IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2012 (AEFJ)

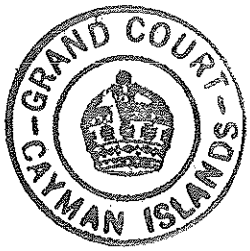
IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF JP SPC 1

CAUSE NO: FSD 166 OF 2012 (AEFJ)

IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF JP SPC 4



The Hon Mr. Justice Angus Foster
In Chambers
Wednesday, 13th March 2013

Appearances: For the Joint Receivers Mr. David Herbert and Ms Alexia Adda of Harneys
For the Cayman Islands Monetary Authority ("CIMA") Mrs. Gail Johnson-Goring and Ms. Nedra Ebanks
Also present Mr. Mike Saville and Ms Sarah Bourke – Grant Thornton

RULING

INTRODUCTION

1. This is an application by the Joint Receivers ("the Receivers") of two segregated portfolios of two segregated portfolio companies seeking clarification of their status, duties and powers, in particular in order to assist in a proposed application to be recognised in the High Court of England and Wales under the English Cross-Border Insolvency Regulations 2006 ("the CBIR") and/or pursuant to a proposed Letter of Request. They also seek various additional directions to facilitate carrying out their duties under the Companies Law (2012 Revision) ("the Law").

2. The background to this matter is that JP SPC 1 ("the SPC") and JP SPC 4 ("the Master SPC") (together "the Companies") are both segregated portfolio companies registered as such pursuant to Part XIV of the Law. The SPC has six segregated portfolios one of which is the Axiom Legal Financing Fund ("the Portfolio"). 68% of the shares of the SPC are designated to the Portfolio, representing some 73.75% of the SPC's investors. The Master SPC has a segregated portfolio called Axiom Legal Financing Fund Master SP ("the Master Portfolio").

The only assets of the Portfolio are shares in the Master Portfolio. The assets of the Master Portfolio are receivables from loans made to certain English law firms known as the Panel Law Firms.

3. After a contested hearing on Amended Petitions by the directors of the Companies for their appointment, the Receivers were appointed as receivers of the Portfolio and the Master Portfolio (together "the Axiom Portfolios") by orders dated 12th February 2013 pursuant to Section 224(1) of the Law. The Receivers are two members of Grant Thornton in the Cayman Islands together with a member of Grant Thornton in England.

THE RECEIVERS' POWERS AND DUTIES

4. The orders dated 12th February 2013 directed that the business and segregated portfolio assets of the Axiom Portfolios should be managed by the Receivers for the purposes specified in Section 224(3) of the Law. Section 224(3) provides that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver for the purposes of:

> *(a) the orderly closing down of the business of or attributable to the segregated portfolio; and*
> *(b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.*

Other than providing that each of the Receivers were authorized to exercise the powers conferred by the Law, either alone or together with either or both of the others, the orders dated 12th February 2013 made no specific provision with regard to the Receivers' powers and duties. However, Section 226 of the Law provides as follows:

> *(1) The receiver of a segregated portfolio –*
> *(a) may do all such things as may be necessary for the purposes set out in Section 224(3); and*
> *(b) shall have all the functions and powers of the directors in respect of the business and segregated portfolio assets of or attributable to the segregated portfolio.*
>
> *(2) The receiver may, at any time, apply to the Court-*
> *(a) for directions as to the extent or exercise of any function or power;*
> *(b) for the receivership order to be discharged or varied; or*
> *(c) for an order as to any matter acting in the course of his receivership*

(3) In exercising his functions and powers the receiver shall be deemed to act as the agent of the segregated portfolio company, and shall not incur personal liability except to the extent that he is fraudulent, reckless, negligent, or acts in bad faith.

(4) .....

(5) When an application has been made for, and during the period of operation of, a receivership order, no suit, action or other proceedings shall be instituted against the segregated portfolio company in relation to the segregated portfolio in respect of which the receivership order was made except by leave of the Court, which may be conditional or unconditional.

(6) During the period of operation of a receivership order-

(a) the functions and powers of the directors shall cease in respect of the business of or attributable to, and the segregated portfolio assets of or attributable to, the segregated portfolio in respect of which the order was made; and

(b) the receiver of the segregated portfolio shall be entitled to be present at all meetings of the segregated portfolio company and to vote at such meetings, as if he were a director of the segregated portfolio company, in respect of the general assets of the company, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets.

5. For completeness, in relation to the Receivers' powers, I also note Section 228 of the Law which provides:

> *The remuneration of a receiver and any expenses properly incurred by him shall be payable, in priority to all other claims, from the segregated portfolio assets attributable to the segregated portfolio in respect of which the receiver was appointed but not from any assets of the segregated portfolio company.*

6. Sections 216, 219 (1), (2), (3) and (4) and Section 220 of the Law in particular are, in my view, also of assistance in clarifying the position of the Axiom Portfolios and determining the issues which arose as a result of the Receivers' present application. They respectively provide:

216 (1) A segregated portfolio company may create one or more segregated portfolios in order to segregate the assets and liabilities of the segregated portfolio company held within or on behalf of a segregated portfolio from the assets and liabilities of the segregated portfolio of the segregated portfolio company or the assets and liabilities of the segregated portfolio company which are not held within or on behalf of any segregated portfolio of the segregated portfolio company

(2) A segregated portfolio company shall be a single legal entity and any segregated portfolio of or within a segregated portfolio company shall not constitute a legal entity separate from the segregated portfolio company.

(3) .....

219 (1) The assets of a segregated portfolio company shall be either segregated portfolio assets or general assets.

(2) The segregated portfolio assets comprise the assets of the segregated portfolio company held within or on behalf of the segregated portfolios of the company.

(3) The general assets of a segregated portfolio company comprise the assets of the company which are not segregated portfolio assets.

(4) The assets of a segregated portfolio comprise-

(a) assets representing the share capital and reserves attributable to the segregated portfolio; and

(b) all other assets attributable to or held within the segregated portfolio.

.....

220. Segregated portfolio assets-

(a) shall only be available and used to meet liabilities to the creditors of the segregated portfolio company and holders of segregated portfolio shares who are creditors or holders of segregated portfolio shares in respect of that segregated portfolio and who shall thereby be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio for such purposes; and

(b) shall not be available or used to meet liabilities to, and shall be absolutely protected from, the creditors of the segregated portfolio company and holders of segregated portfolio shares who are not creditors or holders of segregated portfolio shares in respect of that segregated portfolio, and who accordingly shall not be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio.

7. The first principal issue which arose as a result of the Receivers' applications was to determine the nature, extent and exercise of the powers of the Receivers, such as their entitlement to exercise and the manner in which they may exercise certain procedural tasks, namely investigations, the avoidance of share transfers and the distribution of the Axiom Portfolios' assets. It was submitted on behalf of the Receivers that the provisions of Part V and the Third Schedule of the Law as applying to liquidators should also apply, as appropriately modified, to receivers appointed pursuant to Section 224 of the Law generally, or that they should at least apply to the present Receivers. That submission was supported by counsel on behalf of CIMA.

8. It was argued that having regard to the provisions of Section 224(3) of the Law (quoted at paragraph 4 above) the duties of a receiver of a segregated portfolio to close down the business of the portfolio and distribute the assets of the portfolio to the creditors and/or shareholders of the portfolio are akin to the duties of a liquidator but confined to the portfolio and its assets and creditors. Section 224(3) of the Law (quoted at paragraph 4 above) expressly provides that the purpose of such a receivership order is the orderly closing down of the business of the segregated portfolio concerned and the distribution of the assets of the portfolio to those entitled to have recourse to them, namely the creditors of and/or holders of shares in the particular portfolio (see Section 220 of the Law quoted at paragraph 6 above). The purpose of appointing a receiver of a segregated portfolio, notwithstanding that a segregated portfolio is not a legal entity separate from the company (see Section 216(2) of the Law also quoted at paragraph 6 above) and notwithstanding that such receivership ceases on the winding up of the company (Section 224(4)(b) of the Law), is in practical terms, as far as the individual portfolio is concerned, effectively the same as the purpose of the appointment of a liquidator in respect of the whole company would be but confined to the creditors of or shareholders in the portfolio.

9. The Law provides that in fulfilling the purpose of closing down the business of the portfolio and distributing its assets to the portfolios' creditors and/or shareholders, the receiver may do whatever is necessary for those purposes and shall have all the functions and powers of the directors of the company in respect of the business and assets of the portfolio. In addition the receiver may, as has been done by the instant application, apply to the Court for directions in

relation to the extent or exercise of his functions or powers. Also, similar to the position in a company winding up, no proceeding may be instigated against the company in relation to the portfolio subject to a receivership application or order without the leave of the Court. All of this suggests to me that the practical intent of the Law is that a receivership of a segregated portfolio is in effect to close down that portfolio without a liquidation of the whole company.

10. I also note that Section 223 of the Law specifically provides that:

> *(1) Notwithstanding any statutory provision or rule of law to the contrary, in the winding-up of a segregated portfolio company, the liquidator-*
>
> *(a) Shall deal with the company's assets only in accordance with the procedures set out in section 219(6); and*
> *(b) In discharge of the claims of creditors of the segregated portfolio company and holders of segregated portfolio shares, shall apply the segregated portfolio company's assets to those entitled to have recourse thereto under this Part.*
>
> *(2) Section 140 shall be modified so that it shall apply in relation to protected segregated portfolio companies in accordance with this Part and, in the event of any conflict between this Part and section 140, this Part shall prevail.*

It is not entirely clear to me how this sits with the provisions of Section 221(1), which provide that a liability arising in respect of or attributable to a segregated portfolio shall be settled first from the assets of that segregated portfolio but that, to the extent that the portfolio assets are insufficient, it may then be settled, subject to certain conditions, from the company's general assets.

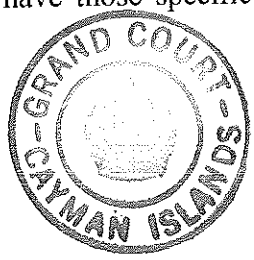
However, as far as the receiver of a segregated portfolio is concerned it seems to me correct that in order to fulfill his duties to creditors and/or shareholders of the portfolio and to close down the portfolio business he may well need powers the same or similar to those of a liquidator.

11. In my view there is nothing in Part XIV of the Law to preclude a receiver of a portfolio appointed under the Law having in practice the same or similar powers, subject to appropriate modification, in relation to the segregated portfolio of which he is receiver as a liquidator would have under Part V of the Law in respect of the whole company. I was told

at the hearing that there is no Cayman Islands jurisprudence relating to segregated portfolio companies and segregated portfolios in this respect. However, it is clear from the terms of Section 226(2) of the Law that the Court has a discretion in determining what directions to give *"as to the extent or exercise of any function or power"* of a receiver of a segregated portfolio. The Court will accordingly consider in each case the particular circumstances concerned in giving such directions and on any such application may determine whether it is or is not appropriate or desirable for the receiver concerned to have all or any of the equivalent powers in respect of the portfolio which a liquidator would have in respect of a company winding up, or indeed any other powers.

12. In the present case, I am persuaded by the submissions on behalf of the Receivers and on behalf of CIMA that I should in the circumstances here direct that the Receivers should have the powers, as modified, in respect of the Axiom Portfolios which a liquidator of the whole Companies would have. There is currently no application for the Companies themselves to be wound up; in fact I was previously informed that the other five segregated portfolios of the SPC are performing satisfactorily. It is only the Axiom Portfolios that are in trouble and which required, as I previously found, to be made subject to receivership orders.

13. I was taken through the Sections of Part V of the Law providing for the various statutory powers of liquidators appointed by the Court. I am satisfied that the powers provided in Sections 101-103 (powers relating to investigation into the affairs of the company); Section 110(2) (powers under Part I of the Third Schedule to the Law requiring further sanction of the Court and powers under Part II not requiring further sanction) and Sections 145-147 (voidable preferences, fraudulent dispositions and fraudulent trading) of the Law should be exercisable by the Receivers, subject of course to appropriate amendment of the references in the Law to a liquidator to a receiver and of the references from a company to a segregated portfolio in each case. I therefore directed that the Receivers should have those specific powers.



THE RECEIVERS' POWER TO BRING LEGAL PROCEEDINGS

14. A specific issue which was raised at the hearing concerned the Receivers' power to bring legal proceedings in relation to assets or other claims of the Axiom Portfolios. Such a power is, of course included within the powers of a liquidator under Part I of the Third Schedule to the Law with sanction of the Court. As already mentioned, the assets of the Master Portfolio, in which the Portfolio is invested, are receivables in respect of loans made to the Panel Law Firms. Some of such assets may require to be recovered by way of legal proceedings. Also, at the earlier hearing before me which resulted in the order for the appointment of the

Receivers on 12th February 2013, there was evidence that there are potential claims by one or other or both of the Portfolios for fraud or other misfeasance against the former investment manager and/or the principals thereof and possibly also against the directors of the Companies and/or other service providers. A major aspect of the Receivers' function in this case is to investigate such potential claims and, if appropriate, to obtain sanction to bring legal proceedings in respect thereof. In this context it was noted again, as mentioned above, that the Axiom Portfolios are not separate legal entities in the name of which legal proceedings could be brought. Indeed it is clear from the provisions Part XIV of the Law that the assets of the Axiom Portfolios, although segregated from the general assets of the Companies (and other segregated portfolios) in the manner provided for by the Law, are nonetheless assets of the Companies in each case. The fact that a segregated portfolio is not a legal entity separate from the segregated portfolio company itself supports that. I refer also, for example, to Section 216(1) of the Law (quoted at paragraph 6 above) which refers to the segregated portfolio company creating *"one or more segregated portfolios in order to segregate the assets and liabilities of the segregated portfolio company held within or on behalf of a segregated portfolio...."* (my emphasis). Likewise Section 219(1) of the Law (also quoted at paragraph 6 above) states that *"the assets of a segregated portfolio company shall be either segregated portfolio assets or general assets"* (my emphasis) and subsection (2) of the same Section (219) specifically provides by way of further clarification that *"the segregated portfolio assets comprise the assets of the segregated portfolio company held within or on behalf of the segregated portfolio of the company"* (again my emphasis).

15. It seems clear from the foregoing that segregated portfolio assets, although segregated into the portfolio concerned, are nonetheless assets of the company (although not general assets). In light of this in my view the provisions of Section 226(1)(b) of the Law that the receiver of a segregated portfolio shall have all the powers of the directors of the company in respect of the portfolio business and assets; the provisions of Section 226(3) that in exercising his functions and powers the receiver is deemed to act as the agent of the company and the provisions of Section 226(6)(a) that during the receivership the powers of the directors of the company cease in respect of the portfolio business and assets, indicate to me that a receiver of a segregated portfolio has power to bring proceedings in name of the company itself in respect and on behalf of the segregated portfolio of which he is receiver in appropriate circumstances, in the same way as a liquidator would in respect of a claim of the company itself.

16. Since the assets of the Axiom Portfolios will require to be ascertained and recovered in England and since any potential claim against the principals of the former investment advisor require to be further investigated in England and, if appropriate brought by way of proceedings in England, the Receivers wish to seek recognition and assistance from the High Court of England and Wales ("the High Court").

THE APPLICATION UNDER THE CBIR

17. By their application, the Receivers seek to remove, as far as possible, any uncertainty in the process of recognition by the High Court asking this Court to confirm that the proceeding by which the Receivers were appointed is a *foreign proceeding* within the meaning of the CBIR and also that the Receivers are *foreign representatives* as defined in the CBIR

18. Apparently if this Court were to confirm, by way of a certificate, both the status of the proceedings in this Court and of the Receivers in these respects, that will give rise to a presumption in the High Court under Article 16 of the CBIR that such statements are correct.

19. There is apparently relatively limited authority in England providing guidance as to the factors relevant for determining whether the Receivers should be recognised by the High Court under the CBIR. A segregated portfolio company is not an entity known under English law, nor is a receiver of a segregated portfolio. It is known that receivers, as more traditionally understood, do not qualify for such recognition but what is relevant is not the title of the individuals seeking to be recognised but their status, duties and powers as laid down by the relevant law under which they were appointed. If that is consistent with the CBIR, it should not be relevant what those foreign officeholders happen to be called.

20. Article 15(1) of the CBIR provides:

> *1. A foreign representative may apply to the court* [i.e. the High Court] *for recognition of the* ***foreign proceeding*** *in which the foreign representative has been appointed.*
>
> *"foreign representative" is defined as " a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding";*
>
> *"foreign proceeding" is defined as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."*

21. Article 15 (2) of the CBIR provides:

> *"An application for recognition shall be accompanied by:*

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative."

22. Article 16, headed, *Presumptions concerning recognition*, provides:

"1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized."

23. The Receivers, supported by CIMA, therefore submit that if this Court were to provide such a certificate as is referred to in Article 15(2)(b) that will create a presumption in the High Court (albeit rebuttable) which will greatly assist the recognition application by the Receivers.

24. In support of this Court granting such a certificate, the Receivers rely upon the facts and matters set out below which, they contend, established the status of these proceedings and of the Receivers as a *foreign proceeding* and as *foreign representatives* respectively within the meaning of the CBIR.

24.1. The Receivers submit that Section 224 of the Law is a *"foreign proceeding"* within the meaning of Article 15(1) of the CBIR. The English Court of Appeal in *In Re Stanford International Bank Ltd* [2012] Ch. 33 at paragraph 24 indicated that the starting point is to identify the law pursuant to which the appointment was made and determine whether that law *relates to insolvency.* The Receivers contend that, unlike the case of the US Receiver in *In Re Stanford*, this requirement is satisfied in respect of them. S.224(1) of the Law sets out the grounds upon which the Court can appoint receivers of a segregated portfolio. It provides that receivers can be appointed if:

"...the Court is satisfied –

(a) That the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the

company's general assets, unless there are no creditors in respect to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and

(b) That the making of an order under this section would achieve the purposes as set out in subsection (3)."

Accordingly, the making of a receivership order is determined by the insolvency of the segregated portfolio and not simply, for example, as a means of protecting assets in light of an alleged fraud. Also, the evidence before this Court in support of the Amended Petitions for the Receivers' appointment emphasised the insolvency aspects of the case (see for example the First Affidavit of Ronan Guilfoyle) and the insolvency of the Axiom Portfolios was expressly pleaded in the Amended Petitions and accepted by the Court.

24.2. As already explained, S.224(3) of the Law also provides that the function of a receivership is for the business and assets of or attributable to the segregated portfolio concerned to be closed down in an orderly manner and for the assets attributable to that segregated portfolio to be distributed to those entitled to have recourse thereto. The appointment of the Receivers is expressly to achieve and concerned with the orderly closing down of the segregated portfolios' business and the distribution of their assets "to those entitled to have recourse thereto", namely the creditors and/or the shareholders of the Axiom Portfolios. The process is thus wholly inclusive and a collective proceeding in the true sense for the benefit of all those entitled to have recourse to the assets and not merely for the benefit of a select group of investors. It was an important factor against recognition of the US Receiver in *In re Stanford* that the recovery action in that case was only carried out for the benefit of certain investors, leaving others outside the process and unlikely to benefit from it: see Lewison J at first instance.

24.3. Further support is gained for this contention from Section 226(1) of the Law which, as already mentioned, provides that the receiver of a segregated portfolio may do all such things as may be necessary for the purposes set out in section 224(3). The absence of such a power of distribution, at least without first having to apply to the US Court for it, was apparently also considered to be a significant factor against the recognition of the US Receiver in *In re Stanford*.

24.4. A segregated portfolio of a segregated portfolio company is a feature of the substantive law of the Companies Law of the Cayman Islands and is not a procedural matter. The segregation of portfolios in such a company applies irrespective of whether a receiver of a portfolio or a liquidator of the company is appointed. The Law expressly requires a liquidator to respect the segregated nature of assets held under each segregated portfolio (see Section 223 of the Law). If such segregation arises even if a liquidator is appointed it is clearly a matter of substantive law on insolvency.

24.5. The proceeding appointing the Receivers also has the effect of placing a moratorium on all other actions against the segregated portfolio company in respect of the segregated portfolio concerned (see Section 226(5) of the Law, already quoted above). It appears that the absence of such a provision in respect of the US receivership in *In re Stanford* was a relevant factor against recognition under the CBIR: see again Lewison J at first instance.

25. I accept these arguments and in my view, taking all these factors into account, the application to appoint the Receivers under s.224 of the Law qualifies as a "foreign proceeding" for the purposes of the CBIR, at least as I interpret its provisions.

26. The Receivers also submit that on the assumption that the matters referred to above establish that the proceedings giving rise to the appointment of the Receivers constitute a *foreign proceeding* as defined in the CBIR, it follows that the Receivers are a *foreign representative,* since their status is dependent upon having been authorised in a *foreign proceeding*. I agree that the powers invested in the Receivers under s.224(3) of the Law, which authorise the Receivers to carry out the distribution of the debtor's assets to those entitled to receive them and which, in conjunction with Section 226 of the Law, empower the Receivers to represent the foreign proceeding if necessary, constitute the Receivers as a *foreign representative*. In my opinion, the elements of the definition of a *foreign representative* as set out above are also satisfied such that the appropriate certification of both requirements may be properly given by the Court, which I shall therefore do.

APPLICATION FOR LETTER OF REQUEST

27. The Receivers, again supported by CIMA, also submit that as a prudent step even if the Court is minded to accede to the issue of a certificate pursuant to the CBIR, as I have done, there nonetheless remains the possibility that the High Court may adopt a different approach or for some reason rebut the presumption which such a certificate would create, they should invite the Court to issue a Letter of Request seeking assistance from the High Court under s.426 of the English Insolvency Act 1986.

28. The terms of the request, and the extent of recognition which the Receivers seek, are widely drawn. The Receivers say that is necessary in light of the very early stages of their investigations. In the circumstances the need to take steps in England does seem to me inevitable, and accordingly the recognition there which the Receivers seek is required. Precisely what such steps will need to be taken and therefore the precise ambit of the powers of recognition cannot be identified with certainty at this stage, hence the broad nature of the request for assistance. I accept this Court should make such a request to the High Court.

DIRECTIONS FOR APPOINTMENT OF RECEIVERSHIP COMMITTEE

29. The Receivers also seek directions for the appointment of a receivership committee. They submit that in the circumstances it would be desirable to have such a committee of creditors and other stakeholders to act in a similar way as a liquidation committee, to be consulted by and to make proposals to and advise the Receivers in what is likely to be a contentious receivership. I agree that this is a sensible proposal and I direct such a committee be established to act in respect of both the Axiom Portfolios.

Dated 15th April 2013

GRAND COURT - CAYMAN ISLANDS

The Hon. Mr. Justice Angus Foster
JUDGE OF THE GRAND COURT