IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. 144 OF 2015 (AJJ)

The Honourable Mr. Justice Andrew J. Jones QC

In Open Court, 6 October 2015

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF SECTION 30(11)(b) OF THE MUTUAL FUNDS LAW (2015 REVISION)

AND IN THE MATTER OF BRIGHTON SPC (IN CONTROLLERSHIP)

Appearances:

Ms. Gail Johnson-Goring for the Cayman Islands Monetary Authority

Mr. Kenneth Farrow QC of HSM Chambers for Belvedere Life Limited, PCC ("Belvedere Life") an investor of four of the segregated portfolios of Brighton SPC (referred to as "the Fund"), namely Kijani Commodity Fund (USD), Kijani Commodity Fund (EUR), Kijani Commodity Fund (GBP) and Kijani Commodity Fund (CHF) (referred to collectively as "the Kijani Funds")

Mr. Jeremy Walton of Appleby (Cayman) Ltd for Messrs. Simon Conway and David Walker of PwC Corporate Finance & Recovery (Cayman) Limited in their capacity as controllers of the Fund and its portfolios

The Fund was not represented

REASONS

Factual background and procedural history

1. On 6 October 2015 I made a winding up order in respect of Brighton SPC ("the Fund") and its funded segregated portfolios (referred to collectively as "the Portfolios") upon the petition of the Cayman Islands Monetary Authority ("CIMA"). Some considerable time later, I was asked to give full written reasons for my order, which I now do.

2. The Fund was incorporated under the Companies Law (2013 Revision) on 15 May 2014 as a segregated portfolio company. On 27 June 2014 it was registered with CIMA pursuant to section 4(3) of the Mutual Funds Law (2013 Revision) as a registered mutual fund, but its business was not commenced until November 2014. The Fund was brought to the attention of CIMA on 17 March 2015 when it was notified by the independent directors that they had resolved to suspend subscriptions and redemptions and then resigned with immediate effect as a result of allegations of fraud made against the Fund and its promoters in a well-known publication called *OffshoreAlert*. The article asserts that the Fund is part of a huge criminal enterprise operated through the Belvedere Management Group, a group of companies based in Mauritius and controlled by Mr. David D. Cosgrove ("Mr. Cosgrove"), Mr. Cobus Kellerman and Mr. Kenneth Maillard. The article in *OffshoreAlert* asserts that the Fund "appears to be a crude Ponzi scheme".

3. The *OffshoreAlert* article also asserts (and CIMA subsequently confirmed) that the Belvedere Management Group's London based foreign exchange business called CWM FX

was the subject of a criminal investigation by the City of London police and that the Financial Services Commission of Mauritius had taken regulatory action against Belvedere Management Limited, which is the Fund's sub-administrator. CIMA subsequently ascertained that the Fund's administrator, Drake Fund Advisers Limited, and its investment manager, Premier Capital Management Limited, which are not affiliates of the Belvedere Management Group, had also resigned.

4. Having engaged in correspondence with the Fund's local attorneys between 19 March and 16 April 2015, CIMA still held significant concerns about the Fund's operations and therefore decided, in the exercise of its power under section 29 (3) of the Mutual Funds Law, to authorize a firm of forensic accountants to assist in the performance of its regulatory powers. On 30 April 2015 CIMA issued an *Authorization to Perform Forensic Examination* to PwC Finance Corporate Finance & Recovery (Cayman) Limited ("PwC"). This Authorization (and the related Terms of Reference) has not been disclosed to the Court but the primary purpose of PwC's engagement is stated as follows-

To examine and report on the operations of [the Fund] for the purpose of assisting [CIMA] in the performance of its powers and functions to determine whether-

a. the operations of the Fund are indicative of a fraudulent scheme;

b. the direction and management of the Fund has not be conducted in a fit and proper manner or gives rise to any other regulatory concerns; and

c. any person has represented in a false or misleading manner the performance or activities of the Fund.

5. PWC delivered its Forensic Examination Report on 21 May 2015. It reported that the Fund established a large number of segregated portfolios designated with the prefix CWM which were intended to act as vehicles for investments related to CWN FX. Since

CWN FX had ceased to carry own its business following the action taken by the City of London Police, these portfolios were never funded. PwC therefore concluded that its investigation should focus on the funded portfolios, in particular those called Kijani Commodity Fund (USD), Kijani Commodity Fund (GBP), Kijani Commodity Fund (EUR) and Kijani Commodity Fund (CHF) (referred to collectively as "the Kijani Funds"). The Kijani Funds are said to have been "transferred" into the Fund from Four Elements PCC (and created as segregated portfolios of the Fund) in November 2014.

6. Four Elements PCC was incorporated in 2008 as a protected cell company under the laws of Mauritius. It carried on business as a collective investment scheme and was managed by Belvedere Management Limited. On 20 October 2014 the Financial Services Commission of Mauritius ("FSC Mauritius") took regulatory action against Four Elements PCC by prohibiting it from taking on any new business. On 20 March 2015 FSC Mauritius withdrew its authorization to act as a collective investment scheme and revoked Belvedere Management Limited's licence to act as an investment manager.

7. PwC reported that the Kijani Funds' offering documents and marketing materials give an overall impression of highly liquid funds taking daily positions in commodities through a sophisticated proprietary trading system and generating returns through arbitrage. In fact, the sole investment asset of the Kijani Funds is a loan receivable due from a wholly owned subsidiary called Kijani Resources Limited ("KRL"). KRL is an investment holding company which has not engaged in commodities trading.

8. The Forensic Examination Report (a redacted copy of which has been put in evidence) concludes that the Fund's management-

- *Misrepresented the structure and purpose of the Kijani Funds to investors;*
- *Did not invest in accordance with the Kijani Fund's investment criteria, with a potentially significant adverse impact for investors;*
- *Relied on misleading valuation methodologies to value the Fund's key assets with a resulting significant over-valuation of the Fund's NAV;*
- *Recorded no material cash returns on the sole investments of the Kijani Funds (ie. the KRL Loan) and therefore met redemption requests through the proceeds of new subscriptions; and*
- *Made purported currency trading related payments of approximately US$2m to a substantial investor in the Fund and possible affiliate of Belvedere Management Limited.*

9. In the light of PwC's findings and the information contained in its report, CIMA satisfied itself, for the purposes of section 30(1), paragraphs (a), (b) and (d) of the Mutual Funds Law, that the Fund is or is likely to become unable to meet its obligations as they fall due; that it is carrying on or attempting to carry on business in a manner that is prejudicial to its investors and creditors; and that the direction and management of the Fund has not been conducted in a fit and proper manner. In my judgment CIMA had sufficient evidence upon which to reach these conclusions, with the result that it was entitled to exercise its power under section 30(3)(e) of the Mutual Funds Law to appoint a person to assume control of the Fund's affairs. On 1 June 2015 CIMA appointed Messrs. Simon Conway and David Walker of PwC as controllers of the Fund, whereupon their firm ceased to act in an advisory capacity and they became entitled under section 30(7) to exercise all the powers necessary, to the exclusion of the directors, to administer the

affairs of the Fund and its portfolios in the best interests of its investors and creditors. By section 30(9), the Controllers are required to make a report to CIMA upon the affairs of the Fund within 3 months. They delivered two reports dated 26 June and 3 August 2015, redacted copies of which have been put in evidence.

10. By their First Report, the Controllers re-confirmed the findings previously expressed in the Forensic Examination Report and went on to make further findings in relation to the KRL Loan and the manner in which KRL's business appears to have been conducted. They had taken the decision to demand repayment of the KRL Loan and KRL's directors advised that it was not possible to repay it in accordance with the terms of the Loan agreement, with the result that the Fund is not in a position to pay redemption monies owing to its former shareholders. The Controllers concluded (at paragraph 4.3 of the First Report) as follows -

"As noted in the [Examiners'] Report, the Fund has significant unpaid redemptions of approximately US$12m. In light of the inability of KRL to repay its loan, at least in the short term, the Fund is cashflow insolvent. While the Fund's Directors advised their intention of raising new subscriptions in order to meet redemptions, and cited a pipeline of US$27m of new investor monies, in the Controllers' view this approach would pose a clear risk of prejudice to investors and should not be considered.

Furthermore, given the likely significant overvaluation of the underlying assets of KRL, and the lack of any significant cash returns from the KRL Loan to date, the Controllers' do not consider that it is viable for the Fund to continue operating as a going concern.

Given the concerns raised above, the Controllers' view that the Fund is not a viable going concern, it is recommended that the CIMA petition the Grand Court of the Cayman Islands for the winding-up of the Fund, in order to protect the interests of investors and creditors.

11. The Controllers' conclusions and recommendation were re-confirmed in their Second Report dated 3 August 2015, a redacted copy of which has also been put in evidence. On the same day the Executive Committee of CIMA's board of directors resolved to present a winding up petition against the Fund and cancelled its registration under the Mutual Funds Law with effect from the date upon which official liquidators are appointed by the Court. On 24 August 2015 a notice was sent by the Controllers to the Fund's investors stating that they would be provided with access to redacted copies of the Forensic Examination Report and the two Controllers' Reports through the mechanism of an electronic data room. The Controllers' notice states that –

Please also note that redactions have been made where necessary in order to:

- *Avoid disclosure of commercially sensitive information; and*
- *Avoid disclosure of information and/or opinions that were provided to the Controllers on a confidential basis.*

12. It is these redacted copies of the reports which have been put in evidence. It follows that the investors, including Belvedere Life, have the same documentary evidence as the Court. It seems to me that it is inherently unsatisfactory for the Court to be asked to make a winding up order on the basis of reports which have been redacted unless the judge is able to satisfy himself that the redacted material is irrelevant or, if potentially relevant, that its redaction has no bearing on those parts of the reports upon which CIMA relies. CIMA did not seek to rely upon those parts of the reports that had been redacted and I therefore proceeded on the assumption that the redacted material must be

irrelevant to the adjudication of the issues before the Court. No application was made by any interested party for a direction that un-redacted copies of the reports be disclosed.

13. Curiously, the final paragraph of the Controllers' notice states that "The CIMA is now considering what, if any, regulatory actions are required in respect of the [Fund] and these shall be communicated to investors as soon as practicable". In fact, CIMA had already decided what action should be taken and its winding up petition was presented on 8 September 2015. It was served on the same day together with supporting affidavits and a summons for directions (pursuant to CWR Order 3, rule 15) returnable on 10 September 2015. The Fund was not represented at the hearing but Belvedere Life did appear by counsel and stated its intention to oppose the petition. A hearing date and timetable for the exchange of affidavit evidence was fixed and the Controllers were directed to provide Belvedere Life with copies of the Fund's register of members and articles of association.

The applicable law

14. CIMA is empowered by section 94 of the Companies Law (2015 Revision) to present winding up petitions in two quite different situations. First, sub-section 94(1)(d) empowers CIMA to present a petition "subject to subsection (4), pursuant to the regulatory laws". The "regulatory laws" are defined by section 2(1) to include the Mutual Funds Law (2015 Revision). Second, sub-section 94(4) empowers CIMA to present a petition against a company which is carrying on a "regulated business" on the ground

that it is not duly licensed or registered to do so under the applicable regulatory law. In this situation, the purpose of a winding up order is to terminate a business which is being carried on unlawfully by an unlicensed company. In the present case the Fund was duly registered under the Mutual Funds Law and CIMA's petition is presented under sub-section 94(1)(d) pursuant to the Mutual Funds Law (2015 Revision). The second limb of section 94(4) provides that CIMA may present a petition "for any other reason as provided under the regulatory laws or any other law". What this means is that CIMA can present a petition against a company which is licensed or registered to carry on a "regulated business" on the grounds specified in the applicable "regulatory law", in this case the Mutual Funds Law (2015 Revision).

15. Section 92 of the Companies Law (2013 Revision) sets out the grounds upon which a company itself or any of its creditors (including contingent or prospective creditors) or contributories may present a winding up petition. It has no application to a winding up petition presented by CIMA on regulatory grounds. The grounds upon which CIMA may present a winding up petition against a mutual fund are those specified in section 30(1) of the Mutual Funds Law (2015 Revision) which provides as follows-

The Authority may take all or any of the actions specified in subsection (3) if it is satisfied that-

(a) a regulated mutual fund is or is likely to become unable to meet its obligations as they fall due;

(b) a regulated mutual fund is carrying on or attempting to carry on business or is winding-up its business voluntarily in a manner which is prejudicial to its investors or creditors;

(c) a regulated mutual fund, in the case of a licensed mutual fund, is carrying on or attempting to carry on business without complying with any condition of its Mutual Fund Licence contrary to section 5(5);

(d) the direction and management of a regulated mutual fund, has not been conducted in a fit and proper manner; or

(e) a person holding a position as a director, manager or officer of a regulated mutual fund is not a fit and proper person to hold the respective position.

16. Section 30 of the Mutual Funds Law (2015 Revision) circumscribes CIMA's power to present a winding up petition by imposing a "two stage" procedure. When CIMA is satisfied, at least on a provisional basis, about the existence of one or more of these grounds, as it was in this case, it still cannot proceed immediately with the presentation of a winding up petition. It must first take one or other of the less draconian regulatory actions specified in sub-section 30(3). This includes appointing an adviser under sub-section 30(3)(d) or a controller under sub-section 30(3)(e). In this case CIMA appointed controllers, who are required to administer the affairs of a mutual fund and to report on its affairs and, where appropriate, make recommendations to CIMA. In practice the terms of a controller's appointment will normally specify matters to be investigated and matters about which recommendations are sought. The effect of sub-section 30(11) is that CIMA is not empowered to present a winding up petition against a mutual fund without first appointing an adviser or controller and giving due consideration to the report and any recommendations which the adviser/controller is required to make by sub-section 30(9). I am satisfied that CIMA has complied with these procedural requirements.

17. CIMA put its case under paragraphs (a), (b) and/or (d). The Court therefore needs to be satisfied that the Fund and/or the Portfolios are or are likely to become their obligations as they fall due or that the business of the Fund and/or the Portfolios is being carried on in a manner prejudicial to the investors and creditors or that the direction and management of the Fund and its Portfolios has not been in a fit and proper manner. If the Court is satisfied about any one of these matters, it must then go on to consider (under section 92(e) of the Companies Law) whether or not it is just and equitable that the Fund be wound up.

The evidence before the Court

18. The evidence filed on behalf of CIMA comprises two affidavits sworn by its Head of Compliance, Mr. R.J. Berry, and two affidavits sworn by Mr. Simon Conway in his capacity as one of the joint controllers. Redacted copies of the Examination Report and the Controllers' Reports are exhibited to Mr. Conway's affidavits. Mr. Conway also gave oral evidence and was cross-examined by counsel for Belvedere Life. No evidence was filed on behalf of the Fund and its Portfolios, although I did take into account an e-mail transmitted on 29 September 2015 in which the former directors stated that the Controllers' actions were and continue to be based upon "insufficient and inaccurate analysis and were therefore ill-informed and disproportionate". They also expressed a willingness to be re-appointed as directors in the event that the petition is dismissed. The evidence filed on behalf of Belvedere Life comprised an affidavit sworn by Mr. David D.

Cosgrove. Having read all this evidence and considered Mr. Conway's oral evidence, I reached the following conclusions.

19. First, the Fund's offering and marketing documents materially misrepresent the nature of its actual business. I accept that these documents give an overall impression of a highly liquid fund taking daily positions in commodities through a sophisticated proprietary trading system and generating returns through arbitrage. In fact, the sole investment is the KRL Loan. In response, counsel for Belvedere Life pointed to the fact that KRL is itself a subsidiary of the Kijani Funds with the result that one should ignore the loan and consider whether the business of KRL is consistent with that described in the offering documents. Even if one approaches the issue in this way, the evidence is that KRL was not carrying on any kind of commodities trading business. In fact it owns a portfolio of illiquid private equity type investments. The significance of this misrepresentation is that the true nature of the underlying business is such that the Kijani Portfolios are inherently unlikely to be able to redeem shares on a monthly basis which must be a key consideration for the investors. Mr. Cosgrove's attempt to address this complaint is wholly unconvincing. His affidavit fails to give any meaningful explanation for the business model actually adopted by the Fund and fails to explain why this business model was not disclosed in the offering documents. His assertion that KRL's investments, if made by the Kijani Funds, would have been permitted by the very wide criteria contained in the offering document is unconvincing. His affidavit fails to address the point that the offering documents give the impression that the Fund and its Portfolios will be engaged

in a highly liquid commodity trading business which will enable them to make monthly redemptions without necessarily taking in new subscriptions. In fact the true nature of its business was quite different, with the result that it could not in fact make redemptions when the need arose. For this reason, I conclude that the business of the Fund and its Portfolios was being carried on in a manner prejudicial to the investors.

20. Second, the Kijani Funds did in fact receive redemption requests of approximately US$12 million in total which they were unable to pay. The directors' response was to suspend redemptions and suspend the payment of redemption proceeds pursuant to articles 9.13 to 9.15 of the Fund's articles of association. On this basis Mr. Cosgrove argues that the Fund and the Kijani Funds are not insolvent because no debt is presently due and owing to the redeeming shareholders. The argument is that the redemption proceeds will not become payable unless and until the suspension has been lifted. I might add that the directors promptly resigned immediately after having taken this decision. The terms of article 9.13 contemplate that the directors' power to suspend redemptions and payments will become exercisable in a variety of circumstances which are outside their control. In this case the need to suspend arose out of the directors' decision to permit KRL to invest in illiquid assets, thus preventing it from making the loan repayments necessary to enable the Kijani Funds to meet their redemption obligations. Even if the directors were properly entitled to suspend payment of the redemption proceeds (which is highly doubtful in my mind), the evidence leads to the conclusion that the Fund and its portfolios are no longer a going concern. Even if they are not technically cash flow

insolvent *now* (because the power of suspension was properly exercised), the evidence about the way in which KRL's assets have been overvalued leads to the conclusion that the Fund and its Portfolios will probably *never* be able to meet their obligations in full, in which case they will become insolvent at some point in the future. The suggestion that the amount owing to the redeemed shareholders could be paid out of new subscriptions of up to US$27 million potentially available from new investors is wholly lacking in credibility. No potential new investors have been identified. It seems to me that it is inherently improbable that anyone armed with the information contained the reports and aware of the regulatory action taken by Mauritius FSC and CIMA would want to invest in this Fund.

21. Third, the Fund and its Portfolios no longer have any effective management and there is no evidence before the Court that any reputable firms would be willing to take on the roles of administrator, investment manager and auditor if the winding up petition were to be dismissed. Harneys are on the record with CIMA as legal counsel to the Fund. The Court received an e-mail from Harneys on 10 September 2015, immediately before the hearing of the summons for directions in relation to the winding up petition. It stated as follows –

The [Fund] has no directors. We have, accordingly, sought instructions from the holder of record of the Management Shares in the [Fund], Straffan Asset Management Limited. We were able to speak with Mr Conor McGrath, the director of Straffan, only a few moments ago. Mr. McGrath denies that Straffan ever agreed to hold the management shares and that the Management Shares were transferred to it without its knowledge [or] consent. Straffan is unwilling to give instructions as it does not accept that it is the holder of the Management Shares.

The Fund was unrepresented at the hearing of the petition. It was unclear who would be entitled to appoint new directors and take all the necessary steps to engage new service providers.

Conclusion

22. For these reasons I was satisfied that CIMA had established its case under both sub-sections 30(1)(a) and (b) of the Mutual Funds Law and that it is just and equitable to make a winding up order in respect of the Fund and its Portfolios. I did not consider that it was necessary to go on a decide whether CIMA has made out its case under sub-section 30(1)(d).

Dated this 21st day of May 2016

The Hon. Justice Andrew J. Jones QC