Spotlight on the Cayman Islands

Guy Manning and **Mark Goodman** of Campbells review recent developments in insolvency law and practice in the Cayman Islands.

Despite many economies experiencing a period of recovery from the financial crash of 2008/2009, the Cayman Islands courts continue to deal with a number of complex liquidations which have resulted in a series of recent significant decisions which go some way to clarifying the rights of creditors and the powers of liquidators.

Rights of Redeemed Investors

The decision of Jones J in *Primeo Fund (in official liquidation) v Herald Fund SPC (in official liquidation)*[1] addressed two matters of importance for investors in Cayman Islands' investment funds and Cayman Islands' insolvency practitioners: the effect of Section 37(7) of the Companies Law (2013 Revision) (the **"Law"**) on the rights of redemption creditors (particularly its application in respect of shares subject to unpaid redemption requests); and the circumstances in which a liquidator must or may rectify the register of members of a fund in respect of which the net asset value ("**NAV**") has been mis-stated.

Herald Fund SPC ("**Herald"**) and Primeo were direct or indirect victims of the Madoff Ponzi scheme. Herald had been incorporated as an open ended investment fund in March 2004, having originally invested substantially all its investments in Bernard L Madoff Investment Securities LLC. In turn, Primeo Fund ("**Primeo**") had invested substantially all of its shares in Herald.

Primeo, amongst others, had submitted redemption requests to Herald as at 1 December 2008 (the "**December Redeemers**"), substantially all of which were accepted by Herald. Subsequently, on that date, all of the December Redeemers' shares were removed from Herald's share register. However, save for one investor, none of the December Redeemers were paid their redemption proceeds before Herald went into liquidation on 23 July 2013. The Privy Council has previously confirmed that an investor's right of redemption (and a company's right to suspend redemptions) is governed by, and must be determined by reference to, a company's articles of association[2]. There remained, nonetheless, some uncertainty as to whether section 37(7)(a) of the Law affected the rights of investors who had redeemed prior to a liquidation but had not been paid their redemption proceeds as at the commencement of the winding-up.

It was accepted by all of the parties in *Herald* that the December Redeemers' shares had been redeemed on 1 December 2008[3]. Herald contended however, that because the December Redeemers had not received the proceeds of their redemptions, section 37(7)

1/. Unreported, 12 June 2015.
2/. Culross Global SPC Limited v Strategic Turnaround Partnership Limited [2010] 2 CILR 364.
3/. This was accepted in light of the Strategic Turnaround decision, supra.

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applied, effectively subordinating the December Redeemers' claims to the claims of any unsecured creditors of Herald under section 37(7)(b)[4].

The Court found that section 37(7) has no application at all where shares have already been redeemed as at the commencement of a company's liquidation. As a consequence, the only circumstances in which section 37(7) is likely to have any application going forward would be where a fund's articles of association require some positive step to be taken by the fund in order to effect a redemption request and where those steps have not been taken as at the commencement of the winding-up. This situation is unlikely to arise very often, if at all, given that the articles of almost all Cayman Islands' mutual funds do not prescribe any such requirement. Liquidators may need to reconsider their position in relation to redemption creditor claims which have been rejected on grounds relating to section 37(7), but where distributions are yet to be made. An appeal is pending in relation to this issue and is expected to be heard in April.

The Court had to determine two additional matters concerning the NAVs of Herald in the period 2004 to 2008 (i.e. prior to the revelation of the Madoff fraud), namely, whether the NAVs were not binding on Herald and its members by reason of "fraud or default", within the meaning of section 112 of the Law and Order 12, rule 2 of the Companies Winding Up Rules ("**CWR**"), and whether those same provisions applied to require or empower Herald's additional liquidator (the **"Additonal Liquidator"**) to rectify its register of members.

The Court held that, as a matter of contract

4/. Section 37(7)(b) of the Law provides that payments due to shareholders for redeemed shares under section 37(7)(a) rank behind unsecured creditors of the Company but have priority over its ordinary shareholders.

pursuant to Herald's articles of association, the NAVs remained binding between Herald and its members. They would only not be binding by virtue of "fraud or default" imputed to Herald itself, as opposed to Madoff, but no such allegation was made. Consequently, the Additional Liquidator had no duty under CWR Order 12, rule 2 to rectify the register of members.

The Additional Liquidator did, however, have a *power* as an officer of the Court to rectify the register of members pursuant to section 112, in order to achieve justice as amongst those recorded as members *as at the commencement of Herald's liquidation*, irrespective of whether the NAVs were binding as a matter of contract. Whether or not the Additonal Liquidator should exercise that power (and, if so, how) is to be determined at a subsequent hearing.

The decision in *Herald* benefits unpaid redemption creditors whose position has, absent any successful appeal, been significantly strengthened. The decision is less likely to be welcomed by other creditors of an insolvent fund (including, for example, unpaid service providers or judgment creditors), who are now likely to rank *pari passu* with the fund's unpaid redemption creditors.

Share Premiums for Redemption of Shares

In a decision of the Grand Court, *RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund (in official liquidation)*,[5] Smellie CJ has found that redeemed shareholders are entitled to retain redemption proceeds paid to them by a fund even though the fund was cash flow insolvent at the time of the payment. The Judge found that the Companies Law (2007 Revision) (applicable at the relevant time) did not prohibit the use of share premiums for the redemption of shares when permitted by a fund's articles, even when insolvent, because by operation of section 34(2)(f) as it then stood, payments out of share premiums were not regarded as payments out of capital.

Smellie CJ rejected the liquidators' argument that a redemption payment out of share premium fell within s 37(6)(a)[6], by virtue of the deemed meaning of the phrase "*payment out of capital*" under section 37(5)(a) and (b), which included payment "*otherwise than out of its profits or the proceeds of a fresh issue of shares*".

The judge expressed the view that many Cayman investment companies operated on the basis that redemption payments were made in the ordinary course of business from profits, share premiums and the proceeds of fresh issues of shares. He further considered that the liquidators' position was inconsistent with section 34, under which a sum equal to the total value of share premiums must be transferred into a share premium account. The Judge found that section 34 was not subject to section 37 but was instead a separate regime dealing with payments out of share premium.

The purpose of the capital preservation requirement is to protect a company's creditors. At common law, company assets cannot be distributed to shareholders, unless statute provides otherwise. Such a distribution is defined as a return of capital and, as such, is unlawful.[7] Thus, the definition of capital is potentially broad but is limited by statute. On Smellie CJ's construction of the Law, the common law rule has a very narrow application in the context of Cayman funds, being confined to the (typically nominal) amount of paid up share capital. In this case, the payments were held to have been made in accordance with the articles and specific statutory provisions, and consequently, there was no breach of the capital preservation rule.

Smellie CJ's decision was recently upheld by the Court of Appeal[8] and provides welcome certainty and comfort to investors who have been paid share redemption proceeds prior to

5/. Grand Court, unreported, 17 November 2014.
6/. Section 37(6)(a) provides 'A payment out of capital by a company for the redemption or purchase of its own shares. is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary court of business.'
7/. Progress Property Co Ltd v. Moore [2010] UKSC 55.
8/. Cayman Islands Court of Appeal, unreported, 15 November 2015.

the collapse of a Cayman Islands investment fund.

Foreign Court Assistance

The Privy Council's judgments in *Saad Investments Company Limited*[9] and *Singularis Holdings Limited*[10] are noteworthy for their clarification of the ability of officeholders to obtain the assistance of Foreign Courts and the rights of 'strangers' to a liquidation to challenge a Winding Up order. Importantly, the practical ramifications of statutory limitations on liquidators' rights to production of documents, highlighted in Singularis, continue to hamper efforts by Cayman liquidators to reconstitute the state of a Company's knowledge and affairs.

Saad Investments Company Limited ("**Saad**") and Singularis Holdings Limited ("**Singularis**") are related companies which were both incorporated in the Cayman Islands and which were both ordered to be wound up by the Grand Court of the Cayman Islands. PricewaterhouseCoopers ("**PwC**"), based in Bermuda, was the auditor for both Saad and Singularis and liquidators for the companies sought to obtain documents in PwC's possession in relation to its audits of the companies.

The liquidators of Saad applied for and obtained a winding up order in the Supreme Court of Bermuda and, in turn, an order pursuant to section 195 of the Bermudian *Companies Act 1981* seeking the disclosure of information in PwC's possession.

The liquidators of Singularis sought and obtained recognition from the Supreme Court of Bermuda of the Cayman liquidation. The Bermuda court in turn issued an order, based on its "common law power" to assist the Cayman liquidation, requiring PwC to produce working papers in relation to the audits (which it appears were agreed not to be property of Singularis), which otherwise would not have been disclosed under section 195 of Bermuda's *Companies Act 1981* or the equivalent section 103 of the Law in the Cayman Islands.

PwC resisted the orders made in both cases and appealed to the Bermuda Court of Appeal. The Court of Appeal rejected PwC's appeal and upheld the Saad decision (in relation to which PwC had argued that the Supreme Court of Bermuda had no jurisdiction to order the winding up of Saad because Saad was an overseas company which did not carry on business in the jurisdiction and thus did not come within the statutory definition required to establish jurisdiction under Bermuda law). The Bermuda Court of Appeal allowed PwC's appeal and set aside the Singularis decision (in relation to which PwC had argued that the Supreme Court of Bermuda could not assist the Cayman liquidation by ordering production of information which could not have been ordered by the Cayman court itself). Further appeals of the decisions were brought to the Privy Council.

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9/. PricewaterhouseCoopers v Saad Investment Co Ltd [2014] JCPC 35.
10/. Singularis Holdings Limited v PricewaterhouseCoopers [2014] JCPC 36.

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The Saad Appeal

The Privy Council's decision in the Saad appeal was unanimous. The Board held that the Supreme Court of Bermuda did not have jurisdiction to order a winding up of Saad because the jurisdiction was wholly statutory in nature and Saad did not fall within the statutory definition of a "company" necessary to establish jurisdiction under Bermuda law. Saad's ownership of shares in a company incorporated in Bermuda was not considered sufficient to bring Saad within the definition of "company".

On a collateral issue, the Board rejected the liquidator's submission that PwC had no standing in relation to the Winding Up order, basing its decision on the extraordinary circumstances of the case. PwC had standing to contest the winding up even though it was technically a "stranger" to the proceeding based upon the fact that the entire winding up proceeding was focused on PwC and its books and records relating to its audits of Saad. Accordingly, the Board considered it just and equitable to grant PwC standing to challenge the winding up order. To deny PwC the ability to argue that the court lacked jurisdiction in the proceedings in which PwC was the target would have been a breach of natural justice.

The Singularis Appeal

The Privy Council's decision in the Singularis appeal was not unanimous and was delivered by the members of the Board in five separate judgments. The majority of the Board held that there is a common law power to assist a foreign court in insolvency proceedings and that the principle of "modified universalism" is available to assist a foreign winding up proceeding *so far as the court properly can*. The limits on a court's ability to assist the foreign proceeding are established by local law, public policy and the limits of the court's own statutory and common law powers. Accordingly, when a compelling legal policy calls for it, in the absence of a specific statutory power (in this case, to compel production of information) the court has the common law power to overcome the statutory shortfall.

In reaching that conclusion, the majority of the Board determined that the power was available to assist the officers of the court in the foreign proceeding and to overcome the problems imposed by the territorial limits of the original court's jurisdiction in relation to a winding up proceeding which involved issues extending beyond that court's territorial jurisdiction. Importantly, this power will be applied to permit the performance of officers' functions and will not extend to relief which the officers do not have under the laws by which they were appointed. Further, common law powers of this kind are not to be used as a means to obtain material for use in litigation – in relation to which other rules and powers will apply.

The majority of the Board found that the production of materials sought was not available under Cayman law because the Cayman court would have been limited to ordering production of materials '*belonging to*' Singularis under section 103 of the Law. It was apparently accepted that the audit working papers were not owned by

Singularis, although Lord Sumption and Lord Collins "*express[ed] their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property*". Accordingly, the majority of the Board declined to exercise the common law powers of the court in favour of the liquidators and the appeal was dismissed.

The Singularis decision highlights the limitations of liquidators' statutory investigatory powers under section 103 which, when enacted in 2009, put Cayman's statutory regime out of kilter with insolvency regimes in many other Commonwealth jurisdictions. Under section 103 it is only possible to obtain documents *belonging* to the company in liquidation, rather than any documents *relating to the company's affairs*. Further, orders for disclosure under section 103 may only be made against "relevant persons", as opposed to *anyone* who might have information relating to the company. The definition of "relevant persons" is quite proscribed and does not include, for example, the company's former lawyers or auditors (unless the auditors can be brought within the definition of "relevant persons" because they constitute officers of the company as a matter of construction of the company's Articles).

If information and documentation sought by liquidators is located in a Commonwealth jurisdiction where the statutory powers of examination and production are wider than the scope of section 103, one potential solution would be to commence an ancillary liquidation, as opposed to merely seeking recognition, in the relevant foreign jurisdiction. It seems fairly clear from the Board's decision in Singularis that the full suite of local statutory remedies would be available to the liquidators in an ancillary liquidation, irrespective of whether those remedies are available in the original jurisdiction.

Security for Costs

In *Dxynet Holdings Limited v Current Ventures*[11] the Court of Appeal addressed the availability of security for costs in winding up proceedings, holding that the Cayman court may order that an impecunious corporate petitioner or appellant provide security for the respondent's defence costs, irrespective of whether the petitioner/appellant is a foreign or a Cayman company.

The case was specifically concerned with the narrower question of the Cayman court's jurisdiction to order security for costs against a *foreign* company which had presented a winding up petition against a Cayman Islands company. However, as a result of the judgment, the broader state of the law on this issue appears to be that when *any* company (i) petitions the Cayman court for an order winding up another company, or (ii) appeals against the rejection of its proof of debt by liquidators appointed by the Cayman court, if the court is satisfied that the assets of the petitioning/appellant company would be insufficient to pay any costs awarded in the proceedings to the respondent company/liquidators, the court has jurisdiction to order the provision of sufficient security to meet those costs[12]. The court has an express power to do so under section 74 of the Law where the petitioning/appellant company is a Cayman Islands company[13] and an inherent jurisdiction to do so where a foreign company is involved and the Court is satisfied that the company is unable to meet an adverse costs award. It is important to note however that no such jurisdiction exists in winding up proceedings where the petitioner/appellant is an individual, irrespective of his or her country of residence or impecuniosity.

11/. Dxynet Holdings Limited v Current Ventures II Limited & another, CICA No. 33 of 2013 (unreported, 20 February 2015).

12/. The usual form of security is a cash deposit in an escrow account under the control of the court, and the security must be within the jurisdiction in any event: see Caribbean Islands Development Ltd. (in official liquidation) v First Caribbean International Bank (Cayman) Limited, FSD No. 52 of 2013, judgment of Chief Justice Smellie (unreported, 16 September 2016 at 46).

13/. In GFN SA, Artag Meridien Ltd., Caribbean Energy Company v The Liquidators of Bancredit Cayman Limited (in official liquidation) [2009] UKPC 39, the Judicial Committee of the Privy Council held that a proof of debt appeal constituted "proceedings" with the meaning of section 74 of the Companies Law.

...the principle of "modified universalism" is available to assist a foreign winding up proceeding so far as the court properly can

One important factor in the court's decision was that, by virtue of the Cayman Islands Constitution, the government and, by extension, the court must not discriminate between different classes of litigants. If the court only had jurisdiction in winding up proceedings to order security against Cayman companies, that would provide preferable treatment to foreign companies and be discriminatory against Cayman companies. Cayman and foreign litigants are therefore now to be treated on an equal footing in this respect, as in all others.

Loss of Substratum

The Grand Court recently clarified two matters concerning petitions to wind up a company on the just and equitable ground on the basis it has lost its substratum in *Re Harbinger Class PE Holdings (Cayman) Ltd*[14]. The judgment of Clifford J confirms that the applicable test for whether there has been a loss of substratum, in petitions against companies other than open-ended mutual funds, is whether it is *impossible* (as opposed to merely impractical) for the company to achieve the object for which it was formed. In applying that test to a company with an unrestricted objects clause in its memorandum of association, the court must look beyond the clause and ascertain, on the particular evidence, the principal or main object of the company in line with the reasonable expectations of its participating shareholders.

Harbinger Class PE Holdings (Cayman) Ltd ("**Harbinger**") was a special purpose vehicle established in December 2008 as part of a credit crunch restructuring of a Master-Feeder fund structure following losses arising from the collapse of Lehman Brothers. Investors in the Feeder received shares in the Company by way of an *in specie* redemption of their shares in the Feeder. A supplement to the Offering Memorandum explained the synthetic side-pocket type arrangement and stated an intention to realise the illiquid assets by the end of 2010. Although substantial realisations and distributions were made, the process was not completed. An investor presented a petition to wind up Harbinger on the "just and equitable" ground[15], arguing that there had been a loss of substratum.

The appropriate test for determining whether there had been a loss of substratum was central to the case and the enquiry comprised two parts, namely, whether the object for which the company was formed needed to have become impossible or merely impracticable and whether the company's purpose should be determined solely by reference to its constitutional documents.

The Judge reviewed the case law and found that a long line of English authority pointed to 'impossibility' as the applicable test. Recent Cayman decisions at first instance[16], had departed from this approach and applied a less stringent test of whether it had become *"impractical, if not actually impossible"* to carry out the purpose of the company. *Belmont*[17] and the cases in which it was followed all concerned open-ended corporate mutual funds. Clifford J distinguished the decision in *Belmont* on the basis that the Company was not an open-ended corporate mutual fund and followed the English authorities[18].

In ascertaining the purpose of the company, the Judge considered the unrestricted objects clause contained in the Company's memorandum of association. Clifford J held that, in the case of a wholly general objects clause, the Court must look beyond the clause and ascertain the principal or main object for

14/. Unreported, 10 November 2015.
15/. Section 92(e) of the Law.
16/. See, for example, In the Matter of Belmont Asset Based Lending Limited [2010] 1 CILR 83 per Jones J.
17/. Supra. 72. The Belmont test was considered but not followed by Bannister J in the BVI, with the English test being preferred. Bannister J considered that there was no basis for open-ended corporate mutual funds to be treated differently and rejected the concepts of practicality and viability favoured in Belmont as too uncertain.
18/. Paras 52-53 & 57-58.

which the Company was formed by reference to the evidence of participating shareholders' reasonable expectations.[19] In applying the test, the Judge considered that the object of the Company was limited to holding the relevant shares issued by the Master Fund and receiving through the redemption of those shares the net cash flow from the realisation by the Master Fund of its assets, for onward payment to the Company's own shareholders. He therefore held that the principal or main object of the Company had not become impossible.[20] The object of the Company was not, as the petitioner claimed, to realize the assets in the Master Fund and to return the proceeds to investors.

Harbinger creates a split in the applicable test when determining if a company has lost its substratum for the purpose of a winding up petition on the just and equitable ground. Open-ended mutual corporate funds may be deemed to have lost their substratum, and therefore be liable to be wound up, if the conduct of their business has become impractical or ceased to be viable, whereas the conventional test of impossibility will apply to other businesses.

Directors' Standing to Petition

On 25 November 2015, the Grand Court handed down judgment in the matter of *Re China Shanshui Cement Limited*[21] concerning the controversial question of whether, and in what circumstances, directors of Cayman Islands' companies are authorised to present a winding-up petition on behalf of the company of which they are officers. In a detailed and carefully reasoned ruling, Mangatal J declined to follow an earlier decision of Jones J in the case of *Re China Milk Products Limited* [22] and, in so doing, found that the Law does not permit directors of companies to present a winding-up petition unless expressly authorised to do so by the company's articles of association or by a resolution of the company's members.

China Shanshui Cement Limited ("**China Shanshui**") is a Cayman Islands' holding company of an international group of companies, with operating subsidiaries located in the PRC (the "**Group**"), which focused on the design, manufacturing, sale and distribution of cement, cement-related products and construction materials. Its shares are publicly listed in Hong Kong. The company's market capitalisation, based on its share price as at April 2015, was over US$2.7 billion. The company's unchallenged position however was that, although it is

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19/. Para 65.
20/. Paras 83-84.
21/. (FSD 178/2015, unreported).
22/. [2011] 2 CILR 61.

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very much balance sheet solvent, it is deeply and incontrovertibly cash-flow insolvent.

As a result of its financial position, the Company's directors presented a winding-up petition and sought the immediate appointment of joint provisional liquidators ("**JPLs**"), so that the JPLs might propose and implement a formal restructuring plan pursuant to section 104(3) of the Law. Two of the Company's largest shareholders (who, together, held 53.27% of its issued share capital) opposed the appointment of JPLs and sought to strike out the petition on the basis that the directors had no authority to present it.

The question of whether or not directors are entitled to present a winding-up petition in the company's name was previously considered by the Grand Court in 2011 in *Re China Milk*. In *China Milk*, the Grand Court held that the scope of the directors' power to present a petition depended on whether the company was solvent and the date on which it was incorporated. Prior to *China Milk*, the Cayman Court had followed and applied the decision of Brightman J in the English case of *In re Emmadart Ltd.*[23], which confirmed that directors could not present a winding-up petition without an ordinary resolution of the company's shareholders unless its articles provided them with specific authority to do so.

In *China Milk*, Jones J found that the Law Review Committee's recommendation that directors should be entitled to present a winding up petition on the grounds of insolvency, irrespective of whether they were authorized to do so by the company's articles of association, was accepted by Government but that "*the language of what became s.94(2)*[24] *does not, by itself, come close to enacting the intention stated in the Bill*". However, construing the Law as a whole and seeking to avoid an interpretation that would produce an impractical result unintended by the legislature, he concluded that the legislature must have intended to abolish or circumscribe the rule in *Emmadart Ltd* as that rule does not *"distinguish appropriately between solvent and insolvent companies"*. Ultimately, Jones J held that the ability of directors to present a winding up petition on the ground of insolvency should not vary according to the language of its articles of association and was not dependent upon the cooperation of shareholders.

In *China Shanshui*, Mangatal J concluded that the 2007 amendments to the Companies Law did not materially change the substance of section 94 which was in place when it was decided that *Emmadart* applied in the Cayman Islands. The Honourable Judge pointed out that there was no reason to assume that the legislature's failure to address the rule in *Emmadart* when passing the Companies (Amendment) Law 2007 was not deliberate, and found that the rule in *Emmadart* did not produce unworkable results prior to *China Milk*. Mangatal J held that Jones J's decision was wrong[25] and that the company's petition should be struck out in circumstances where the presentation of a winding-up petition by its directors was neither permitted by the company's articles nor sanctioned by a resolution of its shareholders. Accordingly, notwithstanding the fact that the Company was insolvent for the purposes of section 92 of the Law, and its directors considered that it should be placed into provisional liquidation, the petition was struck out and the application to appoint

23/. [1979] Ch. 540.
24/. Section 94(2) provided that directors of a company incorporated after the commencement of the Companies (Amendment) Law, 2007 had authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting if that authority was expressly provided for in the company's articles of association.
25/. As a judge of the Grand Court Mangatal J was obliged to follow Jones J's decision unless she was convinced that his decision was wrong: Re Alibaba.com Limited [2012] (1) CILR 272.

JPLs was dismissed with costs.

The decision in *China Shanshui* means that the position under Cayman Islands law is now that directors cannot present a winding-up petition on the grounds of insolvency unless permitted to do so by the company's articles or by a resolution of its shareholders.

The decision in *Emmadart*, despite having being discredited and overruled in numerous other Commonwealth jurisdictions, and disapplied by statute in England, once again represents good law in the Cayman Islands.

Directors of insolvent companies are now potentially faced with a situation where they need to apply to put the company into provisional liquidation, to facilitate a restructuring, or into official liquidation, but are prevented from doing so by the company's shareholders (who may have no economic interest in the liquidation). Statutory amendments are urgently required.

Directors' Duties

The Cayman Islands' Court of Appeal has overturned the first instance *Weavering*[26] decision which had held a hedge fund's former non-executive directors liable for damages of $111m on the basis that they had acted with "wilful neglect and default" in failing to identify that the fund's main "assets" were fictitious swap agreements. Purportedly worth $637 million, the swap agreements had in fact been made with a related counterparty which had no assets to satisfy its liabilities under the agreements.

The Court of Appeal concluded that although the non-executive directors had acted negligently, they were not guilty of wilful default because there was no evidence that they had ever intended to breach their duties, nor that they had even suspected that they were failing to meet their obligations. The trial judge had made erroneous findings of fact in relation to the directors' actions and failings to carry out certain functions. It was also suggested that the liquidators had pleaded the allegations of breach too loosely and that critical evidence had not been put to the directors in cross-examination.

The appeal judgment gives some comfort to directors, and particularly to non-executive directors, that the common exemption provision in a hedge fund's articles, excluding liability for conduct falling short of wilful default or neglect, will apply unless any breach of duty is shown clearly to be intentional (or reckless, in the sense that the directors had been conscious that they might be acting in breach, but continued regardless).

The decision also re-affirms that the scope of directors' duties is fact sensitive in every case. In analysing the scope of the directors' duties, the Court of Appeal paid particular attention to the objectives that the directors had recorded in board minutes early in the formation of the fund. Consequently, non-executive directors should be careful to fulfil any tasks that they have previously committed to perform in their service agreements, board meeting minutes or otherwise, as well as complying with their general duty to supervise the fund's service providers.

The case also highlights the need for liquidators to take sound strategic advice before pursuing litigation to ensure that meaningful recoveries can be made for investors. In this case, if, as the Court of Appeal found, the directors were liable in negligence only, the exemption from liability would apply. Had the directors been liable for wilful default, the directors' insurance policy would almost certainly not have responded; so any recoveries could only have been sourced from the directors' own resources and would have been modest. An appeal of the decision is expected to be heard before the Privy Council in June. *Michael Crystal QC and Tom Smith QC appeared for Primeo in Primeo Fund v Herald. Tom Smith QC appeared for Harbinger in Re Harbinger.*

26/. The Court of Appeal decision is: Weavering Macro Fixed Income Fund Limited (in liquidation) v (1) Stefan Peterson and (2) Hans Ekstrom CICA 10 of 2011 (unreported, 12 February 2015). The first instance decision is: Weavering Macro Fixed Income Fund Limited (in liquidation) v (1) Stefan Peterson and (2) Hans Ekstrom [2011] (2) CIRL 203.