CAYMAN ISLANDS

GRAND COURT

In the Matter of the Washington Special Opportunity Fund, Inc. (Unreported, 25 February 2016)

CONTRIBUTORY'S WINDING UP PETITION - JUST AND EQUITABLE - LOSS OF SUBSTRATUM - OPPRESSION, WILFUL DISREGARD AND UNDERMINING APPLICANT'S RIGHTS AND INTERESTS - LACK OF PROBITY AND LOSS OF CONFIDENCE IN MANAGEMENT - INVESTIGATION OF COMPANY'S AFFAIRS

The Learned Judge, Mangatal J, dismissed the windingup petition after considering all the affidavit evidence and cross examination of the Parties (which was ordered previously in December 2015 with reasons to follow which are set out below). The Petitioner's reasons for the Fund to wind up on just and equitable grounds were: (a) loss of substratum; (b) oppression, wilful disregard and undermining of the Petitioner's and the Investor Group's rights and interests; (c) lack of probity and loss of confidence in management; and (d) the need for an independent investigation.

Mangatal J adopted the approach set out in *Banco Economico S.A.-v- Allied Leasing and Finance Corporation* [1998] CILR 92 in which the Learned Smellie J (as he then was) referred to *In Re ABC Coupler & Engr Ltd* [1962] 1 WLR 136 and considered by Templeman J in *In Re Armvent* [1975] 1 WLR 1679 that *"where grave charges"* are made *"against individuals the court could not in the exercise of its discretionary jurisdiction be satisfied with prima facie evidence but require the petitioner to substantiate his case more fully…which would require where practicable the evidence of witnesses with direct knowledge…and upon which they could be cross examined…".* Further, Mangatal J referred to CWR O. 3, R. 11(2)(h) in which the Court may give directions regarding cross examination and that the true nature of the issues in the case is what must be considered.

Washington Special Opportunity Fund, Inc. (the "Fund") was an exempted limited Cayman Islands Company and Xena Investments Limited, an exempted Cayman Islands company, which holds non-voting participating Class R shares in the Fund (the "Petitioner").

By way of background due to the a large number of redemption requests in June and September 2008, the Directors of the Fund sought to manage the liquidity of the Fund and to slow the pace of redemption in which it was resolved to, *inter alia,* convert the balance of shares that were not redeemed to Class R shares which would be redeemed on a slow pay basis as assets were liquidated. However, no timetable was put in place in this regard. The articles of association were amended accordingly with consent of all the Shareholders on 30 July 2008, and at the hearing of the Petition, the validity of the amendment of the articles was unchallenged.

A winding up petition was served on the Fund on 18 September 2015 on the basis it was just and equitable to do so., At the hearing of the Petition, it was argued that the Petitioner is supported by legal and/or beneficial interest in a majority of the participating shares in the Fund as they held 53% of the Class R shares. It was undisputed that the Fund was solvent on a cash flow basis.

In relation to loss of substratum the Petitioner submitted that the Fund was not viable and that the Petitioner was entitled to have the Fund liquidated by professional liquidators and not by the Manager of the Fund. Great reliance was placed on *Belmont*

Asset Based Lending Limited [2010] (1) CILR 83 ("Belmont") along with, *inter alia*, *Re Freerider* [2010] 1 CILR 486*;* In *Re Wyser-Pratte Eurovalue Fund Ltd.* [2010] (2) CILR 94 ("Wyser-Pratte") and In *Re Heriot African Trade Finance Fund Ltd.* [2011] (1) CILR 1. The Petitioner submitted that as a result of the "soft wind-down" of the Fund, it lost is substratum.

It was argued on behalf of the Fund, that Belmont should not be followed and that the current state of the law in the Cayman Islands is unsatisfactory in which it was submitted that there appears to be two different tests for loss of substratum, namely, one in relation to funds and the other with respect to other companies. Case law in BVI also referred to Belmont and Wyser-Pratte which were not followed by Bannister J who held that there must be a universal principle and the introduction of *"*viability*"* is unhelpful [see *Aris Multi-Strategy Lending Fund Ltd. -v- Quantek Opportunity Fund* (15 December 2010)]. However, *Re ABC Company (SPC) -v- J & Company Ltd.* [2012] (1) CILR 300 was referred to and relied upon on behalf of the Fund in which the Court of Appeal struck out a petition, as the amendment of articles gave the Company power to liquidate over three years and make *pro rata* distributions, which articles were approved to achieve these goals by all classes of the participating shares thereby there was no loss of substratum.

Mangatal J followed the principle set out in *ABC Company (SPC)* that the amendment of the articles was approved and that *"it is the documents as amended as agreed by the shareholders, that encapsulates the reasonable expectation of the shareholders"*. Further, she did not follow Belmont in this instance nor was there any reason to find that the Fund lost its substratum or was not viable. The Learned Judge also noted that, as there was no timeframe put in place and the assertion relied upon, namely, that the Manager failed to complete the mandate after seven years, was unfounded.

Based on the facts of the case, the Learned Judge found no basis to find in favour of the Petitioner with respect to the remaining reasons as set in the petition.