BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/322
BETWEEN:

WESTERN UNION INTERNATIONAL LIMITED

Applicant

and

RESERVE INTERNATIONAL LIQUIDITY FUND LTD

Respondent

Appearances: Mr Richard Hacker, QC for the Applicant
Mr Paul Webster QC and Mr Kerry Anderson of O'Neal Webster for the Respondent
Mr Eliot Simpson of Appleby for Caxton International Limited and Caxton Equity Growth Holdings LP
Ms Jacqueline Wilson and Ms Lynette Ramoutar for the Financial Services Commission

JUDGMENT

[2010: 18 January; 26 January]

(Application for appointment of liquidators on just and equitable grounds – loss of substratum - whether applicant creditor or member – whether creditor entitled to appointment on loss of substratum grounds – investors proceeding in New York courts – company desiring to distribute to remaining members in accordance with direction of New York court – Financial Services Commission supporting company and opposing appointment of liquidators in BVI until New York proceedings concluded – whether appointments to be made)

[1] **Bannister J [ag]:** On 18 January 2010 I appointed liquidators over Reserve International Liquidity Fund Limited ('the Company') on the application of Western Union International Limited ('WU'). These are my reasons for that decision.

[2] The Company was incorporated in the BVI on 15 March 1990 and is currently registered under the Business Companies Act, 2004 ('the 2004 Act'). It carried on business as a mutual fund under the Mutual Funds Act 1996 (as amended). It operated as a money market daily liquidity fund, aiming (but not guaranteeing) to maintain a NAV per share of US$1. It is regulated by the Financial Services Commission ('FSC'). It invested funds received from investors (including WU) in fixed interest securities, including commercial paper and notes issued by Lehman Brothers Holdings Inc ('Lehman'). Investors invested by acquiring shares in the Company, redeemable in accordance with the provisions of the Company's Articles of Association. The Company had power under its Articles in certain specified circumstances to suspend calculation of NAV and the issue and redemption of its shares.

[3] The directors of the Company are Bruce R Bent, Arthur T Bent III and Bruce R Bent II. Its administrator is Reserve Management Company Inc and the Company is part of a group (in the non-technical sense) of companies engaged in similar activities and all controlled by the Bent family, the most significant of which is The Reserve Primary Fund ('the group', 'the Primary Fund'). The management of the group was carried out in New York. The Company conducted no business within the BVI and had no assets here. Its remaining funds, amounting to some US$307 million, are currently held in a bank in Boston, Mass.

[4] On Monday 15 September 2008 it was announced that Lehman had filed for bankruptcy in the United States. The Company was immediately swamped with requests by investors for redemption of their shares. Although the precise sequence of events is not completely clear, the Company claims, by resolution passed on 23 September 2008, to have suspended all redemptions with effect from 16 September 2008 and to have suspended payment of all redemption proceeds. That, at any rate, is what the Company claimed in a press release of 24 September 2008. In a memorandum of law filed in an interpleader complaint in the United States District Court for the Southern District of New York ('the US District Court') it is asserted on behalf of the Company that by a board resolution of 23 September 2008 the Company suspended calculation of NAV as of 16 September 2008 and suspended all redemptions as of 22 September 2008. In an affidavit sworn in BVI proceedings in opposition to a statutory demand served by WU on the Company on 23

September 2008 (but subsequently withdrawn) Bruce R Bent II says that the Company became unable to calculate NAV on an accurate or timely basis after 5 pm ET on 16 September 2008. In the same affidavit, Mr Bent also says that redemption requests received after the new of Lehman's bankruptcy broke on 15 September 2008 were initially met, but that because of the size and volume of the requests it became impossible to do so after 11.31 am on that day. It will be seen that the Company does not suggest that it suspended redemptions with effect from any time earlier than 16 September 2008.

[5] Among those submitting redemption requests to the Company on 15 September 2008 was WU. Its unchallenged evidence is that at 11.30 ET on that day it submitted, through an agency, a request for the redemption of 50 million shares. Fifty nine minutes later it submitted a request for the balance of its holding, some 248 million shares. The Company accepts that the requests were received on 15 September 2008 and there is in evidence an e-mail from an officer or employee of the company sent to WU on the same day confirming that the reference numbers on the wire transfers (sc. by which the proceeds of redemption were to be transmitted) would be sent to WU once [the funds had been] transmitted. NAV was calculated at US$1 at close of business on 15 September 2008.

Is WU a creditor of the Company?

[6] On these facts WU claimed that it was a creditor of the Company in the sum of some US$298 million. In fact, subsequent *pro rata* distributions made to members of the Company have reduced the amount of the Company's claim to some US$20 million. The Company denies that WU has redeemed or that it is, for the purposes of its application to appoint liquidators, a creditor of the Company.

[7] First, the Company says that although the requests were received on 15 September 2008, the redemption process was incomplete and remains incomplete. It relies on the (somewhat contradictory) evidence as to suspension of calculation of NAV and of redemptions and payments which I have summarized above. In order to decide this issue it is necessary to consider the relevant provisions of the Company's Articles of Association. Their material parts read as follows:

‘REDEMPTION OF SHARES

60. Subject to the previsions of the Act and of these Articles, the company shall, upon receipt by it or its authorized agent of a redemption request by a Member, in such form as the directors may from time to time determine, redeem on a Dealing Day all or, with the consent of the directors evidenced by a Resolution of Directors, a portion of the shares registered in the name of such Member at not less than the Redemption Price.

….

61. The Redemption Price of share being redeemed shall be their aggregate Net Asset Value per share as calculated at the close of business on the Dealing Day on which such shares are redeemed less any redemption charges as may be provided in the Prospectus. Requests for redemption on a Dealing Day will generally be honoured within seven days of receipt if they are received by the Company or its authorized agent in proper form, before 5:00 pm Eastern Time on a Dealing Day and if all conditions as to the validity of the redemption request have been fulfilled or waived prior to the Dealing Day.

62. Upon the redemption of a share, the holder of such share shall cease to have any rights with respect thereto (except the right to receive the redemption proceeds and the right to receive any dividend declared but unpaid prior to the redemption being effected).

63. No shares shall be redeemed during any period when the determination of Net Asset Value of shares is suspended pursuant to Regulation 76. Any Member who has made a redemption request which cannot be honoured due to suspension of asset valuation may withdraw such redemption request, and such withdrawal shall be effective if received by the Company prior to the termination of the suspension period. Shares for which a redemption request is made and not withdrawan shall be redeemed on the first Dealing Day following the termination of the suspension period. Except as provided herein, redemption requests are irrevocable.

….

65. Any redemption request received after 5:00 pm Eastern Time on a Dealing Day or received on a day other than a Dealing Day may be deemed by the directors to have been received and will be processed on the next following Dealing Day.

….

DETERMINATION OF NET ASSET VALUE

71. The Net Asset Value of the Company's shares, for the purpose of issuing and redeeming shares, is determined by or under the direction of the directors as of 5:00 pm Eastern Time each applicable Dealing Day and on such other occasions as the directors may determine, and is equal to the fair value as at such date of all the securities, cash and other assets of the company attributable to a particular share class less all the liabilities of the Company attributable to that class divided by the number of shares of that class outstanding.

….

78. The directors may, at any time and from time to time, suspend the calculation of Net Asset Value, and the issue and redemption of any of the Company's shares, for the whole or any part of any period under the following circumstances:

    (a) when any securities exchange, board of trade or organized interdealer market on which a significant portion of the Company's assets is regularly quoted or traded is closed or trading thereon has been restricted or suspended;
    (b) whenever, as a result of events, conditions or circumstances beyond the control or responsibility of the Company, disposal of the assets of the Company or other transactions in the ordinary course of the Company's business involving the sale, transfer, delivery or withdrawal of securities or funds is not reasonably practicable without being detrimental to the interests of the Company or the Members;
    (c) if it is not reasonably practicable to determine the Net Asset Value of the shares on an accurate and timely basis; and
    (d) if the directors have resolved to dissolve or liquidate the Company.'

[8] Mr Hacker QC, who appeared for WU, submitted that the combined effect of Articles 60, 62 and 65, as set out above, was that shares referred to in a request for redemption are redeemed, if the request is received before 5 pm ET on a dealing day, on the day of

receipt. He submitted that the provision in Article 61 that requests for redemption will generally be honoured within seven days of receipt refers to honouring by way of payment and is to be contrasted with the word 'processing' in Article 65, which clearly refers to the effecting of the redemption itself. I accept these submissions. It follows that all 289 million shares were redeemed on 15 September 2008 at a NAV of US$1. The earliest date for the suspension of the calculation of NAV contended for by the Company is 16 September 2008 and that was too late to prevent the redemption of WU's shares on the previous day.

[9] Although the board claimed to have exercised a power to suspend payment of redemption monies, there is no such power in the Articles of Association, but then neither is there any specific date after the redemption has been effected within with the Company is obliged to remit the redemption proceeds. The fact that the redemption proceeds have not been paid does not, in my judgment, mean that the shares have not been redeemed, nor does it mean, as submitted by Mr Paul Webster QC, who appeared, together with Mr Kerry Anderson, for the Company, that the redemption process is incomplete, except in the sense that WU remains unpaid. The redemption was complete when the Company accepted the request on 15 September 2008. The fact that WU has yet to receive the redemption proceeds has no bearing on that fact. Article 62 of the Company's Articles of Association puts that beyond doubt, by distinguishing between the event of redemption and the subsequent receipt of the redemption proceeds. The position is not affected, either, by the fact that under its statutory powers the FSC on 17 October 2008 suspended the redemption of shares by investors and the payment of the proceeds of the redemptions to investors by the Company.

[10] It follows, in my judgment, that WU ceased to have any rights 'with respect to' its shares in the Company, other than the right to receive redemption proceeds (and any unpaid dividends – the point does not arise), by at the latest close of business on 15 September 2008.

The effect of section 197 of the Insolvency Act, 2003

[11] Mr Webster QC submits, however, that even if that is the case, still WU is not a creditor of the Company. He reaches this conclusion by the following route.

[12] First, he relies upon the definition of 'creditor' in section 9(1)(a) of the Insolvency Act, 2003 ('the 2003 Act') which provides that a person is a creditor of another if he has a claim against the debtor which would be admissible in the liquidation of the debtor. He then points to section 197 of the 2003 Act, which is in the following terms:

> '197. Dividends payable to member
>
> A member, and a past member, of a company may not claim in the liquidation of the company for a sum due to him in his character as a member, whether by way of dividend, profits, redemption proceeds or otherwise, but such sum is to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves.'

It is helpful at this point to set out also section 62(1) of the 2004 Act:

> 'Shares redeemed otherwise than at option of company
>
> 62.(1) If a share is redeemable at the option of the shareholder and the shareholder gives the company proper notice of his intention to redeem the share
>
> (a) the company shall redeem the share on the date specified in the notice, or if no date is specified, on the date of the receipt of the notice;
> (b) unless the share is held as a treasury share under section 64, the share is deemed to be cancelled; and
> (c) from the date of redemption, the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.'

[13] Mr Webster QC submits that WU is a member, or at any rate a past member of the Company and is seeking to recover the proceeds of the redemption of its shares, which falls squarely within the language of section 197. Therefore, he submits, WU cannot claim for the redemption proceeds in the liquidation of the Company. It follows, he argues, that it cannot be a creditor of the Company, because it cannot satisfy section 9(1)(a).

[14] In my judgment this is a misapplication of section 197 to the facts in this case. The redemption proceeds are not due to WU in its character as a member of the Company. WU ceased to be entitled as a member of the Company on 15 September 2008. It is true that it retains the right to receive the redemption proceeds and that it is not a misuse of language to describe that right as a right 'in respect of its shares', but that right only arose because it had disposed of the shares by way of redemption. The payment which became due to WU on redemption was a payment made in consideration of its surrendering its rights as a member – selling them, in effect, back to the Company. When the shares were disposed of by WU in this way, the so called statutory contract comprised by the Articles of Association and any applicable provisions of the relevant legislation was brought to an end. WU claims the price not as a member of the Company, but as someone which the Company has agreed to pay precisely because and only because it has ceased to be a member of the Company. It follows that WU's claim to the redemption proceeds (as opposed to its original request to redeem) is not made in its character as a member of the Company. WU claims, as section 62(1)(c) of the 2004 Act provides that it must, as a creditor of the Company. There is thus no conflict between section 197 and section 62 in respect of claims to redemption proceeds.

[15] Obviously, if a member holding redeemable shares attempted to commence or continue an as yet uncompleted redemption process after liquidation had commenced, section 197 would preclude him from claiming the proceeds in competition with creditors. That is because he would be claiming in his character as a member. But a member who had completed the process of redemption before the commencement of the liquidation but had yet to receive the proceeds would, for the reasons I have given, be claiming in his character as a seller entitled to the price, not in his character as a member, and would thus be entitled to claim in competition with other unsecured creditors of the company.

[16] If this were not so and if a member who had redeemed his shares before the commencement of the liquidation were not able to claim as a creditor, he would have no locus at all in the winding up. He would not (on this argument) be a creditor but (if the articles of association under which he had redeemed were anything like those of the Company's, which ordinarily they would be) he would have ceased to be a member. He

would therefore be without rights of any sort in the liquidation. This demonstrates, in my judgment, (and with respect to the careful submissions of Mr Webster QC) the fallacy underlying the construction of section 197 for which he contends.

[17] This analysis is unaffected by the reference in the opening words of section 197 to past members. For the reasons I have given, the redeemed member's claim to the redemption proceeds is not made in his character as a member. The fact that in the past he had, *ex hypothesi*, been a member does not alter the position. The critical question is the nature of the claim made by the member or past member, not whether the person claiming can be described as a member or a past member. The reference in section 197 to past members is intended, in my judgment, to catch, by way of example, transferors of shares who have reserved the right, against their transferees, to dividends, etc, referable to the period during which the transferor held the shares.

[18] I do not find **Soden v British & Commonwealth Holdings,** whether in the Court of Appeal[1] or in the House of Lords[2] of assistance in this context. First, because with the greatest of respect it does not seem to me that the appellant's contention in that case bore the slightest scrutiny, so that much of the analysis, particularly in the Court of Appeal, was unnecessary to the decision. Secondly, because the UK provision on which the decisions were based [3] differs significantly from section 197. Specifically, the UK statute operates by deeming certain liabilities of the company in liquidation not to be debts of the company. Section 197, by contrast, operates by precluding members and past members from making certain types of claim in the liquidation. And, thirdly, because, the UK legislation contains separate express provisions[4] subordinating redemption proceeds to the claims of 'external' creditors in a winding up. This fact both suggests that the UK legislature did not consider that s.74 of the Insolvency Act 1986 had that effect as it stood and highlights the absence of any similar provisions in sections 59 to 63 of the 2004 Act.

[19] In my judgment, therefore, WU is a present creditor of the Company whose claim is unaffected by section 197 and is entitled to make this application as such. Of course, if the

[1] [1997] 3 WLR 840
[2] [1998] AC 298
[3] s.74 Insolvency Act 1986
[4] s.735 Companies Act 2006

Company's submissions were correct, WU would remain a member and be entitled to apply in that capacity. It therefore has locus whichever side is right.

The grounds for the application

[20] WU does not found its application on grounds of insolvency. Indeed, it could not, on the facts of the case, do so. Instead, it says that it is just and equitable that the Company be wound up because it has lost its substratum. I do not think that Mr Webster QC seriously challenges the contention that the Company's substratum, in the sense explained in **Citco Global Custody NV v Y2K Finance Inc**[5], has been lost. The Company admits that it has not been able to trade in the manner contemplated by its offering memorandum and memorandum and articles of association. Its directors say that they are in no position to wind down the fund and distribute assets to members who have exercised their rights to redeem because, as I understand it, they claim to be unable to resolve a supposed conflict between investors like WU, who are claiming to be entitled to be paid out on the basis of NAV struck when they redeemed and others (such as Caxton International Limited ('Caxton') and Caxton Equity Growth Holdings LP, who appeared by Mr Eliot Simpson to oppose the application) who contend for a pro rata distribution. Of the US$307 million remaining available to the Company, the evidence is that some US$240 million would have to be applied (in addition to the *pari passu* distributions which they have already received) to satisfy claims, if made good, of investors who say that they redeemed on 15 or 16 September 2008 and are in consequence entitled, as a matter contract, to be paid out at a NAV of US1$. Various calculations are given, but it seems clear that a final distribution recognizing those who had redeemed when the NAV was calculated at US$1would leave little over for others. Continuing to distribute *pro rata*, however, would probably result in all investors receiving about US$0.95 in the dollar. In proceedings in the United States, to which I will have to refer in more detail later, the Company has told the United States District Court that it cannot liquidate the fund by making a final *pro rata* distribution without exposing itself to claims from investors in the position of WU.

[21] On these facts, it seems to me clear that the Company not only has no commercial future but that its directors and managers feel themselves unable, without the protection of a

[5] BVIHCV 2009/0020A (25 November 2009)

court order, even to conduct redemptions to close. The Company has no business and its management is paralysed. Accordingly, I find as a fact that the Company has lost its substratum.

Discretion

[22] Mr Hacker QC submitted that once this point is reached I have no alternative but to appoint liquidators. He relied upon **In re Bristol Joint Stock Bank**[6] where Kekewich J is reported as having said that if the court comes to the conclusion that a company has lost its substratum, it is bound to exercise its jurisdiction to wind up. I do not believe that that represents the law in England and it certainly does not represent the law here, where section 167(1)(b) of the 2003 Act gives me an express discretion to dismiss a liquidator application even if a ground for appointment has been proved.

[23] Mr Webster QC submits that even if the loss of substratum ground is made out I should exercise my discretion against making an appointment, for three principal reasons.

[24] The first (I hope I summarise it accurately) is that it is strange to find a creditor (or a person claiming to be a creditor) relying upon a 'pure' just and equitable ground, such as loss of substratum. He referred to **Levy v Legal Services Commission**[7]. That case decided that while a person with a debt that would not be provable in an English (or Scotch) bankruptcy has locus to petition for a bankruptcy order, it is impossible to conceive (or at any rate next to impossible to conceive) of circumstances under which the court would make such an order on the petition of such a person. As I understood him, Mr Webster QC says that this shows that I should at any rate be wary of appointing liquidators on 'pure' just and equitable grounds at the instance of a creditor. If I have correctly understood Mr Webster's submission, then all I can say is that I do not agree with its premise and do not think it derives any support from **Levy**. I can see nothing strange in a creditor whose debt cannot be repaid precisely because a company has ceased to trade and whose management has become paralysed, relying on those matters as grounds for winding up. **Levy** is not to the contrary. **Levy** decides that a person who has no status to

[6] (1890) 44 Ch D 703
[7] [2001] 1 All ER 895

claim in a winding up will not be granted a bankruptcy order, even if he has locus to apply for one. I have already decided that WU has status to claim in the liquidation of the Company. **Levy** is not in point.

[25] Mr Webster QC's second and third grounds are connected. Before dealing with them I must return to the factual background.

[26] On 6 October 2008, Caxton started proceedings in the New York County Supreme Court seeking an order that the Company distribute its funds on a *pro rata* basis. Between 1 October 2008 and 17 October 2008, as I have mentioned, the FSC received complaints from investors in the Company making allegations that favoured investors had been tipped off by management about the possibility of a run on the Company. On 17 October 2008 the FSC issued a directive to the Company under section 40 of the Financial Services Commission Act 2001 requiring the Company to suspend redemptions and the payment of redemption monies.

[27] On 6 November 2008 the US District Court appointed one Denis O'Connor ('Mr O'Connor') in the Caxton proceedings as 'Temporary Supervisor'. I was not directed to evidence as to the precise status and role of Mr O'Connor, but on 15 April 2009 he submitted a report to Judge Gardephe, who presides in the US District Court, which was critical of the Company's supervision and management.

[28] Commencing in November 2008 the Company began a process of submitting draft liquidation plans to the FSC with a view of entering voluntary liquidation. Although a second liquidation plan was submitted on 11 September 2009, no such plan has been approved by the FSC. In January 2009 the FSC amended its first directive to enable the Company, with the prior written approval of the FSC, to make interim distributions. As mentioned earlier, three such distributions have been made. All such distributions have been made on a *pari passu* basis and have been accepted by some investors, including WU, without prejudice to their claims to be entitled to a payment based on a NAV of US$1.

[29] On 23 March 2009 another investor, VeriSign SARL ('Verisign') started proceedings against the Company in the New York County Supreme Court seeking payment based on a NAV of US$1. There is no evidence that any significant steps were taken in either set of

New York County Supreme Court proceedings before WU served this application on the Company on 22 September 2009.

[30] On 5 May 2009 the US Securities and Exchange Commission ('the SEC'), started proceedings against the Primary Fund, making serious allegations against its management and seeking orders against two members of management (identified only as 'Bruce Bent SR' and 'Bruce Bent II') that they 'disgorge their ill-gotten gains' received as a result of alleged violations of various US statutes and that they pay penalties under those statutes.

[31] On 31 August 2009 Reserve Management Company, Inc the associated company which managed the Company, submitted a claim for some US$3.3 million of management fees covering the period from 15 September 2008. On 2 September 2009 the FSC prohibited the Company from paying professional fees without its consent.

[32] The present application was issued on 16 September 2009 and, as I have said, served on the Company on 22 September 2009. On the same day, the Company paid its New York attorneys US$875 thousand without the FSC's consent.

[33] On 27 October 2009 the Company commenced what have been described as interpleader proceedings in the US District Court. It has joined Caxton and VeriSign and it seems that the proceedings are ultimately intended to bind all the Company's three thousand or so investors. In the interpleader proceedings the Company seeks to be allowed to place all its funds in the custody of the US District Court; to enjoin, once a final plan of distribution has been approved, all proceedings against the Company or its directors; to obtain a discharge of the Company and its directors from all liabilities to investors; and an order that the investors interplead and settle as between themselves their rights in the final distribution. It is clear that if the interpleader proceedings continue, the Company will press for the US District Court to direct that the Company's remaining assets be distributed to investors on a *pro rata* basis.

[34] On 3 November 2007 the FSC gave notice of intention to appear on the application which is before me. Although the FSC is neither a member nor a creditor of the Company, there has been no objection to its appearing and making submissions on this application and I

have had the benefit of helpful submissions from Miss Jacqueline Wilson who, together with Miss Lynette Ramoutar, appeared for the FSC at the hearing.

[35] On 20 November 2009 VeriSign lodged a Response to Amended Order to Show Cause in the interpleader proceedings in the US District Court asking that they be struck out on the basis, first, that they are not true interpleader proceedings; second, because of a challenge to venue; and third, because the US District Court should defer to the liquidator application then on foot and which I have just decided. Finally, VeriSign said that payment of the Company's funds into Court could not take place without the consent of the SEC.

[36] On 25 November 2009 Judge Gardephe handed down his Memorandum Opinion in the Reserve Primary matter. Relying upon powers which he derived from section 21(d)(5) of the federal Securities Exchange Act of 1934, which applies only to actions or proceedings brought by the SEC, he directed that the funds available in that matter to satisfy investors claims be distributed *pro rata*, regardless of the strict contractual rights of particular investors.

[37] On (I think) 7 December 2009, Judge Gardephe gave the FSC permission to make submissions in the interpleader proceedings. In a written submission dated 4 January 2010 the FSC refers to the fact that ordinarily, given the circumstances affecting the Company, matters would be resolved in the context of a liquidation in the BVI. Nevertheless, the FSC supported the interpleader proceedings as the appropriate primary forum for resolving outstanding disputes and completing the distribution of the Company's remaining assets to shareholders. The FSC's reasons as stated in the written submission were, in summary,

> (1) that there would be questions about the enforcement within the US (where the Company's assets are situate) of orders made by this Court in the liquidation. For reasons which will appear, I shall refer to that as 'the Bear Stearns point';
>
> (2) that the FSC trusts the US District Court to resolve the question as to how the funds should be distributed – *pro rata* or in accordance with the contractual entitlement of individual investors; and

(3) that the FSC is, if not satisfied, at any rate reassured by certain amendments made by the Company in its proposals ('the Term Sheet') for final distribution.

[38] On 8 January 2010 there was a hearing before Judge Gardephe in the interpleader proceedings. Counsel for the FSC addressed the Judge. He submitted that the US District Court was the proper forum for, in effect, conducting the winding up of the Company. He submitted that the Bear Stearns point at any rate threatened to disrupt the enforcement in the US of any orders made in a liquidation by this Court. It is unclear from the transcript whether it was also being submitted that the conflict between a *pro rata* distribution and one founded on strict contractual rights would be decided in accordance with BVI law.

[39] Finally, although the details are not entirely clear, it seems that the Company's most recent proposals to the US District Court are that there should be an independent monitor to oversee the distribution process; that distribution should be *pro rata*; that the Company should be protected by way of injunction against all claims and that its officers should be similarly protected against all claims for which the Company might be obliged to indemnify them (in essence, all claims not involving dishonesty or bad faith); that, provided it had majority investor support, this injunction be extended to cover all claims against officers, whether or not involving dishonesty or bad faith; that if the majority of investors do not vote to extend the injunction a fund of US$50 million [8] be withheld to cover defence costs of officers for claims against which they are not indemnified together with management and adviser fees and other operating costs; but that if the injunction is 'extended' that fund shall be reduced to US$21 million; and finally, that some US$5 million be withheld to pay the fees of the monitor and other expenses.

[40] Mr Webster QC, with the support of Miss Wilson for the FSC, says that the continuation of the interpleader proceedings in the US District Court offers the best outcome for the Company and its investors. He relies principally on the following grounds.

[8] the most recent figure may in fact be US$40 million

[41] First, he says that the US District Court, if satisfied that it has jurisdiction to entertain the interpleader proceedings[9], has the power to and is likely to grant an injunction barring all suits against the Company, thus protecting its assets and saving it the considerable costs of having to defend itself against multiple claimants in multiple proceedings. He points, correctly, to the fact that the Company's only asset is the money in the bank in Boston and he submits that that asset is vulnerable to an uncoordinated scramble by investors which only the US District Court can effectively enjoin.

[42] Hand in hand with this submission goes a submission that an order of this Court appointing liquidators would not enable the appointees to obtain the assistance of the US Courts in getting in and protecting the Company's assets. Thus, Mr Webster QC submits, it is essential for an orderly distribution to be guaranteed that it take place under the supervision of the US District Court. For this submission Mr Webster QC relies upon **In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited** [10], a decision of Judge Lifland in the United States Bankruptcy Court for the Southern District of New York, which was subsequently affirmed on appeal[11] ('**Bear Stearns**'). Mr Webster QC says, correctly, that that case decides that Chapter 15 recognition would be denied to foreign representatives of a company (in **Bear Sterns** they were liquidators appointed by the Grand Court of the Cayman Islands) where the evidence was sufficient to displace the presumption that the company's centre of main interests ('COMI') was its place of registration or incorporation. Judge Lifland decided that since Bear Stearns conducted no business (indeed was precluded from conducting any business) and had no assets in the Cayman Islands its COMI was in the United States, where its business was conducted and where its assets were situated. The authority of Judge Lifland in this area of international insolvency law is of the highest, since he was a participant in the drafting of the UNCITRAL Model Law. Mr Webster QC says, correctly, that the facts in **Bear Stearns** are indistinguishable from those in the present case and that the prospects of liquidators appointed in this Court obtaining recognition and assistance from the US Bankruptcy Court are negligible or worse. So, he submits, there would be no realistic prospect that

[9] this has yet to be decided
[10] 374 B.R. 122
[11] 389 B.R.325

liquidators appointed in this Court would obtain any help in the United States to enjoin a scramble for assets and accordingly the only hope for an orderly distribution is for me to let the US interpleader proceedings take their course and refrain from appointing liquidators, or at least postpone making any appointment until after the interpleader proceedings have either run their course or been dismissed on jurisdictional grounds. In this, he is supported by the FSC.

[43] On this basis Mr Webster QC submits that WU has an alternative (and, as he would say) preferable remedy available to it in the shape of the US District Court proceedings because only in the context of those proceedings will an orderly distribution take place. He submits that I am obliged to take the availability of this remedy into account when deciding whether to make the appointments and that I should follow the statutory hint embodied in section 167(3) of the 2003 Act and leave WU to pursue its entitlements in the context of those proceedings.

[44] I should add, if that has not already become plain, that both Mr Webster QC and the FSC are keen that the US District Court (on the assumption that the interpleader proceedings go the distance) should direct a distribution on a *pro rata* basis. Mr Webster QC said in the course of his submissions that this was the only equitable way in which to proceed to distribution. He adds that it is to be inferred that the 'vast majority' of the Company's 3,000 or so investors are in favour of such a result.

[45] Mr Hacker QC points out that while the effect of **Bear Stearns** is as Mr Webster QC contends, it leaves unaffected section 1509(f) of the US Bankruptcy Code (11 U.S.C.). Indeed, Judge Lifland was at pains to stress this in his first instance judgment. The effect of section 1509(f), as summarised by Judge Lifland, is that the failure of a foreign representative to obtain recognition under Chapter 15 does not affect any right he might have to sue in a court in the United States to collect or recover a claim which is the property of the debtor. It follows that liquidators appointed by this Court have both title and status to collect the Company's credit balance at the bank in Boston. If they do this, they will have disposed of any difficulty flowing from their inability to obtain the assistance of the US Courts in enjoining a scramble for assets. There will be no need for any injunction

from the US Courts if the joint liquidators take the Company's only asset into their possession and control.

[46] Of course, it is perfectly possible, although there is no evidence to this effect, that creditors or investors have already obtained rights over this credit balance and **Bear Stearns** shows that if that has happened the joint liquidators are unlikely to get any help from the US Courts if they seek to avoid those rights. But it does not seem to me right for this Court to refrain from appointing liquidators simply because this possibility may exist. Exactly the same might have happened had the bank balance been situated within the BVI and had astute creditors perfected remedies against it before the appointments had been made.

[47] That, it seems to me, disposes of any practical difficulty presented by **Bear Stearns**.

[48] It still leaves the question whether the interpleader proceedings represent an alternative remedy such that I should leave WU to take its chance in those proceedings and refrain from or defer the appointment of liquidators on WU's application. I have no doubt that I should not, for the following reasons:

(1) As an undoubted creditor in a still significant sum WU has a right, subject to the Court's overriding discretion, to have the Company wound up. It seems to me to be quite wrong in principle for this Court to deny WU that right purely upon the grounds that there is available in some friendly but nevertheless foreign jurisdiction a proceeding which has, subject to the jurisdictional challenge currently being made, the object of distributing the Company's assets among investors;

(2) The objection is immeasurably the stronger where it is clear that (if the Company, supported by the FSC, gets its way in the interpleader proceedings and assets are distributed *pro rata*) WU will be deprived of its contractual rights under the Company's Articles of Association and be compelled to accept a fraction only of what it is entitled to receive in a liquidation conducted in accordance with the law of the Company's incorporation;

(3) It seems to me of the highest importance that those who become creditors of, or who invest in, companies incorporated under the laws of the BVI, as well as those who

finance them, should have complete confidence that if the company in question gets into difficulties, their rights will be determined in accordance with the law of this jurisdiction. Although I accept that business men are unlikely to spend their waking hours reminding themselves of the law governing the rights which they have in respect of a BVI incorporated company, at the end of the day they are, it seems to me, entitled to have the confidence and certainty that this court will deal with their claims strictly in accordance with the law of this, and not that of some other jurisdiction. In my judgment, this confidence will be weakened if the perception is allowed to be gained that the Courts here are prepared to decline or defer jurisdiction in insolvency matters in favour of foreign courts;

(4) In this regard, I note that while the FSC states in its written submissions that it is in favour of a liquidation taking place here *at some time in the future* and although in submissions made on its behalf to Judge Gardephe on 8 January 2010 it has said that it wishes the disputes between a distribution on a strict contractual basis and one carried out on a *pro rata* basis to be determined under BVI law, there can in my judgment be no distribution on a *pro rata* basis (which is the basis for which the FSC contends – see paragraph 12 of its written submissions) under BVI law unless either every single remaining investor stands in precisely the same contractual position to the others as against the Company, which is plainly not the case, or a scheme of arrangement is implemented under section 179A of the 2004 Act. With great respect to the FSC, it seems to me that it is impossible to square this particular circle. Either the Company is wound up here and there will be no overall *pro rata* distribution unless a scheme of arrangement is implemented; or the US District Court orders a *pro rata* distribution, in which case BVI law will not have been applied. As I hope I have made clear, I am in no doubt that it is the former of these two outcomes which this Court must be astute to bring about;

(5) To these concerns may be added that quite apart from the question as to what basis should be used for the remaining distributions to investors, the present proposals in the interpleader proceedings involve the retention (and possible dissipation) of a large reserve of assets to pay directors' defence costs if they are sued by investors or other

who think that they may have claims against them. The maintenance and disposal of such a reserve is wholly foreign to a liquidation carried out in accordance with the provisions of the 2003 Act and provides yet another reason why the Company should be wound up here and wound up sooner rather than later.

[49] In my judgment, when the 2003 Act speaks, in section 167(3), of an alternative remedy, it is referring to a remedy which in the opinion of the Court is likely to afford to the applicant at least an equivalent by way of alternative relief to what the applicant would be likely to obtain on a winding up. For the reasons set out in the preceding paragraph, the current proposals in the interpleader proceedings would afford WU, if it was left to participate in them, relief inferior to that to which it is entitled to in a liquidation conducted here under the 2003 Act. In my judgment, therefore, there is no alternative remedy available to WU within the meaning of the 2003 Act.

[50] Mr Webster QC has invited me to infer from the fact that the Company has some 3,000 investors that the vast majority are in favour of a *pro rata* distribution. It is true that two of them, the Caxton companies which have appeared to oppose the application, are in favour of a *pro rata* distribution. Of the remaining 2,997 nothing has been heard and I decline to draw from their silence the inference which Mr Webster QC invites me to draw.

[51] Finally, I should mention that both Mr Webster QC and Miss Wilson urged upon me that if, as I have done, I were to appoint liquidators, one of them should be Mr O'Connor. I see that circumstances might arise where Mr O'Connor's expertise and experience of this matter could be of assistance to the joint liquidators. It seems to me, however, that they will have ample power under my order to engage his services if that appears to them to be advantageous and I think I will leave it to them to do that rather than make a formal appointment at this stage.

Commercial Court Judge

26 January 2010