant evidence put before him including that advanced by CMBI and it cannot be established that the judge's conclusion was wholly wrong.

4 (a) The judge cited the evidence in para 59 of Wang 1 and was fully aware of the two relevant statutory purposes, namely, to facilitate the winding down or closing down of the portfolio's business (s. 224 (3) (a)) and it must be demonstrated that the business of the portfolio ought properly to be closed down (per Kawaley J in Green Asia Restructure SP) and was entitled to conclude for the reasons he gave that the statutory purposes requirement had not been met.

(b) It is clear from the judgment that the judge was not satisfied either as to s. 224 (1) (a) (insolvency) or s. 224 (1) (b), such that the judge did not (and did not need to) exercise a discretion.

(c) There is no suggestion in the judgment to the effect that, if contrary to his findings, the SP was insolvent and the statutory purposes were met, the judge would exercise his discretion not to make a receivership order.

Discussion and Decision

47. I first address CMBI's submission that construed:

(i) against the background of the Act as a whole, including Part V in particular, and some of the provisions of the Mutual Funds Act that apply where "the fund is unable or likely to become unable to meet its obligations as they fall due"; and

(ii) having regard to the purpose of section 224 (1) (a) which is to provide for an effective method by which the affairs of a poorly performing segregated portfolio can be managed separately from the affairs of the segregated portfolio company,

the insolvency test provided in section 224 (1) (a) should be construed as a cashflow test, namely, whether the segregated portfolio is unable to pay debts attributed to it as they fall due.

48. With respect to Ms Ter-Berg, I am in no doubt that this submission should be roundly rejected. In my judgment, it is manifest that:

(i) by providing for the appointment of receivers over segregated portfolios in a Part of the Act quite separate from Part V which deals, inter alia, with the winding up of companies;

(ii) by adopting quite different wording (including the word "assets") in section 224 (1) from that used in sections 92 (d) and 93 (a), (b) and (c) of the Act; and

(iii) by the omission in the Companies (Amendment) Law 2007 to give effect to the Law Review Committee's 2006 recommendation that a segregated portfolio should be liquidated in exactly the same way as if it were a company,

the Legislature did not intend the insolvency test found in section 224 (1) (a) to be the cash flow insolvency test provided for in sections 92 and 93 of the Act.

49. With the benefit afforded by the judgments of Parker J and Kawaley J in *Re Obelisk Global Fund SPC* and *Re Green Asia Restructure SPC*, I turn now to consider the meaning and effect of the words *"the segregated portfolio's assets attributable to a particular segregated portfolio of the company […]. are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio"* in section 224 (1) (a) (1).

50. I agree with and adopt the view expressed in both judgments that these words provide for a flexible balance sheet test which, instead of contemplating a simple assessment of the relative sides of a balance sheet, involves determining on the available evidence, applying the civil standard of proof, whether the assets, taking into account the actual, contingent and prospective liabilities, are now or are likely to be insufficient in the reasonably near future to pay the claims of creditors. I agree that the legislature intended the test to be more flexible than a straight-forward balance sheet test in order to mitigate the difficulties creditors might otherwise have in accessing the necessary financial information to satisfy such a balance sheet test.

51. At the heart of the test is an assessment of the value of the postulated assets attributed to the segregated portfolio[11] and in carrying out this assessment, the Court should carefully examine what the evidence reveals as to how the value of the assets has been arrived at. This is of particular importance given that the great majority of segregated portfolio companies do not engage in conventional trading but are vehicles for holding investments in the form of financial instruments such as shares and bonds which might not be traded on exchanges offering bid and offer prices by which the instruments can be marked to market. Often, audited financial statements will be part of the evidence and, where the assets are financial instruments, the Court should be concerned to be shown the auditors' notes thereon and those sections in the SPC's Articles and Private Placement Memorandums dealing with how the instruments are valued in the financial statements and for NAV purposes.

52. With respect to Kawaley J, although I gratefully accept much of what he says in his illuminating judgment in *Re Green Asia Restructure SPC*, I find it necessary to comment on three passages therein. The first is his use of the expression "prima facie" in the second half of the third sentence in paragraph 14, which sentence reads: "*A creditor must therefore be entitled to prove either that (a) it is probable that a deficiency exists (in which case a positive finding is justified) or that (b) the evidence establishes a risk of deficiency so cogent and real that a receiver should* ***prima facie*** *be appointed in any event."* My difficulty with "prima facie" is that its appearance

[11] The establishment of the creditors' claims will invariably be a straightforward matter.

in scenario (b) has the effect of potentially glossing the intended effect of section 224 (1) (a) which is that, if it is established that the segregated portfolio's assets **are likely** to be insufficient to discharge the claims of creditors, the petitioner will be entitled to a receivership order just as he would be if he established that the assets **are** insufficient to discharge the claims of creditors, subject of course in both cases to (i) the discretion imported by the word "may" in the final phrase of subsection (1) (a); and (ii) establishing that the proposed receivership order would achieve the purposes set out in subsection 3. It may be that Kawaley J intended "prima facie" to apply to both (a) and (b) in recognition of the discretion conferred by "may" and the requirement that the statutory purposes requirement be satisfied but I think that is unlikely. Suffice it to say that I respectfully suggest that it would have been better if the words "prima facie" had not been included in scenario (b) of the third sentence in paragraph 14.

53. The second matter I propose to comment on is Kawaley J's observation in the last sentence of paragraph 19 that a petitioning creditor under section 224 (1) (a) must not only satisfy the statutory purposes requirement found in section 224 (3) but, "*As already noted above, it must also be demonstrated by an applicant for a receivership order that the business of the segregated portfolio ought properly to be closed down.*"

54. The preceding observation "already noted above" is the following unobjectionable sentence in paragraph 18:

> "Even an unpaid creditor with a presently due undisputed debt is not entitled to a receivership order as of right".

In my view, it is clear that this proposition is founded on the discretion imported by the word "may", as explained in paragraph 51 above.

55. The point I wish to make about the last sentence of paragraph 19 in Kawaley J's judgment goes to the width of the words "ought properly to be closed down". In my judgment, it is clear that the discretion conferred by "may" only comes to be exercised after the Court is satisfied as to the purposes of the proposed receivership prescribed in section 224 (3), namely: (a) the orderly closing down of the business of or attributable to the segregated portfolio; and (b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto, both of which require a non-discretionary judgment to be made. Additionally, (b) requires a prediction of what the contended for order will achieve. And when the judge comes to exercise the "may" discretion he or she must have regard to all relevant considerations including the superiority of the interests of creditors owed undisputed debts over

the interests of participating shareholders which will invariably be subordinate to those of the creditors.

56. The third matter I propose to comment on is proposition (b) in the first sentence of paragraph 20:

> *"In the vast majority of cases, therefore, no matter how light the balance sheet solvency test which is contended for in any particular case may be, an application for a receivership order made by creditors is unlikely to succeed, save in circumstances, where that relief is also (a) consistent with the express or implied wishes of the majority of creditors and/or* ***(b) there is no room for serious doubt that the segregated portfolio is hopelessly insolvent."*** (Emphasis supplied)

57. Whilst propositions (a) and (b) may or may not be a reasonable prediction as to how certain receivership applications will fare in the future, proposition (b) must not be taken to be a working rule of thumb in the determination of section 224 (1) (a) petitions given that the expression "hopelessly insolvent" appears nowhere in the wording of that subsection.

58. I turn now to deal with CMBI's case that the judge erred in law in finding that it had not been established that the SP's assets were or were likely to be insufficient to discharge the claims of creditors.

59. To recap, the evidence before the Court was:

> (i) CMBI was owed the very large sum of US$92,346,800.00, a significant part of which had been outstanding for many months;
>
> (ii) since 31 December 2021, the date of the last audited financial statements of the SP which showed net assets of US$759,581,372, there had been a collapse in the prices of the SP's major investment in PRC real property bonds that had hit "rock bottom" to the point that, if there were an attempt to sell these bonds to raise the money to discharge the debt owed to CMBI, the Participating Shareholders would all suffer "a great loss";
>
> (iii) according to the exhibited unaudited balance sheet as at 30 December 2022:
>
> > (a) the values of the investments in financial instruments including bonds were stated to be "Cost of Investment";

(b) the value of the Bonds valued on the foregoing basis was stated to be US$531,457,834.85;

(c) the net assets were valued at US$284,550,606.26;

(d) the sum in bank accounts was stated to be US$42,631.096.52;

(e) the list of liabilities included US$188,139,596.96 in respect of payable redemption payments (including those owed to CMBI), leaving US$92,792,796 owed to other redemption creditors;

(iv) according to the exhibited unaudited Profit & Loss Statement for the period 1 December 2022 to 30 December 2022 there had been a YTD[12] loss on bonds of (US$358,961,501.00);

(v) Oakwise had suspended the right to redeem as of 2 November 2022 and had announced, on 16 February 2022, the suspension until further notice of the payment of redemption proceeds totalling US$188,139,596.96 that were otherwise due to be paid; and

(vi) whilst Oakwise's letter to CMBI dated 22 November 2022 referred to a 16 point plan to attempt to ease the restrictions on lending to the PRC Real Estate Sector and it was stated in Wang 1 (24 February 2023) that there had been "an appreciable rebound in the PRC property market", the view expressed in the BSP letter was that, despite the measures taken to improve the state of the PRC property market, more than likely it would take **considerable** time for the PRC Developers Note Market to improve.

60. Plainly, in the face of this evidence a great deal turned on the reliability of the values accorded to the SP's investments in the unaudited financial statements for the year ended 31 December 2022 and the weight that was to be given to the different interests of the redemption and other creditors on the one hand and the participating shareholders on the other.

61. As to the first of these matters, it was of great significance that the SP's investments in financial instruments, including (principally) bonds (USD 531,457,834.85) but also equities, OTC Notes,

[12] Year To Date

mutual funds and OTC Market Value Derivatives, were each shown as "Cost of Investment" in the unaudited balance sheet as of December 30, 2022 prepared by Apex Services. This is because this basis of valuation was in stark contrast to how these investments had been valued in the 2021 audited financial statements and with what was said in the Valuation Risk Statement in an Oakwise PPM shown to the judge by Ms Ter-Berg[13] that stated that where there is very limited if any market information in respect of an investment, *"it is inherently difficult to value and valuation of such investments are subject to subjective judgments and substantial uncertainty […] [t]here is no assurance that the estimates resulting from such valuation process will reflect the actual value of such securities"*.

62. As the judge recognised in the course of the hearing, what was needed, if possible, was the SP's financial statements for the year ended 31 December 2022 independently audited by EY, but these were not available in the extraordinary circumstances recounted in paragraph 8 of Wang 2 set out in paragraph 23 above -- extraordinary because of the unexplained refusal of EY to issue audited financial statements ahead of the hearing of the petition and in the light of Mr Wang's extremely limited account of what transpired at the meeting with EY on 2 May 2023, leaving many questions hanging in the air such as whether he demanded to know what possible reason EY could have had for holding back the audited accounts until after the conclusion of the hearing and, if he did ask this question, as one would have expected him to have done, what reason did EY give for adopting this bizarre stance.

63. Unsurprisingly, it is clear from the transcript of the hearing[14] that the judge was very concerned that not even a letter from EY had been provided to the Court with the result that he was left in the dark as to what valid reason professional auditors could have for refusing to issue the audited SP's financial statements for the year ended 31 December 2022 until after the conclusion of CMBI's receivership application. The judge also observed that no evidence had been submitted on behalf of Oakwise showing that chasing letters had been sent to EY emphasising how important it was to put before the Court audited financial statements for the year ended 31 December 2022[15].

64. As already related, these concerns led the judge to propose to the parties that EY be informed that he would be assisted if audited accounts were filed as soon as possible and certainly before the end of May 2023 and it was tentatively agreed by all sides that this was a good idea and the

[13] Transcript p.32:8-17
[14] Transcript p.29:7-18.
[15] Transcript p.59:1-3.

parties should have liberty to serve submissions on this new evidence if it were provided. However, just eight days after the conclusion of the hearing the judge issued his draft judgment dismissing the petition, having decided that he should not draw any adverse inference from Oakwise's failure to provide the Court with audited financial statements and that he should proceed to give judgment as soon as possible.

65. With respect to the judge, in my opinion his decision dismissing the petition for the reasons he gave is fatally flawed and should be set aside. I say this because in my view he seriously erred in accepting the reliability of the unaudited financial statements on the back of Mr Wang's statement in paragraph 10 of Wang 2 that he did not anticipate that there would be any material differences between the unaudited and the audited financial statements. Mr Wang may be a director of Oakwise but there was no evidence that he is a qualified auditor, let alone a qualified independent auditor. Also, there were the following substantial grounds for doubting the values assigned to the SP's investments in financial instruments (including in particular bonds) in the unaudited balance sheet for 30 December 2022:

(i) Mr Wang's statement in Wang 1 that in **December** 2022 Chinese real estate bond prices had crashed and the "appreciable rebound" referred to para 32 (b) thereof was not in respect of a rise in real estate bond prices but in respect of "the PRC property market" unsupported by any data;

(ii) the aforementioned Valuation Risk Statement drawn to the judge's attention by Ms Ter-Berg;

(iii) as noted above, the values assigned to each of the SP's investments in financial instruments (including bonds) were clearly described as "Cost of Investment" which denoted something markedly different from:

(a) a value based on an estimation of the price that a willing buyer and a willing seller would agree whether in reference to a transaction on an exchange quoting the bonds or in reference to a sale by private treaty; and

(b) the valuation methodologies adopted by EY when auditing the 2021 balance sheet as revealed in EY's notes to those accounts which the judge should certainly have looked at when assessing the evidence of the value of bonds held by the SP as at 30 December 2022, even if his attention may not have been specifically drawn to them in the hearing.

66. In short, I accept Ms Ter-Berg's submission (to which, if necessary, I would apply the proviso[16] in section 20 (3) of the Court of Appeal Act) that the judge should have held on the evidence before him that:

> (i) CMBI had established at least a prima case that the assets attributable to the SP were likely to be insufficient to discharge the claims of creditors in respect of the SP;
>
> (ii) Oakwise had failed to rebut the presumption arising therefrom; and
>
> (iii) the assets attributable to the SP were or were likely to be insufficient to discharge the debt owed to CMBI of the SP's creditors.

67. I am also respectfully of the view that the judge's conclusion in paragraph 37 of the judgment that, even if the insolvency test had been made out, he was not satisfied that the making of a receivership order "would achieve the statutory purposes" because *"the closing down of the business under receivers would not [...] be in the best interests of the investors/creditors"* was a fundamentally flawed exercise of discretion, as contended by CMBI. This is so because the statutory purposes the judge held not to have been achieved are thoses stated in section 224 (3), namely: *"(a) the orderly closing down of the business of or attributable to the segregated portfolio; and (b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto",* and the achievement or non-achievement of these purposes cannot be assessed as the judge purported to do in high level general terms that make no reference at all to the applicable wording.

68. In paragraph 23 of the judgment, the judge said that he had not been persuaded that the Court would be justified in exercising its discretion in favour of CMBI and here it seems to me he should be taken to be referring to the discretion derived from the word "may" (see paragraph 52 above). He then went on to refer to: (i) the statement in the PSP letter that the "stakeholders" in the fund would suffer a significant loss if the bonds were sold to pay creditors' claims (para 25); (ii) Mr Wang's evidence that (a) the "overwhelming" response of "investors" has been vehemently in opposition to CMBI's petition with fifty per cent of them having contacted him to indicate their opposition thereto (para 29); (b) the key consideration of the Directors was to ensure all "investors" are treated equally and proportionately (para 31); and (c) receivership would not achieve the orderly closing down of the business; instead the outcome would be the

[16] "unless the Court otherwise orders upon such terms as it deems fit".

opposite and would come at great financial detriment to the "shareholders" and "third party creditors", all of whom opposed the petition (para 34).

69. Whilst the judge's conclusion in paragraph 37 that the statutory purposes had not been achieved cannot stand, I think he should be taken to have intended his finding in that paragraph that *"the closing down of the business under receivers would not […] be in the best interests of the investors/creditors"* to be based on the evidence recited in (i), (ii) and (iii) in paragraph 68 above and that that finding should be taken as an exercise of the "may" discretion. That said, I am of the opinion that for the following reasons his exercise of this discretion cannot stand.

70. Although Mr Wang stated in Wang 1 that all of the SP's "third party creditors" opposed the petition, one of Oakwise's principal submissions was that the judge should dismiss the petition to allow the price of bonds to recover for otherwise the participating shareholders would suffer "great financial detriment" if receivers were appointed and it is clear that the interests of the participating shareholders loomed very large as a reason behind the discretionary decision the judge made. In my judgment, in proceeding in this way, the judge erred in law because, as Ms Ter-Berg submitted to the judge and submits in this appeal, CMBI's claim in debt would rank ahead of any claim the Participating Shareholders would have in the winding up of the SP as is clear from the reasoning of the Privy Council in *Pearson v Primeo Fund* [2017] UKPC 19 at paras 18-22 (referring to sections 37 (a), 37 (7), 49 (g) and 139 (1) of the Act), a very well-known decision of great significance for Cayman Islands open-ended investment funds.

Conclusions

71. For the reasons given above I propose that:

(1) this appeal be allowed and the judge's orders dated 2 June 2023 and 30 June 2023 be set aside;

(2) the appellant's receivership petition be re-heard by another FSD judge with liberty to adduce further evidence to take account of relevant events occurring since 11 May 2023 and to amend the petition accordingly; and

(3) the respondent be ordered to pay the appellant's costs both on appeal and below.

Moses JA

72. I agree.

Goldring, (President)

73. I also agree.