IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 55 OF 2015 (NAS)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF PRIMARY DEVELOPMENT FUND (CAYMAN) SPC

JUDGMENT

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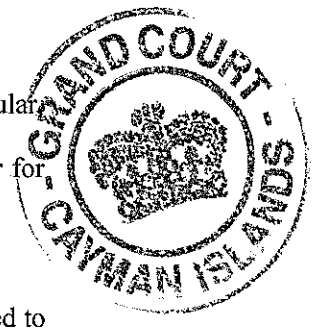
1. This is my judgment on the Amended Summons dated 4 August 2016 of the Joint Receivers (the ***Receivers***) of Helvetia Trading Fund SP (in receivership) (the ***Portfolio***), a segregated portfolio of Primary Development Fund (Cayman) SPC (the ***Company***), for the discharge of the receivership order (made on 1 July 2015) and certain consequential relief.

2. The consequential relief sought includes an order under Section 227(3) of the Companies Law (2013 Revision) directing that the liabilities of the Portfolio to all creditors with claims against the Portfolio shall be deemed to be fully satisfied.

3. In his Second Affidavit, Mr Morrison, one of the Receivers, affirms and confirms that the Receivers have collected in the only asset of the Portfolio which is a balance in a bank account held at Barclays Bank PLC in the sum US$34,382. There are no other Portfolio assets. This sum, together with funds paid by the Company to the Receivers prior to their appointment on account of their remuneration and expenses, have been

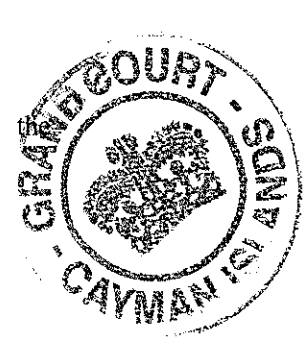
used to discharge the Receivers' remuneration and expenses, including in particular sums payable to the Receivers' legal advisers and to the Portfolio's administrator for costs incurred in assisting the Receivers.



4. As a result, there are no remaining assets of the Portfolio available to be distributed to the Portfolio's creditors. The total known liabilities of the Portfolio are estimated by the Receivers to amount to US$18,636,406.

5. The Receivers have reported to the Portfolio's creditors on the conduct and outcome of their Receivership. By a notice dated 12 February 2016, the Receivers convened a meeting of the Portfolio's creditors and sent to such creditors a copy of their First and Final Report on the Receivership. The Report set out and explained the work that the Receivers had done, the assets which had been collected, the costs which had been incurred and the basis on which the Receivers' remuneration had been calculated. The creditors were invited to attend a meeting and to pass a resolution approving the Receivers' remuneration and costs. However, no creditor attended the meeting and the meeting was declared inquorate.

6. Since there were no further assets of the Portfolio to collect or deal with and no further investigations or actions required in order to close down the Portfolio and distribute its assets to those entitled, the Receivers decided that it was appropriate to apply to the Court for an order discharging the receivership order. The Receivers initially issued a summons seeking, and applied for, a discharge of the receivership order in June and in the absence of any appearances by any creditors or any other parties, requested that I deal with the summons on the papers. While I was prepared to deal with the summons on the papers and discharge the receivership order, I indicated that I did not consider that the Court had jurisdiction or was able to make an order under Section 227(3) of the Companies Law. This was because, since the only assets of the Portfolio had been used in paying the Receivers' remuneration, costs and



expenses and no sums had been distributed to creditors of the Portfolio, the requirements of Section 227(3) were not satisfied.

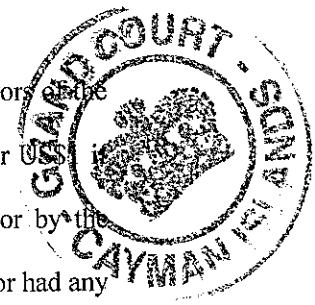
7. Section 227(3) states as follows:

> *"Upon the Court discharging a receivership order in respect of a segregated portfolio of a segregated portfolio company on the ground that the purpose for which the order was made has been achieved or substantially achieved, the Court may direct that any payment made by the receiver to any creditor of the company in respect of that segregated portfolio shall be deemed full satisfaction of the liabilities of the company to that creditor in respect of that segregated portfolio and the creditor's claims against the company in respect of that segregated portfolio shall be thereby extinguished."*

8. Section 227(3) gives the Court a discretion to give a full satisfaction direction but in order for the Court to be able to do so there must have been a "payment made by the receiver to" a creditor. No such payment has been made in the present case. Creditors have received nothing and there will be no distribution. Furthermore, the power to give a full satisfaction direction applies to each creditor separately. Section 227(3) permits the Court to give a direction that "any payment made by the receiver to any creditor of the company in respect of that segregated portfolio shall be deemed full satisfaction of the liabilities of the company to that creditor in respect of that segregated portfolio, and the creditor's claims against the company in respect of that segregated portfolio should by thereby deemed extinguished" [underlining added]. Accordingly, the Court can only direct that liabilities owed to a particular creditor shall be fully satisfied where that creditor has received a payment.

9. The Receivers, after having heard my views, requested that the Court should not make the discharge order so that the Receivers could consider their position further.

10. Subsequently the Receivers renewed their application and issued an Amended Summons on 4 August 2016 seeking once again a discharge of the receivership order and an order under Section 227(3) of the Companies Law. The Receivers felt able to renew their application for an order under Section 227(3) because they had taken



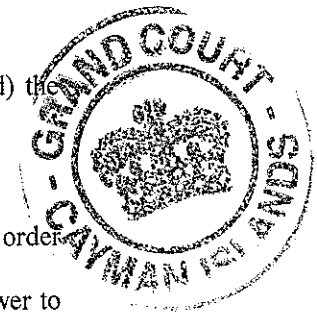
further steps to arrange for a small and part payment to be offered to creditors of the Portfolio. They had written to all creditors and offered to pay each creditor US$1 in demanded in full and final settlement of the liability owed to the creditor by the Company in respect of the Portfolio. No creditors had however responded nor had any payments been made to such creditors.

11. In their letter to creditors the Receivers stated that it was necessary to obtain a full satisfaction direction so that the Company (by a resolution of its directors) could terminate the Portfolio. This was considered important since a termination was required to prevent the Company having to pay further annual fees to the Registrar of Companies and the Cayman Islands Monetary Authority in respect of the Portfolio as well as fees payable to auditors and the Portfolio's administrator.

12. At the hearing of the Amended Summons on 2 September counsel for the Receivers submitted that the requirements of Section 227(3) had been, or should be treated as having been, satisfied. Payment had been made to the Portfolio's creditors either because (i) US$1 had been tendered by the Receivers and the tendering of that sum should be treated as a pro tanto discharge of part of the debt owed to each creditor or (ii) there had been a discharge by way of accord and satisfaction since the creditors had been offered valuable consideration by way of payment even though no actual payment had been made.

13. In my view, neither of these submissions is correct. A tender is not a discharge of the underlying debt (and therefore not a payment for the purposes of Section 227(3)) but merely gives the tendering party the right to raise a plea of tender by way of a defence to a claim by the creditor based on non-payment (see paragraph 21-086 of *Chitty on Contracts, volume 1*, thirty-second edition, 2015). Furthermore, an accord and satisfaction involves a new agreement with a creditor which replaces and discharges the previous liability. But there can be no such agreement where, as in the present

case, the creditors have taken no action and failed to accept (by word or deed) the offer made to them.



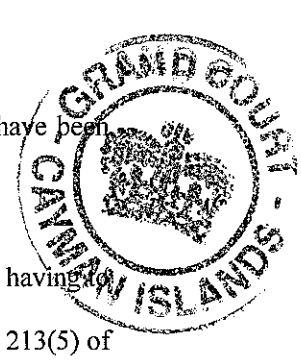
14. However, it also seems to me that a full satisfaction direction is not required in order to permit the Company's directors to terminate the Portfolio. The statutory power to terminate is not dependent on the Portfolio having no outstanding liabilities. It is sufficient that the Portfolio has no remaining assets.

15. Section 228A(1) of the Companies Law permits the directors of the Portfolio to terminate the Portfolio following the discharge of the receivership. It states as follows:

> *"Where a segregated portfolio has no segregated portfolio assets or liabilities of the segregated portfolio company attributable to it, the segregated portfolio company may, by resolution of its directors (or such other authority as may be provided for in, and subject to the provisions of, its articles of association) terminate such segregated portfolio."* [emphasis added]

16. Section 228A(1) therefore permits the directors to terminate a segregated portfolio in two circumstances. Either the portfolio has no assets or no liabilities. It is not necessary for both conditions to be satisfied. It seems to be that the use of the term "or" is to be construed disjunctively. It is not necessary, in order for the directors to be able to terminate the portfolio, for the portfolio both to have no assets and no liabilities.

17. A construction of Section 228A(1) which required that there be both no assets and no liabilities would prevent the proper and effective functioning of the receivership order provisions of the Companies Law. In the same way that a company can be dissolved, and needs to be dissolved, following the end of a liquidation in which all the company's assets have been realised even if no distributions have been made to creditors and liabilities remain outstanding, a segregated portfolio needs to be terminated once all its assets have been realised. There is then no need or point in



continuing the life of the relevant segregated portfolio once all its assets have been realised and the proceeds exhausted.

18. A termination of the segregated portfolio is required in order to prevent fees having to be paid in respect of it by the segregated portfolio company. Under Section 213(5) of the Companies Law a segregated portfolio company has to pay an annual fee in respect of each segregated portfolio it has created other than those in respect of which a notice of termination has been given under sub-section (6) of Section 213. Sub-section (6) permits a notice of termination to be given where a segregated portfolio has been terminated under Section 228A. It would make no sense to prevent directors from being able to terminate a segregated portfolio which had no assets merely because the value of its assets were insufficient to pay in full the amount of the remuneration and costs of the receivership – or because the segregated portfolio in question had no assets at all. In a case in which the assets of the segregated portfolio are all used to pay the remuneration and costs of the receivers, it must still be permissible and appropriate for the segregated portfolio to be terminated following the discharge of the receivership order so as to prevent further fees having to be paid. The life and usefulness of the segregated portfolio will have come to an end.

19. Accordingly, I will make an order (i) discharging the order dated 1 July 2015 appointing the Receivers on the ground that the purpose of the receivership has been achieved, (ii) approving the Receivers' remuneration and (iii) ordering that the books and records of the Portfolio be retained for a period of no less than 6 years from the date of the order and that thereafter they may be destroyed (and that the costs of retaining and destroying the books and records be treated as an expense of the receivership).

20. However, I will not make an order including, and for the reasons I have explained do not consider it necessary to make, a full satisfaction direction. In view of that decision, Counsel for the Receivers invited me to include in the order a paragraph

stating that " the directors of the Portfolio are entitled to pass a resolution pursuant to Section 228A(1) of the Companies Law." This is, in substance, a declaration that in the present circumstances where the Portfolio has no assets, the directors may exercise the statutory right to terminate the Portfolio. I do not consider that it is appropriate to make such a declaration on the Receivers' application for a discharge of the receivership order and therefore in proceedings to which neither the directors nor the Company (nor indeed the Registrar of Companies or CIMA) are parties. But I would hope that this judgment (and the clear conclusion I have reached as to the proper construction of section 228A(1)) will be of assistance to the Company's directors and can be shown to the Registrar of Companies or CIMA to the extent necessary to demonstrate that the statutory power to terminate may be used where the Portfolio has no remaining assets even if its liabilities (technically the liabilities of the Company attributable to the Portfolio) have not been discharged.

The Honourable Justice Nick Segal
28 September 2016