IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 329 OF 2022 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF OAKWISE VALUE FUND SPC

AND IN THE MATTER OF ENHANCED FIXED INCOME SP

Appearances:	Harriet Ter-Berg and Sam Hall of Walkers for the Petitioner Matthew Hardwick KC, Grainne King and Sarah Sussman of Harneys for the Respondent
Before:	The Hon. Justice David Doyle
Heard:	11 May 2023
Draft Judgment Circulated:	19 May 2023
Judgment delivered:	26 May 2023

HEADNOTE

Determination of a petition for the appointment of receivers of a Segregated Portfolio pursuant to sections 224 and 225 of the Companies Act (as revised)

JUDGMENT

Introduction

1. By petition dated 29 December 2022 CMB International Securities Limited (the "Petitioner") seeks the appointment of receivers over the segregated portfolio of Oakwise Value Fund SPC ("Oakwise") known as Oakwise Value Fund SPC – Enhanced Fixed Income SP (the "Segregated Portfolio") pursuant to sections 224 and 225 of the Companies Act (as revised) (the "Act").

Section 244

2. Under section 224 (1) of the Act it is provided, subject to subsections (2) to (5), if in relation to a segregated portfolio company, the Court is satisfied:

   (a) that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of the creditors in respect of that segregated portfolio; and

   (b) that the making of an order under this section would achieve the purposes set out in subsection (3),

   the court may make a receivership order under this section in respect of that segregated portfolio.

3. Section 224 (3) provides that a receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of –

(a) the orderly closing down of the business of or attributable to the segregated portfolio; and

(b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

Section 225

4. Under section 225 (1) an application for a receivership order may be made by –

(a) the company;

(b) the directors of the company;

(c) any creditors of the company in respect of the relevant segregated portfolio;

(d) any holder of segregated portfolio shares in respect of that segregated portfolio; or

(e) in respect of a company licensed under the regulatory laws of the Cayman Islands Monetary Authority where the segregated portfolio company is regulated by the Authority.

The Petition

5. At paragraph 2 of the petition the Petitioner states that it is a creditor of Oakwise in respect of the Segregated Portfolio and seeks the appointment of joint receivers over the Segregated Portfolio on the grounds that:

(a) the Segregated Portfolio is insolvent, the assets attributable to the Segregated Portfolio are, or are likely to be, insufficient to discharge the claims of creditors in respect of that segregated portfolio; and

(b) the appointment of receivers to manage the assets and business of the Segregated Portfolio would enable the orderly close down of the business attributable to the Segregated Portfolio and the distribution of its assets to those persons entitled to have recourse thereto.

6. At paragraph 9 of the petition the Petitioner states that the Segregated Portfolio "is indebted to the Petitioner in the sum of USD 91,385,352.69 and RMB 10,558, 045.07" (the "Redemption Debt").

7. At paragraph 31 of the petition it is stated that on 11 November 2022 Walkers (Hong Kong) on the instructions of the Petitioner "sent a letter to Oakwise on behalf of the Fund" demanding that the Redemption Debt be paid in full by no later than 4pm Hong Kong time on Tuesday 15 November 2022 and requesting that (if the Segregated Portfolio was unable to make payment by that date) certain information (including why the Segregated Portfolio was unable to pay the Redemption Debt and full particulars of the Segregated Portfolio's assets and liabilities as at 31 October 2022) be provided no later than 4pm Hong Kong time on Thursday 17 November 2022.

8. At paragraph 32 of the petition there is reference to a letter dated 22 November 2022 sent by Oakwise to the Petitioner and at paragraph 33 a reference to an email sent to investors on 24 November 2022. It may be helpful if at this stage I refer to those letters in a little more detail.

9. The following are extracts from the letter dated 22 November 2022:

> "1. We regret to inform you that the Segregated Portfolio is experiencing challenges in liquidating its assets to satisfy your redemption request due to its investments in certain notes issued by real estate companies in PRC …. Accordingly, the Directors will have no choice but to sell the portfolio investments of the Segregated Portfolio at a significantly low price if the redemption request from you is to be further progressed, which will inevitably result in great loss to all Participating Shareholders …
>
> 3. … as the Directors in good faith determine that it is for the best interests of the Segregated Portfolio and all the Participating Shareholders, the Directors decide to suspend redemptions from all Participating Shareholders …

4. That said, we would like to draw your attention to the latest development in the real estate sector in the PRC. The Central Bank of the PRC and China Banking and Insurance Regulatory Commission have jointly released a 16-point plan recently which significantly eases the crackdown on lending to the real estate sector. Key measures in such plan include allowing banks to extend maturing loans to property developers, supporting property sales by reducing the size of down payments and cutting mortgage rates, ensuring the delivery of pre-sold homes to buyers, and boosting other funding channels such as bond issues. Shares and bonds in Chinese real estate companies rose sharply in the wake of such news. We believe that PRC's real estate market will bottom out and the Net Asset Value of the Segregated Portfolio will increase gradually with the improvement of the property market."

10. The letter dated 24 November to all investors was in similar terms and the following are relevant extracts:

"1. … We believe with recent government measures in revitalizing domestic property market, the bond market will gradually bottom out and it will be a great loss to Participating Shareholders to liquidate and terminate the Segregated Portfolio in current market ….

3. … for the best interest of the Participating Shareholders as a whole, the Directors decide to suspend redemptions from all Participating Shareholders as from 2 November, 2022."

11. The Petitioner (as a creditor of the Segregated Portfolio) states at paragraph 37 that under Article 5.10 of the M&A it has no right of recourse to the general assets of the Company.

12. The Petitioner at paragraph 38 states that according to the 2021 Financial Statements the total assets of the Segregated Portfolio as at 31 December 2021 amounted to USD 1,387,958,834 with total liabilities of USD 628,377,462 meaning that the net assets amounted to USD 759,581,372. At paragraph 39 of the petition the Petitioner accepts that the Segregated Portfolio appeared to be

balance sheet solvent at the date of the 2021 Financial Statements but avers that it "has reason to believe that the figures in the 2021 Financial Statements are out of date and that the assets of the Fund are (or are likely to be) insufficient to discharge its liabilities."

The "reason" appears to be based on the following as pleaded by the Petitioner:

(1) despite repeated requests Oakwise has failed to provide full particulars of the Segregated Portfolio's latest asset and liability position (paragraph 40);

(2) there has been a significant decline in the value of the real estate market in China and by extension, the value of the bonds held by the Segregated Portfolio (paragraph 41);

(3) the letter dated 22 November 2022 from Oakwise, the 24 November 2022 letter to investors and the suspension of redemptions from 2 November 2022 (paragraph 42); and

(4) there has been a repeated failure of the Segregated Portfolio to pay all the Redemption Repayments in full since January 2022 (paragraph 42).

The Submissions

13. I have considered the written and oral submissions of the Petitioner and the Respondent, the Segregated Portfolio. I do not set them all out in detail but have full regard to them. It should be obvious from the determination section of this judgment, the submissions I have rejected and those I have accepted.

Law

14. The Petitioner and the Respondent both refer to and rely on *Obelisk Global Fund SPC* (FSD unreported judgment of Parker J, 12 August 2021) and *Green Asia Restructure Fund SPC* (FSD unreported judgment of Kawaley J, 3 August 2022) and I have full regard to these first instance authorities. I do not benefit from reference to any Court of Appeal authority in this area of the law other than *ABC Co v J & Company Limited* 2012 (1) CILR 300, supplied on the eve of the hearing

by Harneys, which is not exactly on point. Both sides in effect ask me to follow *Obelisk* and *Green Asia* and I accept that invitation, for present purposes.

15. In *Obelisk* Parker J considered the provisions of section 224 of the Act. The following are extracts from his judgment:

> "17. The question whether the Fund has sufficient assets to meet the claim of its creditor is a question of solvency … The Fund is clearly not solvent on a cash flow basis …
>
> 24. A company is insolvent under the balance sheet test if its assets do not exceed its liabilities, taking into account its contingent and prospective liabilities …. The test is not a strict mathematical exercise based on a company's balance sheet …
>
> 36. Both sections [Sections 224 of the Act and 123 (2) of the Insolvency Act in the UK] establish in my view what may be called a '*balance sheet*' test albeit '*the discharge of claims of creditors*' wording in the Cayman statute adds something more than simply assessing the relative values of two sides of a balance sheet. The court has jurisdiction to make a receivership order when the portfolio's assets are or are likely to be insufficient to discharge those claims. That involves a determination on the available evidence of whether the assets are sufficient now or are likely to be in the reasonably near future, when assessed against its liabilities (as well as its prospective and contingent liabilities), and are held in a form where they may be used to pay the claims of creditors …
>
> 38. I accept that a stand-alone test more akin to a traditional balance sheet test for segregated portfolios may set a different bar to clear for creditors, with no deeming provision, but that is what the statute plainly provides. I also acknowledge that there may be practical difficulties for creditors accessing information in relation to segregated portfolios and situations where assets may appear to be more valuable than in fact they turn out to be.

39. However, as a practical matter it is to be noted that section 224 does provide two alternative bases of satisfying the court. First the court may make a receivership order if the assets attributable to a particular segregated portfolio of the company *are* insufficient to discharge the claims of creditors in respect of that segregated portfolio. In the alternative if the assets *are likely to be* insufficient. Difficulties in the precise valuation of assets may not be a particularly high hurdle when creditors' claims for relatively modest amounts are accepted, as they are in this case, and are not discharged. The starting point in such a situation is that a petitioner may legitimately say that the assets, presently realisable or liquid, are insufficient to discharge the claim. That is not in dispute in this case.

40. The court is able to assess the evidence before it as to whether the Fund has assets sufficient to discharge the claim of a creditor now, or is likely to have sufficient assets in the reasonably near future. There is no evidence whatsoever in this case as to the asset position of the segregated portfolio Fund, save for the amounts said to be due from third parties.

41. As there is no dispute that the Fund currently has insufficient assets to meet the claims of its creditors, the court has jurisdiction to make a receivership order. The only argument has been as to third party realisable assets which it is said makes it likely that the Fund will have sufficient assets in a reasonable period of time in the future. This does not provide the Fund with a defence as to the court's jurisdiction."

16. In *Green Asia* Kawaley J had no hesitation in following *Obelisk* and added the following:

> "9. … even if the solvency test is met by a creditor, it must also demonstrate that the business of the segregated portfolio as a whole should be brought to an end …"

17. I apply what Kawaley J at paragraph 12 of *Green Asia* referred to as "the somewhat fluid balance sheet solvency test".

18. Kawaley J cited in full paragraphs 35 to 41 of Parker J's judgment in *Obelisk* and at paragraphs 13-18 commented as follows:

> "13. This approach is both principled and practical and accords with the purposive rule of statutory construction, which requires the interpreter to ascertain what the underlying legislative purpose of a particular statutory provision is, viewed in its wider legislative context. Parker J's construction:
>
> (a) extracts the balance sheet test from the natural and ordinary meaning of the statutory language which speaks of an insufficiency of assets to meet liabilities; and
>
> (b) identifies a flexibility in the basic balance sheet, based on the actual words used but understood by reference to how a rigid traditional balance sheet test could make the jurisdiction unworkable in practice;
>
> (c) ultimately concludes that a *prima facie* case of insolvency can be made out for the purposes of section 224 (1) (a) if a creditor of a segregated portfolio can demonstrate that there is a deficiency of assets relative to liabilities or there is likely to be such a deficiency.
>
> 14. Bearing in mind that positive factual findings in the civil law context are established on the balance of probabilities, classically explained as "more likely than not", these two phrases "are" and "are likely to be", expressed as alternatives, must indeed mean something different. Statutory language is invariably assumed to be far more precise than casual conversation, so the idea that the draftsman was simply expressing the same idea in different ways can confidently be rejected. A creditor must therefore be entitled to prove either that (a) it is probable that a deficiency exists (in which case a positive finding in this respect is justified) or that (b) the evidence establishes a risk of deficiency so cogent and real that a receiver should *prima facie* be appointed in any event. A narrower construction of the solvency test would, as Parker J observed, mean that creditors would only be

able to avail themselves of the requisite standing as creditors of an insolvent segregated portfolio in the rare circumstances where they had full visibility of the portfolio's financial status.

15. This consideration could only be ignored if there was something in the wider legislative scheme which justified the conclusion that the only potential creditors of a segregated portfolio would be participating shareholders who had redeemed (in whole or in part) and who could therefore be expected to have current information about the portfolio's financial status. In my judgment there is no justification for such an inference for two principal reasons. First, there is nothing in the wider statutory scheme which precludes third parties such as banks from providing credit to a special purpose company linked to a segregated portfolio's assets as opposed to the company's general assets. Second, it is a notorious fact that when a business entity of any description enters choppy financial waters, the free flow of information about its true financial status is often interrupted. The position is frequently much the same whether one is considering communications between management and creditors or communications between management and investors.

16. So Parker J was clearly right to conclude that the difficulties creditors would have in accessing the receivership jurisdiction if they were required to meet a traditional balance sheet test and positively prove a deficiency of assets in relation to liabilities is a powerful consideration justifying concluding that Parliament must be presumed to have intended to create a more flexible and functional solvency test. Building on the important conceptual foundations laid by Justice Raj Parker in *Re Obelisk Global Fund SPC* as to the solvency test applicable to the appointment of receivers on the application of creditors of a segregated portfolio, I would add two refinements of my own.

17. Firstly, the case for a more flexible balance sheet solvency test than would apply in the winding-up context is supported by the important ways in which a receivership order granted in relation to a segregated portfolio is a less drastic

remedy than that of a winding-up. Taking a high-level view, the investment vehicle is clearly intended to be more nimble than a limited company and easier to both get into and get out of, even though it borrows many features from the company law regime. For present purposes, the most noteworthy overarching distinctions between a winding-up order and a receivership order under Part XIV of the Act are the strikingly contrasting levels of finality and flexibility. For instance:

(a) the Court is empowered to vary the terms of a receivership order, as well as to discharge the order (section 226 (2) (b));

(b) the Court is empowered to discharge a receivership order not just when its purpose has been carried out, but also where that purpose is "*incapable of achievement*" (section 227 (1))

(c) where the affairs of a portfolio have been wound-up, the directors of the company can terminate the portfolio by resolution (section 228A(1)), without any involvement of the Court; and

(d) the directors may by resolution reinstate a segregated portfolio which has been terminated, again with no involvement of the Court (section 228A(2)).

18. Secondly, the potential risk of harm or prejudice flowing from an overly flexible solvency test is counterbalanced by another important characteristic of the solvency test and its interrelationship with the jurisdiction to make a receivership order. Even an unpaid creditor with a presently due undisputed debt is not entitled to a receivership order as of right. This is in marked contrast with the position as regards to the winding-up jurisdiction ..."

19. At paragraph 19 Kawaley J says that "the overall financial state of the portfolio must be taken into account" and "it must always be demonstrated by an applicant for a receivership order that the business of the segregated portfolio ought properly to be closed down."

20. At paragraph 20 Kawaley J stated:

> "In the vast majority of cases, therefore, no matter how 'light' the balance sheet solvency test which is contended for in any particular case may be, an application for a receivership order made by creditors is unlikely to succeed save in circumstances where that relief is also (a) consistent with the express or implied wishes of the majority of creditors and/or (b) there is no room for serious doubt that the segregated portfolio is hopelessly insolvent. How the solvency test operates in practice therefore will likely be a fact-sensitive matter, highly dependent upon both (1) the nature and extent of the claims which are asserted in each creditors' receivership application in relation to a particular segregated portfolio or group of portfolios, and (2) the extent to which (if any) the application is opposed by either the segregated account company or other stakeholders."

Determination

21. I now turn to my determination of the petition.

22. On the basis of the evidence and arguments put before the Court it has not been proved by the Petitioner on a balance of probabilities that the Segregated Portfolio's assets are or are likely to be insufficient to discharge the claims of the creditors.

23. I have considered the position of the Segregated Portfolio and the position of the investors/creditors. Despite the comprehensive and eloquently presented submissions of Ms Ter-Berg I have not been persuaded that this Court would be justified in exercising its discretion in favour of the Petitioner.

24. I note the position of the Petitioner and Lokka Inc and the sums said to be outstanding to them: approximately US$94 million due to the Petitioner and approximately US$1.7 million plus interest said to be due to Lokka Inc.

25. I note also the position of Blue Sailing II Limited Partnership Fund and Golden Leap Limited Partnership Fund (holders of 36.33% of the Segregated Portfolio's total Participating Shares with

an investment of US$100 million) who support "defending against the Petition." In their letter dated 10 May 2023 (provided late on the eve of the hearing) they state:

"1) Based solely on the Financial Statement, we understand that as of 30 December 2022 the SP appears to be balance sheet solvent. We have been advised by our independent Cayman counsel and believe that the Court does not have the jurisdiction to appoint receivers pursuant to section 224 (1) of the Act where the SP is solvent.

2) Based solely on the information provided by the SP, we understand that the SP has made investments in certain notes issued by developers in the PRC ("Real Estate Notes"). It is a widely known fact that the PRC real estate industry has been facing financial difficulties. However, the key developers have been taking steps to restructure their operations and debts to resolve liquidity issues. Further, the PRC government has launched various relief measures to stabilise the real estate sector. Most significantly, the People's Bank of China has announced to lower interest rates on mortgage loans, amidst the global upward trend for interest rates. Despite the PRC developers' intention to restructure their debts and the recent government measures in revitalizing onshore real property market, more than likely it would take considerable time for the PRC developers' note market to improve. Therefore, if the SP were to be wound up and the receivers appointed otherwise performed their duties to liquidate the Real Estate Notes under the current market conditions, it could result in a significant loss for its stakeholders.

3) In view of the above, we believe that the SP should be allowed some time to maximize returns from underlying investments and to then resolve its liquidity issues, which we believe would serve the best interests of its stakeholders, including its creditors.

4) It is apparent to us that the recovery value for stakeholders of the SP in an immediate liquidation of the SP would be extremely low.

5) We accordingly support the SP in defending against the Petition. We believe that the appointment of receivers over the SP would jeopardize the recovery in assets value of the SP, and will harm the interest of all stakeholders of the SP."

26. On the basis of the evidence before the Court, the Segregated Portfolio is not insolvent on the basis of the flexible balance sheet test. I can deal with this quite concisely. The Segregated Portfolio's audited financial statements for the year ended 31 December 2021 disclosed net assets of US$759,377,462. It appeared to be common ground that the deterioration of the notes issued by real estate companies in the PRC occurred from December 2021. The Segregated Portfolio's balance sheet as at December 2022 discloses net assets of US$284,550,606.25. The Segregated Portfolio's unaudited financial statements for the year ended 31 December 2022 disclose net assets in the same sum of US$284,550,606.25. Mr Wang Fengyu ("Mr Wang"), a director of Oakwise, has affirmed that the audited statements "will corroborate that the Segregated Portfolio was solvent as at the date of the presentation of the Petition" (last sentence of paragraph 34 of his first affirmation).

27. There is no financial evidence before the Court which contradicts the Segregated Portfolio's financial statements for the year ended December 2022. There is no cogent evidence that the financial position of the Segregated Portfolio has significantly deteriorated since the end of December 2022 to justify a judicial conclusion that the assets of the Segregated Portfolio are or are likely to be insufficient to discharge the claim of the creditors including the Petitioner.

28. Indeed the evidence before the Court (see for example the letter dated 10 May 2023 from Blue Sailing II Limited Partnership Fund and Golden Leap Limited Partnership Fund) indicates that the market may be improving but it will take some considerable time.

29. Mr Wang at paragraph 9 of his first affirmation says that the "overwhelming response received" from the investors "has been vehemently in opposition to the Petition and the relief sought therein". Mr Wang at paragraph 35 adds that "a number of investors, together representing in excess of 50% in value of the Segregated Portfolio have contacted me and my colleagues to indicate their opposition to the appointment of joint receivers …".

30. Mr Wang at paragraph 25 of his first affirmation says:

> "As is widely reported in the media, and as must be well known by the Petitioner, in December 2021 bond prices in the Chinese property sector crashed. The resulting liquidity crisis negatively impacted the liquidity of the investments held by the Segregated Portfolio. This is because the underlying assets of the Segregated Portfolio primarily consisted of bonds issued by a variety of Chinese property developers. The price crash not only heavily weighed on the asset value of the Segregated Portfolio but also made it extremely difficult to dispose of the Segregated Portfolio's assets in large volumes and at a reasonable price, as there were so few buyers in the market at that time. In light of the prevailing market conditions, the Directors determined that it was not in the interests of the investors in the Segregated Portfolio to make full payment of all redemption proceeds, as to do so would have necessitated selling certain investments of the Segregated Portfolio at a significantly depressed price, to the great detriment of all investors. Instead, the Directors made and continue to make partial payments as and when in their professional opinion it is appropriate to do so, as they are so entitled under the terms of the Documents."

31. At paragraph 27 Mr Wang says that "It has been a key consideration of the Directors to ensure all investors are treated equally and proportionately to all of its other redeemed shareholders."

32. Mr Wang at paragraph 32 (b) of his first affirmation affirmed on 24 February 2023 adds:

> "Bond prices did indeed hit rock bottom in November 2022, and since December 2022 there has been an appreciable rebound in the PRC property market and increasing indicators of recovery which are expected to gather momentum particularly given the lifting of all COVID-19 related restrictions and policies measures."

33. Ms Ter-Berg submitted that there was no evidence supporting that. There is however no evidence to contradict it and the letter dated 10 May 2023 from the holders of 36.33% of the Segregated Portfolio's total Participating Shares does provide some support for a revitalisation of the PRC onshore real property market albeit over a "considerable time".

34. Mr Wang at paragraph 59 of his first affirmation states:

"Moreover, even if the Segregated Portfolio were insolvent, which it is not, the appointment of joint receivers would not achieve the orderly close down of the business of the Segregated Portfolio. The outcome would be the opposite, and would in my opinion come at great financial detriment to the shareholders and third party creditors of the Segregated Portfolio, all of whom vehemently oppose the Petitioner's application."

35. Mr Wang in his second affirmation affirmed on 2 May 2023 states:

"7. The administrator of Oakwise, Apex Fund Services Ltd (Apex), is responsible for preparing the Company's annual financial accounts and for sending those accounts to its auditors, EY, for completion of the audit. I am aware that the 2022 Financial Statements were sent by Apex to EY in around February 2023 (although I am not aware of the precise date).

8. As part of its usual audit process, on 21 April 2023, I attended a meeting with EY at Oakwise's offices to discuss the 2022 Financial Statements. One issue raised by EY during the meeting was the impact of these Proceedings on completion of the audit. EY suggested that completion of the audit be delayed until 31 May 2023. However, Oakwise requested that EY complete the audit before 11 May 2023 being the date of the hearing of the Petition (Hearing). Whilst EY was willing to bring forward its anticipated date for completion of the audit to 15 May 2023, it was firm that completion of the audit must await the outcome of the Hearing of the Petition. As such I was informed by EY that the audit of the 2022 Financial Statements will not be completed until 15 May 2023, at the earliest.

9. As a result, the audit of the 2022 Financial Statements will not be finalised in advance of the Hearing.

10. A copy of the unaudited 2022 Financial Statements of the Segregated Portfolio are at pages 1 to 4 of the Exhibit. I do not anticipate that there will be any material differences between the unaudited and audited 2022 Financial Statements.

11. The 2021 audited financial statements were received from the auditors on 28 April 2022. As such, although the timing indicated by EY for finalisation of the audit for the 2022 Financial Statements is not dissimilar to the previous financial year, due to the Hearing there will be a delay to completion of the audit for the 2022 Financial Statements."

36. Counsel made reference to the suspension of the payment of redemption proceeds on 16 February 2023. On behalf of the Petitioner it was submitted that there was no basis for the Segregated Portfolio to contend that the Petitioner was not entitled to be paid the redemption proceeds immediately. On behalf of the Segregated Portfolio it was submitted that there had been a valid suspension. It is unnecessary and perhaps undesirable for me to determine the suspension issue as it may be the subject of a dispute in substantive proceedings between the parties. I have considered all of what the parties have had to write and say about that issue. Looking at the evidence in respect of the financial position of the Segregated Portfolio, suffice to say even if I were to decide the suspension issue in favour of the Petitioner such would not lead me to conclude that it was otherwise appropriate to exercise this Court's discretion in favour of making a receivership order. It can be seen from the financial information put before the Court and referred to in this judgment that even if the Petitioner was entitled to immediate payment such would not render it likely that the assets of the Segregated Portfolio "are or are likely to be insufficient to discharge" such claim within section 224 (1) (a) of the Act.

37. I am simply not satisfied on the insolvency ground. Moreover even if the insolvency ground had been satisfied I am not satisfied that the making of a receivership order would achieve the statutory purposes. The closing down of the business under receivers would not, in my judgment, based on the evidence and arguments put before the Court be, in the best interests of the investors/creditors. I accordingly dismiss the petition.

38. Subject to considering any concise (not more than 3 pages) submissions to the contrary I am minded to make an order for costs against the Petitioner to be taxed on the standard basis in default of agreement. If there are any submissions to the contrary they should be filed within 14 days of the delivery of this judgment.

39. I should deal with two further points. Firstly, the Petition made no reference to the Court's general jurisdiction to appoint receivers if it was just and convenient to do so. It appeared for the first time in the Petitioner's skeleton argument dated 4 May 2023. It appears to have been very much an afterthought perhaps coming to mind during a realisation that the Petitioner's case on a section 224 receivership was not a strong one. Ms Ter-Berg sensibly did not advance the ground as it was not open to her on the pleadings but even if it had been I would not have appointed receivers under the Court's general receivership jurisdiction as I was not persuaded that it would be just and convenient to do so. I leave open the question whether in these types of applications under section 224 the Court retains a general receivership jurisdiction or whether it is limited to the provisions provided for in section 224.

40. Secondly, the Petitioner made complaints about the management of the Segregated Portfolio and pleaded at paragraph 43 of its petition that it had "lost all confidence in the Fund's management in light of the matters particularised" in the petition. The pleading and the complaints in respect of management had the flavour of the type of issues a Court would be considering if being requested to wind up a company on the just and equitable basis. Nowhere in section 224 and 225 do you find the words "just and equitable".

41. As the Court of Appeal made crystal clear in *ABC Company v J & Company Limited* 2012 (1) CILR 310 at paragraph 19:

> "There is no provision for the making of a receivership order in respect of an individual segregated portfolio at the suit of a shareholder on just and equitable grounds."

42. Insofar as the complaints in respect of the management of the Segregated Portfolio are irrelevant to the Court's consideration of issues arising under sections 224 and 225 of the Act I disregard them. In any event, I have concluded that the complaints of mismanagement do not assist me in the determination of the petition which I remind the Petitioner is an application for the appointment of receivers and is not a winding up petition on the just and equitable ground. In such circumstances I say no more about them.

Draft Order

43. I would be grateful if counsel could provide within the next 7 days a draft Order for my approval reflecting the determination contained in this judgment.

Postscript

44. Following the despatch of an advance draft of this judgment to counsel and the parties, in accordance with the usual procedure, Walkers raised an issue in respect of the failure of the Respondent to provide audited financial statements.

45. During exchanges with counsel at the hearing I had noted that the audited financial statements could, on the evidence, perhaps be made available by 15 May 2023 and towards the end of the hearing having reserved judgment I expressed the wish that if and when they were made available they be brought to the attention of the Court. They were not immediately forthcoming and I decided to proceed to deliver judgment rather than delay matters further (having indicated I would deliver judgment as soon as possible) as upon reflection I took the view that it was not essential that they be made available before the court proceeded to deliver judgment. I record that I did not feel able to draw any adverse inference from the Respondent's failure to provide the Court with audited financial statements.

David Doyle

The Hon. Justice David Doyle
Judge of the Grand Court