IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO: BVIHC (COM) 0044 Of 2015

IN THE MATTER OF SECTIONS 184B AND 184I OF THE BVI BUSINESS COMPANIES ACT, 2004

AND IN THE MATTER OF SWISS FORFAITING COMPANY LTD

BETWEEN

INDEPENDENT ASSET MANAGEMENT COMPANY LIMITED

Claimant

v

SWISS FORFAITING LTD

Defendant

Appearances

James Collins QC and Jonathan Addo for the Claimant

Christopher Parker QC, Arabella di Iorio and Simon Hall for the Defendant

---

2016: June 7, 8 and 9
June 29

JUDGMENT

Collective Investment Fund with non-participating voting A shares issued to claimant investment manager and participating non-voting B shares issued to investors – application

under section 184B and 184I of Business Companies Act 2004 to set aside issuance of 500 A shares to nominee of the board, thus diluting existing A shares at a time when claimant was in dissolution, the Fund had ceased to operate, all B shareholders had redeemed and beneficial owner of claimant and associated management company were claiming fees going back 7 years -- 500 shares issued to stop claimant from gaining control of the Fund which was defending the claim for such fees and suing for funds held in trust for it -- whether dilution amounted to unfair prejudice or was done for an improper purpose --- whether it was necessary to join the holder of the 500 A shares in a claim to set the issuance aside.

[1] Sher J [Ag] This action concerns a claim by the Claimant company ("IAMC") for an order under section184I of the Business Companies Act 2004 reversing the dilution of its voting power as a shareholder in the Defendant company ("the Fund") from 100% to 16.66%. It is an extremely unusual case not only because IAMC did not exist at the time of the dilution (having been dissolved some years before) but also because the voting shares in respect of which it was diluted enjoyed no economic interest in the assets or profits of the fund beyond their nominal paid up value of €100.

Split between Voting (non-participating) and Participating (non-voting shares)

[2] The Fund was set up by Mr Salvatore Chiappinelli who is an expert in the field of forfaiting (a method of trade finance involving investment in an exporter's receivables). He has been president of the Swiss Association of Forfaiters as well as a board member and Secretary General of the International Forfaiters Association. The Fund was to be an open-ended investment company and was to invest in financial instruments such as promissory notes, bills of exchange, irrevocable letters of credit and other similar instruments in this specialized area of forfaiting in which Mr. Chiappinelli had expertise. Mr Rinaldo Invernizzi was a wealthy investor who provided an initial investment of €5 million. The Fund was set up with two classes of shares. Class A shares

had no right to participate in the profits or assets of the Fund but they enjoyed 100% of the voting rights. 100 A shares (which had a par value of €1 per share) were authorised to be issued and were issued to IAMC, a company wholly owned by Bon Max Development Ltd, a Samoan company, which in turn was held as to 75% by Mr. Chiappinelli and 25% by Mr Invernizzi. Class B shares (which had a par value of €.01 per share) carried all the rights to participate in the profits and assets of the Fund, but enjoyed no voting power at all. These were issued to Mr Invernizzi and later investors in the Fund. While a B shareholder owned indirectly a proportionate part of the assets of the Fund, an A shareholder had no proprietary relationship with the assets of the Fund; the issue of the A shares was simply a mechanism that separated the managers of the Fund, who had all the voting control, from the investors, who had no voting control at all (but had the right from time to time to redeem their investments at the net asset values ("NAVs") determined in accordance with the constitutional documents setting up the Fund). This was a common structure utilised in the BVI and elsewhere for open-ended collective funds of this kind. The investors would receive their returns from the funds under management. The management would receive their return from fees charged for asset management and corporate services.

IAMC appointed investment manager

[3] By an investment management agreement dated 8 January 2007 ("the IMA") the Fund engaged IAMC as the investment manager of its assets. I need record only two features of the IMA: first, by clause 16 (2), it could not be terminated without the approval of the holders of the 100 A shares; and, secondly, by clause 6.1, the investment manager could delegate the responsibility for managing the portfolio to an investment advisor. It was envisaged from the start that the Fund would appoint agents to act as key service providers to the Fund and this was reflected in a Private Placement Memorandum ("PPM"). Under the PPM the initial director of the Fund was CTS

Management Ltd (part of Circle Partners ("Circle"), a group of financial service providers with expertise in areas of fund administration, corporate finance and fiduciary management). Circle Secretarial Services Ltd, another company in the group, has been the Fund's secretary since incorporation. CTS Nominees Ltd is another company within the group that features later in this narrative and provides professional nominee shareholding services in the BVI. IAMC was appointed investment manager under the PPM (in addition to the IMA) and the provision for delegation of its responsibilities was recorded in the PPM as being subject to retention of certain responsibilities for evaluating and coordinating the services provided by its delegates. The PPM also established a credit committee consisting of Mr Chiappinelli, Mr Invernizzi and another, which was responsible for approving the purchase of investments on behalf of the Fund.

Management done by SFC Swiss Forfaiting Co Ltd

[4] SFC Swiss Forfaiting Co Ltd ("SFC") was appointed as an agent to purchase securities and offer the same to the Fund on a first refusal basis. The evidence at trial was not clear precisely what services SFC performed for the Fund but its involvement in the affairs of the Fund is central to the dispute which has given rise to these proceedings. It is a company owned and controlled by Mr Chiappinelli. It carries the name Swiss Forfaiting which Mr Chiappinelli described in evidence as his valuable brand (a name which is shared by the Fund itself). SFC is the entity to which IAMC delegated its function as investment manager. There is no indication in the evidence that IAMC itself ever performed any services for the Fund, not even the residual function of evaluating and coordinating the services provided by SFC. It seems to have delegated its functions completely to SFC. The picture emerges that it was Mr Chiappinelli who performed the functions of management, mainly through SFC.

Migration to Luxembourg

[5] The Fund performed well in its first 14 months but, by the end of 2008, it was becoming increasingly clear that the growth opportunities were constrained by the world financial crisis and by its BVI domicile. It seemed that only a European domiciled fund was marketable and would be able to survive the bear market. This led to a decision in September 2009 to transfer the registered office of the Fund to Luxembourg. This transfer has been referred to in the evidence as the migration to Luxembourg and by the middle of 2011 the plan to migrate was well advanced. Under article 6 of the Luxembourg Law on Special Investment Funds, the Fund had to have a Luxembourg investment manager and it was therefore clear that IAMC would no longer have any part to play after the migration. Accordingly, a Swiss company Farad Investment Advisors SA was chosen and negotiations began as to the terms on which it would act. As for IAMC (which was incorporated in Hong Kong) Mr Chiappinelli gave instructions to his Hong Kong lawyers to put IAMC into dissolution. On 12 August 2011 IAMC applied to the Hong Kong Companies Registry to be deregistered on the grounds (contained in a standard form) that its members had agreed to its deregistration, that it had no outstanding liabilities and that it had either never commenced business or that it had ceased to do so for more than 3 months before the application. This was not a case of a company being struck off for not paying a government fee but a procedure that led to the company being deregistered as defunct and dissolved on publication in the Hong Kong Gazette on 30 December 2011.

[6] Mr Chiappinelli says that this made no difference to the continued operation of the Fund as the day to day activities were performed by SFC and management decisions continued to be taken by him in conjunction with Mr Invernizzi's family office. However, it appears that while preparations were being made for the migration, SFC stopped making deals on behalf of the Fund and there was a considerable wind down of business.

Beginning of conflict with Mr Chiappinelli

[7] By September 2012 the Fund had communicated the intended migration to its investors and sought approval from the BVI Financial Services Commission to continue its business under the laws of Luxembourg. This resulted however in a wave of redemption requests. In order to meet the redemption requests, Circle and Mr Chiappinelli set about calculating the NAVs for the 31st August, which were approved by Mr Chiappinelli in an email to the persons he was dealing with at Circle on 5 December 2012. He noted in that email "maturities will be fully paid in the fund after deductions of certain cost (detailed invoice(s) will be timely provided) incurred by the SFC Swiss Forfaiting Co. Ltd. during the last years. I can't hide that the current circumstances of Swiss Forfaiting Fund has to be dissolved (ev. liquidated) and/or simply closed….I am working on a couple of solutions but I do not know if anyone would like to absorb the current BVI status…"

[8] I have quoted this email as it was written because I consider that it marks the beginning of a change in the relationship between Mr Chiappinelli and the service providers at Circle that is key to the outcome of these proceedings. Mr Chiappinelli is here heralding a potential problem for the future. The Fund is heading for eventual ("ev.") liquidation and he is indicating that there is in the pipeline a "certain cost" that his company SFC is going to put up in detailed invoices to be provided and that that cost will impact on the maturities to be paid in the future. We know now that that "cost" has become the subject matter of proceedings in Switzerland and other proceedings in the BVI and was very soon after this email to result in Mr Chiappinelli and the Fund confronting each other across a hostile divide.

[9] It was becoming increasingly clear by December 2012 that the migration was not going to happen. It seems clear from Mr Chiappinelli's evidence that the attempted migration was expensive and that fees for management over the years had not been regularly and efficiently rendered or paid. I hasten to say that I do not make any findings in these proceedings as to the issues concerning fees (which are the subject matter of the other proceedings I have mentioned) beyond holding that the historical rendering of fees appears to have been in total disarray. An example of this is a suggestion that a figure of some €2 million had been paid by the Fund to a company called IAMC in Panama which had nothing to do with IAMC and therefore, presumably, had to be paid again. I need not, and do not, record allegation and counter-allegation in this respect. The detail is not relevant to these proceedings and I do not have the evidence to investigate these allegations in any event. All that is relevant is that there was brewing at this time (and now is) a sizeable dispute over fees between Mr Chappinelli's company SFC and the Fund.

Collapse of migration

[10] On 19 December 2012, the Fund wrote to the FSC telling the Commission that it was no longer requesting its approval to migrate to Luxembourg, that it had received redemption requests from all the B shareholders and that following consultation with Circle, IAMC and Maples & Calder, it had suspended the purchase and redemption of shares as from 1 December 2012. Further, the FSC was told that for those redeeming as from 1 October 2012, the payment of redemption proceeds had been suspended and that IAMC was in contact with the Fund's shareholders regarding the preferred way to liquidate the Fund's assets.

[11] In a letter in response from the FSC dated 5 February 2013 to Circle, the FSC asked for details of how the Fund intended to unwind and return funds to investors and for various other details and documents. The letter was sent on

to Mr Chiappinelli asking him how the fund intended to unwind. On 12 February 2012, Mr Chiappinelli was asked for the valuations to calculate the NAVs for the end of September and end of October 2012.

[12] Mr Invernizzi held his investment in the Fund through a company called SIX SIS AG ("SIX"). At this time there were only two remaining investors, SIX and a company called Citco Global Custody N.V. ("Citco"). Six held 99% of the unredeemed B shares; Citco held 1%. The evidence is unclear but it was thought by Circle that the beneficial owner of Citco's 1% was Mr Chiappinelli.

[13] SIX was pressing Circle by emails regarding its redemption requests which required determination of the NAVs for September and October 2012. After many chasing emails, Mr Chiappinelli said on 15 March 2013 that the NAVs would be sent the following week and that he was reviewing and processing material regarding a prospective claim against the Fund. On 20 March 2013 there was a further reference by Mr Chiappinelli to a prospective claim against the Fund referring to the fact that he had to review what he described as "7 years material". No quantification, however, was provided.

[14] By 26 April 2013, the Fund still had not received the data relating to the NAVs for September and October 2012 and was still waiting for the information required to respond to the FSC's letter of 5 February 2013. The Fund wrote formally to IAMC. No response was received and the Fund therefore sought legal advice. Messrs Maples & Calder wrote to IAMC on behalf of the Fund on 27 May 2013 demanding the information concerning the NAVs and the information needed to respond to the FSC. They instructed a courier to hand deliver the letter to IAMC's address in Hong Kong. The courier found the site under renovation and was informed that IAMC had moved out a long time ago. The letter was also addressed by email to addresses used by Mr Chiappinelli.

No response was received. This troubled the Fund, given that SFC held significant sums on trust for the Fund.

Discovery of dissolution of IAMC

[15] On 31 January 2014, in the context of considering taking court action against IAMC and SFC, the Fund discovered that IAMC had been dissolved on 30 December 2011. At this time (January 2014) the position was as follows: there were only two investors left, SIX (entitled to 99%) and Citco (entitled to1%).SFC was holding something of the order of €8 million in trust for the Fundwhich it was not releasing to the Fund. There was a potential claim by SFC (and, possibly IAMC) against the Fund for fees in amounts which had not yet been quantified. The Fund needed information to calculate the NAVs for the outstanding redemption requests by SIX to be paid. The Fund needed information to respond to the FSC's letter of 5 February 2013. The relationship between the Fund on the one hand and Mr Chiappinelli and SFC on the other had deteriorated into one of some hostility with litigation in the air.

The reorganisation plan

[16] In these circumstances, and following discussions within Circle (and a company called AMS, which had by this time taken over Circle Trust Services BVI Ltd), a reorganisation plan was formulated. Hitherto I have referred generally to Circle without distinguishing which entity within Circle was involved in various aspects of administration of the Fund. Further, there were a number of individuals within Circle's offices who dealt with the administration of the Fund. It has not been necessary thus far to identify precisely (even if it was possible to do so) which entities and which individuals were responsible for each action or suggestion, and it would unduly clutter this judgment to attempt to do so. One individual, however, needs to be singled out and that is David Payne, who was responsible for carrying out this reorganisation plan and who spoke for the directors of the Fund in giving evidence before me. He was managing director of Circle Trust Services BVI Ltd, the parent company of

CTS Management Ltd, the Fund's corporate director. On 20 February 2013 he became a director of CTS Management Ltd. His co-director of that company was a Mr Peter Poole. As for the Fund itself, its two directors were CTS Management Ltd and a Mr Humphrey Leue. It is of importance to know what the motives of the directors of the Fund were at the time of this reorganisation plan, and that can only be found in the minds of these three individuals: Messrs Payne, Poole and Leue. Of the three, Mr Payne seems to have been more closely involved than the other two and he was the only one who gave evidence in court. He became a director of the Fund in his individual capacity in 2015. He was a transparently honest witness whose evidence I accept (despite the fact that criticism can be made of the pleadings to which he subscribed his name under a certificate of truth and which I deal with further below.) I am afraid I cannot say the same of Mr Chiappenelli whose evidence I found unsatisfactory. I shall come back to this later in this judgment. So far as this recital of the facts is concerned there has been no conflict in the evidence. Indeed, overall, this is not a case in which there is a conflict of evidence between two witnesses. However, the motivations of Mr Chiappenelli in resurrecting IAMC and pursuing this action are important, as I shall explain, and in that respect I am unable to accept his evidence except where it is corroborated by other evidence in the case.

[17] The reorganisation plan to deal with the unfortunate situation the Fund faced was put forward by the in-house lawyer in Circle in an email dated 17 April 2014 sent to (amongst others) David Payne. This plan followed a meeting between the in-house lawyer and others who were in the Netherlands on other business, and which was not attended by Mr Payne. It involved the following elements: first, to amend the Memorandum and Articles by resolution of the directors to include a provision permitting the compulsory redemption of the B shares and increasing the authorised number of A shares from 100 to 600. The former element was necessary to enable the Fund to redeem Citco's 1%

because, until that was done, the Fund would be regarded by the FSC as a mutual fund and could not be deregistered as a BVI fund. In addition to the above the directors' resolution was intended to eliminate the word "Fund" from the name as it was anticipated that this would be a requirement of the FSC to enable deregistration as a BVI fund.

[18] Particularly relevant to the present proceedings, the reorganisation plan included an issue of an additional 500 A shares to the directors. It was then proposed to declare a dividend to the 99% shareholder (i.e. SIX) of approximately €4.5 million which was still held in the Fund, leaving a margin to cater for the expenses of winding up. Finally, the proposal was to get SIX to consent to the reorganisation plan to protect the directors and administrators from any future complaints.

[19] In accordance with the reorganisation plan, the Fund wrote to the two remaining shareholders: first to Citco compulsorily redeeming the 1% for valuation dated May 30 2014, issuing a redemption certificate recording Citco's right to a pro rata distribution of any further proceeds received or recovered by the Fund; and then to SIX pointing out that the 500 new A shares would be issued to CTS Nominees Ltd "in order to ensure the control of the Fund is not lost" and saying that "the control of the Fund will rest with CTS Nominees Ltd and the uncertainty regarding the shares held by IAMC will be lifted."

[20] The letter went on to say that there would be an 80% distribution of cash then available in the Fund with a further payment when more became available, and that once the distribution had been made, the FSC would be informed and asked for approval to deregister the Fund as a BVI mutual fund. In the final paragraph of the letter SIX's agreement to the reorganisation was sought. Mr Invernizzi responded by requiring the newly issued 500 A shares to be

transferred to a company under his control to ensure, in his words, "control of the fund/company, without intermediaries."

[21] In the event the reorganisation plan went ahead. On 10 July 2014 the necessary directors' resolution was passed and the newly issued 500 A shares were issued to CTS Nominees Ltd (and, in time, were transferred by that company to a company called Sunimar Private Ltd, a Singaporean company, presumably under the control of Mr Invernizzi). On 25 January 2015 the FSC cancelled the fund's recognition as a private mutual fund.

The dilution

[22] The idea behind the issuance of the 500 A shares was, as indicated in the quoted passages from the reorganisation plan, to ensure that control of the Fund was not lost. This plainly looked forward to the possibility that IAMC might be restored to life and that its 100 A shares would then control 100% of the voting power. The issue of 500 A shares to CTS Nominees Ltd would ensure in those circumstances that voting control would remain with the directors. This is the dilution complained of in these proceedings. IAMC would in such circumstances be diluted from 100% of the voting rights down to 16.66%. In the event, this is precisely what happened and the dilution is relied upon as conduct of the affairs of the Fund in a manner that was unfairly prejudicial (within the meaning of section 184I of the Business Company's Act 2004) to IAMC in its capacity as a shareholder in the Fund. The dilution is also relied upon as a contravention of that Act by the Fund and its directors within the meaning of Section 184B of the Act in that, as alleged, the directors did not exercise their power to issue the new A shares for a proper purpose.

Swiss and BVI proceedings concerning fees

[23] On or about 10 July 2014 (the same date as the directors' resolution implementing the reorganisation plan), the Fund issued proceedings in Switzerland in the Commercial Court of the Canton of Zurich against SFC

claiming sums estimated at €8.3 million held in trust for the Fund by SFC. A defence was served by SFC on 23 March 2015. There was little dispute about the sums held in trust for the Fund, but SFC asserted a statutory right of retention pending payment of the fees due to it and stated that it would commence proceedings in the BVI for the sums that were due; it then reserved the right to set off such sums (when the amount thereof was established in the BVI proceedings) against any liability to the Fund. SFC then commenced proceedings against the Fund in the BVI in order to establish the extent of the Fund's liability to it in respect of fees. Leon J stayed the BVI's proceedings on forum non conveniens grounds and judgment on appeal from that stay is pending.

Knowledge of Mr Chiappinelli as to the issue of the 500 new A shares

[24] Reverting to the claim in the Swiss proceedings which were issued on 10 July 2014, in the statement of claim the Fund recorded the dissolution of IAMC and said: "the Plaintiff [i.e. the Fund] intends to issue 500 new class A shares to appoint a voting shareholder once again." Accordingly, SFC (and through SFC, Mr Chiapinelli) knew at that time of the intention to issue the 500 A shares. However, it was not until October 2014 that he applied (through Bon Max Development Ltd, the sole shareholder of IAMC) to the Hong Kong Special Administrative Region Court of First Instance for restoration of IAMC to the register. Mr Chiappinelli had said in his witness statement that he only discovered that the 500 shares had been issued some 8 months after it had taken place and that this was brought to his attention by his BVI counsel as a result of a routine search of the BVI companies register. He also said that the restoration of IAMC in October 2014 was prompted by the fact that the migration project was not going to take place. In fact Mr Chiapinelli knew about the impending issue of the 500 A shares soon after the issue of the Swiss proceedings (as he acknowledged in the witness box) and it seems reasonably clear that the application for restoration of IAMC was precipitated by that

knowledge rather than the failure of the migration project, which had happened by late 2012. This is an example of the unreliability of Mr Chiapinelli's evidence.

Inconsistencies in the Fund's case

[25] I should mention that in the pleadings the Fund responded to a request to state the reasons why the Fund had issued the 500 class A shares to CTS Nominees Ltd, saying that as a result of the dissolution of IAMC it was left with no functioning holder of its voting shares and contrary to the Investment Business Act 2010 had no investment manager, the IMA had been terminated, repudiated or frustrated and the July issuance of the 500 shares was therefore necessary for the Fund to continue to operate as a company and to meet its regulatory obligations.

[26] Under Mr Collins QC's careful cross examination these reasons were abandoned by Mr Payne, who accepted that the issue of the 500 shares can have had nothing to do with the regulatory requirement that the Fund should have an investment manager (as the Fund could have replaced the investment manager without issuing new A shares). Mr Payne also accepted that the directors of the Fund had extensive powers under the articles and that there was nothing that the directors wanted to do under the reorganisation plan that they could not do without a members' resolution. He accepted that they did not need a members' resolution to amend the memorandum or articles, to compulsorily redeem the 1% shareholder, to commence proceedings against SFC or to de-register the Fund as a mutual fund. Mr Collins took Mr Payne to task over his statement in paragraph 40 of his witness statement that the dissolution had left the Fund paralysed. Mr Payne fairly pointed out that a members' resolution would be required to wind up the Fund which was the ultimate objective of the directors, but he agreed with Mr Collins that that

ultimate objective was further down the line in terms of time. Mr Payne was further criticised in cross examination for subscribing to the certificate of truth in the defence which included, in paragraph 11, the statement that the IMA was terminated by notice dated 27 May 2013, a notice given with the approval of the majority of the voting shares. As it turned out this was corrected in a later pleading as being a typographical error and, insofar as the document dated 27 May 2013 itself was concerned, it is plain for anyone to see that it didn't amount to a termination. Mr Payne corrected this himself in his witness statement. There was a further criticism of a later pleading to which Mr Payne did not subscribe and I will say no more about it.

[27] I have mentioned these criticisms in some detail in order to show that I have not overlooked them in coming to the clear conclusion that Mr Payne was a transparently honest witness. The worst that can be said of him is that in signing off documents drafted by others who had the conduct of the litigation he was not conscientious in making the document his own. I gained the impression that this may have been true not only in respect of the pleadings but of the reorganisation plan itself. In particular, I am not sure that he, personally, focussed specifically on the choice of 500 new shares as opposed to a number less than 100, which would have equally facilitated a members' resolution, without eliminating IAMC's control should it be restored. When confronted with the fact that much of what had been put forward as the reasons for the issuance of the 500 shares could not have been the reasons, he was refreshingly straightforward in accepting this. He expressed what he saw as the motivation, namely, that there was nothing left to do in the Fund other than to sue SFC for the moneys it was holding, resolve the issue of its fees and distribute what was left to the remaining two investors, and that the Fund saw Mr Chiappinelli as hostile to it because of the fees issue. Whether that motive was a proper one for the issue of the new shares lies at the heart of these proceedings. It is not of course inconsistent with the reasons put

forward in the pleadings but the fact that it was not highlighted as part of the reason for the directors' actions suggests that the directors were not entirely comfortable as to whether that motive was a proper one on which to base their actions.

Mr Chiappinelli's evidence

[28] I have considered the evidence of Mr Payne above. I now consider Mr Chiappinelli's evidence and that of the other witnesses. As I have indicated, this is not a case involving a flat conflict between witnesses in which only one is telling the truth. The issue so far as the witnesses is concerned is not so much one of honesty as reliability. I have already said that I was less than satisfied with Mr Chiappinelli's reliability as a witness. He was discursive, argumentative and always attempted to avoid the questions he didn't want to answer. He was not prepared to acknowledge where he had acted wrongly. When confronted, for example, with resolutions purportedly made by IAMC after it had ceased to exist, he said that he must have forgotten about the dissolution, something I do not believe. He took refuge when unable to answer by saying that he was confused and all was chaos.

[29] An important part of his evidence was to explain why he was going to the enormous lengths he was to re-establish IAMC with 100% voting control over the Fund when there was nothing left for the Fund to do but to sort out the litigation against his company SFC. There does not appear to be any interest that IAMC is seriously intent on protecting other than to influence the proceedings against SFC. Mr Chiappinelli denies this but everything I have seen so far lends support to this inference.

[30] Mr Chiappinelli has, through SFC, used the present proceedings to persuade the Swiss court on two occasions to arrest the progress of the Swiss proceedings by questioning the Fund's authority to instruct its legal

representatives to act for it in the Swiss proceedings without the consent of IAMC. The implication is that IAMC intends, if successful in the present proceedings, to influence what the Fund does in the Swiss proceedings. That would effectively put Mr Chiappinelli on both sides of the record in those proceedings. Anyone can see that would be inappropriate. If that is not Mr Chiappinelli's aim, he has not put forward any alternative credible explanation.

[31] He asserted for the first time in his oral evidence in court that it is the brand "Swiss Forfaiting" that he wishes to protect. That name is of course enjoyed by SFC, his own company, and in any event will no doubt cease to be used by the Fund after it has been wound up. There is not a shred of evidence that this issue of a valuable brand has ever been the concern that has led to the proliferation of all this litigation. As Mr Christopher Parker QC put to Mr Chiappinelli in cross examination, he has never made an approach to the Fund to exclusively take over the use of the name "Swiss Forfaiting".

[32] The only other possible explanation for Mr Chiappinelli's interest in taking control of the Fund is the suggestion he made that he might resurrect the business of the Fund. The suggestion is made rather faintly and in the light of the history of the Fund described above and its deregistration in the BVI as a mutual fund, it seems to me to be fanciful to think that the forfaiting business could be restarted in this empty shell of a company, once the litigation over fees has been determined. If there is any scope for such new business it would be simpler to start again with a newly formed company. Certainly, it is difficult to believe that this litigation has been embarked upon with a view to resurrection of the business of the Fund, and I do not accept that explanation.

The other witnesses

[33] There were two other witnesses. Olga Lucia Schiffers, who was the sole director of IAMC, gave evidence by video link from Hong Kong. She was

appointed on 18 December 2014 having never had, so far as I am aware, anything to do with IAMC or the critical events I have related above. In these circumstances there was little that she could contribute by way of admissible evidence. The evidence she attempted to give simply amounted to argument based on her reading of the papers after she was appointed a director. As such, I get practically no help from her evidence in chief. As to cross examination, it was not suggested to her that the reason why IAMC wanted to get back into control of the Fund was to influence the course of the litigation with SFC, although she was asked why IAMC wanted to get back that voting control. She gave no answer to this question beyond saying that the dilution was done "in a very wrong way". Surprisingly she said that she had never met or spoken to Mr Chiappinelli. Perhaps Mr Chiappinelli wanted to distance himself from IAMC and its intentions but this was not put to Mr Chiappinelli and I do not speculate about this. At all events, her evidence took this case no further and I make no further comment on it.

Mr Kevin Bowers.

[34] The final witness was an expert on Hong Kong law – Mr Kevin Bowers -- who gave evidence on the effect of restoration of a company pursuant to a court order under section 767 of the Hong Kong companies ordinance. He confirmed, as stated in section 768 of that ordinance, that the company is considered as having remained in existence as if it had not been dissolved. The effect of the process, he said, is to restore the company and all parties involved with it to the same position as if the company had never been struck off. This was not controversial but it does not mean that in testing the motives of the directors of the Fund the situation in July 2014 was anything other than that IAMC was in dissolution.

The Hong Kong restoration.

[35] The affidavit evidence filed in Hong Kong in support of the application for restoration was not available during the trial but was made available to those

representing the Fund after the trial, and passed onto me in London together with additional submissions from each side. The evidence in support of the application for restoration was sworn by Mr Chiappinelli. In that affidavit Mr Chiappinelli told the Hong Kong court that the nominal value of the 100 A shares was €100 but that "it is estimated that the market value of the Shares is about €5,000,000.00 as at August 2014". He went onto say that Bon Max Development Ltd was the sole beneficial owner of the shares by holding them through IAMC "and should be entitled to sell and deal with them" through IAMC had it not been dissolved. Therefore, he added, Bon Max Development Ltd was aggrieved by the dissolution of IAMC and it was just that IAMC should be restored.

[36] By way of explanation of this evidence an affidavit has been put in by one of IAMC's current legal practitioners saying that she is informed by Mr Chiappinelli that he was advised by the Hong Kong lawyers representing Bon Max Development Ltd that the affidavit in support of the application for restoration "had to contain a 'real' value rather than a par value for any shares in bona vacantia." She adds that upon that advice Mr Chiappinelli informs her that an "unscientific" value of €5 million was attributed to the shares and that value was inserted by the lawyer in the affidavit in support of the restoration.

[37] Unfortunately, this evidence came too late to question Mr Chiappinelli about it or to ask Mr Bowers to comment upon whether the court would have granted the restoration had Mr Chiappinelli been truthful about the nature of the shareholding and its value. It is submitted on behalf of the Fund that it is clear that Mr Chiappinelli has misled the Hong Kong court and that it should be inferred that his real reason for restoring IAMC was one that the Hong Kong court would not have found acceptable, namely, to be in a position to thwart the Fund's wish to prosecute the proceedings against SFC. IAMC's counsel respond by saying that if the Fund wishes to challenge the restoration it must

do so in Hong Kong. However, I do not understand the Fund to be asserting that the restoration should be set aside.

[38] More to the point is the estimated value of €5 million and Mr Chiappinelli's euphemistic description of that value as "unscientific". IAMC's counsel submit that the value is necessarily subjective and that that is no doubt why it was described as an estimate. They add that it is not appropriate to criticise that estimate after the trial has closed. As to Mr Chiappinelli's evidence in support of the restoration application that Bon Max Development Ltd should be entitled to sell or deal with the shares, they argue (unconvincingly) that this is a statement as to entitlement, not intent, and the phrase "sell or deal with" covers all options. If the shares are sold, they argue, they will otherwise not be dealt with. "If they are dealt with – e.g. through the exercise of voting rights –they have (by definition) not been sold".

[39] I have no hesitation whatsoever in rejecting this attempted explanation of Mr Chiappinelli's affidavit. It seems to me that the plain and simple fact is that he misled the court by indicating that the 100 shares were shares capable of being sold and were worth some €5 million. If there was an innocent explanation I would have expected it to have been put forward in counsel's submissions. As I say, I reject the explanation that has been put forward. However, I have no idea whether Mr Chiappinelli's misleading evidence made any difference to the outcome of the restoration application and I am not prepared to speculate in this regard. Accordingly, at the end of the day, all that this additional material adds up to is to confirm me in the view that I had already formed as to the unreliability of Mr Chiappinelli's evidence.

Analysis of the Law

[40] IAMC's claim is based on sections 184B and 184I (1) of the Business Companies Act 2004. The former section concerns conduct of a company or

director that contravenes the Act or the memorandum or articles of association of the company. If there is such conduct, the Court may make an order directing the company or director to comply with the Act or the memorandum or articles. The conduct complained of in this case is the issuance of the 500 A shares. There is no dispute that the directors of the Fund had power to amend the memorandum and articles and issue the 500 A shares (and thus to dilute the voting power attaching to IAMC's 100 A shares). It is said, however, to have been in breach of the Act because the directors exercised their power for an improper purpose. Section 121 of the Business Companies Act provides as follows: "A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company." See also Re Saul D Harrison & Sons Plc [1] where Hoffmann L.J. at 488 said: "If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company"; and Neill L.J. said at 500: "A shareholder can legitimately complain, however, if the directors exceed their powers vested in them or exercise their powers for some illegitimate or ulterior purpose".

[41] Section 184I (1) was the section most debated in the course of this trial. It provides "A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section." The conduct which is said to be unfairly prejudicial is of course the issuance of the 500 A shares. As above, there is no dispute that the directors had the power to achieve that issuance. It is said, however, to have been unfairly prejudicial because the power was used for an ulterior, or improper, purpose.

[1] [1994] BCC 476

[42] The question, therefore, is the same under both sections. The conduct complained of does not have to be separately analysed under each of them. If the directors used their power to issue the 500 A shares for a proper purpose this action will fail under both sections. If the directors acted for a purpose which is regarded as permissible and proper, any dilution caused by the issuance will not have been unfair. IAMC accepts that if the issuance was not unfair within the meaning of section 184I (1) then the claim will fail under that section as well as under section 184B.

[43] Ultimately, therefore, there is only one critical question: was the issuance done for a proper or an improper purpose? Before addressing that question it would be convenient to clear away one or two legal issues which have not been controversial. First, it is common ground that IAMC is a member. This goes to its locus standi to make a claim under section 184B and 184I (1). There is no requirement that the member was also a member at the time of the conduct complained of. The fact that the issuance happened at a time when IAMC was not a member because it was in dissolution is of little consequence. A current member can complain under section 184I (1) in respect of past conduct occurring before it became a member. In Bermuda Cable Vision Ltd v Colica Trust Ltd[2] the matters about which the petitioner complained under the equivalent section of the Bermuda Companies Act,1981 had all been established prior to the petitioner becoming a member (but were continuing) and the petitioner knew about these matters when it acquired the shares. The appellant argued that this prior knowledge debarred any remedy under the section. This was rejected by the Privy Council.

[2] [1998] AC 198

[44] In Lloyd v Casey[3] the conduct complained of had pre-dated the petitioner becoming a member, and was not continuing. The English Court held that this did not debar the petitioner under the equivalent English section.

[45] In any event the effect of section 768 of the Hong Kong Company's Ordinance would preclude any point being taken in this regard. The restoration of IAMC to the register has the effect of treating the company as having continued in existence as if it had not been dissolved.

The heart of the case

[46] Mr James Collins QC appeared with MrJonathan Addo on behalf of IMAC. Their central plank underlying their submissions is that it has long been recognized that directors are not entitled to use their powers to issue further shares for the purpose of altering the voting power in the company. The issue of shares in order to alter the voting power has been described, they say, as the most blatant form of unfair prejudice: see DR Chemicals Ltd[4]. They rely on the decision in the Privy Counsel in Howard Smith Ltd v Ampol Petroleum Ltd.[5] where Lord Wilberforce at 837 said: "it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist". They cited other cases involving the dilution of voting power in support of this central submission.

[47] Mr Collins' central submission fails to recognize an important distinction between the cases he relies upon and the present case. That is that in every case relied upon by him the voting power concerned was attached to shares

[3] [2002] 1 BCLC 454
[4] (1989) 5 BCC 39 at 51
[5] [1974] AC 821

which carried an interest in the assets of the company i.e. shares which were the expression of a proprietary relationship with the company. The votes attaching to such shares would normally be deployed in protecting that proprietary interest and any dilution in that voting power will, ipso facto, have significant consequences so far as that interest is concerned. It is an altogether different situation to contemplate dilution of voting power where there is no such interest to protect. I do not mean to say that no unfair prejudice can result from dilution in such a situation. I say, simply, that it is important to recognize that this is a different situation which has to be analysed in its own terms. Mr Collins does not engage in that analysis. He stops short at the point of dilution and repeats, simply, that dilution per se was wrongful. He relies on dilution alone as the be all and end all of his case, without analysing the facts any further. In the very case he relies upon, Lord Wilberforce said:

> "In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power and having defined as can best be done in the light of modern conditions, the, or some, limits within which it may be exercised, it is then necessary for the courts, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls".

[48] Accordingly, it is necessary to examine the substantial purpose for which the power to issue the new shares was exercised. To define in advance the circumstances in which it may be permissible to issue new shares is, in their Lordships' view in Howard Smith Ltd v Ampol Petroleum, impossible. As

they said: "the variety of situations facing directors of different types of company in different situations cannot be anticipated." That was said in the context of the issue of shares in a company where the shares represented an indirect proprietary interest in the assets of the company. The original 100 A shares which are the subject matter of the dilution complained of in this case have nothing to do with a proprietary interest in the assets of the company. They were shares which conferred control, pure and simple, directed primarily at preservation of the investment manager's contract and the flow of fees that that contract entailed. The purpose of the issue of the 500 A shares was not to exercise control by terminating that management contract. There was no attempt to do so (and it is in any event doubtful whether, in the light of clause 16 (2) of the IMA the 500 shares would have enabled the holders to do so). The purpose of the issue of the 500 A shares was to prevent the control that otherwise would have vested in the 100 A shares from influencing the litigation with SFC to the detriment of the Fund. The management contract had, in any event, become, to all intents and purposes, a dead letter, as submitted by Christopher Parker QC, with whom Arabella di Iorio and Simon Hall appeared for the Fund.

[49] The business of the fund was at an end and the intention was to deregister it as a mutual fund in the BVI. There was, in essence, only one investor left and he had given notice to redeem. (Citco's entitlement to 1% of further recoveries is immaterial in this context.) There was a hostile relationship between the Fund, on the one hand, and SFC and Mr Chiappinelli, on the other. They were holding back trust funds belonging to the Fund and had been dragging their feet in coming out with details of a claim for fees going back over 7 years. That claim eventually came to something of the order of €4.3 million, more than half the trust funds held by SFC in trust and, in addition, a further claim surfaced for €2.3 million which had already been paid by the Fund (allegedly erroneously) to IAMC in Panama. All that essentially remained to be done in

the management of the Fund was to resolve the growing dispute concerning fees. The costs of that resolution were likely to be high and it made complete sense to allow the one remaining investor, whose funds would bear such costs, to decide how far to litigate such dispute. This dispute had become polarised between the Fund on the one hand and SFC, Mr Chiappinelli and IAMC, on the other hand.

[50] Faced in these circumstances with the knowledge that IAMC had been dissolved back in 2011, it seems to me that it was quite natural that the directors would be disinclined to consult Mr Chiappinelli, who was in the hostile camp. They did not, and could not, know precisely what would be required by a Hong Kong court to enable IAMC to be restored, or whether that would definitely happen. It was not unnatural to fear that if IAMC was restored so that its control was resurrected, that control might be used to thwart the Fund in pursuit of its claim against SFC and in pursuit of its defence to SFC's impending claim for fees. That that was the substantial purpose for which the power to issue the new shares was exercised is now clear and accepted by the Fund. However, I do think that there was a recognition that the uncertainty created by the total absence of voting control and the inability to pass a members' resolution had to be addressed sooner or later. How much attention was given to the extent to which a members' resolution would be required in the future remains unclear. There was a certain amount of reconstruction when these proceedings were launched as to the reasons that prompted the new issue. The directors were more comfortable with being able to say that they had to issue the new shares to fill a vacuum created by the dissolution of IAMC rather than that they took advantage of the opportunity to dilute IAMC's voting control. Embarrassed though they may have been to admit that that was their motive, it does not follow that they were acting for an improper purpose, and I do not think they were.

[51] Their concern that if IAMC was restored it might seek to thwart the Fund in pursuit of its claim against SFC and its defence against SFC's claim for fees has been borne out in the events which have happened in the Swiss proceedings. Mr Parker points out that in exercising the jurisdiction in section 184I the "court is entitled to look at the reality and practicalities of the overall situation, past, present and future" – per the Court of Appeal in Grace v Biagioli[6]. This was said in the context of identifying a remedy under the section but it plainly bears upon the nature of the unfair prejudice and whether it is continuing at the time the court is seized of the matter. Looking at the matter from today's perspective only serves to confirm me in my judgment that the dilution of IAMC's shares was not unfair and that the directors were not acting from an improper motive in issuing the 500 new shares.

[52] Mr Parker submits that the considerations of the board in issuing the shares were management considerations, namely, in his words: "to ensure untroubled prosecution of the claim for the return of the Fund's assets, and the shares were issued to the party with the economic interest (in circumstances where the Fund had ceased to be active as an investment fund…..)." He adds: "It is clear from Howard Smith v Ampol that, absent self-interest on the part of the directors, the Court does not interfere with an issue of shares for proper management purposes. The purpose of the issue in this case was not merely to dilute the voting control of IAMC. It was to ensure that IAMC could not prevent the Fund prosecuting a claim inimical to IAMC and to SC [Mr Chiappinelli], its ultimate beneficial owner (and it is clear that the board showed a degree of prescience in acting as they did)."

[53] I accept this submission. It seems to me, from a practical point of view, that all that the directors did was within the province of management (of, admittedly, a uniquely unusual situation) and the Court will, as Lord

[6] [2006] BCC 85

Wilberforce said, respect the directors' judgment. Even if, strictly, this is not to do with management (although I think it is), it seems to me that by going ahead and issuing the 500 shares the directors were not acting with an improper purpose in mind. They were acting to protect the funds under their control for the benefit of the two remaining shareholders in the equity. The directors were acting in the interests of the company as a whole and not, as submitted by Mr Collins, favouring the interests of one section of the shareholders against another. Had the Fund been a thriving ongoing business and IAMC available to perform its functions, of course IAMC would have had a legitimate interest to protect and the dilution would have been unfairly prejudicial to IAMC. On the facts of this case, however, and in the events that had happened, there was no legitimate interest in IAMC that required protection and any prejudice there may have been in the dilution was not, in my judgment, unfair. In the circumstances, the claim fails under both section 184B and section 184I.

Comments on the relief

[54] In the light of my conclusions above no issue arises as to the relief under section 184I. In case this litigation goes further, I should briefly mention that the main relief relied upon was an order under sub-section (2) (h) setting aside the issuance of the 500 A shares (and relief to achieve the same effect was asked for under section184B). Under sub-section (3) no order may be made against the company or any other person under the section unless the company or that person is a party to the proceedings in which the application is made. It seemed to me, and I raised this with Counsel, that the main relief would involve an order against Sunimar Private Ltd, which company is the present holder of the 500 shares. In closing submissions, Mr Parker said: "IAMC will have to explain how the relief sought can be granted when Sunimar is not a party to the proceedings."

[55] Alternative relief is asked for in the shape of compensation against the company, which relief would not, of course, require Sunimar to be joined, but such relief is of no value as no quantifiable damage has been suffered.

[56] In support of his contention that Sunimar need not have been joined to sustain the main relief relied upon, Mr Collins cited two cases Re Ravenhart Service Holdings Ltd, Reiner v Gershinson and others [7] and Holman v Adams Securities Ltd and others. [8]

[57] These cases were produced late in the trial and I gave Counsel the opportunity of letting me have any further authorities they wanted me to take into account within a week after the trial. Although I have heard from Counsel, through the Court, on the documentation concerning the application to restore IAMC, I have had nothing more on this issue. The Holman case is of no help as it concerns arguments as to parties who should not have been joined. The Ravenhart case is more to the point but does not go far enough to justify the non-joinder of Sunimar in relation to relief involving the setting aside of the issuance of the 500 shares. Such relief, in my judgment, would need to be awarded against Sunimar as it would take away a property right that company has at the present time. It would involve an order against Sunimar and, under sub-section (3) of section 184I, no such order can be made in the absence of Sunimar.

[58] Ravenhart does not help. That was an application for an interlocutory injunction (within proceedings under the then equivalent in England of section 184I) to restrain the company from paying remuneration (on the face of it, unauthorised) to Darren Gershinson, who was not joined as a party to the

[7] [2004] 2 BCLC 376
[8] [2010] EWHC 2421 (Ch)

petition (or the interlocutory application). Etherton J (now MR) said that no relief was sought against Darren Gershinson in the petition. Nor was relief sought against him in the application. Furthermore, he was a shareholder and a director of the company and the Judge commented that he was aware of the proceedings and had not sought to be joined. Even then the Judge said that he did not consider it necessary for him to be joined "at least at this stage".

[59] The most that can be said about Sunimar in this regard is that it is probably a company owned by Mr Invernizzi who probably knows about these proceedings; but there is no evidence to support this conjecture. However, even if there was such evidence, the fact remains that the relief asked for would have to be made against Sunimar. Accordingly, the issuance of the 500 shares could not have been set aside in any event.

[60] This judgment will be handed down on my behalf by another Judge. To assist the parties on the question of costs I make the observation that the Fund has succeeded in the action and (subject to their submissions) I can see no reason why costs should not follow the event. However, the Fund made an application for summary judgment and other relief at the start of the trial, and lost and (again, subject to further submissions) I can see no reason why the Fund should not be ordered to pay IAMC's costs of that application. In both cases I would have been minded to order the costs in both directions to be subject to a detailed assessment if not agreed. Of course the parties will be free to make their submissions about costs at the hand down of this judgment.

Jules Sher QC
Commercial Court
Judge (Ag.)
29 June 2016