

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2012/0116

In the Matter of FuturesOne Innovative Fund SPC Ltd (in liquidation)

And in the Matter of the Insolvency Act 2003

Ex parte John Greenwood, its liquidator

CLAIM NO. BVIHCM 2012/0115

In the Matter of Anchor Hedge Fund Ltd (in liquidation)

And in the Matter of the Insolvency Act 2003

Ex parte John Greenwood, its liquidator

CLAIM NO. BVIHCM 2013/0085

In the Matter of FuturesOne Diversified Fund Ltd (in liquidation)

And in the Matter of the Insolvency Act 2003

Ex parte John Greenwood, its liquidator

Representation for the “on paper” application:

Ms. Sara-Jane Knock of Withers BVI

2019: June 3

Company in liquidation – Order permitting transfer of shares – whether Court has power to grant liquidator general permission to transfer shares

JUDGMENT

- [1] **JACK, J [Ag.]:** These three applications are in very similar form and raise the same point of law.
- [2] The facts of FuturesOne Innovative Fund SPC Ltd ("Innovative") can be taken as typical of the three cases. Innovative was a hedge fund. Its shares are divided in non-participating voting shares and participating non-voting shares. The holder of the voting shares, in this case Innovative Financial Holdings Ltd, dealt with the management of the hedge fund. The holders of the non-voting shares were the investors, who were entitled to a distribution.
- [3] Mr. Greenwood was appointed as liquidator of Innovative by a members' resolution which became effective on 24th October 2012. (He was initially one of two joint liquidators, but his joint liquidator was removed by order of the Court on 28th July 2018.) The appointment was confirmed by a meeting of creditors on 9th November 2012. This Court declared the appointment valid by an order of 20th March 2013.
- [4] Brown Brothers Harriman are custodians of 622.0709 non-voting shares in Innovative. They hold the shares for Crédit Agricole (Miami) for the benefit of various customers of Crédit Agricole. Brown Brothers wish to transfer the shares to Ocean Park International Ltd. The shares are fully paid up. No obligations are owed to Innovative. No transfer of beneficial ownership is intended. The transfer is to affect a policy of changing the custodian of shares periodically. A share transfer form has been executed in proper form.
- [5] Section 175(1)(d) of the Insolvency Act 2003 provides that "unless the Court otherwise orders, no share in the company [by which is meant, the company in liquidation] may be transferred." Section 186(5) provides: "The liquidator of a company, whether or not appointed by the Court, may at any time apply to the Court for directions in relation to a particular matter arising in the liquidation."

- [6] The liquidator applies firstly for authorization to transfer the 622.0709 shares to Ocean Park International Ltd and secondly for "permission to register transfers of shares in the Fund in all cases where the liquidator is satisfied that the shares to be transferred are fully paid-up and free from any obligation towards the Fund and that otherwise in his opinion such transfers should be permitted, without prejudice to the liquidator's right to object to any request to register any transfer of shares submitted to him by any of the Fund's shareholders."
- [7] The first part of the application is unproblematic. I have no hesitation in making an order permitting the transfer of the 622.0709 shares.
- [8] The second part of the application raises a point of law on the Court's jurisdiction. If the Court has jurisdiction, then I would happily make the order in the form sought. There seems no good reason not to leave the transfer of paid-up shares to the good sense of the liquidator.
- [9] However, the Court must always be satisfied that it has jurisdiction to make the order requested. Further, the Court must take points as to its jurisdiction of its own motion. The problem here is (a) whether granting this *general* power to transfer shares falls within the Court's power under section 186(5) to give directions "in relation to a *particular* matter which arising in the course of the liquidation" or (b) whether a general *future* waiver is permissible under section 175(1)(d) or whether the power is directed at concrete identified share transfers.
- [10] When I had this matter raised with Ms. Knock by email, she provided a copy of an order made on 8th April 2013 by Bannister J in **Re Fulcrum Distressed Partners (BVI) Ltd.**¹ Para 2 of the order is in the same words as the application which I have set out above, except that the Court there granted a "general permission" rather than merely a "permission" as sought in the current application. There is, however, no indication that this jurisdictional problem was brought to the attention of Bannister J. Certainly he appears not to have given any judgment on the point.

¹ BVIHC (COM) 2013/0033.

[11] It seems probable to me that there is some case law in the English common law world on the true construction of sections 176(1)(d) and 186(5) or their equivalents, but Ms. Knock has not yet been able to find any. I therefore propose:

- (a) to authorize the particular share transfers which are the subject of the three applications;
- (b) to grant the liquidator liberty to apply in the current application to seek the authorization of the Court for identified future share transfers (so the liquidator does not need to issue a fresh application at consequential expense); and
- (c) to adjourn for further consideration the application for a general dispensation from the need to obtain the Court's authorization.

[12] I shall invite Ms. Knock to submit orders in these terms. Once she or counsel have researched the point on jurisdiction, I am happy to consider the point on paper.

Adrian Jack (Ag)

Commercial Court Judge

By the Court


Registrar