IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 116 OF 2015

IN THE MATTER OF THE EXEMPTED PARTNERSHIP LAW 2014
AND THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF BAY CAPITAL ASIA FUND, LP
(IN VOLUNTARY LIQUIDATION) ("THE FUND")

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 22ND DAY OF SEPTEMBER 2015 AND 1ST OCTOBER, 2015

APPEARANCES: Mr. Peter Hayden of Mourant for the opposing creditors (with him Mr. Mill and Tammy Fu of Zolfo Cooper

Mr. Jayson Wood for the Petitioner. With him Mr. David Walker (one of the JOLs) and Mr. Ryan Murray of PWC

Petition for voluntary liquidation to continue under the supervision of the court – identity of the liquidators – objection to voluntary liquidators on the basis of apparent conflict of interest – test to be applied

JUDGMENT

1. The question is whether the instant petition – which seeks an order for the voluntary winding up of the Fund to continue under the supervision of the Court – should be adjourned. The Fund is a Cayman Islands registered exempted limited partnership which was placed into voluntary liquidation by way of the resolution of its directors and its General Partner Military Mutual Aid Association BCA Ltd. ("the current GP"), taken on 29 June 2015 ("the Resolution").

2. The adjournment is sought by the petitioners themselves who are the Joint Provisional Liquidators ("JVLs") appointed by the Resolution.

3. The Fund was placed into voluntary liquidation on three grounds, including its inability to pay its debts and therefore its insolvency.

4. The JVLs seek to adjourn the petition in order to adduce evidence to refute an allegation of conflict of interest raised against them on behalf of the creditors of the Fund. They seek to remain in office on the basis of their appointment on the Resolution.

5. At all material times the Fund had two limited partners, Bay Capital Asia Fund GP "Bay Capital" (which is also its former GP and which holds 3.3% of its shares) and Military Mutual Aid Association ("MMAA"), which holds 96.7% of the shares.

6. The Fund being insolvent, the primary economic interests in the Fund are, of course, those of its creditors. Such interest as MMAA might have as the owner of residual equity must be regarded as relegated to those of the creditors.

7. There are two creditors already identified. They are again, Bay Capital and Ms. Gyeong Mi Yang ("Ms. Yang"). Together, Ms. Yang and Bay Capital have submitted claims amounting to approximately USD2.8 million.

8. Mr. Christopher Han, a director of Bay Capital, speaks on behalf of Bay Capital as well as Ms. Yang, by way of his affidavit filed in opposition to the JVLs' application for the adjournment.

9. The only known asset of the Fund is its investment of USD30 million in bonds issued by Fung Choi Media Group Limited ("FCMG"), a PRC investment company in media and marketing businesses. The Fund holds the bonds through a wholly owned

subsidiary of the Fund BCA, Best Business Service Limited ("BBS") – a company incorporated in Mauritius. Thus, the Fund has a direct economic interest in FCMG.

10. In or around August 2014 FCMG defaulted on its obligations under the bonds and the Fund though BBS commenced enforcement action against FCMG to recover the value of the bonds.

11. BBS is itself also in liquidation and the liquidators are the same persons who are appointed as the JVLs of the Fund.

12. The only realizable asset of the Fund is therefore, in essence, its enforcement action. It is the only asset against which Bay Capital (both as creditor and equity shareholder), Ms. Yang as creditor and MMAA as majority equity shareholder, can hope to realize a recovery.

13. In his affidavit, Mr. Han, on behalf of Bay Capital and Ms. Yang, explains their reasons for objecting to the continued appointment of the JVLs and to the JVLs' application to adjourn the petition.

14. In essence, Mr. Han explains that the JVLs' who are employees of PWC, are irreconcilably conflicted in their role as liquidators of the Fund having been engaged to advise and having advised MMAA in relation to its investment in the Fund.

15. Moreover, Mr. Han also explains that he was informed by a Mr. Kim of MMAA that PWC had been engaged by MMAA in relation to the removal of Bay Capital as the former GP and its replacement by the current GP which is MMAA's affiliate. This removal of Bay Capital had indeed become a very contentious issue, until it was settled by an agreement between Bay Capital and MMAA.

16. It is of some import that the resolution (by which Bay Capital was removed as GP and replaced by the current GP) expressly refers to the work which PWC had, by that time, done on behalf of MMAA. At paragraph 1.1.3 (iv) that resolution provides as follows:

> *"The advisory work undertaken by PWC to date to protect the interests of MMAA is valuable in terms of allowing a subsequent appointed liquidator to best protect the interests of the Fund."*

17. These circumstances are, in my view, sufficient to cause fair minded stakeholders in the positions of Bay Capital and Ms. Yang to be reasonably concerned whether PWC now operate under a real conflict of interest on account of their former role as advisor to MMAA and their current role as JVLs. That is in essence, the test to be applied by the court in resolving a question like the present, which is whether liquidators who are fiduciary office holders operating under the aegis of the court, should be allowed to continue when a challenge as to their independence is raised on grounds of conflict of interest. See *In the Matter of Hadar Funds Ltd. (In Voluntary Liquidation)*[1].

18. In my view, the objection of these creditors to the appointment of PWC now seeking to be continued under the aegis of the Court, is prima facie well grounded.

19. But rather than having this issue resolved on the present state of the evidence, PWC seeks an adjournment, in essence so as to allow them to present evidence that would disabuse the Court of the concern. On their behalf, Mr. Wood submits that if allowed an adjournment, the JVLs would be able to adduce evidence which is held within MMAA's offices in the PRC to explain that the earlier work undertaken by PWC on behalf of MMAA does not in reality place them in a conflict of interest.

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[1] FSD 94 if 2913 (AJJ), written reasons delivered on 13 August 2013.

20. It seems to me that four important considerations now arise in relation to whether the adjournment should be granted.

21. First, on the face of the evidence as it stands, the conflict of interest complained about by the creditors is prima facie apparent. It is hardly likely therefore that any explanation that PWC might present, will be sufficient to disabuse Bay Capital and Ms. Yang of their reasonable concerns. The test is not whether the court might itself be satisfied. The test is whether the Court considers that the investors are reasonably concerned that the liquidators operate under a conflict of interest. As Justice Jones declared in *Hadar* (above):

> *"Whether or not any particular kind of professional or economic relationships will lead to the conclusion that an insolvency practitioner can or cannot be properly regarded as independent must depend upon the factual circumstances of each case which will vary in an infinite variety of ways. The Court must first identify the relationship and determine whether it is capable of impairing the appearance of independence. If the answer is yes, the Court must then consider whether its existence is sufficiently material in the factual circumstances of the liquidation in question that a fair minded stakeholder would reasonably object to the appointment of the nominee in question."*

22. Second, PWC could have as long ago as 10th July 2015, in response to a letter from Mourant sent on behalf of Mr. Han and Ms. Yang, disabused them of any concern

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over the perceived conflict of interest by presenting evidence to explain it away. PWC did not do so. In effect, they appear to have ignored Mourant's letter.

23. Third, the adjournment now sought by PWC would result in some weeks of delay before the identity of the liquidator is finally known but the creditors are entitled to know who the liquidator will be, as soon as possible.

24. Fourth, and as already mentioned, the Court must be guided primarily by what is in the best interest of those having the real and ultimate economic interest in this Fund, namely the creditors; not by what is in the best interests of PWC as the prospective liquidators.

25. In these circumstances, where there is a clear prima facie conflict of interest which PWC has had ample opportunity to explain away if they could, I conclude that it would be inappropriate to adjourn this petition simply for the purpose of allowing them a further opportunity to do so. Although the petition is brought by PWC acting as the JVLs (in the persons of Mr. David Walker and Mr. Man Chun So), the only issue is the identity of the liquidators, viz: should it continue to be PWC officers or some other appointees. All are agreed that the voluntary liquidation should continue under the supervision of this Court and that the petition should itself be granted accordingly.

26. For all the foregoing reasons, the application for adjournment is refused. The petition will proceed and as the only issue is the identity of the liquidators, the application that the joint voluntary liquidation continues under the supervision of the Court is granted but, instead of the PWC representatives, I appoint the nominees from Zolfo Cooper, identified by the creditors, to be the official liquidators.

27. Mr. Han's costs as well as PWC's costs properly incurred in bring the petition are to be treated as costs of the petition and so are to be met from the assets of the Fund. Ms. Yang has incurred no separate costs of her own so as to justify a separate order in her favour.

Hon. Anthony Smellie
Chief Justice

October 1, 2015