

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

CAUSE NO. 373 OF 2009

**IN THE MATTER OF SECTIONS 92 AND 105 OF THE COMPANIES LAW
(2007 REVISION) AS AMENDED BY THE COMPANIES (AMENDMENT) LAW,
2007**

AND IN THE MATTER OF HERALD FUND SPC

**Appearances: Mr. Terence Mowschenson QC instructed by Mr. Matthew Goucke
of Walkers for the Fund**

**Mr. Stephen Atherton QC instructed by Mr. Paul Keeble of
Nelson & Co for the Petitioner**

**Mr. Hector Robinson and Mr. Simon Dickson of Mourant for
Primeo Fund (in liquidation)**

Before: Hon. Justice Henderson

Heard: October 9, 2009

RULING

1. Primeo, a creditor of the Fund, supported by the fund itself, applies for an adjournment of today's hearing of this winding up petition brought by Natixis S.A.
2. The petition can fairly be described as equivocal as to whether the Fund is solvent or insolvent. Natixis is a contributory of the Fund but not a creditor. In paragraph

11 it pleads that it has a tangible interest in the Fund which it describes in this manner:

"To the extent that a liquidator makes any recoveries in respect of Herald USA or limits or reduces the potential liability of Herald USA, these recoveries and limitation of liability will benefit Natixis and the other shareholders."

3. What are apparently the last set of audited accounts of the Fund as at December 31, 2007 set the NAV at US \$1.8 billion.
4. Substantially all of the Funds's assets were held and managed by an investment advisory business run by Bernard Madoff and called Bernard L. Madoff Investment Securities LLC. I will refer to this entity as "BMIS".
5. The shareholder investors in the Fund were advised in December 2008 that the Fund had invested almost the entirety of its assets in accounts managed by Mr. Madoff:

"Therefore [the advice noted laconically] the Fund has an exposure to Madoff".

6. In February 2009 the directors advised all shareholders that the suspension of the NAV, which was first effected in mid-December, would remain in place indefinitely. The petition says:

"...it being impossible to estimate the value of the NAV, or to ascertain Herald USA's assets pending the investigations into BMIS and Madoff".

7. Paragraph 23 goes on to allege that:

"The petitioners... believe that in the circumstances substantially all of the assets of the Fund and Herald USA have been lost."

8. In paragraph 25 the petition asserts that:

"...it is uncertain what, if any, assets Herald USA, or the Fund, currently have."

9. A redemption request was submitted by Natixis in December 2008 which has not, of course, been honoured.

10. In paragraph 30, the petition asserts that:

"...Herald USA has lost substantially all of its assets. All marketing and investment activities have ceased. No debts are being paid, no redemption requests are being honoured. Herald USA and the Fund have no cash flow and Herald USA and the Fund's principal activities appear to be only the consideration, review and management of their legal options."

11. To the same effect is paragraph 33 which reads:

"The assets of Herald USA and the Fund have almost certainly been completely depleted and lost as a result of the Madoff fraud. The only likely significant assets of Herald USA and the Fund are the legal claims they may have for their losses – against various parties including its advisers, auditors and directors."

12. The directors have resolved to file a claim with the BMIS trustee in the amount of some US \$1.9 billion. There has been some difficulty in effecting that.

13. Under the heading "Solvency" at paragraphs 51 and following, the petition says this:

"...as far as the Petitioner is aware, the Fund has little in the way of liquid assets.

The Fund is facing a number of substantial claims including... [one for some] US \$578 million... and at least three claims against it by investors...

...Any substantial recovery in the BMIS bankruptcy beyond the maximum available US \$500,000 SIPC coverage appears unlikely."

14. The Petitioner in its Skeleton has disavowed reliance on those four paragraphs, but the matter is not quite so simple. It is not open to a party to unilaterally disavow allegations in a pleading; leave of the Court is required. In any event, assuming that leave were granted, the Respondent would be entirely at liberty to adduce evidence of those same factual matters.
15. In summary, this petition on its face demonstrates a considerable uncertainty as to the insolvency of the Fund which necessarily must, in turn, mean that this Petitioner's standing in this action is subject to serious question. I am not without sympathy for the Petitioner because it pleads, in some detail, a lack of relevant disclosure to it by the Fund over the last few months which has placed it in this invidious position.
16. There is another shareholder before me today - Primeo - which owns about 40 percent of the shareholding in this Fund. In contrast, Natixis owns some 1.2 percent.

17. Primeo has its own petition for winding up which is set for hearing in this Court on November 13th, 2009. Primeo is in the advantageous position of being both a creditor and a shareholder, so no question of *locus standi* can arise in that action. Primeo says that today's hearing is premature. It has proposals it wishes to explore between now and November 13th which may at least shed some light on the question of solvency. Moreover, if the Fund is solvent or does prove to be solvent, the views of the other contributories will be of interest to the Court in making what is, after all, a discretionary order. The other shareholders have not been told about today's hearing and may well be unaware of it.
18. In these circumstances, and with the concurrence of the Fund itself, I am prepared to adjourn this petition to November 13th for hearing provided that the Fund agrees now to provide what information it can to this Petitioner. I am prepared to make, with the concurrence of the Fund, some appropriate directions to achieve that. I will start by making a direction that notice is to be provided by the Respondent to all shareholders of the November 13th hearing.

Dated this 9th day of October, 2009

Henderson, J.
Judge of the Grand Court