



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 133 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND

IN THE MATTER OF ADAMAS HERACLES MULTI STRATEGY FUND

CAUSE NO: FSD 140 of 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND

IN THE MATTER OF ADAMAS ASIAN ORIGIN FUND SPC

IN COURT-VIA ZOOM

Appearances

Mr Mark Goodman of Campbells for the Petitioner in FSD 133/2021
("Heracles")

Mr Ian Lambert of Broadhurst LLC for the Petitioner in FSD 140/2021
("Asian Origin" and together with Heracles, the "Companies")

Mr Chris Keefe of Walkers for Adamas Asian Opportunity Fund (in
Official Liquidation) ("AOF"), a purported contingent creditor of
Heracles (FSD 133/2021), and for the Public Institution for Social
Security for the State of Kuwait ("PIFSS") (collectively, the
"Creditors"), a purported contingent creditor of Asian Origin (140/2021)

Before: The Hon. Justice Kawaley

Heard: 23 July 2021



Date of decision: 26 July 2021

Draft Reasons

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INDEX

Unopposed winding up petitions in relation to affiliated companies-whether liquidators appointed in relation to related companies should be appointed on application of purported creditor instead of liquidator proposed by a director of one respondent and the other respondent-standing of purported contingent or prospective redemption creditor-independence of liquidators of affiliates

REASONS

Introductory

1. On July 23, 2021, I granted the winding-up orders sought by a creditor and director of Heracles and by Asian Origin, respectively. I reserved judgment on the identity of the Joint Official Liquidators (“JOLs”) but otherwise granted the Winding-up Orders on the terms of the drafts submitted by the respective Petitioners. Because the two matters were heard together, without being formally consolidated, for convenience I have prepared a single consolidated Judgment.
2. The merits of the disputed limbs of each application turned on an analysis of evidence filed by or on behalf of PIFSS which I was regretfully unable to review before the hearing (because of other commitments) or view during the hearing (because of my inability to negotiate the electronic bundles filed in updated form in a flurry on the day of the hearing).
3. The standing of AOF and the impartiality of AOF’s proposed JOLs (Messrs Andrew Morrison and David Griffin of FTI Consulting (Cayman) Ltd, and John Batchelor of FTI Consulting (Australia) Limited) were put in issue by the Petitioner in the Heracles matter. The Petitioner/Company in the Asian Origin matter queried the standing of PIFSS. If PIFSS/AOF had (as they claimed) a substantial economic stake in the Companies, it was clear that their wishes should be preferred to those of ‘management’. Exhibit “AM-3” to the Third Affidavit of Andrew Morrison contained a structure chart portraying the connections between various Adamas entities.
4. It generally makes sense to have the same JOLs appointed over an entire group of companies in liquidation on the understanding that any conflicts arising in relation to

inter-group claims can be dealt with by appointing additional liquidators. Somewhat bizarrely, this consideration was invoked by Asian Origin as the basis for appointing the same liquidators over it and Heracles as if these two companies belonged to a separately hermetically sealed sub-group of the wider Adamas Group. In fact, it is deposited in the Second Morrison Affidavit (FSD 133/2021) based on extensive investigations by the JOLs of two other entities in the Adamas Group:

“51. It is the view of the... JOLs... that the significant degree of inter-relationship/investment across the Adamas group (including the appointment of Adamas manager and investment manager entities throughout the chain of investment) was deliberately complex and may not have been discovered (or would have been more difficult to discover) had the FTI Nominees not had access to information in respect of a number of Adamas entities within the group (in their capacities as...JOLs...)”

5. I accordingly summarily reject the conflict objection to AOF’s JOLs being appointed in relation to Heracles. The only question of substance to determine, therefore, was whether PIFSS/AOF has standing to advance their proposed nominees as JOLs in each case and, if so, whether their views should be accorded deference over those of management.
6. Mr Keefe made it clear that his clients’ opposition to the appointment of Messrs. Penner and Green of Deloitte was not based on any suggestion that they were not in general terms entirely qualified and suitable for appointment.
7. On July 26, 2021, I signified my decision via email to appoint Andrew Morrison and David Griffin of FTI Consulting (Cayman) Ltd and John Batchelor of FTI Consulting (Australia) Limited as JOLs of both Companies. These are the brief reasons for that decision.

Relevance of stakeholder views

8. The views of stakeholders in a liquidation are generally accorded considerable weight. The Cayman Islands Court of Appeal considered the same broad principles in connection with two related companies in which PIFSS was a significant economic stakeholder, *In the Matter of Asia Private Credit Fund Limited (in Voluntary Liquidation) and In the Matter of Adamas Asia Strategic Opportunity Fund Limited*, Civil Appeals Nos. 17, 26 and 27 of 2019 (Consolidated), Judgment dated November 8, 2019 (unreported). The Court of Appeal was concerned with the analogous context of considering the weight to be given to the respective views of management and



stakeholders in relation to the making of a supervision order and who the official liquidators should be. Sir Richard Field JA held as follows:

“118...I reject Mr Cogley’s submission that the judge erred in giving pre-eminent weight to the views of the Petitioner as to the identity of the liquidators. The Petitioner was the sole stakeholder in the liquidation and, as noted by Kawaley J, there is an abundance of authority for the proposition that that liquidation proceedings, whether insolvent or solvent, should be conducted in the interests of those persons who are financially interested in the liquidation process.”

9. Against this background, the attempt of ‘management’ in relation to both Companies in this case to prefer their views over those of stakeholders, should they be indeed stakeholders, at the hearing had a distinct sense of *deja vu* about it. The distinct impression was that management wished to subtly obstruct rather than facilitate an efficient liquidation process, presumably because of anxieties as to where that process will lead.

Standing in relation to Heracles

10. A notice of appearance was filed by AOF, and the position adopted by AOF was supported by PIFSS. In the First Affidavit of Meshal Alothman, the Director General of PIFSS, it is deposed that PIFSS, indirectly, is the largest economic stakeholder in Heracles. The basis of PIFSS’ interest is clearly and simply set out at paragraphs 9-10. In the Second Affidavit of Andrew Morrison, one the JOLs of AOF, the redemption debt of AOF in the amount of approximately US\$1.8 million is clearly explained (at paragraphs 25-35). PIFSS is said to be the ultimate Participating Shareholder and AOF’s interest is said to be held through a custodian, although AOF will become a direct creditor of Heracles when the custodian agreement terminates on or before October 19, 2021. These assertions were supported by the Exhibit to the Second Morrison Affidavit which confirmed both the outstanding redemption request and the fact that the registered investor (HSBC Institutional Trust Services (Asia) Limited) had entered into a custodianship agreement with Heracles.
11. Mr Goodman referred the Court to high authority on the importance of ensuring that a party seeking to obtain relief has standing to influence the way the Court exercises a statutory power. In *Deloitte & Touche –v- Johnson* [1999 CILR 297] at page 304, Lord Millett opined as follows:



“In their Lordships’ opinion, two different kinds of case must be distinguished when considering the question of a party’s standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it.”

12. Without relying on any positive evidence casting doubt on the evidence relied upon by AOF, the Petitioner effectively invited the Court to positively satisfy itself that the standing requirement had been made out. The Companies Act (2021 Revision) section 94(1)(b) confers standing to petition on “*any creditor or creditors (including any contingent or prospective creditor or creditors)*”. A qualifying creditor clearly has standing to seek to influence the Court’s decision on the identity of the JOLs to be appointed on the winding-up of a company.
13. In my judgment the requisite standing requirement clearly has been made out in both evidential and legal terms. AOF is a contingent and/or prospective creditor of Heracles since having given notice to terminate its custodian agreement with HSBC it will in the foreseeable future acquire the rights of a redemption creditor now legally held by its nominee.

Conclusion: JOLs of Heracles

14. AOF supported by PIFSS made a rational case for appointing Messrs Andrew Morrison and David Griffin of FTI Consulting (Cayman) Ltd, and John Batchelor of FTI Consulting (Australia) Limited as JOLs of Heracles. Further and in any event, AOF is the most substantial economic stakeholder before the Court and its views would, all other considerations being equal, be entitled to considerable deference. For these reasons on July 26, 2021, I made the appointments sought by AOF, and supported by PIFSS, as JOLs of Heracles.

Standing in relation to Asian Origin

15. In Asian Origin's Skeleton, Mr Lambert submitted:



“11. As set out in the Affidavit of Kevin Andre Phillip dated 27 May 2021 (“Phillip 1”) at paragraph 21 [HB / Tab 2 / pg 6], the Company’s sole remaining portfolio, Ganymede SP, has one registered investor, being HSBC Nominees (Hong Kong) Limited A/C 540856 (the “Investor”).

12. Despite request, and the burden of proof being on them, PIFSS have not provided the Company with any evidence to support their contention that PIFSS and/or AJOF are somehow connected to the Investor. In the absence of such evidence, the Company does not consider PIFSS to be a creditor (either contingent, prospective, indirect or otherwise) of the Company, and as such, respectfully submits that PIFSS has not established that it has standing to appear and oppose the appointment of the Proposed JOLs as liquidators of the Company.”

16. Again, as in the case Heracles, the issue raised was that Asian Origin's registered investor in relation to the “last remaining” Ganymede SP portfolio is HSBC Nominees (Hong Kong) Limited (“HSBC”) and that no documentary support has been provided for PIFSS’ contention that it is a creditor of any sort. It is admitted that over US\$8.0 million in redemption monies are owed to the registered investor who is the sole economic stakeholder in Asian Origin (Affidavit of Kevin Andre Phillip, paragraphs 20 -24). The point taken seemed, against the wider background of the present case, to be an obtuse one. Asian Origin did not suggest that it had contacted the registered investor who had either failed to confirm PIFSS’ interest or suggested that there was a third party investor.
17. A notice of appearance was filed in the sole name of PIFSS. Attached to “Exhibit SS-1” to the First Affidavit of Siobhan Sheridan filed in FSD 140/2021 was a letter emailed by Walkers to Broadhurst LLC on July 21, 2021. Mr Keefe referred to this letter in the course of argument but by reference to a tab in a bundle which I did not have. It asserted that PIFSS was beneficially entitled to 99.2% of the redemption proceeds which were admittedly due in respect of the Ganymede portfolio. The letter explained how this investment was made through Adamas Japan Opportunity Fund (“AJOF”) and asserted that back-to-back redemption requests had been made by PIFSS (to AJOF) and by AJOF (to Asian Origin). It was critically asserted:

“...PIFSS... is therefore a contingent creditor of AAOF by reason of its ability to collapse the AJOF unit trust.”



18. Enclosed with this letter was the First Affidavit of Meshal Alothman, to which the AJOF financial statements for the period ending September 30, 2018 were exhibited. This document (at page 25 of Exhibit MA-1) records, *inter alia*, the following:

“During the year, the Trust held an investment in Adamas Asian Origin Fund SPC - Ganymede SP (the ‘Origin Fund’) ... and was acquired in August 2017 for JPY205, 000,000 and transferring some of its acquired investments amounting to JPY1, 925,173,879...”

19. In paragraph 8 of PIFSS’ Skeleton, Mr Keefe submitted as follows:

“(b) in respect of AAOF (which in turn has an interest in AHMS):

- (i) PIFSS invested JPY 10 billion in AJOF, and following PIFSS’ request for the redemption of its entire interest in AJOF in November 2017, approximately JPY867, 229,356 (being equal to approximately US\$7,896,773.71) remains outstanding and payable to PIFSS. PIFSS holds (or prior to the redemption of its interests in AJOF, PIFSS held) 99.2% of the economic interest in AJOF;*
 - (ii) AJOF’s only investment was in AAOF – segregated portfolio ‘Ganymede’; and*
 - (iii) AAOF’s only remaining investment (in the amount of JPY 960 million) is in AHMS. Following the redemption of AAOF’s interests in AHMS approximately US\$7,896,773.71 remains outstanding and payable in respect of such redemption proceeds.”*
20. These submissions are supported by the First Affidavit of Meshal Alothman filed in FSD 133/2021. Their focus is to support the interest PIFSS has in Heracles, not Asian Origin. It is initially somewhat difficult to extract from these averments the conclusion that PIFSS is a creditor through AJOF of Asian Origin. But Mr Alothman clearly deposes that PIFSS invested in AJOF, which in turn invested in Asian Origin, which in turn invested in Heracles and that just under US\$8 million is indirectly owed to PIFSS from Heracles through AJOF. Its interest in Heracles and Asian Origin are said to be intertwined.



21. This evidence directly supports the assertion made in Walkers' July 22, 2021 letter that PIFSS invested in Asian Origin through AJOF and that PIFSS can indeed potentially liquidate AJOF because it has failed to honour its redemption request. It is common ground in any event that AJOF is the sole outstanding investor in relation to the Ganymede portfolio. Is there any reason to doubt the bare assertion in correspondence that PIFSS is the 99% beneficial owner of the relevant investor? PIFSS' evidence is not directly challenged; rather PIFSS is put to strict proof of its standing.
22. The assertions of PIFSS on their face are inherently believable taking into account the undisputed surrounding facts notably that PIFSS is not a private investor but a parastatal organization which the Court can properly assume is acting in the public interests of Kuwait. The fact that the investment in the Ganymede portfolio is registered in the name of a nominee calls for no explanation. Moreover, this disputed standing as a contingent creditor is not being exercised to contend for an unusual or irrational result in terms of which individuals are appointed as JOLS of Asian Origin. The position contended for makes eminent commercial sense. In these circumstances I find that the standing bar is not a high one and I am satisfied that PIFSS as a contingent creditor is a proper party to seek the relief which is sought.

Conclusion: JOLS of Asian Origin

23. For these reasons on July 26, 2021 I appointed the JOLs of Asian Origin proposed by PIFSS.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT