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Case No: CR- 2021-000862

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST (ChD)

In the Matter of KMG SICAV-GB Strategic Land Fund

Royal Courts of Justice
Strand, London, WC2A 2LL

10 May 2024

Before :

Deputy ICC Judge Kyriakides

- -

Between :

East Riding of Yorkshire Council as adminisitrating authority of the East Riding Pension Fund	**Claimant**
- and -	
KMG SICAV-SIF-SA	**Defendant**

- -
- -

Lexa Hilliard K.C. (instructed by **Spector, Constant & Williams**) for the **Petitioner**
Oliver Caplan (Direct Access Counsel**)** for the **Respondent**

Hearing dates: 19 and 20 March 2024

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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.

Deputy ICC Judge Kyriakides:

1. On 13 May 2021 East Riding of Yorkshire Council as Administrating Authority of the East Riding Pension Fund ("**the Petitioner**") presented a petition to this court ("**the Petition**") for the compulsory winding-up of KMG SICAV-GB Strategic Land Fund (formerly known as KMG SICAV-SIF-Lucent Land Fund ("**the Sub-Fund**") as an unregistered company pursuant to the provisions of sections 220 and 221 of the Insolvency Act 1986 ("**IA**"). The Petition was subsequently amended on 31 July 2023.

Background

2. The Sub-Fund is a "Dedicated Fund" of an investment company known as KMG SICAV-SIF-SA ("**the Company**" or "**the Fund**"), which was incorporated under the laws of Luxembourg on 4 June 2008. The Company is in the form of a public limited company constituted as a SICAV-FIS (which is a specialised investment fund) and is subject to the law of the Grand Duchy of Luxembourg dated 13 February 2007, as amended, relating to specialised investment funds ("**the Law of 2007**") and the law of the Grand Duchy of Luxembourg dated 1915 on commercial companies, as amended ("**the Law of 1915**"). It is also regulated by the Commission de Suveillance du Secteur Financier ("**CSSF**"), the Luxembourg equivalent of the Financial Conduct Authority.

3. The Company offers investments to Well-Informed Investors, such as institutional investors, who can invest in one of more of the Company's "Dedicated Funds". These Dedicated Funds, of which the Sub-Fund is one, each have their own separate pool of assets and a specific set of investment objectives. When investors invest in a Dedicated Fund, Shares in the Company representing the value of their investment are allotted to them.

4. The Articles of Association of the Company ("**the Articles**"), the Offering Document produced in relation to the Sub-Fund ("**the OD**") and the Law of 2007 explain, among other matters, the structure and status of the Company as a specialised investment fund, the structure and status of the Dedicated Funds, the rights and status of creditors and investors and how the Company and/or a Dedicated Fund may be wound up. These provisions are considered later in this judgment.

5. The Petitioner, which was a Well-Informed Investor for the purposes of the Law of 2007, invested the sum of £20 million in the Sub-Fund. In return, it received 17,110.835 shares in the Company on the basis that its rights to capital and income were restricted to the assets of the Sub-Fund. Details of the Investment Objective, the Investment Policy and Liquidity Strategy of the Sub-Fund were set out in the Appendix to the OD and were as follows:

> Investment Objective: *"to achieve medium to long-term capital growth through investment in strategic land assets located within the United Kingdom."*
>
> Investment Policy: to *"seek to achieve the stated Investment Objective by targeting an average return in excess of 12% per annum .... "Whilst the* [Sub-Fund] *has the potential to*

invest in assets located throughout the UK, it is intended that the primary focus for the [Sub-Fund] *will be in high growth areas where demand for new housing stock is most acute."*

Liquidity Strategy: *"- it is expected to hold up to 10% of the* [Sub-Fund's] *assets in cash or cash equivalents – as part of the investment policy, approximately 20% of the* [Sub-Fund's] *assets will have an expected maturity period between 12 and 18 months."*

6. Pursuant to its stated Investment Objective, the Sub-Fund was invested in land assets in the United Kingdom through four Luxembourg subsidiaries of the Company which had been specifically incorporated for that purpose. Whilst originally sums totalling £80 million were invested into the Sub-Fund, the value of the Sub-Fund was later reduced to £55 million, following a redemption of shares for the sum of £27 million.

7. On 29 June 2016 the Company sent a notice to the Sub-Fund investors notifying them that the board of directors of the Company had decided, in accordance with Article 13.2 of the Articles and the applicable provisions of the OD, to suspend the calculation of the Net Asset Value, and the issue, switching and redemption of the shares, of the Sub-Fund until further notice. The reason given for the suspension was that the Sub-Fund had suffered a significant exposure on an option to acquire land, which, in the opinion of the board, meant that the Sub-Fund could not be adequately valued.

8. Audited financial statements for the Fund and the Sub-Fund for the year ended 31 December 2016, which were signed off by KPMG on 29 July 2017, disclosed that the value of the Sub-Fund had decreased to £36.4 million. In the unaudited part of the accounts, the reduction in value was attributed to the uncertainty of the outcome of the Brexit negotiations and the consequent uncertainty regarding the future values of real estate in all sectors of the UK property market.

9. The suspension notified on 29 June 2016 continued. On 12 August 2019 a further notice was sent to the Sub-Fund Investors notifying them that because of the continued economic uncertainty since the Brexit referendum and also because of political uncertainty, the board of directors had decided to conduct a liquidation of all of the shares of the Sub-Fund pursuant to Article 16 and that it had decided to appoint ME Business Solutions S.à.r.l. as liquidator of the Sub-Fund under the supervision of the board.

10. A further notice was sent to investors on 12 August 2020. This stated that there was the possibility that no value would be realised from the Sub-Fund's investments and a call to the investors would be organised for September. This was arranged for, and held on, 27 September 2020.

11. On 11 December 2020 a final notice was sent to the Sub-Fund investors informing them that the liquidation Net Asset Value was zero and that consequently, no distribution would be made to them. All creditors of the Sub-Fund have, however, been repaid in full.

Procedural history

12. As it is not possible under Luxembourg bankruptcy laws to obtain a winding-up order against the Sub-Fund, on 13 May 2021 the Petitioner presented the Petition in this jurisdiction for the Sub-Fund to wound up as an unregistered company under the provisions of IA sections 220 and 221. On 18 May 2021 ICC Judge Prentis gave permission for the Petitioner to serve the Petition out of the jurisdiction on the Company in Luxembourg. On 28 June 2021 the Company applied to set aside ICC Judge Prentis' order ("**the Set Aside Application**"). Pursuant to directions made in respect of the Set Aside Application, expert evidence was filed and served.

13. The Set Aside Application was heard by ICC Judge Burton on 28 April 2022. On 2 February 2023, she ordered that the order of ICC Judge Prentis granting permission to serve the Petition out of the jurisdiction should be set aside. The Petitioner subsequently appealed against the order of ICC Judge Burton and on 24 July 2023, Mr Justice Green granted the appeal and set aside ICC Judge Burton's order.

The Issues

14. The jurisdictional issues which the Petitioner must satisfy on the balance of probabilities are as follows:

    14.1. whether the Sub-Fund is an unregistered company within the meaning of IA section 220(1);

    14.2. whether the Petitioner is a contingent creditor and therefore has standing to present the Petition under IA section 221(1);

    14.3. whether the Petitioner has demonstrated the existence of one or more circumstances as required by IA section 221(5).

15. If the Petitioner satisfies the jurisdictional hurdles, the court must then consider whether, as a matter of its discretion, a winding-up order should be made

Whether the Sub-Fund is a company within the meaning of IA 220(1)

<u>The Law</u>

16. As was pointed out by Ms Hilliard K.C. ("**Ms Hilliard**"), on their face the words of IA section 220(1) are very wide, In *Russian and English Bank and Florance Montefiore Guedalla v Baring Brothers and Company* [1936] A.C. 404, a case concerned with whether an English liquidator of a foreign dissolved company was entitled to bring proceedings in the name of the company, in considering the extent of section 338 of the Companies Act 1929 (a predecessor section to IA section 221), and the meaning of unregistered company, which was defined by section 337 as including "*any trustee savings bank…and any partnership, whether limited or unlimited, any association and any company"* with certain exceptions, Lord Russell of Killowen stated at page 432:

> "It [section 338] includes, therefore, countless cases of partnerships, associations and companies which are merely names of groups of individuals, and which are not corporations at all."

17. It is not disputed that foreign companies are within the ambit of section 220(1). As shown in *In re Russian and English Bank* [1932] 1 Ch 663, 668 this was established in the case of *In re Matheson Brothers Ld* 27 Ch.D 338 where it was held that a company which owed its existence to foreign law was an unregistered company falling within section 338 of the Companies Act 1929. However, as Ms Hilliard rightly pointed out, IA section 220(1) is not restricted to companies incorporated under a foreign law, but includes foreign unincorporated companies and foreign associations.

18. Despite the apparent width of section 220(1), the cases show that the section nevertheless has its limitations. I was referred, in particular, to four cases.

19. The first case is *In re St James Club* (1852) 2 De B.M &G 383 where the Court held that a club, which had not been formed with the objective of making a gain or profit from trade and where the members were not in partnership and did not incur any liability under the club's rules except for subscriptions, was not an association for the purposes of the Joint Stock Companies Winding-up Act 1848 as amended by the Joint Stock Winding-up Amendment Act 1849 (which was not very dissimilar to IA section 220(1)). In so doing, Lord St. Leonards first observed that there would be great difficulty in bringing such clubs within the operation of the above Acts. At page 922 he stated:

> "The question, whether clubs, in the ordinary acceptation of the term, are within the Winding-up Acts, depends upon the construction of these Acts; but before entering upon that consideration, it is necessary to consider the nature and constitution of such clubs: they are, generally speaking (and there is nothing particular in this club), all formed on this principle: the candidate must be elected, he must then pay an entrance fee, and also an annual sum or subscription. In this club there was a rule under which, if the person elected did not pay the entrance fee and annual subscription, he ceased to be a member; there was also an express rule, that if a member's conduct was objectionable out of the house, he might be dismissed from being a member. What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and if the club was broken up

> while he was a member, he might file a bill to have its assets administered in this Court, and he would be entitled to share in the furniture and effects of the club; but he had no transmissible interest, he had not an interest, in the ordinary sense of the term capital in partnership transactions; it was a simple right of admission to, and an enjoyment of, the club while it continued. Under such circumstances the difficulty would be very great in bringing clubs within the operation of the Winding-up Acts; and, in my opinion, any decision to that effect would be attended with much mischief".

He then concluded at page 923 as follows:

> "The words are very wide, no doubt; but still, I must give a reasonable construction to the Act, which is in pari materia, and incorporated within the Act of the preceding year. I cannot hold it to apply to every association or company. If I were to do so, I might be called upon to carry the application much lower than to such a club as that now in question. A cricket club, an archery society, or a charitable society, would come under the obligation of the Act, and indeed every club would be included. Though "associations" are mentioned I cannot think that word is to be treated without regard to the particulars with which it is associated….I will not say what associations are within the Acts; but bearing in mind that the individuals who form a club do not constitute a partnership, not incur any liability as such, I think associations of that nature are not within the winding-up Acts. I find that these Acts to which I have referred, that every provision is inconsistent with including such an association as this club is. If such had been the intention of the legislature, why should not the word "club" have been expressly mentioned? If, however, the legislature has used ambiguous expressions, I will not extend their signification beyond their natural import. At first sight, the word "association" would seem to in the case of clubs, but in looking at the context, I am clearly of the opinion that it does not."

20. The second case is *In re International Tin Council* [1989] Ch 309, where an order was sought to wind-up the International Tin Council ("**ITC**"). The ITC was an international organisation, which had been established by a treaty, the First International Tin Agreement, concluded between sovereign states. The issue before the court was whether such an association fell within section 665 of the Companies Act 1985, the predecessor section to section 220. Having considered *In re St James Club*, the Court of Appeal held at 330D that that case established that the word "association" did not include an association which Parliament could not reasonably have intended should be subject to the winding-up process. It then went on to hold that an international organisation established by treaty by sovereign states was such an association and therefore could not be wound-up under section 665.

21. The third case is *Re Witney Town Football and Social Club* [1993] BCC 874. This case concerned a football club which had been established for social and sporting purposes, although it also ran a fairly sizeable football team. Having regard to its constitution, the court concluded that the club was not an association falling within section 220(1). In so doing, Morritt J stated at 876F-G:

> "Ever since 1848 the statutory provisions conferring jurisdiction on the court to wind up unregistered companies have defined an unregistered company as including "any association and any company" subject to various exclusions which are not

material….Moreover, the various re-enactments since 1852 have been made in the light of the decision of the Lord Chancellor in Re St James's Club so that the apparently unlimited word "any" cannot be given its literal meaning. The decision of the Court of Appeal in Re International Tin Council, which is binding on me, establishes that the question is whether Parliament could reasonably have intended a club of this sort to be subject to the statutory winding-up procedure."

22. Finally, I was referred to *Re Caledonian Employees Benevolent Society* 1928 S.C. 663*,* where the court held that an employees' benevolent association, which employees were required to be members of as part of their contracts of employment, was not an unregistered company within the meaning of section 267 of the Companies (Consolidation) Act 1908, which defined an unregistered company (with certain exceptions) as including "any partnership, association or company consisting of more than seven members*"*. In reaching its decision, the Lord President stated at pages 635 and 636:

"It is not, I think, open to doubt that the fundamental and essential characteristic of the whole class of bodies described in the Act as companies, associations, and partnerships, is that they are bodies constituted by some species of contract of society, and founded on the contractual obligations thus undertaken by the members, or the socii, inter se. It is very obvious that this is so in the case of both companies and partnerships. No doubt the word "association" is by itself capable of including a wide variety of much more loosely and irregularly constituted bodies of persons; but, looking to the context in which it appears in Part VIII of the Act, I see no reason to doubt that what is meant is a society (whatever its object) based on consensual contract among its constituent members whereby mutual relations inter se with regard to some common object are regulated and enforced. An ordinary friendly society would provide a good example.

But the Caledonian Employees' Benevolent Society is not an ordinary friendly society. It has no foundation in any consensual contract among its members. On the contrary, its obligations and its benefits alike are inseparable concomitants of employment in manual labour under a limited company…

……..

The members are thus joint contributors by contract with their employer, to a benefit scheme set up by and contributed to by him; and they are no doubt entitled, as against him, to have their terms and conditions of the scheme fulfilled. But of contractual rights and obligations inter se they have none.

It is therefore impossible to regard this Society – or rather the members of the scheme which it conducted – as constituting either a company, association or partnership, within the meaning of section 267 of the Companies (Consolidation) Act 1908. It should be remembered that, in the case of a proper company or association or partnership (within the meaning of the Act), the reason why special procedure is necessary for the purpose of winding it up is by no means limited to the necessity of distributing its assets. Indeed, the fundamental object of the special procedure which the statute provides is to enable those obligations which are brought into being inter socios as the result of the formation of the company, association or partnership to be finally discharged and wiped out.

If I am right in what I have said, then there are no obligations inter socios to be wiped out, and no reason to resort to any special procedure for winding up the benefit scheme carried on in its name. It is enough that the necessary steps should be taken to realise and distribute, as far as may be possible, the assets remaining in the hands of its office-bearers and trustees."

The Articles, the OD and the Expert Evidence

23. The arguments of the parties and my decision regarding whether or not the Sub-Fund is an unregistered company within the meaning of section 220(1) cannot be understood without first referring to relevant parts of the Articles, the OD and the Experts Reports.

The Offering Document

24. The relevant provisions of the OD are:

24.1. Section 2, which provides the following definitions:

"**Assets**": a "resource managed by an entity as a result of transactions from which future economic benefits may be obtained and property or things having a value";

"**Category**": a "group of shares of each Class, which are sub-divided into capitalisation of income or distribution of dividends"

"**Class**": a "group of shares of each Class, which are sub-divided, inter alia, in respect of their specific denominated currency, charging structure or other specific features";

"**Dedicated Fund**": "a separate portfolio of assets within the Fund";

"**Fund**": as a "Luxembourg société d'investissement à capital variable - specialised investment fund as more fully described in the section entitled "The Fund", known as KMG SICAV-SIF";

"**Shareholder**": an "owner of the Shares" and

"**Shares**": "each share within any Dedicated Fund".

24.2. Section 3, which states:

"In accordance with the Articles of Incorporation, the Board of Directors of the Fund may issue Shares in each Dedicated Fund. A separate pool of assets is maintained for each Dedicated Fund and is invested in accordance with the investment objectives applicable to the relevant Dedicated Fund. As a result, the Fund is an "umbrella fund" enabling investors to choose between one or more investment objectives by investing in one or more Dedicated Funds. Investors may choose which Dedicated Fund(s) may be most appropriate for their specific risk and return expectations as well as their diversification needs.

Each Dedicated Fund is treated as a separate entity and operates independently, the relevant portfolio of assets being invested for the exclusive benefit of this Dedicated Fund. A purchase of Shares relating to one particular Dedicated Fund does not give the holder of such Shares any rights with respect to any other Dedicated Fund.

The net proceeds from each subscription for each Dedicated Fund are invested in the specific portfolio of assets constituting that Dedicated Fund.

With regard to third parties, any liability will be exclusively attributed to the Dedicated Fund.

Shares of different Classes or Categories within each Dedicated Fund may be issued, redeemed and converted at prices computed on the basis of the Net Asset Value per Share, within the relevant Dedicated Fund ….".

24.3. Section 10 which states:

"The Fund is one single entity; however the right 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 …."

The wording of section 10 is identical to Article 6, although Article 6 adds: "In relations between the Company's shareholders, each Dedicated Fund is treated as a separate entity …."; and

24.4. Section 21, which addresses the dissolution and liquidation of a Dedicated Fund as follows:

"… the liquidator … will realise the assets of … the Dedicated Fund in the best interests of the Shareholders thereof and upon instructions given by the general meeting, the Custodian will distribute the net proceeds from such liquidation after deducting all liabilities and liquidation expenses relating thereto, amongst the Shareholders of the relevant … Dedicated Fund in proportion to the number of Shares held by them."

The Articles

25. Then relevant articles are:

25.1. Article 1, which states:

"There exists among the existing Shareholders and those who may become owners of Shares in the future, a Luxembourg company (the "Company") under the form of a public limited company (société anonyme) subject to the 10th August 1915 as amended relating to commercial companies (the "Law of 1915") and the law of 13th February 2007 relating to Specialised Investment Funds ("the Law of 2007")".

25.2. Article 2, which states:

"The registered office of the Company is established in Luxembourg….".

25.3. Article 4, which states:

"The exclusive purpose of the Company is to invest the funds available to it in transferable securities…according to the Law of 2007 by means of spreading investment risks and affording its Shareholders the results of the management of its assets".

25.4. Article 5(a) , which states:

"The purpose of the Company is to provide investors with the opportunity to invest in a professionally managed fund in order to achieve an optimum return from the capital invested".

25.5. Article 6, which states:

"(a) The capital of the Company shall be represented by fully or partly paid up Shares of no par value ….and shall at any time be equal to the total net asset value of the Company.
……

(c) For each Dedicated Fund. A separate portfolio of investments and assets will be maintained. The different portfolios will be separately invested in accordance with their specific features as described in the Offering Document of the Company.

(d) 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 the Dedicated fund, and the assets of the Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors who claims arose in 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…..

…….

(f) …in respect of each Dedicated Fund, the Board of Directors of the Company may decide to issue one or more classes of Shares ("the "Classes"), and within each Class, one or more several Category(ies) of Shares subject to specific features….as may be determined by the Board of Directors of the Company from time to time".

25.6. Article 7.1, which states:

"(a) The Company shall issue ordinary Shares (being referred as "Shares") in registered form only ….

……

(c) All issued registered Shares of the Company shall be registered in the register of shareholders which shall be kept by the Company or by one or more persons designated thereto by the Company…..

(d) The inscription of the Shareholders, name in the register of Shares evidences his or her right of ownership of such registered Shares ……

…….

(f) Shareholders wishing to transfer some or all of the Shares registered in their names should submit to the Registrar and Transfer Agent a Share transfer form or other appropriate documentation signed by the transferor and the transferee…..".

25.7. Article 8.1, which states:

"(a) the Board of Directors may issue Shares of any Class or Category within each separate Dedicated Fund."

25.8. Article 8.3, which states:

"(a) Shareholders may only request redemption of their Shares in accordance with the conditions set-forth for each Dedicated Fund in the Offering Document……".

25.9. Articles 16.2(a) to (f), which deal with the voluntary liquidation and dissolution of the Company. This can only happen if certain conditions are met and the Shareholders at a general meeting pass a winding-up resolution;

25.10. Article 16(g) , which states:

*"*In the event that for any reason whatsoever, the value of assets of … a Dedicated Fund should fall down to such an amount considered by the Board of Directors as the minimum level under which the … Dedicated Fund may no longer operate in an economically efficient way, or in the event that a significant change in the economic or political situation impacting such … Dedicated Fund should have negative consequences on the investments of such … Dedicated Fund … the Board of Directors may decide to conduct a liquidation…. The

Company shall send a notice to the Shareholders of the relevant … Dedicated Fund before the effective date of such liquidation …."; and

25.11. Article 17, which provides for the Company to be managed by a Board of Directors.

The Expert Evidence relating to the status of Dedicated Funds and their winding-up

26. The following expert reports on the relevant law of Luxembourg were produced to the Court: (i) the expert report of Vandenbulke dated 27 July 2021 ("**V1**"); (ii) the supplementary expert report of Vandenbulke dated 7 December 2021 ("**V2**"); (iii) the expert report of Marc Elvinger dated 21 January 2022 ("**ME1**"); (iv) the Joint Statement of the Experts dated 4 March 2022 ("**the Joint Statement**"); and (v) the expert report of Bertrand Gerdin (a partner in Ogier Luxembourg (GP) S.a.r.l) dated 11 December 23 ("**BG1**"). In relation to the common questions asked of the experts relating to the status of the Dedicated Funds and their winding-up, there does not appear to be much difference between them. I set out below the relevant parts of their reports.

The status of a Dedicated Fund

27. This issue is dealt with under section 5 of V1. In answer to the question whether a Dedicated Fund is a legal entity, V1 states as follows:

"The Fund [i.e. the company] is a so-called "umbrella fund" constituted with multiple "dedicated Funds". A "Dedicated Fund" is defined in the Offering Document…as "a separate portfolio of assets within the Fund".

According to article 71(1) of the Law of 2007 "Specialised investment funds may be constituted with multiple compartments, each compartment corresponding to a distinct part of the assets and liabilities of the specialized investment fund.". Therefore, the term "Sub-fund" or "Dedicated Fund" corresponds to what the Law of 2007 defines as a "compartment", being a "distinct part of assets and liabilities".

……

The operation of a compartment is governed by principles of segregation, i.e. the assets and liabilities of a specific compartment are segregated from those of other compartments within the same investment vehicle.

According to article 71(5) of the Law of 2007 "The rights of investors and creditors concerning a compartment or which have arisen in connection with the creation, operation or liquidation of a compartment are limited to the assets of that compartment, unless a clause included in the constitutive documents provides otherwise……For the purpose of the relation between investors, each compartment will be deemed to be a separate entity, unless a clause in the constitutive documents provides differently."

Consequently, the assets of a given compartment are available solely to satisfy the right of investors in relation to that compartment, and the rights of creditors whose claims have arisen in relation to the creation, operation or liquidation. Unless the constitutive document provides otherwise, for the purpose of the relationship between investors (only), each compartment will be deemed to be a separate entity.

However, "separate entity" does not mean 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 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. An umbrella fund is a collective investment vehicle that exists as a single legal entity, but has several distinct compartments or sub-funds……

With respect to the Law of 2007, Luxembourg tax authorities formally expressed the view that compartments constitute separate economic units but legally gathered into a single legal entity and only this single legal entity may be registered as a taxpayer. The Association of the Luxembourg Fund Industry (ALFI) takes the same position having stated that: "While the umbrella fund is a legal entity, the sub-funds are segregated compartments of that legal entity but not separate legal entities […]. Although sub-funds have no legal personality, they generally constitute a separate economic entity under an umbrella fund (i.e. the SICAV), as their assets and liabilities are legally segregated."

Winding-Up of a Dedicated Fund

28. In V1 and V2, Vandenbulke summarises the Law of Luxembourg as follows:

28.1. the relevant Luxembourg law governing insolvency procedures applies only to the opening of proceedings against a company having a legal personality and not to a Dedicated Fund;

28.2. the only procedures available for an orderly liquidation of a Dedicated Fund are a voluntary liquidation or what is termed as a "judicial liquidation";

28.3. the voluntary liquidation of Dedicated Fund is permitted by article 71(6) of the Law of 2007 which provides that: "Each compartment of a specialised investment fund may be liquidated separately without that separate liquidation resulting in the liquidation of another compartment…". Such voluntary liquidation is decided on by the board of directors of the company in accordance with its articles and the investment fund documentation (i.e. prospectus, subscription documents and so forth);

28.4. the voluntary liquidation procedure consists of realising all of the assets of the Dedicated Fund, collecting any claim and settling liabilities relating to that fund and distributing the net proceeds from such liquidation to the investors who invested in the fund. It will not affect any other dedicated funds and once the liquidation procedure is closed, the Dedicated Fund will cease to exist;

28.5. the judicial liquidation of a Dedicated Fund is a limited jurisdiction. Article 1200-1 of the Law of 1915 provides that, at the request of the Public Prosecutor, the

Luxembourg District Court sitting in commercial matters may order the judicial dissolution and liquidation of any commercial company which pursues activities contrary to the criminal law or which seriously contravene the provisions of the Commercial Code or the Law of 1915 including those laws related to the delivery of authorisation to do business. Article 47(1) of the Law of 2007 makes specific provision for the judicial liquidation of a Dedicated Fund. It states:

> "The District Court dealing with commercial matters shall, at the request of the Public Prosecutor, acting on its own initiative or at the request of the Commission de Suveillance du Secteur Financier ("**CSSF**"), pronounce the dissolution and order the liquidation of one or more compartments of a specialised investment fund subject to this Law, in cases where the authorisation of this (these compartment(s) has been definitely refused or withdrawn."

28.6. where a Dedicated Fund has been voluntarily liquidated, judicial liquidation is no longer possible, because a court cannot order the liquidation of a Dedicated Fund that no longer exists.

The Arguments

29. Ms Hilliard for the Petitioner submitted that there were two issues that the court had to decide:

29.1. the first concerned the interpretation of IA section 220(1);

29.2. the second was whether the Sub-Fund was an entity that fell within the meaning of IA section 220(1).

The interpretation of IA section 220(1)

30. After having taken me through the authorities referred to above, Ms Hillard submitted that the words of section 220(1) are very wide and are non-exhaustive. She said that they were wide enough to include entities, which might be neither a company nor an association, and entities which did not have any separate legal personality. In all cases, she submitted, the relevant question for the court to determine was whether the entity came within the concept of an unregistered company.

Whether the Sub-Fund falls within section 220(1)

31. Ms Hilliard then submitted that the Sub-Fund, although not a company nor an association, was an entity which came within the concept of an unregistered company. Her reasons may be summarized as follows:

31.1. first, the Sub-Fund is a form of collective investment scheme within the meaning of section 235 of the Financial Services and Markets Act 2000 ("FSMA") (albeit, as a foreign scheme, it is not subject to FSMA) in that it enables investors collectively to receive profits or income arising from the acquisition, holding, management or disposal of property or sums paid out of profits or income (see: *Financial Conduct Authority v Asset LI Inc* [2016] UKSC 17 at [5] and [6]). Ms Hilliard made the point that in this jurisdiction, although collective investment schemes were managed through limited companies, because of the width of the definition in section 235 of FSMA, such schemes could be run other than through an incorporated company, for example, through a trust or through a partnership. In such cases, it was argued, the court would have jurisdiction to wind-up the collective investment scheme and/or to make bankruptcy orders;

31.2. secondly, the Sub-Fund is an entity which was formed for profit, the investment objective, as described in the OD, being to target an average return in excess of 12% per annum by investing in land assets of strategic significance and importance;

31.3. thirdly, the business structure of the Sub-Fund is similar to structures found in off-shore jurisdictions, such as Jersey and the Isle of Man, where such schemes are operated through protected cell companies or incorporated cell companies;

31.4. fourthly, similar structures also exist in this jurisdiction. In this respect, I was referred to the Risk Transformation Regulations 2017 ("**RT Regulations**") which apply to protected cell companies ("**PCC**") registered bv the FCA. In particular, I was referred to:

31.4.1. regulations 12 to 15, which govern the formation of a PCC and the application to be made by the PCC in order for it to be able to carry out the activities mentioned in regulation 57. Regulation 12 sets out what a PCC is and states that it is comprised of different parts, which are the core and the cells created by the PCC after its registration and authorisation. The core administers the PCC and the cells are used for assuming risk from undertakings, issuing investments to investors to fund the PCC's exposure to that risk, holding the

proceeds of sale of those investments and, where permitted by the PCC's instrument of incorporation, entering into arrangements between cells. Regulation 12 also states that neither the core nor the cells have legal personality distinct from the PCC, but are nevertheless segregated from each other;

31.4.2. regulation 166, which provides, among other things, that a cell of a PCC may be wound up as if it were an unregistered company under Part 5 of the IA and, for that purpose, the insolvency legislation will apply to the cell subject to the modifications set out in Schedule 2 (I deal with these later in my judgment). It also provides that the entry of a PCC into liquidation does not affect the power of the PCC or the directors of the PCC to act in relation to the core or the cells, save that they may not exercise a management power in relation to a cell in liquidation without the consent of the liquidator. A management power is defined as: "a power which could be exercised so as to interfere with the exercise of the powers of the liquidator";

31.4.3. regulation 167 which deals with the power to wind up the core or put it into administration under the IA and regulation 168, which makes it clear that where two or more parts of a PCC are in liquidation or administration, then the insolvency legislation applies to each separately; and

31.4.4. finally, regulation 169 which states, inter alia, that except as provided by Chapter 15, a winding-up order may not be made against a PCC or any part of the PCC;

31.5. drawing from the RT Regulations, Ms Hilliard submitted that if English law permits the winding-up of a structure similar to the Sub-Fund as part of its own internal legislation, this supports her argument that the Sub-Fund is an entity that comes within the concept of an unregistered company and is an entity which the court can find is one which Parliament could reasonably have intended should be subject to this jurisdiction's winding-up processes;

31.6. fifthly, although the Sub-Fund does not have a separate legal personality, this is not necessary in order for section 221 to apply as evidenced by the definition of unregistered company in section 220(1) where "associations" are expressly included. Therefore, provided that an entity can reasonably have been intended by Parliament

to be subject to the winding-up process, as in the case of the Sub-Fund, that is sufficient for section 221 to apply;

31.7. sixthly, it is irrelevant that the Sub-Fund has already been subject to a voluntary winding-up process by the directors of the Company, as there is no provision in the OD or the Articles to the effect that upon such a winding-up, the Sub-Fund is dissolved, although this is not surprising since dissolution is normally associated with incorporated entities; and

31.8. finally, save for not having any separate legal personality, the Sub-Fund has all the characteristics of a company in that:

31.8.1. it is a separate entity from the Company;
31.8.2. it comprises a separate pool of assets;
31.8.3. it operates independently;
31.8.4. the purchase of shares relating to the Sub-Fund does not give the holder of such shares any rights to any other Dedicated Fund within the Fund;
31.8.5. the proceeds of the Sub-Fund were invested in a specific portfolio;
31.8.6. any liability owed to third parties is exclusively attributed to the Sub-Fund;
31.8.7. the Sub-Fund could be liquidated voluntarily under article 76(1) of the Law of 2007;
31.8.8. the Sub-Fund could be liquidated judicially under certain conditions under article 47(1) of the Law of 2007; and
31.8.9. the Sub-Fund was created for gain and profit with its stated objective of achieving medium to long term capital growth with an average return in excess of 12% per annum.

32. Mr Caplan submitted that, as a matter of construction, section 220(1) did not permit the inclusion of any entity other than companies and associations. He also argued that even if this were wrong, the Sub-Fund was not an entity that Parliament could reasonably have intended to be subject the winding-up jurisdiction. Without any disrespect to Mr Caplan's arguments, I do not propose to set them out separately in this judgment as they have been fully taken into account in my judgment below.

Discussion

33. The issues to be decided by this court are:

33.1. first, how section 220(1) should be construed; and

33.2. secondly, if section 220(1) is a non-exhaustive provision, whether the Sub-Fund is an entity which Parliament could reasonably have intended to be subject to the winding-up process.

Construction of IA section 220(1)

34. Ms Hilliard acknowledged that a Sub-Fund is neither a company nor an association. The issue that arises for consideration is whether the definition of "unregistered company" in section 220(1) is, as submitted by Ms Hilliard, a non-exhaustive definition and therefore permits the inclusion of entities that are neither companies nor associations. In my judgment, it is not.

35. Section 220(1) defines "*unregistered company*" as including "any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom". It does not, however, state what "*unregistered company"* itself means. In accordance with the cannons of statutory construction, the term "*unregistered company*" is therefore to be understood in accordance with its natural meaning. For these purposes, the legislative history of the winding-up of unregistered companies is relevant since the wording in section 220(1) substantially re-enacts legislative provisions that first appeared in the 19th century. As Morritt J stated in *Witney Town Football and Social Club* [1993] BCC 874 at 876F:

> "Ever since 1848 the statutory provisions conferring jurisdiction on the court to wind up unregistered companies have defined an unregistered company as including "any association and any company", subject to various exclusions which are not material".

And as Norse LJ stated in *Re International Tin Council* [1989] Ch. 309 at 328:

> "Between 1849 and 1929 successive Acts progressively introduced exceptions which are now to be found in section 665 [of the Insolvency Act 1985], but the basic words "any partnership….any association….any company were always there".

36. The Winding-Up Acts were introduced in 1844 at about the same time as the first public legislation by Parliament was enacted that enabled all new associations with more than 25 members or with shares transferable without the consent of all the members to be registered as companies. Prior to that there were either joint stock companies (which were, in fact, partnerships) and corporations which had been created either by Royal Charter or under a special Act of Parliament. Successive Winding-Up Acts were introduced in 1848 and 1849 and in subsequent years, but as stated in the cases referred to

above, the basic words to be found in the current section 220(1) were always there. The only exception is a partnership, the winding-up of which is now governed by the Insolvent Partnerships Order 1994, although the original wording of section 220 is retained by paragraph 2 of Schedule 3 to that Order, which provides that:

> "Section 220 is modified so as to read as follows:
>
> "220.
>
> For the purposes of this Part, the expression *"unregistered company*" includes any insolvent partnership"".

37. In light of the above, the purpose of the word "*includes*" in section 220(1) is to enlarge the natural meaning of the term "*unregistered company"* so as to include other "bodies" or "entities" that do not, or may not, fall within its natural meaning. Those "bodies" or "entities" are companies that are not registered under the Companies Act 2006 and associations. Contrary to the arguments of Ms Hilliard, section 220(1) is therefore not, in my judgment, an inexhaustive provision which would permit the inclusion of bodies or entities other than those expressly referred to in section 220(1).

38. In conclusion, as the Sub-Fund is neither an unregistered company in accordance with its natural meaning, nor a company nor an association, it does not, in my judgment, fall within section 220(1) and cannot be wound-up by this court.

<u>The characteristics arguments</u>

39. If I am wrong about the construction of section 220(1) and it is a non-exhaustive provision which could include entities other than an unregistered company in its ordinary meaning, or any company other than one registered under the Companies Act 2006 or any association, I must now consider whether the Sub-Fund is an entity which Parliament could reasonably have intended to be the subject of the winding-up process and I do so having regard to the Articles, the OD and the expert evidence referred to above.

40. For the reasons set out below, and despite the eloquence of Ms Hilliard's arguments, I have reached the conclusion that the Sub-Fund is not such an entity.

41. Although the Sub-Fund does have some characteristics of a company, for example, it is a segregated "entity", in respect of which trade is conducted with a view to a profit, there are other characteristics which it lacks and which, in my judgment are necessary for it to be held to be an entity which Parliament could reasonably have intended to be included within the winding-up jurisdiction under Part V of the IA. The lack of these

characteristics highlights the difficulties there are of applying the winding-up legislation to the Sub-Fund. I deal with these matters and the difficulties they present below.

42. First, the Sub-Fund has no contributories, although the insolvency legislation clearly envisages the existence of contributories. "Contributories" are defined in section 226(1) as being every person "who is liable to pay or contribute to the payment or any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the right of members among themselves, or to pay or contribute to the payment of the expenses of the winding up".

43. In the case of an incorporated company, contributories are its shareholder members, whether or not their shares are fully paid up (see, for example, *Burnden Group Holdings Ltd v Hunt* [2018] EWHC 463 (Ch)). In the case of associations falling within Part V of the IA, the contributories are its members which under its rules are liable to contribute to the liabilities of the association. In both *In the Matter of St James's Club* and *Re Witney Town Football and Social Club* the court did not accept such clubs as being "*associations"* falling within a similar provision to section 220(1), not only because they were not formed for the purposes of trading at a profit, but also because the members were not liable beyond their yearly subscriptions which they paid to enjoy the recreational facilities provided by the relevant club. In contrast to these cases, in the case of *In the Matter of The Construction Confederation* [2009] EWHC 3351 (Ch), the court held that a not for profit organisation was an association falling within section 220(1) on two grounds: (i) first, because it was a commercial trading association, albeit that it did not trade for a profit; and (ii) secondly, because the substantial liabilities that it incurred were liabilities its members could be called upon to contribute towards.

44. The Sub-Fund has no contributories in that:

    44.1. it has no shareholder members. As shown by the Articles, including Article 7, and as explained in VB1, the shareholders are shareholders of the Company and not of the Dedicated Funds, albeit that under the Law of 2007, for the purposes of the relations between investors, each Dedicated Fund is deemed to be a separate entity, in other words, treated as if it were a separate entity. VB1 explains, however, that this does not mean that the Dedicated Fund has a separate legal personality; in reality, all that it is, is merely "*a pool of assets part of an umbrella structure*". Although none of the experts has explained the purpose of the deeming provision, it seems likely, as it is limited to relations between the investors in a particular Dedicated Fund (and

does not extend to relations between them and the Dedicated Fund), that at least one of its purposes, if not its primary purpose, is to determine as between the investors themselves their percentage entitlements to dividends and other distributions from that fund. It does not make them legally shareholders of the Dedicated Fund. As a matter of their status, they remain as shareholders of the Company and this continues to be their position even if the Dedicated Fund is wound-up by the directors and does not have any assets from which to make any distribution to them, as has happened in this case;

44.2. neither does the Sub-Fund have any other types of "members", who under any rules are required to contribute to the "liabilities" incurred in relation to the Sub-Fund.

45. Secondly, although Ms Hilliard is correct when she submitted that it is not necessary for an entity to have its own separate legal personality in order to be wound up under Part V of IA, in my judgment, what is necessary, and what all of the entities referred to in section 220(1) have in common, is the capacity, either by themselves or through individuals to enter into contractual relations, and to acquire legal rights and incur legal obligations and liabilities. In the case of an incorporated entity, this will be by the entity itself and, in the case of an unincorporated company or association, this will be by the members or by trustees or a management committee. In contradistinction to these entities, the Sub-Fund cannot itself create legal rights or incur legal obligations and liabilities; nor does it have any members, trustees or a management committee who can enter into any such legal relations for its benefit or purposes. Only the Company itself can acquire legal rights and incur legal obligations and liabilities.

46. Thirdly, upon the compulsory winding-up of a company governed by the insolvency legislation, the powers of the directors of the company or of the management committee of an association will cease upon the winding-up (see, for example, *In re Union Accident Insurance Co. Ltd* [1972] 1 W.L.R. 640 at 642). The Sub-Fund, however, has no board of directors or management committee. Pursuant to the Articles, the board of directors is the board of directors of the Company. The management powers of the Company are vested in its board of directors and extend to the whole of the Fund, including each of the Dedicated Funds. If a Sub-Fund were to be compulsorily wound-up, the powers of the Company's directors would continue, including their powers to deal with the Company's assets and liabilities, which "form part" of the Sub-Fund. Any exercise of such management powers may well conflict, and interfere, with the exercise by a liquidator of

his duties. However, without legislation which would limit the exercise of powers by the directors of the Company in respect of the Sub-Fund, it is difficult to see how a liquidator in these circumstances could properly exercise his functions under the existing insolvency legislation. This is a different scenario from, for example, a foreign company which is wound-up under the court's jurisdiction. The foreign body is a single body with a single board of directors. In such a case, the powers of that body in this jurisdiction cease upon its being wound-up in this jurisdiction.

47. Fourthly, the Sub-Fund does not itself own any assets nor is it liable in the legal sense for any debts or other liabilities. The assets and liabilities are the assets and liabilities of the Company. The segregation provisions of the Sub-Fund are in reality provisions which give creditors and shareholders limited rights of recourse solely to the assets of the Sub-Fund. In the case of shareholders, those rights are enshrined in the Articles and the OD, and are similar to class rights under English law. In the case of creditors, it is very likely that their rights are spelt out in the contracts entered into between them and the Company.

48. In such circumstances, it is difficult to see how the insolvency legislation would work in relation to collecting in assets ascribed to the Sub-Fund, but which do not belong to the Sub-Fund, but to the Company, or how creditors could prove for debts and liabilities or sue the Sub-Fund in respect of the same, when such debts and liabilities are not those of the Sub-Fund, but of the Company. The difficulties are highlighted when consideration is given to the right of a Sub-Fund to bring a claim against a third party or the right of a creditor to sue the Sub-Fund. Can the Sub-Fund bring a claim either in the name of the Sub-Fund or in the name of the Company or can a creditor sue the Sub-Fund?

49. This question was posed to the experts who were asked the following question:

> "If permitted, in what name is a Dedicated Fund sued as a Defendant, or by what means can a person vindicate their rights against such a Dedicated Fund and, if judgment can be obtained against such a Dedicated Fund, how is this enforced against the Dedicated Fund?"

50. In V2, Vandenbulke answered this question in the following way:

> "**Under Luxembourg law one fundamental condition to be able to sue or be sued is legal capacity.**
> **A dedicated fund has no legal personality**. It is only a pool of assets of an umbrella structure that allows investors to invest specifically in one asset-class (sub-fund) only.
> Any action in connection with a dedicated fund must necessarily be addressed to the umbrella structure (i.e. the specialized investment fund).
> An investor who wishes to assert his rights in relation to a sub-fund **shall assign the specialized investment fund,** and shall specify which sub-fund is concerned. In any case,

this investor has no right on the assets of the other sub-fund in which he has not invested. **The specialized fund is a single entity which is responsible for all legal actions concerning any of its sub-funds**.
Any judgment rendered in connection with a sub-fund **will be enforced against the specialized investment fund but its effects will be limited to the assets allocated to this sub-fund.**"

51. ME1 stated:

"A dedicated fund (i.e. a compartment) is sued in/under the name of the legal entity (if any) under which the umbrella fund is incorporated, here KMG, a société anonyme (public limited company) incorporated under Luxembourg law. While suing said entity, the claimant will need to specify against which dedicated fund it vindicates it rights, and such claim, if upheld in court, will have to be enforced on assets pertaining to said dedicated fund (he then quotes article 71(5) of the Law of 2007)……

I do not think that Vandenbulke is saying anything different in their Supplemental Report when they say as follows (ME1 then quotes from the report as set out in paragraph 50 above)……..

The expert opinion provided by Vandenbulke is however potentially confusing when, after having stated that "**Under Luxembourg law one fundamental condition to be able to sue or be sued is legal capacity**" it goes on stating "**A dedicated fund has no legal personality.** It is only a pool of assets of an umbrella structure that allows investors to invest specifically in one asset-class (sub-fund) only."

It would have been more correct to say – though truly I think that that's actually apparent from the statement – that "A dedicated fund has no legal personality **different/distinct from the umbrella structure".** As a matter of fact, each dedicated fund "borrows" the legal personality from the umbrella structure where the umbrella structure is incorporated as a legal entity, as is the case for KMG".

52. Finally, in their Joint Statement, both experts stated as follows:

"**5.1.1. Areas of agreement and disagreement between the Experts**
Whereas at first glance there seems to be areas of disagreement between the Experts on the answer to Question 1, it appears from the discussion between the Experts that they are substantially in agreement on the answer to be given to said question.

5.1.2 Discussion between the Experts on the point of disagreement
VANDENBULKE agreed with the statement made by EHP that a Dedicated Fund has no legal personality "different/distinct from the umbrella structure".

Whereas VANDENBULKE considers that the term "borrows", as used by EHP, is not appropriate in the circumstances because, according to VANDENBULKE, it suggests that the Dedicated Fund would receive temporary legal personality ("borrowed" from the umbrella structure) at a certain period of time (via a transfer) which it would have to return to the Fund after use, the Experts have agreed on saying that Dedicated Fund "benefits from" or "takes" the legal personality of the Fund, in particular when it is sued as a defendant (through the Fund)."

53. My understanding of the experts' opinions is that a creditor whose rights of recovery are limited to the assets of a Dedicated Fund may only recover against that fund by suing the Company itself. If the creditor's action is successful and it obtains judgment against the Company, it will then be entitled to enforce that judgment, but only against the assets of the Dedicated Fund.

54. Although the question was not asked of the experts, it seems to me that it must also be the case that if there is a claim that relates to the segregated assets of a Dedicated Fund, including a claim arising from the loss of any assets forming part of the fund, the only body that has the right to bring that claim against any third party is the Company itself; the cause of action is not vested in the Dedicated Fund, nor can it sue in its own name. This then raises the problem of how a liquidator might pursue such a claim since, in this case, the "company" for the purposes of a winding-up under the English insolvency legalisation would be the Sub-Fund and the position of the Sub-Fund regarding any right to sue would be no different in a compulsory liquidation under the IA than it would be if the Sub-Fund were not wound up. If the Sub-Fund does not own the claim and cannot sue in its own name when it is not in liquidation, then it cannot be in any better position if it goes into liquidation.

55. During the course of the hearing, I questioned Ms Hilliard on how a liquidator could pursue a claim that related to assets allocated to the Sub-Fund, but which belonged to the Company. She referred me to the Joint Statement and submitted that if the name of the Company can be "borrowed" for the purposes of being sued, a Liquidator could "borrow" the name of the Company for the purposes of bringing a claim for the benefit of the Sub-Fund. She said that a liquidator had authority to bring proceedings for the benefit of the Sub-Fund and that the name in which such proceedings were brought was neither here nor there. A liquidator was acting on behalf of the Sub-Fund and his position was akin to a trustee. If there were assets to which persons were beneficially entitled, a liquidator was entitled to seek recovery of those assets, even if they were owned by the Company, although she acknowledged that the expert evidence did not go this far. She also argued that this was not the time to consider how a liquidator might deal with this issue and that that was a matter for him, if appointed. She finally, drew my attention to the fact that English courts have always been very creative and that whatever the position might be in respect of claims against third parties, a liquidator always had a right to sue the directors under IA section 212.

56. I do not accept Ms Hilliard's arguments. In addition to the matters referred to above, my reasons are as follows:

56.1. first, I disagree with Ms Hilliard that this is not a matter which the courts should consider at this stage, since the exercise that the court has to carry out for the purpose of deciding whether Parliament could have intended that the Sub-Fund should be subject to its winding-up processes is to consider whether the provisions of the insolvency legislation are appropriate and sufficient to enable the Sub-Fund to be properly wound-up. The difficulty in applying the winding-up legislation to clubs was one of the reasons why the Lord Chancellor in *In the Matter of St. James's Club* decided that the club in that case did not fall within the Winding Up Acts;

56.2. secondly, the arguments advanced fail to make the distinction between the entity that owns the assets, namely, the Company, and the limited rights of recourse of investors and creditors to assets of a Dedicated Fund. The expert evidence shows that a creditor with a right of recourse against the assets of a Dedicated Fund has to sue the entity that is legally obligated to them, namely, the Company. A creditor does not, therefore, "borrow" the name of the Company; it is the only way in which it can obtain judgment with a view to enforcing it against the Dedicated Fund's assets. The same must equally apply if proceedings are to be brought. A liquidator would not be entitled to sue in the name of the Dedicated Fund in liquidation as no cause of action is vested in the Dedicated Fund. Likewise, the liquidator would not be entitled to sue in the name of the Company, the entity in which the cause of action is vested, since the liquidator would not have any authority to do so under either English law (including its insolvency law) or Luxembourg law, unless authorised specifically by the directors of the Company. Indeed, there is no evidence in any of the expert evidence that a liquidator would have the automatic right to bring a claim in the name of the Company without the authority of the Company for the purposes of recovering assets which form part of a segregated Dedicated Fund;

56.3. thirdly, a liquidator would not be able to bring proceedings under IA section 212 against the directors in their office as directors as they are not directors of the Sub-Fund, but of the Company. However, I accept (but without deciding the point) that if any of the directors of the Company have been concerned in the management of the Sub-Fund (which would be "the company" being wound-up), such a person might be caught under the provisions of section 212(1)(c);

56.4. fourthly, the Sub-Fund cannot, in my judgment, be equated to a trust. The segregated assets in the Sub-Fund are not assets to which any person other than the Company is beneficially entitled. Shareholder rights to be paid any income and capital from the assets of a Dedicated Fund, and creditors' rights to look to those assets for recovery of their debts, do not create any form of beneficial interest in those assets in favour of such persons as a matter of English law. There is further no evidence that under Luxembourg law the assets are legally and beneficially owned by anyone other than the Company itself;

56.5. finally, whilst I agree with Ms Hilliard that English law is very creative, there are also boundaries within which its creativity may operate. In my judgment, its creativity does not extend to holding that a claim owned by the Company should be treated as owned by the Sub-Fund nor to permitting a liquidator to pursue litigation of such a claim in the name of the Company, when there is no basis for his authority to do so.

57. Fifthly, I will comment briefly on the winding-up provisions which are also relied upon by Ms Hilliard in support of her arguments. So far as the voluntary winding-up provisions are concerned, I do not think that these in themselves show that the Dedicated Fund is an entity within section 220(1). These provisions effectively enable the directors of the Company to liquidate the assets in a Dedicated Fund owned by the Company, and to distribute them to creditors and shareholders who have rights of recourse against the net proceeds of sale of such assets. I accept, however, that the judicial winding-up provisions under the Law of 2007, which apply only if authorisation for a Dedicated Fund is refused or withdrawn, are an indication that to a limited extent a Dedicated Fund is treated under Luxembourg Law as an entity separate from the Company. However, no expert evidence has been adduced before me as to how the winding-up process operates under Luxembourg Law, but, in any event, the concern of this court is not whether a Dedicated Fund could be wound up under Luxembourg law, but whether, as a matter of English law, a Dedicated Fund is an entity which can be wound up under Part V of the IA.

58. Finally, although Ms Hilliard argued that the Sub-Fund was a form of collective investment scheme within the meaning of FSMA (although not governed by that Act), no authority was produced to the court which showed that where a company or partnership or trust subject to FSMA operated more than one segregated collective scheme, any one of those collective investments schemes could be separately wound up by the court under Part V of the IA, although FSMA has now been in force for over 23 years.

59. All of the above matters, in my judgment, lead to the conclusion that the Sub-Fund is not an entity which Parliament could reasonably have intended to be wound-up as an unregistered company subject to the winding-up process. This conclusion is fortified by the legislation that Parliament has had to enact, namely, the RT Regulations, to enable protected cells to be wound up under Part V of the IA independently of the company of which they are part. For the purposes of this judgment, the most significant provisions of the RT Regulations (which only apply to cells of a PCC incorporated under the RT Regulations and not to cells of a foreign company) are:

59.1. regulation 166(1), which provides, inter alia, that a cell of a protected cell company may be wound up "*as if it were an unregistered company under Part V*". The inference from this regulation is that Parliament did not consider that a cell was an unregistered company falling within the definition of IA section 220(1). Had it done so, then this provision would have been unnecessary. Instead, it has had to enact a provision requiring a cell to be treated as if it were an unregistered company;

59.2. paragraph 2 of schedule 2. This paragraph shows the extent to which Parliament has considered it necessary to modify the IA in order for it to be possible for a cell to be wound-up under the insolvency legislation. Paragraph 2 states:

"The insolvency legislation applies to a cell as if—

(a) the cell is a body corporate with distinct legal personality;

(b) the cell was incorporated on its creation;

(c) the cell is registered in the part of the United Kingdom in which the protected cell company has its registered office;

(d) the registered office of the cell is the registered office of the protected cell company;

(e) the registered name of the cell is the name or number of the cell followed by "of" and the name of the protected cell company;

(f) the registrar of companies is the FCA;

(g) a person who is or was a director, shadow director, officer, employee or agent of the protected cell company is or was a director, shadow director, officer, employee or agent of the cell (as the case may be);

(h) shares issued by the protected cell company on behalf of the cell are shares issued by the cell;

(i) the cell's property, assets, liabilities, debts and creditors are determined in accordance with regulation 48(6) [this provision provides, inter alia, for: (i) assets held by the PCC on behalf of a protected cell to be treated as assets belonging to the protected cell; (ii) a liability or obligation incurred by the PCC on behalf of, or which is attributable to, a protected cell, to be treated as a liability or obligation of the protected cell; and (iii) a creditor of a PCC to be treated as a creditor of the

protected cell which is treated as being indebted to the creditor by virtue of (ii) above];

(j) arrangements made between the cell and another cell in accordance with regulations 68 and 69 are contracts entered into between the cell and the protected cell company acting on behalf of that other cell;

(k) things done by the protected cell company on behalf of the cell are things done by the cell;

(l) things done to the protected cell company in respect of the cell are things done to the cell*;*

(m) judgments or orders made against the protected cell company in respect of the cell are judgments or orders made against the cell;

(n) the books, papers, records, registers and other documents of the protected cell company are, insofar as they relate to the cell, books, papers, records, registers and documents of the cell; and

(o) an associate of the protected cell company (within the meaning given by section 435 of the Insolvency Act 1986 or Article 4 of the Insolvency (Northern Ireland) Order 1989) is an associate of the cell."

60. In my judgment, not only do the RT Regulations demonstrate that a fund like the Sub-Fund does not fall within the definition of "*unregistered company"*, but also how difficult it would be to apply the insolvency legislation as it is to the winding-up of such an entity.

61. For all the above reasons, I have reached the conclusion that the Sub-Fund is not an unregistered company falling with section 220(1) and that this court has no jurisdiction to wind it up. This ground alone is sufficient for me to dismiss the Petition.

Whether the Petitioner is a contingent creditor

The arguments

62. Assuming, however, contrary to my judgment, the Sub-Fund is an entity falling within section 220(1), the Petitioner claims that it is entitled to present a winding-up petition as a contingent creditor (IA section 1241(1) and *Re a Company 003028 of 1987* (1987) BCC 575, 584-585). The Company accepts that as a matter of law a contingent creditor has standing to present a winding-up petition, but disputes the Petitioner's claim to be a contingent creditor.

63. The Petitioner does not contend that English law applies to this issue and rightly accepts that if it did, a shareholder would not be a creditor, whether contingent or otherwise. The issue must therefore be determined in accordance with the law of Luxembourg. In support of the Petitioner's contention that under that law it is a contingent creditor, the Petitioner relies on the Joint Statement and BG1.

64. In the Joint Statement, the experts were asked whether an investor in a Dedicated Fund was a creditor of the Dedicated Fund by reason of the investment, when it was trading, when it is in liquidation or otherwise. The response in the Joint Statement is as follows:

> "**5.2.1 Areas of agreement and disagreement between the Experts**
> Whereas at first glance there seems to be areas of disagreement between the Experts on the answer to Question 2, it appears from the discussion between the Experts that they are substantially in agreement on the answer to be given to said question.
>
> **5.2.2. Discussion between Experts on the points of disagreement**
> It appears from the discussion between the Experts that they agree that the investors in a Dedicated Fund are primarily shareholders of the Fund, but that they may nevertheless also become creditors of the same upon the occurrence of certain specified events, such as when dividends have been approved and declared payable or when, upon having redeemed their shares and having received a confirmation of such redemption, they are entitled to receive payment of the redemption proceeds.
>
> **5.2.3 Agreed Experts' joint statement**
> The Experts agree that an Investor in a Dedicated Fund is a shareholder of the Fund from the subscription of the shares (and during) the liquidation of the Fund.
> The Experts however also agree that during the life of the Fund/Dedicated Fund (including the time when it is in liquidation) such shareholders may, at certain time, also acquire the status of creditors of the Fund when they happen to own a claim against the Fund which is certain and due. This occurs for example when a distribution of dividends to the shareholders has been approved and is payable, or, upon the issuance by the Fund of a redemption confirmation, in respect of the shares redemption price, or upon liquidation of the Dedicated Fund, if and once a distribution of a liquidation surplus (boni de liquidation) has been decided/declared in favour of the shareholders.
> The Experts also agree that the shareholders that have invested in the Dedicated Fund can be distributed the net assets of the Dedicated Fund pro-rata their shareholding in the assets of the Dedicated Fund only once all creditors' claims linked to the Dedicated Fund have been settled. In the event that there are no assets in the Dedicated Fund to distribute to shareholders, the shareholders remain shareholders, but lacking any assets, the right to claim any proceeds cannot be exercised over the Dedicated Fund."

65. In BG1 two questions were asked. The first question was:

> "In what circumstances, if ever, is an investor a creditor of a Dedicated Fund (including, if relevant, upon or after the liquidation of the Dedicated Fund)?"

66. In answer to the first question, BG1 states:

> "..as soon as a decision to distribute a liquidation dividend is made by the liquidator (referred to as an interim liquidation dividend) or when a portion of the liquidation balance is assigned to an investor upon completion of the Dedicated Fund's liquidation process, an investor gains an enforceable right to recover payment of either the interim liquidation dividend or the portion of the liquidation balance allocated to it, whichever is applicable….
> The Investor's right to claim (thus establishing its status as a creditor) against the Dedicated Fund becomes effective from the date the liquidator opts to distribute an interim liquidation dividend, or at the conclusion of the liquidation process, based on whichever scenario is relevant. "

67. The second question asked was:

> "Is an investor treated as a contingent creditor before any liquidation surplus is available for distribution (that is, before it is known what, if any distribution is to be made)?"

68. In answer to this question, BG1 states:

> "Case law generally requires that an investor may be considered a creditor of a fund or a compartment thereof only when their claim is certain, liquid and due. This recognition occurs when an investor is entitled to receive funds as a result of a dividend distribution, or when a portion of the liquidation balance is allocated to a shareholder upon completion.
>
> An investor may be regarded as a contingent creditor prior to the distribution of any excess proceeds from the liquidation. This is particularly pertinent if the liquidation is anticipated to yield a profit (with assets exceeding liabilities) potentially granting the investor a share of the final liquidation balance, irrespective of whether this was reflected in the financial statements prior to liquidation. Under these circumstances the investor is viewed as possessing a claim against the fund or a specific compartment thereof that is undergoing liquidation, which is considered highly probable. Consequently, this status allows them to initiate legal proceedings as a contingent creditor.
>
> We are of the opinion that if it can be demonstrated that the liquidation will result in profits and a particular investor is entitled to a predetermined portion of these profits, then the same rationale should be employed. Nonetheless, this depends on proving that the liquidator did not adequately explore or pursue the available claims on behalf of the said investor."

69. There are some aspects of the above opinion that are not as clear as I would have wanted them to be and, unfortunately, as none of the experts attended the hearing, I could not seek any clarification. I will therefore have to deal with the above evidence as best as I can in the circumstances.

70. Returning to the facts of this case, the Petitioner accepts that all realised assets of the Dedicated Fund have been distributed to creditors and that there is nothing available from their realisation for the shareholders. However, Ms Hilliard submitted that the rights of the shareholders were governed by the Articles and by Luxembourg law and that under that law a shareholder will be regarded as a creditor if there is a possibility of there being a surplus over and above what is necessary to discharge the liabilities of creditors.

71. One of the arguments raised by Mr Caplan was that the Sub-Fund was not an entity at all; its winding-up had been closed by the directors and, as a matter of Luxembourg law, it therefore no longer existed. In support of his argument, Mr Caplan referred me not only to the relevant expert evidence as set out in paragraph 28.6 above, but also to *Re The Imperial Anglo-German Bank* [1872] 26 LT 229. In that case a winding-up order had been made against The Imperial Anglo-German Bank and the issue was whether the order could stand. This in turn depended upon whether the company had been incorporated and existed. Under German law certain formalities were required to be carried out before a company could be incorporated. In this case, the persons seeking to incorporate the company had failed to carry out one of these formalities. In light of this, the Court of Appeal held that the company had not been incorporated, had never existed and that since

a winding-up order could not be made against a non-existent entity, the winding-up order should be set aside.

72. In answer to the Company's submissions that the liquidation of the Sub-Fund was closed, that it no longer existed and therefore that there was no possibility of there being a surplus, Ms Hilliard submitted that whether or not the liquidation of the Sub-Fund was closed assumed that the liquidator had properly carried out his investigations into all matters that might produce a surplus. She claimed that this was not the case in the present case and argued that: (i) the massive losses sustained by the Sub-Fund had not been sufficiently explained and that an independent investigation was required to explain them; (ii) until that happened, a shareholder is to be regarded under Luxembourg law as a contingent creditor, because the court could not be confident that there would be no surplus; (iii) it would make no sense for a shareholder not to be a contingent creditor just because at this point in time no surplus is anticipated, but later it transpires that a sum could have been returned to shareholder; and (iv) if the court were to hold otherwise, the right of a shareholder would be a right without content.

73. Accordingly, relying on the last two sentences of BG1 referred to in paragraph 68 above, Ms Hilliard submitted that a shareholder could be elevated to the status of a contingent creditor if it could be determined that the liquidation would result in profits after the liquidator had successfully explored and pursued available claims.

Discussion

74. There are two issues that arise:

74.1. the first is whether the Petitioner is a contingent creditor;

74.2. the second is, if the Petitioner is a contingent creditor, whether it is a contingent creditor of the Company or the Sub-Fund.

75. There is no doubt, in my judgment, based on the evidence before me, that there has not yet been a sufficient explanation of the substantial losses which have been suffered by the Sub-Fund. Whilst the Petitioner received audited accounts for the year ended 31 December 2016 (which showed net assets at that time in excess of £36 million), it has not received any accounts for any period after that date, including a receipts and payments account for the period of the liquidation; nor is there evidence before me that it has received a full and frank explanation of the conduct of the liquidation and of what

happened to the investments of £55 million remaining in the Sub-Fund after the redemption referred to in the earlier part of this judgment.

76. During the hearing before Mr Justice Michael Green, Mr Mudd, who represented the Company and is one of its directors, told the court, inter alia, that: (i) there had been no incompetence or fraud in relation to the Sub-Fund; (ii) the Sub-Fund was highly regulated and all parts of the business were subject to intense scrutiny from regulators, auditors, valuers and the main board, which has oversight; (iii) the Luxembourg regulator had conducted a two year investigation, and, apart from one aspect to do with a valuation, they had found nothing much wrong; and (iv) there has been complete transparency to investors in that Mr Mudd had kept them informed of the value of the assets of the Sub-Fund and explained what had happened.

77. In response to these submissions, Mr Justice Michael Green stated that he could not decide on these matters, but that if the Petition were to continue, then Mr Mudd or anyone else representing the Company could put in evidence dealing with them in order to demonstrate before the court that no investigation was needed. Despite Mr Justice Michael Green's judgment having been given on 24 July 2023, no such evidence has been adduced by the Company. Mr Caplan sought to explain this by stating that this did not happen because the Company was a litigant in person and there were no orders made by the court directing the filing of any further evidence by the Company. In my judgment, this does not adequately explain the absence of such evidence, both in light of the Judge's remarks, the apparent importance of the issue raised by the Petitioner and the comments of ICC Judge Burton ([40(b)(ii)] of her judgment), which were repeated by Mr Justice Michael Green ([8] of his judgment) that "*the loss of such enormous sums of money certainly appear to merit investigation*".

78. Accordingly, I agree with Ms Hilliard that until a proper account and explanation have been given and it has thereby been shown that there are no viable claims from which the Sub-Fund might benefit, this court is not in a position to conclude with any certainty that: (i) no such claims exist; and (ii) consequently, the winding-up of the Sub-Fund is closed and it has ceased to exist.

79. Where I depart from Ms Hilliard is whether it is sufficient for a shareholder to be regarded as a contingent creditor under Luxembourg law where it is not known whether or not there are any claims that could be pursued. According to BG1, for a shareholder to be a contingent creditor, a profit in the liquidation must be anticipated. To anticipate

something means that it is expected to happen. When this term is considered in light of BG1's statement that it is in these circumstances that a shareholder is viewed as possessing a claim against the fund or a specific compartment "*which is considered highly probable*", logically it suggests that the prospect of a surplus being produced must also be highly probable.

80. Although Ms Hilliard relied in particular on the last part of BG1's answer to the question of whether a shareholder could be a contingent creditor (see paragraph 73 above), what is being said there by BG1 is not very clear. In my judgment, the last sentence of his answer needs to be viewed in the context of the preceding sentence. Viewed as such, BG1 appears to be saying that under Luxembourg law, in order for a shareholder to be considered a contingent creditor, not only must that shareholder demonstrate that there is a claim, which "*will result in profits*", but must also prove that the liquidator did not adequately explore or pursue that claim. I do not think that this sentence means that if it can be shown that proper investigations were not carried out during the course of winding up the Sub-Fund to ascertain whether any claims existed, the Petitioner is to be regarded as a contingent creditor.

81. In light of the above, in order to establish its standing as a contingent creditor, the Petitioner must by evidence satisfy the court: first that the Fund/Sub-Fund has one or more claims; and secondly, that it is highly probable that those claims will succeed.

82. The problem in this case is that, whilst there are clearly matters which require investigation, the Petitioner does not, and cannot, go so far as to contend that it can be shown at this point in time that the Sub-Fund/Fund has claims, let alone claims that have a high probability of success. In her skeleton argument, in the section dealing with whether or not the court should exercise its discretion to grant a winding-up order, Ms Hilliard puts it in this way:

> "This is a case where a winding-up order could [my emphasis] bring a real financial benefit to investors and, even if it does not, at the very least at the end of the compulsory liquidation, investors should have a better understanding of how so much money came to be lost".

83. Further, the effect of Ms Hilliard's argument before the court as set out in paragraph 73 above, is that whilst it cannot at present be said that the Petitioner is a contingent creditor, once there has been a proper investigation by a liquidator and it is shown that there are claims which would result in profits to the Sub-Fund, at this point the Petitioner would be "elevated" to a contingent creditor.

84. In light of the above, I cannot be satisfied on the balance of probabilities that the Petitioner, in its capacity as a shareholder, is a contingent creditor under Luxembourg law. I have to determine this matter at this point in time and on the evidence which has been presented to me. It may well be that at some stage in the future, it transpires that the Fund/Sub-Fund has one or more claims from which it is highly probable that a surplus would be produced, at which point there would be evidence to go before the court to support the claim by the Petitioner that it is a contingent creditor.

85. However, even if the Petitioner had managed to overcome the first hurdle, there is still the issue of whether the Petitioner is a contingent creditor of the Fund or a contingent creditor of the Sub-Fund. This depends on which entity is legally responsible for paying to a shareholder any surplus in the Sub-Fund on a winding-up.

86. In the Joint Statement referred to in in paragraph 64 above, both experts refer to the shareholder being a creditor of the Fund. However, BG1 refers to a shareholder being a creditor of the Fund or the Sub-Fund. The court has not had the benefit of being able to explore this issue properly with the experts. I must therefore do the best that I can with the material that I have. Under the Articles and Luxembourg law, a shareholder is a shareholder of the Fund and has, inter alia, a right to a return of capital on either a redemption or a winding-up (assuming that there is a surplus) from the assets of the Sub-Fund in which its capital has been invested. In light of these rights which derive from its status as a shareholder of the Fund, it is more likely than not that if there is a surplus in the Sub-Fund on a winding-up or an anticipated surplus, then a shareholder will be a creditor, or a contingent creditor, of the Fund, rather than of the Sub-Fund, albeit that the Fund would be obligated to distribute that surplus to the Sub-Fund's investors.

87. Finally, I would refer to an argument raised by Ms Hilliard that the Petitioner might itself have claims against the Sub-Fund and, therefore, can be regarded as a contingent creditor of the Sub-Fund. In her skeleton argument, she put it the following way:

> "…the losses in relation to the Sub-Fund have been insufficiently explained and are so substantial that investors such as the Petitioner may have claims against the Sub-Fund on the basis of misleading or deceptive statements or information that were made or provided to them at the time of the investment".

88. In my judgment, that argument fails for two reasons:

88.1. first, there is no evidence before the Court that the Petitioner does have such claims (as appears to be acknowledged by Ms Hilliard), but without at least some

evidence, the Court cannot conclude on the balance of probabilities that the Petitioner is a contingent creditor;

88.2. secondly, even if such claims had been shown to exist, they would be claims against the Company and not against the Sub-Fund itself. The Petitioner would therefore be a contingent creditor of the Company and not the Sub-Fund.

89. In my judgment, for all the above reasons, the Petitioner is not a contingent creditor of the Sub-Fund and has no standing to present the Petition.

Whether the circumstances justifying a winding-up exist

90. Section 221(5) provides that the circumstances in which an unregistered company may be wound up are:

90.1. 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;

90.2. if the company is unable to pay its debts; or

90.3. if the court is of the opinion that it is just and equitable that the Sub-Fund should be wound up.

91. The grounds relied upon by the Petitioner are that the Sub-Fund has ceased to carry on business and/or it is just and equitable for it to be wound up.

92. In relation to the first ground, Ms Hilliard told the Court that the Petitioner was not claiming that the Sub-Fund had been dissolved. She referred me to Article 16, which shows that dissolution is only referred to in the context of the liquidation of the Company, not in the context of the liquidation of a Dedicated Fund, and added that this was not surprising as dissolution was normally associated with an incorporated entity. Accordingly, the first statutory ground relied upon was that the Sub-Fund had ceased to carry on business. In response, Mr Caplan contended that the Sub-Fund no longer existed. As shown from my decision under the previous heading, I do not accept this argument. Accordingly, I am satisfied that if the Petitioner had succeeded on the first two issues, the court would have had jurisdiction to wind-up the Sub-Fund on the basis that it had ceased to trade.

93. In light of my decision that the Petitioner has not satisfied two or the three jurisdictional conditions necessary for a winding-up order to be made, and because there is some overlap between matters which are relevant to both jurisdiction and the exercise of my discretion, I do not propose to make any decision on how I might have exercised my discretion had I found that the court had jurisdiction to make a winding-up order.

Conclusion

94. For all of the above reasons, I dismiss the Petition.

95. I would like, however, to take this opportunity to thank both counsel for their very helpful and well-argued submissions.