

22/2/06

Winding up

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

3
4 CAUSE NO. 440 OF 2005
5

6
7 IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

8
9 AND IN THE MATTER OF PHILADELPHIA ALTERNATIVE ASSET FUND,
10 LIMITED
11

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13 **Appearances:** Mr. Gabriel Moss, Q.C. and Mr. David Oliver, Q.C.
14 instructed by Guy Locke and Robert Gardner of Walkers for
15 the Petitioner
16 Mr. Edward Bannister, Q.C. instructed by Rosie Whittaker-
17 Myles of Charles Adams Ritchie & Duckworth for Mr. C.
18 Clark Hodgson, Jr.
19

20
21 **Before:** Hon. Justice Henderson
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23
24 **Heard:** November 1 and 2 and December 19, 2005
25



26
27 **JUDGMENT**
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29 The petitioners, who are all registered shareholders in Philadelphia Alternative Asset
30 Fund, Ltd. ("the fund") seek an order for its winding up. There is no dispute that there
31 has been a total loss of the substratum of the fund and that it must be wound up. The
32 dispute is over how that should be done.
33

34 The fund is a Cayman Islands registered exempt limited company licensed to operate as a
35 mutual fund by the Cayman Islands Monetary Authority ("the Authority"). The fund
36 stopped trading in June, 2005 and will not resume trading.
37

1 There are no unpaid creditors. It is said that the fund was the victim of a massive fraud.
2 Large trading losses were incurred but hidden from the investors and other parties,
3 including the United States Commodity Futures Trading Commission.
4

5 The directors of the fund, who have now resigned, were two employees of Maples
6 Finance Limited in the Cayman Islands. The Administrator of the fund was UBS Fund
7 Services (Cayman) Limited.
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9 The only formal opposition to the winding up is from C. Clarke Hodgson, Jr., a receiver
10 appointed by the U.S. District Court for the Eastern District of Pennsylvania over the
11 fund and certain related entities. Mr. Hodgson has been appointed the representative of
12 the fund and the custodian of its assets by the U.S. Court. Those assets and many of the
13 operations of the company were located in the United States. Mr. Hodgson seeks
14 recognition here and asks that the court exercise its discretion to refrain from ordering a
15 winding up to avoid duplication of effort and wasted costs. He agrees there are no
16 positive steps for him to take in the Cayman Islands at the present time.
17

18 The petitioners represent only a minority of the shareholders. Evidently, a major portion
19 of the shareholders are content to await the distribution which will occur within the
20 American receivership and see no need for a winding up in the Cayman Islands.
21

22 When the petitioners made the decision to invest in a company domiciled in the Cayman
23 Islands they would have had a reasonable and legitimate expectation that, in the event a

1 winding up was necessary, it would occur in the Cayman Islands under the applicable law
2 here. The affidavit evidence suggests that the distribution regime likely to be adopted in
3 the American receivership will be roughly similar to that which would follow a winding
4 up in the Cayman Islands. It is likely to be similar, but the evidence does not establish
5 that it will be identical.

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7 The petitioners clearly have a tangible interest in the fund. In cases where the
8 substratum of a company is gone, winding up will usually be ordered despite the
9 opposition of even a majority of members: *Re Haven Gold Mining Co.* [1882] 20 Ch.
10 Div. 151; *Re Baku Consolidated Oil Fields Limited* [1944] 1 All ER 24. In the absence
11 of a voluntary winding up, a petitioner is usually entitled to a winding up order even if
12 this is contrary to the wishes of the majority of shareholders or creditors: *Re JD Swain*
13 *Limited* (1965) 1 WLR 909, at 915.

14

15 This is the fund's domicile. The established rule is that any winding up must take place
16 here although, if there are assets in a foreign jurisdiction, ancillary proceedings abroad
17 may be necessary: see *North Australian Territory Co. v. Goldsborough, Mort and Co.*
18 (1889) 61 LT 716. Counsel have been unable to cite any precedent either here or
19 elsewhere for what Mr. Hodgson now asks. I am unaware of any instance of an English
20 or Cayman Court declining to make a winding up order in the place of incorporation of a
21 company for the sake of deferring to a foreign receivership in respect of that company.
22 The court of the country of domicile is the "principle court to govern" a liquidation: per

1 Vaughn Williams, J. in *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch.
2 385, at 394. The fund having been incorporated here, this is the proper court for the
3 management of its liquidation: see *International Credit v. Adham* [1994] 1 BCLC 66
4 at 71.

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6 One of the long established purposes of a liquidation is the investigation of the
7 company's affairs: see *Re Pantmaenog Timber Co. Ltd.* [2003] 3 WLR 767 at paragraph
8 64. The comments of Robert Walker, J. in *Re Gordon and Breach Science Publishers*
9 [1995] 2 BCLC 189 at 199 describe this consideration as follows:

10 "Fairness and commercial morality may require that a
11 substantial independent creditor (in this case investor)
12 which feels itself to be prejudiced by what it regards as
13 sharp practice should be able to insist on the company's
14 affairs being scrutinized by the process which follows a
15 compulsory order. Such a creditor is entitled to an
16 investigation which is not only independent but can be
17 seen to be independent. This may be so even where the
18 voluntary liquidation is already well advanced and a
19 compulsory order may cause further expense and delay."

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21
22 The Authority appeared on the application and requested this court to make a winding up
23 order. Evidently, it will pursue its own investigation into possible violations of the
24 *Mutual Fund Law* but would prefer to do so within the context of a winding up in the
25 Cayman Islands.

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27 These principles are so clear and of such longevity that it would be wrong in principle to
28 deny the petitioners this winding up order. That remains so whether there will be some
29 duplication of effort and wasted cost or not. My expectation is that the Cayman

1 liquidators will seek to reach agreement with Mr. Hodgson and co-operate to avoid
2 unnecessary expense.

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4 The Petitioners are entitled to the requested order. It follows that Mr. Hodgson's
5 application for recognition in this jurisdiction must be dismissed.

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7 Dated this 22nd day of February, 2006

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9

Henderson, J.

10 Henderson, J.
11 Judge of the Grand Court
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