IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 93 OF 2021(ASCJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION

AND

IN THE MATTER OF SKYE ASSETS FUND SPC (In Voluntary Liquidation) ("the Company")

BEFORE:	Hon. Chief Justice Anthony Smellie
HEARD:	In Chambers
APPEARANCES:	Mr Mark Russell of KSG Attorneys at Law for the Petitioner. Mr James Eggleton of Harneys Westwood & Reigels for the Voluntary Liquidator.
DRAFT RULING CIRCULATED:	21 June 2021
RULING DELIVERED:	30 June 2021

Headnote

Company in voluntary liquidation – application for deferral of dissolution pending petition for supervised liquidation by the court – applicable principles for grant of deferral of dissolution- company without assets -abuse of process if deferral of dissolution intended to force settlement of personal claims.

RULING

1. Mr Kiu Kim (hereinafter "Mr Kim" or "the Petitioner") petitions for the grant of a supervision order over the Company, to bring its voluntary liquidation under the supervision of the Court, pursuant to section 131 of the Companies Act ("the Act"). Pending the determination of the Petition, the Petitioner also applies for an order under section 151(3) of the Act, to defer the dissolution of the Company which would have otherwise followed upon the completion of its voluntary liquidation (the "Deferral Application"). The voluntary liquidation began by way of resolutions taken on 8 December 2020 by the Company's board, following on a supporting earlier resolution taken on 1 December 2020 by Mr Du Ki Hong, in his capacity as the sole management shareholder.

2. The Petition and Deferral Application are based on the grounds that, despite the filing by its directors of a declaration of solvency under section 123(1)(c) of the Act, the Company is in reality insolvent and, that in terms of section 131(b), the supervision of the Court "*will facilitate a more effective, economic or expeditious liquidation of the Company in the interests of its contributories and creditors*", than the voluntary liquidation process in which the Company has been engaged.

3. The Petitioner avers in the Petition that he has good arguable claims against the Company for actionable misrepresentations which induced him to invest into a segregated portfolio of the Company. He now seeks to have the Company's liquidation continued under the supervision of the Court to ensure that his interests, and as he asserts, those of others in his position, are protected and that Mr Du Ki Hong, the sole management shareholder and a director (latterly the sole director) of the Company, the person responsible for its investment strategies, and who came to be appointed as its voluntary liquidator (hereinafter the "VL" or "Mr Hong"), is properly held to account for his actions which are alleged to have caused the collapse of the Company's investment business.

4. On 26 April 2021, I granted the order for deferral of the dissolution until 20 May 2021, with directions for disclosure to be given to the Petitioner by the VL in the following terms:

> "1. *Pursuant to section 151(3) of the Companies Act (2021 revision), the dissolution of the Company is deferred until 20 May 2021.*

2. *On or before 5pm on 7 May 2021, the Voluntary Liquidator shall provide the following documents and/or information to the Petitioner:*

2.1 *the directors' declaration of solvency filed in the Company's voluntary liquidation;*

2.2 *the list of creditors and shareholders of the Company who participated in the Company's voluntary liquidation;*

2.3 *any reports and accounts made or filed by the Voluntary Liquidator in the Company's voluntary liquidation, including as to what payments were made to creditors and shareholders of the Company, and including payments made to the Voluntary Liquidator;*

2.4 *any statements of assets and liabilities of the Company prepared for the purpose or in the course of the voluntary liquidation; and*

2.5 *any other information that may assist an assessment of whether the affairs of the Company have been wound up properly and investor or creditor claims resolved properly.*

3. *there shall be a return hearing on the Petitioner's Application on 19 may 2021 at 10:00am.*

4. *costs reserved."*

5. Following are the reasons for the making of those directions and for the decision later taken upon the further hearing of the Deferral Application, rejecting the Application, after it returned on 19 May 2021.

The Company

6. The Company is a Cayman Islands exempted company incorporated with limited liability and registered as a segregated portfolio company.

7. As stated in its Private Placement Memorandum (PPM) and consistent with section 216 of the Act; as a segregated portfolio company, the Company is permitted to create one or more portfolios in order to segregate the assets and liabilities of the Company held in respect of one portfolio from the assets and liabilities of the Company held in respect of any other portfolio and/or the general assets and liabilities of the Company. Under Cayman Islands law, the assets of one portfolio will not be available to meet the liabilities of another portfolio. Notwithstanding the segregation of assets and liabilities as between portfolios, the Company is a single legal entity and no portfolio constitutes a legal entity separate from the Company itself.

8. The Company is shown to have created at least one segregated portfolio known as Skye Fund 1 SP ("the Fund") and Skye Assets Limited (SAL), a company owned and controlled by Mr Hong, was the Company's directing manager. Privium Fund Management (HK) Limited ("Privium"), was the Company's investment manager and BDO Cayman Islands, was its auditor.

9. It is averred by the Petitioner and not disputed by Mr Hong, that Mr Hong incorporated the Company and created the Fund to carry on business as an open-ended investment fund. And that although the Fund had nominated Privium as investment manager, that Mr Hong was employed or engaged by Privium to provide services to the Fund and, in practice, Mr Hong therefore exercised full discretionary investment control over the Fund.

10. The Company having been placed into voluntary liquidation by resolution passed by the directors (who where then Mr Hong and Mr Randy Clark Wang) on 8 December 2020; Mr Hong, later acting as the VL, filed a final return under section 127(3) of the Act[1] on or about 28 January 2021. Consequently, in the absence of the above-referenced intervening order from the Court made under section 151(3) of the Act[2] deferring the date of dissolution, the Company would have been deemed dissolved three months later on or about 28 April 2021[3]. The Company would then have been liable to be struck off the register by the Registrar pursuant to section 157 of the Act. Once struck off, barring an order by the Court restoring the Company to the Register under section 159, no action could have been maintained against the Company and that was the eventuality which was sought to be avoided by the Deferral Application.

11. However, pursuant to section 160 of the Act, it must also be noted that the striking off of the Company would not affect the liability if any, of any director, manager, officer or member of the Company, such liability continuing to be enforceable as if the Company had not been dissolved.

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[1] Which provides that: "*The liquidator shall, no later than seven days after the meeting [of contributories required by section 127 (2) to be convened by the liquidator for the purpose of considering his final report] make a return to the Registrar in the prescribed form specifying - (a) the date upon which the meeting was held; and (b) if a quorum was present, particulars of the resolutions, if any, passed at the meeting.*"

[2] Invoking also Order 13 rule 12(2) of the Companies Winding Up Rules 2018.

[3] Section 152 of the Act will be examined below. Order 13 rule 12 (2) provides: "*In the event that – (a) the final resolutions are passed [at the contributories meeting]; or (b) no quorum is present (in person or in proxy), the voluntary liquidator shall file a Final Return with the Registrar in CWR Form No.37 with the result that the Company is deemed to be dissolved after the expiry of three months from the date upon which the Final Return is registered.*"

Summary of the Petitioner's case

12. The Petitioner alleges that Mr Hong solicited his investment in the Fund in August and September 2018. This process is said to have involved the provision of a presentation deck (the "Presentation") which included certain statements and representations made on behalf of the Company as averred in the Petition as follows:

- The Fund's objective and philosophy promised to *"Invest in the leaders of future trends and the presently underappreciated hidden gems"* and in doing so, be a *"Long-term investor in businesses; not a short-term trader in the markets."*

13. The Fund's investment risk strategy comprised three key elements:

- *"Safety first"*, meaning that the Fund would look to invest in *"companies that can survive even in the most severe funding drought and market crash, avoid companies "not having adequate resources to support its obligations or growth"*, and *"reducing chance of making rash decisions during the market crash due to psychological stress."*

- *"Thesis driven exit"*, meaning that if the Fund's investment thesis started to change, *"irrespective of positive or negative performance... the manager will not hesitate to exit if the investment thesis turns out to be wrong."*

- *"Long-short pairing"*, meaning that the Fund would *"take short positions in companies with structurally unsustainable businesses or industries which is expected to reduce the overall volatility of the portfolio if there is an indiscriminate market drawdown."*

14. The Petition avers that the Company made these and other representations[4] ("the Representations") to the Petitioner with the intention of inducing the Petitioner to invest in the Fund. Further, that in reliance upon the Representations, on 18 September 2018 the Petitioner agreed to invest in the Fund and entered into a Subscription Agreement by which he agreed to invest USD400, 000 in the Fund in exchange for 400 Class A shares attributable to the Fund (the Shares). The Petitioner had, in fact, duly paid the full subscription amount and was issued the Shares.

[4] Including that if the Petitioner agreed to invest in the Fund, Mr Hong would allow the Petitioner to participate also in another investment in a company called BDF described by Mr Hong as a "once-in-a-lifetime" opportunity.

15. The averments continue that contrary to the Representations, Mr Hong's investment strategy was not focused on long term investment over short term trading, nor was he willing to exit a position once his investment thesis was proven wrong. That Mr Hong instead acted on personal conviction to chase short term gains through aggressive shorting of stock in Tesla, Inc. (**TSLA**). The massive short position in TSLA – at one point it was allowed to reach 80% of the Fund's assets – led to significant losses for the Fund and its investors. By the time the Petitioner was able to redeem his shares, his initial investment had deteriorated by almost 43%.

16. The Petitioner claims to have come to understand that the Representations were false. He has articulated a claim against the Company for actionable misrepresentation (either fraudulent, negligent or actionable under the Contracts Act (1996 Revision)), sounding in damages of at least US$312,022.40 for direct and consequential losses. The Petitioner also has claims against Mr Hong personally which he seeks to pursue in England where Mr Hong resides.

17. The Petitioner's claims are further contextualized by paragraph 25 of his affidavit filed in support of the Petition where he explains as follows:

> *"On 29 April 202, in light of the losses caused by the Fund's divergence from the strategy set out in the Representations by holding and increasing the Tesla short position, I served a redemption notice on the Fund in respect of all my Shares. The next redemption day was 1 July 2020, and my Shares were redeemed on that date. After a lengthy delay, by September 2020, the Fund paid the full redemption proceeds to me in the amount of USD228,992. After making further enquiries, the administrator disclosed to me that my redemption proceeds had USD33,588 of fees deducted. I do not have sufficient information to verify whether the redemption proceeds and deducted fees are valid because there has never been an audit performed on the Fund or the Company, despite the contractual and regulatory requirements for an audit."* [emphasis added].

18. In round sums, it seems his claim of USD312,022 comprises the difference between the amount of his investment of USD400,000, less the amount redeemed (USD228,992) plus the fees deducted (USD33,588) as well as what he describes as opportunity losses of some USD170,000, which he would have realized elsewhere had his investment been returned to him intact.

19. It is further averred in the Petition that it was only in the course of correspondence with Mr Hong regarding the claims in December 2020 to February 2021, that the Petitioner's

English solicitors discovered in late February, that Mr Hong had caused the Company to be placed into voluntary liquidation on 8 December 2020, and had held the final general meeting of the Company on 22 January 2021, with the returns filed with the Registrar on 28 January 2021. Accordingly as noted above, the Company was due to be deemed dissolved under section 151(2) of the Act on or about 28 April 2021.

20. Despite requests made through the Petitioner's solicitors, Mr Hong had not taken any actions to pause or defer the dissolution of the Company. The Petitioner asserts that he was therefore compelled to bring the Deferral Application, in the context of seeking a supervision order and the appointment of an independent insolvency practitioner as official liquidator, in order that his claims against the Company might be pursued before this Court.

21. Mr Hong, represented by Mr Eggleton at the first hearing on 26 April 2021, resisted the Deferral Application on the following grounds:

- The Deferral Application has been brought at the very last minute in circumstances where all of the steps that are required to be taken for the orderly dissolution of the Company, have been taken, and where dissolution is now imminent. Mr Hong had not been afforded a proper opportunity to fully consider the application, nor to file any evidence in reply, should he be so advised. Timing issues ought to be taken into account when it comes to the exercise of the Court's discretion under section 151(3) of the Act.

- The Company has no assets. The effect of the dissolution will be to prejudice Mr Hong insofar as costs (potentially significant costs) will be incurred by him in connection with the supervision petition. Costs have already been incurred in connection with the Deferral Application. If the Petition is allowed to proceed, Mr Hong is likely to be exposed personally to costs that are irrecoverable, even if the Petition fails. The Deferral Application, if granted, will therefore be to Mr Hong's detriment.

- The underlying mischief in these proceedings is an investment (a so-called 'short' position) in Tesla that, in hindsight, failed, and resulted in losses to investors. The Tesla investment was one of many. There is no complaint regarding any of the Fund's other investments. Although this is not the appropriate time to litigate the Petitioner's Mr Kim's underlying complaint, prima facie the claim against the Company, which has been articulated only at the 11th hour, is speculative.

- Mr Kim is a fully redeemed investor who therefore has no standing to claim in the liquidation of the Company. The losses alleged to have been sustained are disproportionate to the course of action ultimately proposed, which appears in theory (although not explained in detail) to include:

    i. The trial of the supervision petition, to include statements of case (subject to the direction of the Court), affidavit evidence and a hearing.
    ii. Investigations by the nominated official liquidator into the Company's affairs. It is noted in this respect that the issue of funding has not been addressed.
    iii. Possible derivative and/or "clawback" claims to be brought by the Company against Mr Hong and possibly others, articulated very recently but not formally pleaded, in order to recover assets for the Company and in order that the Company may in turn distribute assets to creditors, including (if he can establish his claim) the Petitioner. This appears from a letter written by Mr Kim's English Solicitors Northwall Cyber LLP, in a letter dated 3 March 2021 addressed to Mr Hong at his residence in England.
    iv. A claim in turn, by the Petitioner, against the Company and sounding in misrepresentation.
    v. A separate claim by Mr Kim foreshadowed against Mr Hong in person for misrepresentations sounding in damages, as appears also from the Northwall Cyber LLP letter of 3 March 2021.

Factors for consideration

22. From the foregoing counter-arguments, it was immediately apparent that there were stark issues for the Court's consideration. An obvious concern was that of proportionality. At issue was whether the size of the Petitioner's claim (approximating USD312,000), could justify the grant of the Deferral Application, the aim being ultimately to allow for the trial of the Petition to place the Company into a supervised liquidation which is opposed and will be contested, and with all the attended costs to arise not only from the trial of the Petition itself but if successful, from the supervised liquidation of the Company to follow.

23. In addressing this question, consideration also had to be given to the Petitioner's standing to bring the Petition and the apparent merits or demerits of the Petitioner's claims which, as shown above, Mr Hong would describe as *"speculative"* and *prima facie* untenable. And related to this, was the concern that no funding for the supervision of the liquidation had been proposed by the Petitioner and the resonance this gives to Mr Hong's concern that he could be prejudiced as the costs of the liquidation would likely fall to be met by him.

24. On the other hand, a further issue of importance had arisen on the first hearing from the averments of the Petitioner, then as yet unanswered, to the effect that there has been lack of transparency on the part of Mr Hong in his dealings with investors, perhaps most troublingly shown by the fact that despite the contractual and regulatory requirements, there had never been an audit performed of the Fund or of the Company itself. This state of affairs gave rise to both the private interest concerns of the Petitioner (and possibly of other interested investors) as to how the assets of the Company have been appropriated, as well as the public interest concerns in ensuring that investment companies are regulated properly.

25. At the resumed hearing of the Deferral Application on 19 May, further evidence from Mr Hong relating to these issues was considered, including the material he disclosed in response to the directions given on 26 April as set out above. Further submissions were also taken from Mr Russell on behalf of the Petitioner and from Mr Eggleston on behalf of Mr Hong. I will come below to assess the evidence and submissions which led to my final conclusions, after an examination of the law on the subject of deferral of dissolution.

The law on deferral of dissolution

26. Section 151 of the Act provides, in its entirety, as follows:

> *"151.(1) The Registrar shall, within three days of receiving a liquidator's return under section 127(3), register such return.*
>
> *(2) Upon expiration of three months from the registration of the return the company is deemed to be dissolved.*
>
> *(3) Notwithstanding subsection (2), the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the*

company is to take effect to such date as the Court thinks fit.

(4) An application under this section shall not be made after the company is deemed to have been dissolved.

(5) An order of the Court made under this section shall be registered with the Registrar within seven days of the date upon which it was made."

27. Section 151 forms part of the statutory regime for the voluntary winding up of companies under Part V of the Act and relates to that regime by way of section 127(3), which requires a voluntary liquidator to make, no later than seven days after the final general meeting of the company in voluntary liquidation[5], a return to the Registrar in the prescribed form specifying (a) the date upon which the meeting was held; and (b) if a quorum was present, particulars of the resolutions, if any, passed at the meeting. The process which then follows by way of registration of the liquidator's return, leading to the final dissolution, is described in section 151(1) and (2) but this is all subject to an application being made for deferral under section 151(3).

28. There appear to be very few reported cases on applications under section 151(3), (or its equivalent in other jurisdictions), to defer dissolution of a voluntary winding up.

29. It is however, clear from the effect of the provisions of section 151(2) and (4), that such an application must be made within the three-month period beginning with the date of the Registrar's registration of the liquidator's return under section 127(3), as the company will be deemed pursuant to section 151(2), to have been dissolved upon the expiry of that period and, in keeping with section151(4), an application shall not be made after the company is deemed to have been dissolved.

30. As was explained in ***The Working Project Ltd*** [1995] 1 BCLC 226 at 231e (per Carnwath J as he then was), by reference to the equivalent provision under section 201(2) of the Insolvency Act 1986 U.K.; this three-month period recognizes the possibility that other assets of the company might be found or that there might be disagreement between the creditors and the liquidator as to whether his work is truly complete. Where an application is made on some such proper basis, section 151(3) [like section 201(3) of the

[5] Which must be convened, as soon as the company's affairs are fully wound up, pursuant to section 127(1) for the purpose of receiving the liquidators report on the affairs of the company and for laying before the members the final accounts and the provision of an explanation of the accounts.

U.K Act] is also clear that the Court, upon an application being made, has a discretion to order the deferral of the dissolution to such date as the Court thinks fit.

31. Some insight into the kinds of circumstances under which applications for deferral will be granted may be gleaned from the discussion of the English case law in ***Bailey & Groves, Corporate Insolvency Law & Practice, 5th Ed*** at [19.5]. There, by reference to the analogous powers of the English courts given formerly under section 651 of the Companies Act 1985[6] to declare a dissolution void, the following helpful summary is given of the cases decided under that provision:

> *"For the purposes of section 651, a "person interested" was a person with a proprietary interest in restoring the company to the register. This would include an insurer who wishes to use the company name to bring a subrogated claim against a third party[7], a creditor of the company [(providing he can show that he has a reasonably arguable claim)][8], or a person with a contingent or prospective claim against the company, for example a personal injury claim.[9] A solicitor retained by a client who proposed to bring proceedings against the company was not a person interested[10]. The Secretary of State himself would be interested in his regulatory capacity*[11] [(and by analogy so would a regulator in this jurisdiction)]
>
> *Orders under CA 1985 section 651 were made in a wide range of circumstances, but ordinarily, the purposes [of an application under]*

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[6] Now repealed. Section 651 (1) provided: *"Where a company has been dissolved, the court may on an application made for the purpose by the liquidator of the company or by any other person appearing to the court to be interested, make an order, on such terms as the court thinks fit, declaring the dissolution to have been void."* *The Act does not grant a similar power to this Court and so there is no power to restore a company which has been dissolved following a liquidation process even while there is power to restore a company to the Register after it has been struck off pursuant to the administrative powers given the Registrar under section 156(1) where the Registrar has reasonable cause to believe that the company is defunct. For a full discussion in the case law on the different powers see* ***Schramm and Hiscox Syndicate 33 v Financial Secretary and others*** *2004-05 CILR 39,* ***affirmed on appeal*** *2004-05 CILR 104. See also* ***In Re Lung Ming Mining Co. Ltd. CICA (Civil) Appeal No 18 of 2021; Judgment 16 April 2021,*** *drawing the distinction between the absence of power to restore a dissolved company and power to hear an appeal against a dissolution under section 152(1) of the Act.*

[7] Citing ***MH Smith (Plant Hire) Ltd v D L Mainwaring*** [1986] 2 Lloyds Rep 244, [1986] BCLC 342, per Kerr LJ at 345.

[8] Citing ***Wood and Martin (Bricklaying Contractors) Ltd, Re*** [1971] 1 All ER 732

[9] Citing ***Re Philip Powis Ltd*** [1998] 1 BCLC 440, [1998] BCC 756, CA and ***Bradley v Eagle Star Insurance Co Ltd*** [1989] AC 957, [1989] 1 All ER 961 HL

[10] Citing ***Re Roehampton Swimming Pool Ltd*** [1968] 1 WLR 1693

[11] Citing ***Re Townreach Ltd*** [1995] Ch. 28

section 651 were either to enable the liquidator to distribute an overlooked asset or a creditor to make a claim which he had not previously made.[12] *Nevertheless, the application was also used to give the applicant other advantages, for example to enable a landlord after restoring a tenant company to the register to pursue claims against intermediate assignees after the liquidator had disclaimed the lease*[13].

Where the purpose of the restoration of the company was to enable it to bring proceedings, the applicant did not need to demonstrate the validity of the company's claim; he needed to do no more than show that the claim was more than 'merely shadowy'.[14] *In* ***Re Oakleague Ltd***[15] *the liquidator assigned the company's cause of action with respect to the supply of allegedly defective goods before the company was dissolved. The supplier intervened in the assignee's application to restore the company to the register for the purpose of pursuing the claim. Whilst acknowledging that there were very real difficulties in the way of a successful pursuit of the claim, the court made the order commenting that:*

"provided the application for restoration falls within the general legislative purpose … the company will be restored and whether the restoration does anyone any good or not is a matter to be decided by another tribunal in the future."[16]

There was no need for an applicant for an order under section 651 to establish that if restored the company was likely to be solvent."[17]

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[12] Citing ***Stanhope Pension Trust Ltd v Registrar of Companies*** [1994] 1 BCLC 628, 632, per Hoffman LJ.

[13] Citing ***Re Forte's (Manufacturing) Ltd; Stanhope Pension Trust Ltd v Registrar of Companies*** [1994] 1 BCLC 628, [1994] BCC 84. The authors further note by way of juxtaposition: "in this connection note the effect of the House of Lords' decision in ***Hindcastle Ltd v Barbara Attenborough Ass. Ltd*** [1997] AC 70.; see ***22.45*** [(above in the text book)]. There was no basis on which the court would sanction the continuance of an obviously defunct company simply for the purpose of keeping a guarantee alive: ***Re Distributors and Warehousing Ltd*** [1986] BCLC 129 AT 147-148. An order under section 651 was refused where the purpose was to validate a legacy made to a charitable company which had been dissolved which legacy would otherwise pass to the residuary legatees. The court stated that it would not be right to make an order which would dispossess other persons who obtained a vested interest in the relevant asset under a title not derived from the company: ***Re Servers of the Blind League*** [1960] 1 WLR 564 , per Pennycuick J.

[14] Citing **Re Phillip Powis Ltd** [1998] 1 BCLC 440, [1998] BCC 756, CA; ***Stanhope Pension Trust Ltd*** (above); **Wood and Martin (Bricklaying Contractors) Ltd** (above), ***Re Mixhurst*** [1994] 2 BCLC 19. See also Re Blue Note Enterprises Ltd [2001] 2 BCLC 427. The court was, however, prepared, in appropriate circumstances, to look into merits of any claim on behalf of the company to property: ***Re Servers of the Blind League*** (above)

[15] [1995] 2 BCLC 624, [1995] BCC 921

[16] Per Robert Walker J (as he then was): [1995] 2 BCLC 624, at 628i.

[17] Citing ***Re Blenheim Leisure (Restaurants) Ltd*** (No 2) [2000] BCC 821 at 830F.

32. In Cayman, there appears to be only one decided case on the relatable and analogous subject of the deferral of dissolution -that in ***Re Exten Investment Fund and Others*** (2017 (1) CILR Note 11, per Mangatal J. In ***Re Exten,*** the applicant, who was the sole investor in the investment fund companies, sought the deferral of the date of dissolution as well as, like Mr Kim here, that the voluntary liquidation of the fund be continued under the supervision of the Court. Granting the application, the Court observed that the applicant plainly had an interest in the deferral of the date of the dissolution and a pecuniary or proprietary interest in resuscitating the fund companies which interest was, in the language of ***Re Phillip Powis*** (above) *"not shadowy"*. The Court also observed that it was clear that aspects of the companies' business remained to be concluded (including an investigation and possible pursuit of claims in connection with suspected payments) and so, as it also appeared that no detriment to any party would flow from the deferrals, it was also in the public interest that any possible past misconduct by those running the companies be properly investigated and, if appropriate, action be taken (applying ***Kelso Enterprises Ltd v Liu Yiu Keung*** [2007] HKCA 284).

Discussion and conclusions

33. In his affidavit filed in response to the Petitioner's evidence, Mr Hong explained that the decision to place the Company into voluntary liquidation had been taken after consultation and with the support of all remaining investors (then seven (7) including himself). The rationale was that the size of the investment fund had become too small, the then current net asset value being USD1, 568,954.71 (as at 31 October 2020) and that the economics of maintaining it no longer made sense, particularly given the regulatory and administration fees being incurred on an ongoing basis. All investor shareholders were subsequently compulsorily redeemed on notice from the fund administrator Apex Fund Services[18] and had distributed to them the final payments. An Excel spreadsheet showing the values of the respective redemptions was exhibited. The only existing creditors were professional services providers for whom provisions were made.

[18] A member of the Apex Group (https://www.theapexgroup.com) an independent funds administration provider which offers a suit of fund solutions including fund administration, fund compliance and tax services. As at the date of his affidavit, Mr Hong notes that the Apex website states that its fund administration business has USD574 billion under administration. (https://www.theapexgroup.com/fund-solution/fund-administration/).

34. Also exhibited to Mr Hong's affidavit were the written resolutions which had been taken by the directors on 8 December 2020. They were important to the outcome and were to the effect, among other things, as follows:

a) The final net asset value of the Company's sole segregated portfolio (Skye Assets Fund SPC - Skye Fund 1 SP) ("Portfolio") be calculated as at 31 October 2020. Exhibited are the Company's final financial statements as at 31 October 202 as prepared by Apex Fund Services on 27 November 2020, for the purposes of calculating the Company's net asset value.

b) A contingency fund in the amount of $20,000 would be created from the assets of the Portfolio to pay any final fees in respect of the Portfolio on condition that such fees are to be paid by investors in the Portfolio pursuant to the Company documents relating to the Portfolio.

c) Any final dividends payable to investors in the Portfolio (but not yet paid out to such investors) be paid by Skye Assets Limited, to be reimbursed to Skye Assets Limited in due course from the assets of the Portfolio.

d) The affairs of the Company be wound up and that the Company be placed into voluntary liquidation in accordance with the Act. The special and ordinary resolutions to similar effect were earlier, on 1 December 2020, taken by Mr Hong in his capacity as the sole management shareholder of the Company. Notice of these resolution were published in the Cayman Gazette on 8 December 2020, together with notice that, pursuant to section 127 of the Act, the final general meeting of the Company would be held on 22 January 2021 at 10:00am. Also on 22 January 2021, Mr Hong acting as VL, executed the final return to the Registrar and it was filed on 28 January 2021. Thereafter, on 5 February 2021, the Assistant Registrar of Companies issued a Certificate of Dissolution in respect of the Company to the effect that it would be deemed dissolved on 28 April 2021.

e) That by signing the relevant resolutions each of the directors confirmed that:

(i) The Company has operated in accordance with its articles of Association.

(ii) The Company is not being wound up in a manner that is prejudicial to its members and creditors.

(iii) There is no actual, pending or threatened litigation against the Company.

(iv) There are no disputes with any past or current participating members or counterparties [Mr Kim's dispute arose later].

(v) All contracts have been terminated and all trading accounts have been closed (or were in the process of being closed).

(vi) The VL, Mr Hong, had been assigned to discharge the Company's responsibility to comply with Cayman Islands FATCA and CRS legislation by making all regulatory filings, Cayman Islands tax reporting filings, including the final returns required by section 127(3) of the Act.

f) On 8 December 2020, the directors had also executed their Declaration of Solvency.

g) Without waiver of legal professional privilege, Mr Hong also attests that throughout the process of liquidating the Company voluntarily, he had been assisted and advised by the Company's Cayman Islands attorneys, Harneys.

35. When examined in the context of all the foregoing, it became apparent that the Petitioner's allegation, that the voluntary liquidation of the Company's affairs lacked transparency and accountability, itself lacked substance. Moreover, the disclosure of the management accounts kept by Apex also served to allay, at least for the present purposes of scrutiny by the Court, the concerns raised only by Mr Kim, about the absence of audited financial statements and related regulatory concerns which could arise in the public interest.

36. Viewed objectively and in the round, it became apparent from all the circumstances, that Mr Kim's resort to the process of the Court (both for the Deferral Application and ultimately the supervision order) was abusive. His real objective was to leverage a position of advantage in his proposed claim, not so much against the Company itself which had no assets, but personally against Mr Hong.

37. Mr Kim was the only investor to have complained. Yet he had redeemed his shares apparently without demurrer two months before the Company was placed into voluntary liquidation and when the fact that the Fund had sustained heavy losses was already well known to him. This meant that he had no standing to petition to wind up the Company as an investor shareholder and any purported standing to do so as a creditor was at best

contingent and prospective because he had not established a claim by way of a judgment or otherwise. In other words, he had no remaining proprietary interest in the Company whose dissolution he wished to defer. There was no apparent basis upon which his claim could be regarded as aimed at recovering assets belonging to the Company, as contemplated, for instance, in ***The Working Project Ltd*** (above).

38. His claim against the Company could also fairly be regarded as merely speculative because his allegations of misrepresentation were based upon his own purported understanding of the Representations not apparently shared by other investors. Yet, a deferral of the dissolution to enable a claim to be raised by the Company, would also no doubt be of concern to them. Although having redeemed their investments, they could in those circumstances be faced with the prospect of having at least some of their redemptions become the subject of a clawback claim.

39. Moreover, Mr Kim made no proposal for the funding of a supervised liquidation were the Petition to be granted, proposing instead that the liquidator be appointed on what, in effect, would have been a contingency basis as to his fees and other costs of liquidation. Without any proposal for the funding of the liquidation, it appeared Mr Kim's strategy would have been to use the process of the Deferral Application and the Petition to apply pressure on Mr Hong who would be obliged to respond to the enquiries of the liquidator and any eventual investigation which could lead to a possible derivative and/or clawback claim – a daunting and expensive proposition from Mr Hong's point of view, however innocent of misconduct he may be in the management of the affairs of the Company. And a proposition no doubt from Mr Kim's point of view, which could also lead to Mr Hong being compelled to settle his claim given its modest size when compared as a matter of proportionality, to the likely far more expensive liquidation or litigation processes.

40. Such objectives would be anathema to the statutory rationale for deferral of dissolution and certainly do not appear to *"fall within the general legislative purpose"*[19] of section 151 of the Act. Mr Kim's claim may fairly be described as *"shadowy"* and his pleadings as patently lacking in merit - both as regards the deferral of dissolution itself, as well as his Petition seeking to bring the liquidation under the supervision of the Court.

41. Moreover, it should be noted that any proper claims that Mr Kim might be able to bring against Mr Hong in person would not depend upon the grant of such relief by this Court. According to section 160 of the Act, Mr Kim would still be able to pursue such clams if so

[19] Per Robert Walker J from ***Re Oakleague Ltd*** (above)

advised, in England against Mr Hong. He should not be allowed to use the process of the Court here as a means for exerting undue pressure.

42. For all the foregoing reasons, the orders for deferral of dissolution granted on 26 April 2021 and continued on 19 May 2021, are discharged and the dissolution of the Company allowed to occur in keeping with the provisions of the Act.

43. No application for costs was made and so subject to any further application to come in writing within 14 days of the issuance of this ruling, I propose to make no order in that regard.

Hon Anthony Smellie
Chief Justice

21 June 2021