



Neutral Citation Number: [2023] EWHC 114 (Ch)

Case No: CR-2021-000862

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**INSOLVENCY AND COMPANIES LIST (ChD)**

**IN THE MATTER OF AN UNREGISTERED COMPANY**

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Royal Courts of Justice  
Rolls Building, London, EC4A 2NL

2 February 2023

**IN PRIVATE**

**Before :**

**INSOLVENCY AND COMPANIES COURT JUDGE BURTON**

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**Nicola Allsop** (instructed by **Kennedys Law LLP**) for the **Applicant**  
**Daniel Lewis** (instructed by **Spector Constant & Williams**) for the **Respondent**

Hearing date: 28 April 2022

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

## **Insolvency and Companies Court Judge Burton :**

1. This is an application to set aside an order made on 18 May 2021, giving the Respondent permission to serve a winding-up petition out of the jurisdiction.

### **Background**

2. The Applicant is a public limited company operating as an investment vehicle under the laws of the Grand Duchy of Luxembourg. It qualifies as an alternative investment fund. It is regulated by the Commission de Surveillance du Secteur Financier (“CSSF”) which, like the Financial Conduct Authority in this country, supervises professionals operating in the financial services sector. The Applicant is a form of umbrella fund, comprising a number of sub-funds each of which has designated to it a distinct collection of assets and liabilities of the umbrella fund.
3. The Respondent invested £20 million in one such dedicated sub-fund (the “Sub Fund”) in return for which it received 17,110,835 Sub Fund-designated shares in the Applicant.

4. The Applicant’s Articles of Incorporation explain the structure:

“The Company is one single entity; however, the rights of investors and creditors regarding a Dedicated Fund or raised by the constitution, operation or liquidation of a Dedicated Fund are limited to the assets of this Dedicated Fund, and the assets of a Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors whose claim arose in relation to the constitution, operation or liquidation of this Dedicated Fund. In the relations between the Company’s shareholders, each Dedicated Fund is treated as a separate entity...”

5. The Sub Fund’s stated objective was to invest in real estate assets in the UK, via direct ownership, joint ventures, and by holding options via corporate entities to purchase land or by being party to contracts with a view to benefitting from future sales of land. It is said to have received total investments of £55 million. In June 2016, the Applicant’s board of directors released a notice of suspension to those holding shares in respect of the Sub Fund stating that the Sub Fund had a significant exposure on an option to acquire land which prompted the Applicant’s board to suspend the net asset value calculation and the issue, conversion and redemption of shares in the Sub Fund during the suspension period.
6. In February 2019, following what the Applicant’s board described as “continuing economic uncertainty”, and having received redemption requests representing more than 25% of the value of the Sub Fund’s net assets, the Applicant’s board took the decision to liquidate the Sub Fund and to appoint a “liquidator of the Sub-Fund, under the supervision of the Board”.
7. On 11 December 2020, the Applicant’s board of directors informed investors that after three years of marketing the Sub Fund’s assets for sale, and with no proceeds then expected to be realised, the board had concluded that the Sub Fund’s value was zero and would cooperate with the investment fund manager to conclude the liquidation in which there would be no return to those holding shares in respect of the Sub Fund.

8. On 13 May 2021, the Respondent presented a petition to this Court to wind up the Sub Fund as an unregistered company. On the same date, it applied, ex parte, for permission to serve the petition on the Sub Fund out of the jurisdiction at its (i.e. the Sub Fund's) "registered office" (the "Permission Application").
9. On 18 May 2021, ICC Judge Prentis gave permission, on the papers, for the Respondent to serve the petition out of the jurisdiction "by serving at its registered office" (the "Permission"). That order was varied a month later by order of Deputy ICC Judge Schaffer to amend the address for service "to [the Sub Fund's] current registered office" and then provided an address in Luxembourg.
10. The Applicant now applies to set aside the Permission on the basis that (i) in obtaining it, the Respondent failed to give full and frank disclosure; and (ii) in any event, the winding-up petition does not have a reasonable prospect of success.
11. The Applicant relies upon two issues in respect of which it submits the Respondent omitted relevant, material matters. These, it claims, go to the heart of the Court's jurisdiction to make a winding-up order in respect of the Sub Fund and therefore also to the heart of the question whether the Permission should have been granted: first whether the Sub Fund is an entity in respect of which the court can make a winding-up order, and secondly, whether the Respondent has locus to present the petition.
12. Mr Harvey's witness statement in support of the application asserts that:
  - i) the Sub Fund is not an unregistered company and consequently the Court does not have jurisdiction to make a winding-up order whether under section 221 of the Insolvency Act 1986 (the "Act") or otherwise;
  - ii) the Respondent is not a creditor of the Sub Fund and does not have standing to present or prosecute the petition; and
  - iii) the Sub Fund no longer exists, no longer has any assets and no longer has a connection to England and Wales.

### **Relevant legal principles**

#### ***Service out of the jurisdiction***

13. CPR 6.36 and 6.37 provides
  - "6.36. In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court, if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.
  - 6.37
    - (1) An application for permission under rule 6.36 must set out –
      - (a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;

(b) that the claimant believes that the claim has a reasonable prospect of success; and

(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.

... (3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.”

14. For the purposes of CPR 6.37(1)(a), the Petitioner relies upon ground (20) in paragraph 3.1 of Practice Direction 6B, namely:

“(2) A claim is made: (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph”.

***The duty of disclosure on an ex parte application to serve out of the jurisdiction***

15. It is not uncommon for an application to serve proceedings out of the jurisdiction under CPR rule 6.36 to be made ex parte and without notice. The White Book notes that in the context of ex parte applications under CPR 6.36, the duty to make full and frank or fair disclosure has been described in a number of ways. In *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm.), Toulson J provided a summary of the relevant principles:

“23. The starting point is that an applicant for an order on a without notice application must make full and frank disclosure of all material facts, that is, facts known to the applicant which might reasonably be taken into account by the judge in deciding whether to grant the application: *R v Kensington Income Tax Commissioners ex parte Princess Edmund De Polignac* [1917] 1 KB 486, 514 (Scrutton LJ); *Siporex Trade SA v Comdel Commodities Limited* [1986] 2 Lloyd's Rep 428, 437 (Bingham J); *Brink's Mat Limited v Elcombe* [1988] 1 WLR 1350, 1356 (Ralph Gibson LJ).

24. It is for the court to determine what is material according to its own judgment and not the assessment of the applicant: *Brink's Mat Limited v Elcombe*. This means that if the court considers there to have been material non-disclosure, it is not an answer that the applicant in good faith took a different view, although that may affect the court's exercise of its discretion in deciding what to do in the light of the non-disclosure. It does not mean that an applicant is under a duty to disclose facts which could not reasonably have a bearing on the decision which the judge has to make.

25. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it. I was referred to a number of statements on the duty of disclosure in the context of applications for freezing injunctions. In such cases the court is being asked to make an order of an exceptional kind, prohibiting or restricting a defendant's use of its own assets before any adjudication has been made against it. Because of its draconian nature, it is a jurisdiction which requires great caution and a wide range of factors may have a bearing on the court's decision.

26. An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case.

27. Authority supports this approach. In *BP Exploration Co (Libya) Limited v Hunt* [1976] 3 AER 879 (which concerned an application for leave to serve out of the jurisdiction) Kerr J said at 893:

In my view, a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the plaintiff's claim at the trial should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant leave.

28. In *The Electric Furnace Co v Selas Corporation of America* [1987] RPC 23, 29 Slade LJ said that where there was no deliberate intention to mislead the court he agreed with those observations of Kerr J. Mr Gruder sought to rely on Slade LJ's words as cutting down what Kerr J had said. Slade LJ was recognising that simple non-disclosure is to be differentiated from a deliberate intention to mislead a court by a combination of things said and left unsaid. In the present case there is no reason to doubt the truthfulness of MRG's evidence in support of its application for permission to serve out of the jurisdiction that it believed that it had a reasonable prospect of success in respect of its claims. As I have remarked, it is not in dispute that it has indeed a reasonable prospect of success within the meaning of the rules. The question at issue is whether MRG had a duty to disclose facts tending to show that Engelhard had or might have a reasonable prospect of success in defending the claims.

29. If MRG was aware of matters which might reasonably have caused the judge to have any doubt whether he should grant permission to serve out of the jurisdiction, those would have been relevant matters and therefore ought to have been disclosed. This must be so in principle, and it is implicit in the authorities to which I have referred.”

***Winding up an unregistered company***

16. The petition seeks an order to wind up the Sub Fund as an unregistered company pursuant to section 221 of the Insolvency Act 1986. Section 220 sets out the meaning of “unregistered company”:

“220 Meaning of “unregistered company”

(1) For the purposes of this Part, “unregistered company” includes any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom.”

17. Section 221(1) of the Act provides:

“Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions of this Act about winding up apply to an unregistered company with the exceptions and additions mentioned in the following subsections.”

18. Section 221(5) of the Act sets out the grounds on which an unregistered company can be wound up:

“(5) The circumstances in which an unregistered company may be wound up are as follows—

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the court is of opinion that it is just and equitable that the company should be wound up.”

***Permission to serve a winding-up petition out of the jurisdiction***

19. In *Flame SA v Primera Maritime (Hellas) Ltd* [2010] EWHC 2053 (Ch) the Chancellor considered an application for permission to serve a winding-up petition on a company in Liberia. At paragraph 11 of his judgment he said:

“... it is clear that there are two separate questions on an application such as this, first whether jurisdiction to wind up Primera has been established to the criterion that there is a good

arguable case, and secondly whether there is a serious issue to be tried as to whether the jurisdiction to wind up Primera ought, in the court's discretion, to be exercised."

20. There are no definitive principles to determine whether the Court should wind up an overseas company; the matter falls within the discretion of the Court. However as noted in *Stoczniak Gdanska SA v Latreefers Inc (No.2)* [2001] 2 BCLC 116, in most cases it is likely that three conditions should be satisfied: (i) there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction; (ii) there must be a reasonable possibility of benefit to the petitioner; and (iii) one or more persons interested in the distribution of the company's assets must be persons over whom the court can exercise jurisdiction.
21. There was no dispute as to whether one of the grounds in Practice Direction 6B applies. I shall start by applying the principles set out in *Flame SA v Primera Maritime (Hellas) Ltd.*

***(i) Has jurisdiction to wind up the Sub Fund been established to the criterion that there is a good arguable case?***

*Expert evidence*

22. The Respondent initially filed, without permission, the evidence of an expert in relevant Luxembourg law. Subsequently, to assist the Court's understanding of the nature of the Sub Fund, the parties were given permission to file expert evidence addressing a series of questions concerning the Sub Fund under Luxembourg law:

"(1) Is the Dedicated Fund a legal entity as a matter of Luxembourg law?

(2) Can the Dedicated Fund be wound up under Luxembourg law other than by the board of directors of the Fund under article 16 of the Fund's articles of incorporation?

(3) Can the Dedicated Fund be wound up under the law of Luxembourg by court order?

(4) If the answer to question (2) is "yes" on what grounds or in what circumstances can the Dedicated Fund be wound up by the court?

(5) By what other means can the Dedicated Fund be wound up (other than by the board of directors of the Fund or court order)?"

23. The Respondent relies on the reports of Mr VandenBulke dated 27 July 2021 and 7 December 2021. The Applicant relies upon the report of Mr Elvinger dated 21 January 2022. In March 2022, the experts produced a joint statement agreeing that:
- i) a dedicated sub-fund does not have its own legal personality and cannot be sued in its own name but is to be sued in the name of the fund of which it forms part (the "Fund");

- ii) where a dedicated sub-fund is sued as a defendant (through the Fund), it “benefits from/takes” the legal personality of the Fund. A dedicated sub-fund can be liquidated, voluntarily or judicially in its own name, independently from the liquidation of the Fund;
- iii) an investor in a dedicated sub-fund is primarily a shareholder in the Fund, but, during the life of the Fund/dedicated sub-fund (including the time when it is in liquidation) may, at certain times, also acquire the status of creditor of the Fund, such as when dividends have been approved and declared payable or when, upon redeeming their shares and having received a confirmation of such redemption, they are entitled to receive payment of the redemption proceeds;
- iv) shareholders that have invested in a dedicated sub-fund can be distributed the net assets of the dedicated sub-fund pro-rata their shareholding in the assets of the dedicated sub-fund only once all creditors’ claims linked to the dedicated sub-fund have been settled. If there are no assets in the dedicated sub-fund to distribute to shareholders, the shareholders remain shareholders but, lacking any assets, the right to claim any proceeds cannot be exercised in respect of the dedicated sub-fund.

24. The Respondent’s expert, Mr Vandenburg, informs the Court that:

“ ... a compartment has no legal personality, and, as such, no agreement may be signed by, nor can any action be brought against a compartment in isolation. A compartment consists only of a pool of assets part of an umbrella structure. An umbrella fund is a collective investment vehicle that exists as a single legal entity but has several distinct compartments or sub-funds.

...Under Luxembourg law, three procedures can be used to wind up and realise the assets of a Luxembourg company - bankruptcy governed by art. 437 ff of the Luxembourg Commercial Code (the "Commercial Code"), voluntary liquidation governed by title XI of The Law of 1915 or judicial (or involuntary) liquidation governed by title XII of the Law of 1915.

Bankruptcy is the only procedure used exclusively to wind up insolvent companies under Luxembourg law.

... The insolvent compartment of an umbrella structure, which has no legal personality (see 5.1 above) cannot be subject to bankruptcy. As such, the only procedures available for an orderly liquidation of the compartment would be a voluntary liquidation (as described below) or a judicial liquidation (as described below).



### Voluntary liquidation

Voluntary liquidation is, in principle, used to wind up solvent companies for various reasons (e.g. to distribute assets to shareholders, upon expiry of the company's term of existence).

Voluntary liquidation of a compartment is permitted under Article 71(6) of the 2007 Law which provides: "Each compartment of a specialised investment fund may be liquidated separately without that separate liquidation resulting in the liquidation of another compartment [ . . . ]."

Voluntary liquidation is decided by the board of directors of the specialised investment fund in accordance with its articles and the investment fund documentation (prospectus, subscription documents, etc)."

25. Mr Vandebulke explains that the third option, Judicial Liquidation may be instigated at the request of the Public Prosecutor acting on its own initiative or at the request of the CSSF to pronounce the dissolution and order the liquidation of one or more compartments within a specialised investment fund, but only in cases where the authorisation of the dedicated sub-fund has been refused or withdrawn. He states that in practice, dedicated sub-funds are usually liquidated by a decision of the board of directors of the umbrella fund and as such, cases of judicial liquidation of a dedicated sub-fund are rare.
26. In other parts of his expert's report, Mr Vandebulke explains that judicial liquidation is no longer possible once the dedicated sub-fund has been voluntarily liquidated: "a court cannot order the liquidation of a compartment that no longer exists". From a tax perspective he states:

"Luxembourg tax authorities formally expressed the view that compartments constitute separate economic units gathered into a single legal entity and only this single entity may be registered as a taxpayer."

### *Winding up the Sub Fund as an unregistered company*

27. Whilst section 221 of the Act was originally introduced to provide a winding-up mechanism for companies that had not been registered, it is now most commonly deployed in relation to overseas companies.
28. Despite the apparent breadth of the words "any association" as used in section 220, they are not without limitation. As noted by Nourse LJ in *Re International Tin Council* [1989] 1 Ch 309, citing with approval a passage from Lord St. Leonards L.C.'s judgment in *In re St. James' Club* (1852) 2 De G.M. & G. 383, the term should be interpreted in the light of Parliament's probable intention. In the latter case, the Court of Appeal held that if the legislature had intended clubs such as cricket clubs and archery societies to fall within the scope of the section, it could have expressly mentioned the word "club".

29. This approach was followed in relation to football clubs in *Re Witney Town Football and Social Club* [1993] BCC 874 and *Panter v Rowellian Football Social Club* [2012] Ch 125 (the court applying the principle to administration under the Act in *Rowellian* where it noted that, as the club was not susceptible to being wound up, there was no good reason why Parliament should have intended it to be susceptible to administration).
30. Mr Lewis submits that in contrast, the Sub Fund's features are so closely analogous to those of a company that it can be inferred that Parliament would have intended winding up to be available for such a sub-fund. He relies on the following features which, he says, distinguish the Sub Fund from the clubs and other associations to which section 220 of the Act has been found not to apply (the "Distinguishing Features"):

"(1) Investors were offered shares and treated as shareholders of [the Sub Fund]:

- a) Various classes of shares were offered in the [Sub Fund] (Offering Document).
- b) At various times notices were given by Board of Directors to 'Shareholders of [the Sub Fund]';
- c) '*In the relations between the Fund's Shareholders, each Dedicated Fund is treated as a separate entity*' (Offering Document);
- d) The assets of the [Sub Fund] were ring-fenced and '*the assets of a Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors whose claim arose in relation to the constitution, operation or liquidation of this Dedicated Fund*' (Offering Document);

(2) Although the [Sub Fund] did not have its own legal personality, this is of little practical difference where, (experts' joint statement):

- a) it could be sued as a defendant (through the Fund) for which purpose it 'benefits from/takes the legal personality of the Fund'; and
- b) it '*can be liquidated, voluntarily or judicially in its own name, independently from the liquidation of the Fund*'.

(3) The [Sub Fund] produced annual reports and audited financial statement in the same way as a company with its assets and liabilities separately accounted for.

(4) The [Sub Fund] owned 100% of the shares of its subsidiaries and had 'intercompany loans' to those same subsidiaries.

(5) The [Sub Fund] could be liquidated voluntarily:

- a) Under Article 76(1) of the 2007 Law.

- b) It could be placed into liquidation by the general meeting of shareholders (Offering Document).
  - c) The liquidation of the [Sub Fund] would be carried out by one or several liquidators appointed by the shareholders in general meeting (Offering Document).
- (6) The [Sub Fund] could be liquidated judicially under article 47(1) of the Law of 2007.
- (7) On the conclusion of a director-led liquidation the sub-fund is considered as no longer existing, i.e. dissolved.
31. The first of Mr Lewis’s Distinguishing Features appears to be contradicted by the joint experts who agree that investors are given shares in the umbrella fund (in this case, the Applicant public limited company) and not in the dedicated sub-fund. It is for this reason, they say, that investors remain shareholders even if there are no assets in the dedicated sub-fund. I reject his submission that investors were shareholders in the Sub Fund.
32. Notices were indeed given at various times by the Board of Directors to ‘*Shareholders of [the Sub Fund]*’ but Mr Lewis omits the remainder of that sentence: “(the “*Sub-Fund*”) of the investment company [*the Applicant*] (the “*Company*”). The Sub Fund does not have its own directors: it is merely a compartment within the umbrella company which holds assets, ring-fenced for identified investors and creditors whose investment or claims arise in respect of that sub-fund/compartment.
33. Whilst, as Mr Lewis submits, the Sub Fund was treated as a separate entity, the experts agree that this is not the same as the Sub Fund having separate legal personality. The Respondent’s own expert, Mr Vandenburg clearly states:
- “However, “separate entity” does not mean a separate “legal entity”. Indeed the fact that each compartment will be treated as a separate entity does not mean that a compartment is a “legal entity by itself.” A “legal entity” is commonly defined as an individual, company, or organisation that has legal rights and obligations. A legal entity has legal existence and the capacity to act independently through its own statutory bodies. A legal person holds rights which allow it to carry out its activities.
- On the contrary, a compartment has no legal personality, and, as such, no agreement may be signed by, nor can any action be brought against a compartment in isolation. A compartment consists only of a pool of assets part of an umbrella structure...”
34. The first element of the second Distinguishing Feature, that the Sub Fund can only be sued as a defendant through the Applicant, again highlights that it does not have its own legal personality. The second element, that it can be liquidated voluntarily or judicially in its own name, must be read in context. Whilst an umbrella fund’s directors may voluntarily liquidate a sub-fund and apply its assets to the claims of creditors and fund investors which relate specifically to that fund, a sub fund cannot be the subject of

bankruptcy proceedings. As the Respondent's own expert states, under Luxembourg law, bankruptcy is used exclusively to wind up insolvent companies. The Sub Fund is not a company.

35. The possibility of judicially liquidating the Sub Fund must also be considered in context. The court in Luxembourg may only make such an order when the sub-fund's authorisations have been withdrawn, and Mr Vandebulke states that once a sub-fund has been liquidated, it cannot be judicially wound up. The Applicant's solicitor, Mr Harvey, states in his second witness statement that at no time did its regulator, the CSSF request that the Sub Fund be liquidated. The Respondent appears to have sent to the CSSF a copy of at least one of its letters addressed to other parties who invested in the Sub Fund, expressing serious concerns regarding the Sub Fund's financial affairs, but the Respondent's evidence does not disclose whether it expressly requested the CSSF to take steps to initiate a judicial liquidation.
36. The Respondent relies, for its third Distinguishing Feature on annual reports being produced in relation to the Sub Fund. Those financial statements were exhibited to Mr Spector's witness statement, but he did not draw to the Court's attention those parts of the statements which explain that the Sub Fund is not a separate legal entity:
- “Accordingly, these financial statements are, in all material respects, an extract of those sections of the audited annual report of [the Applicant] that relate to [the Sub Fund].”
37. The joint experts' statement does not support the fourth Distinguishing Feature that the Sub Fund owned 100% of the shares in its subsidiaries and held the benefit of inter-company loans. The experts make clear that the Sub Fund cannot enter into contracts. The assets held by the Fund and ringfenced to the Sub Fund are said to be answerable exclusively for the rights of the Shareholders relating to the Sub Fund but that is not the same as the sub-fund owning them.
38. I have rejected almost all of the Distinguishing Features on the basis that the Sub Fund is not a separate entity. Whilst Luxembourg law makes provision, in limited circumstances, for it to be treated as if it were a separate entity, in fact it is not. The Sub Fund is not an entity capable of recognition, in its own right (as would, for example, be an association) within this jurisdiction. I have been shown no authority that confirms, whether in relation to an entity here or abroad, the Court's jurisdiction to wind up just part of a company, partnership or association, in its own name, as if it were a separate entity, when it is not.
39. For all of the reasons I have given for rejecting the Distinguishing Features, and applying the approach set out in *Flame SA v Primera Maritime (Hellas) Ltd* to the question of whether permission should be given to serve a winding-up petition outside the jurisdiction, I do not consider that this court's jurisdiction has been established to the criterion of a good arguable case.

***Is there a serious issue to be tried as to whether the jurisdiction to wind up the Sub Fund ought, in the court's discretion, to be exercised?***

40. As the court's decision in *Stocznia Gdanska SA v Latreefers Inc (No.2)* refers to the winding up of an overseas company, and as I consider that there can be no doubt that

the Sub Fund is not such a company, in my judgment the principles set out in that case are of limited relevance. However, having heard submissions in relation to them, I shall address each in turn. In *VTB Capital Plc v Nutritek International Corp* [2103] UKSC 5 at paragraph 66 of his judgment, Lord Mance explained that when considering whether there was a “serious issue to be tried” this could be interpreted as requiring the Court to determine whether VTB had a “reasonable prospect of success”.

a) ***Sufficient connection with this jurisdiction***

- i) Whilst the Respondent states that the Sub Fund was marketed to investors in this jurisdiction and that it proposed to invest in assets in England and Wales, it is clear from the Respondent’s own expert that it could not enter into contracts in its own right. As such, in my judgment and even applying the very low threshold test, the Respondent does not have a reasonable prospect of persuading the Court that the Sub Fund, which does not exist as an entity separate from the Applicant company, has a sufficient connection with this jurisdiction to merit a winding-up order being made;

b) ***Reasonable possibility of benefit to the petitioner***

- i) The Respondent would like an English insolvency practitioner to be appointed who could investigate what happened to the very large amounts of money that it and other investors paid the Applicant for investment in the Sub Fund. No returns have materialised and the reasons do not appear, yet, to have been satisfactorily explained.
- ii) The loss of such enormous sums of money certainly appears to merit investigation. However, the Respondent chose to invest in a compartmentalised sub-fund, a protective-cell-type entity beneath an umbrella fund, formed and operated under the laws of Luxembourg and subject to the jurisdiction of the courts of Luxembourg. In doing so, it declared itself to be a sophisticated investor.
- iii) Assuming jurisdiction over a foreign entity was once described as “exorbitant”. Whilst it is now more common for this Court to wind up overseas companies as unregistered companies and that term appears no longer to be applied, it demonstrates how carefully the Court must consider extending its jurisdiction beyond its own borders. The Applicant’s own regulator did not take steps to wind up the Sub Fund in the courts of Luxembourg, and according to the Respondent’s expert, it is too late for it now to endeavour to do so.
- iv) Whilst the Respondent may wish this Court to appoint a liquidator to investigate what happened to the money they invested in the Applicant in respect of the Sub Fund, and no doubt consider they would benefit from such an investigation, in my

judgment that alone cannot justify the Court exercising jurisdiction in respect of just part of an overseas company as if it were a separate legal entity when it is not, or, in other words, exercising jurisdiction which I consider would indeed be exorbitant.

- c) *Persons subject to the court's jurisdiction* The third requirement from *Latreefers* is that one or more persons interested in the distribution of the company's assets must be persons over whom the court can exercise jurisdiction.

I accept that the Respondent is a party subject to this court's jurisdiction. However (i) it appears to have invested in shares in the Applicant and not be creditors of the entity it is seeking to wind up; (ii) it is now said that there are no remaining assets; and (iii) in any event, and for the same reasons that I consider *Latreefers* can and should be distinguished, that alone would not, in my judgment, justify the court taking the exceptional step of making an order to wind up the Sub Fund which is just part of an overseas company.

*Is the Respondent a creditor of the Sub Fund?*

41. The Respondent's petition relies upon both 221(5)(a) of the Act (the Sub Fund has ceased to carry on business) and 221(5)(b) (the Sub Fund is unable to pay its debts). In that part of the petition that addresses what became known as "the Coronavirus test" in schedule 10 to the Corporate Insolvency and Governance Act 2020, the Respondent states:

"The grounds relied upon by the **petitioning creditor** for the purposes of the coronavirus test are as follows: the Company entered liquidation in Luxembourg and declared itself insolvent before the coronavirus." (My emphasis.)

42. In relation to the test set out in section 221(5)(b) Mr Spector's witness statement in support of the Respondent's application for Permission states:

"the Sub-Fund in unable to pay its debts, being the sums due to its investors, the Petitioner included.

... The Petitioner and all of the other supporting creditors are under the jurisdiction of the Court."

43. Mr Spector's reference to "all other supporting creditors" appears to be a reference to the table of others who acquired shares in the Applicant dedicated to the Sub Fund and who have contacted his firm.
44. Having been presented with a petition which relies upon the target company's inability to pay its debts and supporting evidence that describes the Respondent and other investors as creditors, the Court could readily have formed the impression that the Respondent is a creditor of the Sub Fund. However there is no evidence before me that

any of the circumstances contemplated by the experts in their joint report as giving rise to investors or shareholders in the Fund becoming creditors of Sub Fund, had arisen.

45. The Respondent invested in the Sub Fund by taking Sub Fund-designated shares in the Applicant. The Applicant's evidence states that all creditors of Sub Fund were paid, leaving no assets for distribution to those holding Sub Fund designated shares. On the evidence before me, therefore, the Respondent does not appear to be a creditor of the Sub Fund and has no standing to present a winding-up petition.
46. For the purposes of section 221(5)(a) of the Act (the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs), Mr Lewis relies on the Applicant's own witness statement. Mr Harvey confirms that:

“the Sub-Fund no longer exists in any meaningful sense and it no longer has any assets”.

47. He reminds the Court that it may wind up an unregistered company which has already been dissolved in the jurisdiction in which it had its registered office (see *Flame SA v Primera Maritime (Hellas) Ltd* [2010] EWHC 2053 (Ch)).
48. The clear distinction in this case, is that the Sub Fund, not being a separate entity, but just a collection of assets within an overseas company, does not have a registered office and it is to be assumed that as it could not enter into contracts in its own name, among the reasons why it “no longer has any assets” is that it could not, at any time, have held assets in its own name.

***Should the Permission order be set aside?***

49. In my judgment, the Respondent failed in its duty to give full and frank disclosure by failing to draw the Court's attention the following features of its petition which I consider to be material:
- i) The Sub Fund is not a company. It should not have been described on the face of the petition as “the Company”. For the purposes of section 220 of the Act, the petition is not in respect of a company, nor any association of the type hitherto considered by the Court. Having chosen so to describe it, the Respondent failed in its duty by omitting to draw to the Court's attention, in both the petition and the Permission application, that, unlike a company, the Sub Fund is not a separate legal entity.
- ii) Instead, in my judgment, Mr Spector's witness statement in support of the Permission Application creates the impression that the Sub Fund is a separate legal entity. His witness statement switched, without explanation, from referring to the “Sub-Fund” to the “Fund”, the latter not being separately defined. It describes the intention for the Fund “to be structured so that operating subsidiaries would be established to hold the land assets”. This appears to be a reference to the Applicant establishing subsidiaries which would hold assets dedicated to the Sub Fund. But that is not clear from the evidence. Two paragraphs later he describes the issue, conversion and redemption of shares in “the Fund” as having been suspended in June 2016 and, in the next

paragraph to “the Fund” having been placed into liquidation in February 2019. These two references appear now to be using the term “the Fund” to refer not to the Applicant but to the Sub Fund. They are followed immediately by a statement that: “According to the notice the board of directors of the Sub-Fund resolved ‘to conduct a liquidation of all shares of the Sub-Fund’”. Despite having switched back to using the term “Sub-Fund”, and thus apparently intending to refer to the Sub Fund, this last statement erroneously suggests that the Sub Fund has its own directors, once again, creating the impression that it is a an overseas company/separate legal entity.

- iii) An order to wind up just part of an overseas company as an unregistered company is at the very least unusual, perhaps even unique.
- iv) Whilst for the purposes of section 221(5) of the Act, the Sub Fund has been dissolved, it is not a company nor an entity with separate legal personality.
- v) There is no explanation of how, having invested funds in respect of the Sub Fund, the Respondent and all other investors referred to in Mr Spector’s witness statement in support of the Permission application, thereby became creditors entitled to petition to wind up the Sub Fund. The witness statement states that for the purposes of section 221(5) of the Act, “the Sub-Fund is unable to pay its debts, being the sums due to its investors, the Petitioner included”. This creates the impression that the sums due to the Sub Fund’s investors somehow comprise debts capable of founding a petition. However, as Ms Allsop states in her skeleton argument: “A shareholder does not become a creditor of a company by reason of the shareholder’s investment. If that were correct, the company would be perpetually insolvent”. The Respondent failed to identify the material facts which pointed against it being a creditor entitled to present a petition, namely that it had not made a redemption request.

### **Summary and conclusion**

- 50. In my judgment:
  - i) the petition does not have a realistic prospect of success; and
  - ii) when presenting its ex parte application to Court for Permission, the Respondent failed in its duty to draw to the Court’s attention each and every one of the omissions which I have highlighted, key among which is that the Sub Fund is not a company in its own right, does not have its own legal personality and does not, as stated on the face of the petition, have a registered office.
- 51. These omissions were of such weight that they misled the Court into exercising its jurisdiction to grant the Permission. As such, when advancing its application for Permission, the Respondent failed to give full and frank disclosure of material facts.
- 52. I shall set aside the order granting Permission.