

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **Cause No.: FSD 232 of 2018 (RMJ)**
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6 **IN THE MATTER OF SECTION 131 OF THE COMPANIES LAW (2018 REVISION)**

7 **AND IN THE MATTER OF ASIA PRIVATE CREDIT FUND LIMITED (IN**
8 **VOLUNTARY LIQUIDATION)**

9 **IN CHAMBERS**

10 **Appearances:** **Mr. Chris Keefe and Ms. Gemma Cowan of Walkers for The Public**
11 **Institution for Social Security for the State of Kuwait**
12 **Mr. Marc Kish and Mr. Shaun Maloney of Ogier for Adamas Global**
13 **Alternative Investment Management Inc.**
14 **Mr. Sam Dawson and Mr. Denis Olarou of Carey Olsen for the Joint**
15 **Voluntary Liquidators of Asia Private Credit Fund Limited**
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18 **Before:** **The Hon. Mr. Justice Robin McMillan**
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20 **Heard in**
21 **Chambers:** **27 February 2019**
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25 **Judgment**
26 **Delivered:** **19 March 2019**
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30 **HEADNOTE**
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33 *The scope of section 131 of the Companies Law – The wide discretion of the Court – The*
34 *importance of the independence of the Court – The absence of a stipulated test of necessity*
35 *under section 131.*
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JUDGMENT

Introduction

1. This matter arises from a Petition dated 18 December by the Public Institution for Social Security for the State of Kuwait (“the Petitioner”). The Petition seeks the continuation of the voluntary liquidation of Asia Private Credit Fund Limited (“the Company”) under the supervision of the Court and the appointment of Mr. David Griffin and Mr. John Batchelor as Joint Official Liquidators (“JOLs”) of the Company.
2. The current Joint Voluntary Liquidators (“JVLs”) are Mr. Russell Smith and Mr. Kenneth Yeo.
3. The Petitioner between 2010 and 2014 had made a number of cash subscriptions and one *in specie* subscription for shares in the Company totaling US \$106,478, 634.39.
4. A restructuring took place in 2014 and since 2014 the net asset value of the shares had deteriorated significantly such that as of 31 March 2018 the Petitioner’s shareholding in the Company was worth approximately U.S \$37,208,691.88.
5. The Company was incorporated in the Cayman Islands on 9 February 2010 as an exempted limited company under the Companies Law (as Amended) (“the Law”), carrying on business as a mutual fund.
6. The Company has been managed by Adamas Global Alternative Investment Inc (“the Manager”), also incorporated as an exempted limited company under the Law.
7. As the Court understands the position, the Petitioner is now the sole investor in the Company and since 2017 the sole participating shareholder. Meanwhile the Manager has no shares except for management shares *per se*.
8. On 27 February 2019 the Court granted the Petition that the voluntary winding up of the Company which was approved by the Manager on 14 December 2018 should continue under the supervision of the Court.



1 9. However, the Court also directed that one of the existing JVLs, Mr. Yeo, should continue
2 in office as JOL along with one further appointee as identified and proposed by the
3 Petitioner with the concurrence of Court.

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5 10. The Court does not intend to set out in full the detailed background to this matter, the
6 evidence adduced and relied upon by the parties nor the Written Submissions of the
7 parties.

8 11. More narrowly, this Judgment concerns the scope and application of section 131 of the
9 Law, upon which the Petitioner has relied.

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11 **Section 131 of the Companies Law**

12 12. Section 131 states:

13 *“131. When a resolution has been passed by a company to wind up voluntarily, the*
14 *liquidator or any contributory or creditor may apply to the Court for an order for*
15 *the continuation of the winding up under the supervision of the Court,*
16 *notwithstanding that the declaration of solvency has been made in accordance*
17 *with section 124, on the grounds that-*

18 *(a) the company is or is likely to become insolvent; or*

19 *(b) the supervision of the Court will facilitate a more effective, economic or*
20 *expeditious liquidation of the company in the interests of the contributories and*
21 *creditors.”*

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23 13. In considering whether to make such an Order, it is for the Court alone to decide whether
24 the supervision of the Court will facilitate a more effective, economic or expeditious
25 liquidation of a company in the interests of the contributories and creditors. In other
26 words, facilitating these broadly expressed factors is not simply a precondition for
27 making the order but the actual reason or reasons for exercising the discretion to do so.



1 14. A general indication as to how the provision should be interpreted is provided in *In the*
2 *Matter of Exten Investment Fund* (Unreported Grand Court), Cause Nos FSD 96-99 of
3 2017, where Mangatal J. states at paragraph 64:

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5 *“As Megarry J indicated in the Test Holdings decision, the word “creditor” has, in*
6 *relation to other statutory provisions, been construed widely so as to include a mere*
7 *contingent creditor. There is nothing in the language of section 131 (b) to suggest that a*
8 *more limited construction should be put on the word “creditor”. Indeed, the language of*
9 *sub-section (b) is wide, and states that the application can be made where supervision of*
10 *the Court will facilitate a more effective, economic or expeditious liquidation of the*
11 *company in the interests of contributories or creditors.”*

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13 15. The reference to the language of sub-section 131 (b) being “wide” is both instructive and
14 helpful. It emphasizes that the approach of the Court should be broad and purposive.

15 **The Legal Submissions**

16 16. Notwithstanding these considerations both the Petitioner and the Manager favour
17 narrower but differing constructions.

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19 17. The Petitioner in its Written Submissions dated 22 February 2018 points out that the
20 wording of section 131 appears to be unique to the Cayman Islands (paragraph 9).
21 Reference is also made to the local Law being derived from the English Companies Act
22 1862.

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24 18. In this regard, the Court notes that under that former legislation the jurisdiction and the
25 discretion of the Court to grant a supervision order were expressed in extremely wide and
26 unfettered terms.

27 19. The Petitioner also argues that in relation to both granting a supervision order and in
28 approving Joint Official Liquidators the Petitioner’s views should carry considerable
29 weight.



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20. Indeed in *Deloitte & Touche A.G. v. Johnson and Dinan* [1999] CILR 297 at page 303, lines 30-45, it is stated that the Court must consider “*the general advantage of the persons interested in the liquidation*” and that the Courts have consistently regarded the creditors and the contributories as the proper persons to make the application, “*being the only persons interested in the liquidation.*”

21. The Petitioner then develops the point to state at paragraph 17 that it is the Petitioner, and only the Petitioner, that has an economic interest in the liquidation of the Company, bearing in mind the poor financial performance of the Company and its underlying investments. The Petitioner also submits that in these circumstances its views should carry substantial weight as regards the identity of the JOLs.

22. While the Court fully recognises the weight of these collective submissions nonetheless the Court reminds itself of its responsibility to act in an independent and impartial manner as distinct from exercising a more passive acquiescence, as is perhaps unintentionally implied.

23. The Manager in contrast submits at paragraph 4 of its Written Submissions dated 22 February 2019 that the current JVLs already have all the tools which they need to make inquiries of the Manager and other service providers and, if they consider it appropriate in due course, to apply for a supervision order.

24. The Manager proceeds to describe the wording of section 131 as setting out a “*test*”. The Court does not accept that there is a formal test as such. There must of course be grounds for the exercise of the Court’s discretion, but the ambit of the Court’s jurisdiction is not defined simply by what is called a test. As indicated, the Court’s discretion once it is activated upon the relevant grounds is wide rather than narrow. This approach is fully consistent with the guidance of Mangatal J.



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25. The Manager submits that the burden rests on the Petitioner to demonstrate that supervision of the Court would enable the liquidation to be conducted in a more effective, economic and expeditious manner in the interests of the contributories and creditors (paragraph 24).

26. Complaint is made at paragraph 25 of the potential for the prejudicial effect a supervision order may have on the interests of all stakeholders in a listed company. This is of course a factor for discretionary consideration.

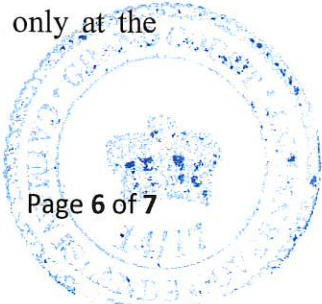
27. The Manager then redefines the legal issue by stating that for the present application to succeed the Petitioner “*must demonstrate that supervision is necessary*”. This proposition is entirely misconceived. Necessity is not a requirement for section 131 to be activated, and to describe the question in this manner, with great respect, could be seriously misleading.

28. The Manager further alleges that the present dispute is ultimately not about a justifiable need for supervision but about a desire to replace the current JVLs.

29. The JVLs themselves have also provided Written Submissions, adopting however a neutral position as to the Petition.

Conclusion

30. The Court has considered carefully the various contentions as to the scope and meaning of section 131. Both the Petitioner and the Manager have overstated their positions, but as the Court has made clear the powers of the Court are not to be exercised only at the direction of the Petitioner without further analysis.



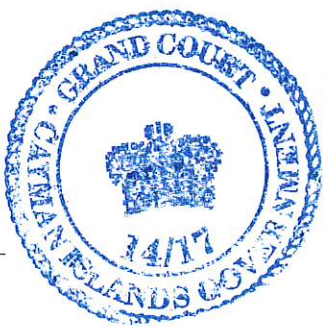
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31. The Court is satisfied that the grounds for the exercise of its discretion under section 131 have been amply made out.

32. In these circumstances where a contributory has suffered a very significant loss of its original investment, it is particularly important in the interests of justice and in order to maintain the reputation and standing of this jurisdiction that supervision should be ordered. At the same time, this decision is no reflection whatever on the professional standing and proficiency of the current JVLs, who have acted entirely impeccably.

33. Equally it is inappropriate to replace both of these JVLs with the Petitioner’s nominees, given the serious loss of knowledge and expertise that this replacement would represent. A party who seeks the intervention of the Court will if it is successful then have to accept the consequence of that success. It is necessarily the Court which conducts the supervision and not the Petitioner or the Manager.

Robin McMillan



THE HON. MR. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT