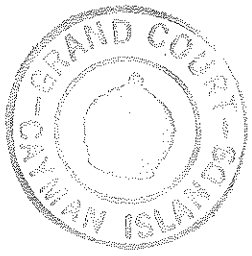
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No FSD 137, 138, 139, 140,
141,154,155,156,157,158,159,160,
161,162,163,164,165,166,167,168,
169,170,171 and 172 of 2014 (NRLC)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
AND IN THE MATTER OF WEAVERING MACRO FIXED INCOME FUND LIMITED (IN LIQUIDATION)
BETWEEN:



(1) IAN STOKOE
(2) DAVID WALKER
(3) HUGH DICKSON
(4) PAUL MCCANN
(AS JOINT OFFICIAL LIQUIDATORS OF WEAVERING MACRO FIXED INCOME FUND LIMITED)

Plaintiffs

-and-

SOMERS DUBLIN LTD AND OTHERS

Defendants

Appearances:	**Mr Jan Golaszewski of Carey Olsen on behalf of the Plaintiffs**
Before:	**The Hon. Justice Nigel R.L. Clifford QC**
Heard:	**Tuesday, 31 March 2015**

RULING

1. This is a series of *ex parte* applications by the Joint Official Liquidators of Weavering Macro Fixed Income Fund (in Liquidation), which I shall refer to as the "Fund", to extend the validity of 24 related writs pursuant to Grand Court Rules Order 6, rule 8. These are writs in which the Joint Official Liquidators, acting in such capacity, are the plaintiffs.

2. The actions are related in that the defendants were all members of the Fund who made redemption requests in December 2008. Payments were made to the defendants pursuant to these requests between 19th December 2008 and 2nd January 2009. This was within, as it turned out, a period of six months immediately preceding the

commencement of the liquidation of the Fund when, it is alleged, it was unable to pay its debts within the meaning of Section 93 of the Companies Law and was, therefore, insolvent.

3. The Joint Official Liquidators contend that, in the circumstances, the payments constituted voidable preferences pursuant to the provisions of Section 145 of the Companies Law and fall to be recovered.

4. In accordance with Section 11 of the Limitation Law, the limitation period of six years runs from the date of the first payments made to the defendants. Shortly before the expiry of such limitation period, in December 2014, the various actions were instituted as protective writs, so it has been put to me, in order to preserve the rights of the Joint Official Liquidators to seek to recover the payments made on the basis that they are voidable transactions on the case being made out.

5. The rationale for the applications before me is that there is already an action in progress against Skandinaviksa Enskilda Banken AB, which I shall refer to as "SEB", which is FSD Cause Number 98 of 2014, and which seeks the same relief on the same basis. So the Joint Official Liquidators wish to hold back on prosecuting the 24 other actions until the outcome of the claim against SEB.

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6. It has been submitted to me that in light of all the activity in the liquidations and the need to save costs, there is a pressing need in this particular instance to avoid having to prosecute what may be unnecessary actions.

7. The relevant provisions of the Grand Court Rules for these applications are set out in Order 6, Rule 8, which have been read to me and which I do not propose to read again. They are in the bundle at Tab 8, pages 1-2.

8. I should just record, though, the applications here as originally framed in the skeleton argument proposed to be made pursuant to GCR Order 6, Rule 8(3) on the footing that "... *the Court may extend the validity of the writs for up to 12 months.*" However, such an application may be made where, in accordance with the express wording of the Rule, despite the making of all reasonable efforts, it may not be possible, my emphasis, to serve the writs within four months. This is plainly not such a case. There is nothing to suggest that it may not be possible to serve the writs within four months. The position,

rather, is that the plaintiffs do not want to serve the writs because of their wish to hold back on proceeding with the actions pending the outcome of the SEB action. As I pointed out to Counsel in the course of argument, the applications could only properly be treated as falling within GCR Order 6, Rule 8(2), which allows extensions not exceeding four months at any one time. This Rule is in identical form to the old Order 6, Rule 8 of the Rules of the Supreme Court, which is relevant when we come to look at the authorities.

9. There is English authority, followed in the Cayman Islands, which has defined the three categories of cases where questions of limitation may arise on an application for the extension of the validity of a writ and laid down the principles to be applied.

10. In *Kleinwort Benson v Barbrak*, [1987] AC 597, the House of Lords held that on the true construction of the Rules of the Supreme Court, Order 6, Rule 8(2), the power extending the validity of a writ should only be exercised for good reason. Whether there was good reason depended on all of the circumstances of the particular case, and the question whether an extension should be allowed was accordingly one for the discretion of the Judge, who is entitled to have regard to the balance of hardship between the parties and the possible prejudice to the defendant if an extension were allowed.

11. In that particular case, which was described as a wholly exceptional one ,where the plan had been designed to save unnecessary proceedings and legal costs, without any prejudice to the defendants, it was determined that there had been good reason for allowing two extensions of what was termed the omnibus writ.

12. As to the categories of cases where questions of limitations may arise, Lord Brandon, in his speech, set out three different categories at pages 615 to 616 of the judgment. I should just refer to it, because it is of relevance. He put it in this way:

"My Lords, there are three main categories of cases in which, on an application for extension of the validity of a writ, questions of limitation of action may arise, all being cases in which the writ has been issued before the relevant period of limitation, that is to say the period applicable to the cause of action on which the claim made by the writ is founded, has expired.

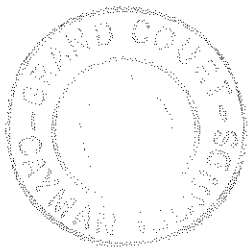
Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired.

Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired.

Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired."

13. The present case is a so-called category two case. The applications here are made when the writs are still valid but after the limitation period has expired since the writs were issued. In these circumstances, it cannot properly be said that the defendants have any accrued right of limitation as things stand.

14. The *Kleinwort Benson* case was applied in the case of *Waddon v Whitecroft* which followed soon after in the House of Lords. The report before me is [1968] 1 WLR 309. That was also a category two case, in which it was held that the applicant still had to show good reason for the extension, even though the application was made before the original period of validity had expired. And applying such principles in that particular case, it was decided that, in the circumstances, the plaintiff's solicitors could and should have served the writ before the original period of its validity had expired.



15. Now, in the applications before me, the plaintiffs submit that in accordance with the principles set out in *Kleinwort Benson*, at pages 622 to 623, they do not have to show exceptional circumstances to secure an extension, but merely that there is good reason for it. I am certainly prepared to accept that.

16. They also, though, go on to submit that *Kleinwort Benson* is authority for the proposition that where a plaintiff has similar claims against a large number of defendants, and prosecutes the proceedings against one of the particular defendants, perhaps the one against whom the largest claim is made, in order to establish the principle of liability of the defendants, but does no more than issue an omnibus writ or series of writs against all the remaining defendants in order to protect the position in relation to limitation, the Court then may properly exercise its discretion to extend the validity of the omnibus proceedings. It is contended by the plaintiffs that this saves potentially unnecessary proceedings and costs and is achieved without prejudice to the defendants. It is

submitted that this qualifies as a good reason to justify the extension of the validity of the writs.

17. As to possible prejudice caused to the defendants, the contention made in the evidence before me and in the submissions that have been made, is that the defendants' officers, and agents are unlikely to have to give evidence recalling events of the past. The likelihood rather is that it will be a challenge as to whether the plaintiffs can discharge the burden of proof upon them for the purpose of claims under Section 145 of the Companies Law. As I put it during the course of submissions, this is a somewhat sweeping assertion I have to say, and, without a detailed analysis, I have some doubt as to whether the position on prejudice can be put as simply as that. I am certainly not sure that prejudice can be ruled out.

18. I anticipate, indeed, that as in the SEB case, defendants may well wish to put forward a case as to the capacity in which they were holders of shares and what was communicated to the Fund by its representatives. And it may also be that there are other variances and nuances in the defences, in individual cases.

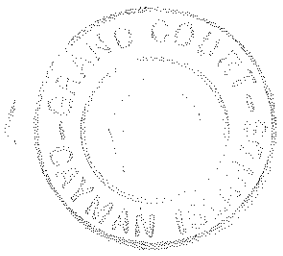
19. Furthermore, I find the plaintiff's reliance on *Kleinwort Benson* on this point to be problematic. This is because *Kleinwort Benson* was found to be, as I have indicated, a wholly exceptional case where, it is clear from the report, that there was no merit in the position of the defendants and no conceivable prejudice to be suffered by them. Counsel very properly referred me to the passage in the speech of Lord Brandon at pages 623 to 634, which makes this clear, which is a reference to the judgment and the analysis of Mr. Justice Sheen in the early stage of those proceedings.

20. In the present case, we do not have anything approaching such factors present, militating in favour of the application. The position rather, in my view, is that the defendants are entitled in the ordinary way of due process to know of the proceedings which have been issued against them. They may or may not know of them, because they are documents of public record, but they certainly have not been served and there is no indication that they have made any approaches to the plaintiffs. They are entitled, though, to know about the proceedings, and they are entitled to know what the claims are and to seek legal representation if they wish, and obtain, I would have thought, preliminary advice, and, if thought necessary, begin to prepare to deal with the case which may be pursued against them depending on certain events which are going to occur over the coming months.

21. Instead of seeking to take *Kleinwort Benson* beyond its limits and rely on it for the particular point which has been advocated, as I pointed out during the course of argument, there is, nevertheless, an alternative course to be taken with the same object of saving potentially unnecessary proceedings and costs. Also, this significantly, in my view, was the course which commended itself to Justice Quin in the other Weavering case of the *Weavering Fund v Ernst & Young*, and I have had the benefit of seeing the unreported judgment of Justice Quinn in that case dated18th March 2014, and hearing submissions on it.

22. Now, in that case, at the *ex parte* stage, Quin J. applied *Kleinwort Benson* and held that saving unnecessary proceedings and costs could amount to a good reason for extending the validity of a writ; and he took into account the balance of prejudice or hardship which he felt weighed in the plaintiff's favour. However, on the subsequent *inter partes* application to set aside the extension granted, having heard full argument, he took a different view. This, as rightly has been pointed out to me, was a Category 3 case, but in my view, on this point, the same reasoning applies to the preferred course to be taken in a situation of this kind.

23. Justice Quin, in reaching his decision, referred to the summary of principles in a helpful note in the Rules of the Supreme Court of England, which has the marginal reference 6/8/6, and in paragraph 52 of his judgment, he said this:



"The best summary of principles could be found in Order 6, r.8(6) of the Rules of the Supreme Court 1999. I can do no better than to set out this summary of principles in its entirety. I regard them as representing the law in relation to this issue in the Cayman Islands."

24. He then set out the principles, most of which are not particularly relevant here, although he does in the course of looking at them cite the passage in paragraph 7, which refers to the Kleinwort Benson case. He then goes on to refer to the last of the paragraphs in the note, which I shall read. It is paragraph 10, and it is particularly relevant, in my view, to the present application:

"Where a plaintiff is faced with the sort of difficulty categorized in paragraph 5 of this note or for any other reason wishes to delay the action, the proper and prudent course is to

serve the writ and to apply to the defendant for an extension of time to serve the statement of claim or, failing agreement with the defendant, to apply to the Court."

25. And then, he went on to say more about this. In paragraph 59 of his judgment, he said this:

"I agree with the defendants' leading counsel that the plaintiff should have either approached the defendants to reach an agreement about serving the second writ or, if no agreement could have been reached, simply serve it and then apply to the Court for a stay. Any Court would have been sympathetic to such an application."

26. He came back on the same theme in paragraph 63 of his judgment to say:

"It is possible the defendants' appeal on the Order 14A ruling may be unsuccessful. However, even though the outcome is uncertain, where the plaintiff is faced with that uncertainty, the proper and prudent course in this case was to serve the second writ and to apply to the defendants for an extension of time to serve the statement of claim, or, failing agreement with the defendants to, apply to the Court."

27. We have similar uncertainty here about the SEB action. It may prove determinative, and thus it may bring an end to all this litigation, or it may not. But I find that the course advocated in paragraph 10 of the notes of the Supreme Court Rules in that particular section, and the course which was adopted by Justice Quin in *Weavering v Ernst & Young*, is the course which should be adopted here.

28. The writs should be served while still valid, thus avoiding any possible challenge to extensions granted *ex parte* with then potential limitation issues which would arise should the extensions later be set aside. In my view, this is not just a proper course, but it is the prudent course to take here.

29. Applications can then be made to stay the actions to save potentially unnecessary proceedings and costs. I appreciate there will be some costs in order to serve the proceedings and in obtaining leave to serve writs out of jurisdiction. But those costs in the overall scheme of this litigation will not be excessive and the costs can be minimized to some extent by dealing with matters in an omnibus fashion. The same letter could be sent out to all of the defendants asking them to agree to the course which has been

proposed, which, it can be indicated, has found favour with the Court, albeit that applications may have to be heard, which may put forward other reasons for taking a different view.

30. I will at least say this at this stage, if it is of some comfort to the Joint Official Liquidators, I would hope that this course might be agreed, as it would appear to make a lot of sense to wait to see how the SEB action materialises, particularly on the question of solvency, which may determine that none of these other actions proceed. So I would hope that there would be good reasons for the defendants agreeing to wait, for not a very long time, to see how that SEB action materialises in the judgment given after the trial, which should be later this year.

31. But in the event that matters cannot be agreed, the Court is likely to look favourably upon an application for a stay for the reasons which have been submitted by Mr. Golaszewski, unless it can be shown, and we cannot of course rule this out, that there is some very good reason, that one has not thought of, for an action continuing. What I will say is, it is very hard at the moment to see what that reason would be or, indeed, why the defendants would not want to wait and see what the outcome would be in the SEB action rather than incur a lot of costs in having to mount challenges to these proceedings in the meantime.

32. I am sure that this is the proper course to take. It is what due process requires. And these defendants cannot be said to be defendants who are not suffering prejudice as time goes by. They are entitled to begin at least to take preliminary steps to obtain representation and be in position then to defend these actions, if necessary, although it may not be necessary.

33. Accordingly, in the exercise of my discretion and having looked carefully at the authorities and in accordance with the principles established in the *Kleinwort Benson* case, I find that the proper course is to refuse these applications and to encourage the other way of dealing with the matter as I have indicated to be possible.

34. I would simply add this is a postscript: As to the future, looking at it I see that most of the writs are for service out of the jurisdiction, so they are in any event valid for 6 months, or the balance of that time remaining. It will be required for them to have leave to serve out. This can be dealt with quite shortly, and I will be prepared to assist to whatever extent I

can for that purpose in a single omnibus application, which may be made by conference call or some other means. I believe there are 16 Carey Olsen writs and 5 Mourant writs for that application. And then there are just 3 other writs, Carey Olsen writs, for serving in the Cayman Islands, and they can easily be served within the period of four months and it appears there is still time to allow for that and then for appropriate steps to be taken to put the proceedings on hold, if not by agreement, then by application.

Dated this 9th day of April 2015

The Hon. Justice Nigel R.L. Clifford, QC
JUDGE OF THE GRAND COURT