IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause Nos FSD 159,160, 161,162
and 169 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 and Ms Amy Altneu of Carey Olsen on behalf of the Plaintiffs in all Causes**
	Mr Jeremy Walton and Mr Andrew Jackson of Appleby (Cayman) Ltd on behalf of the Defendants in Cause Nos FSD 159, 160, 161 and 162 of 2014 (NRLC)
	Mr Ian Huskisson of Travers Thorp Alberga on behalf of the Defendant in Cause No FSD 169 of 2014 (NRLC)
Coram:	**The Hon. Justice Nigel R.L. Clifford QC**
Heard:	**Tuesday, 13 October 2015**

RULING

1. In the five summonses before the Court the Joint Official Liquidators ("**JoLs**") of Weavering Macro Fixed Income Fund Limited (In Official Liquidation) ("the **Fund**") have applied for a general stay of the proceedings in each of the five relevant actions

which they have brought, or, in the alternative, an extension of time to serve the statement of claim in each of those actions. The stays sought have been until the delivery of judgment at trial in Cause Number FSD 98 of 2014 between (1) Simon Conway (2) David Walker as JoLs of the Fund and Skandinaviska Ensklida Banken AB ("the **SEB action**").

2. On 13 October 2015, I heard the applications and refused the stays sought, but granted extensions of 5 weeks for the service of the statements of claim. On that occasion I gave a short *ex tempore* Ruling, a note of which has been approved by me. However, I also thought it appropriate to give fuller written reasons for the Ruling which I now do.

3. The background to these and other related actions is set out in a Ruling of mine dated 9 April 2015. In that Ruling I declined to extend the validity of 24 writs which had been issued by the JoLs, all claiming that redemption payments which had been made out of the Fund constituted invalid preferences pursuant to section 145 of the Companies Law (2013 Revision). The rationale underlying the Ruling, founded on the relevant principles referred to, was for the JoLs to serve the writs and then either to seek an extension of time to serve the statement of claim in each case or to apply to stay the actions. I favoured the latter course to allow what was regarded as the principal action, namely the SEB action, already in progress seeking the same relief, to proceed. I also expressed the hope that this course might be agreed, on the footing that it could make sense for parties to wait to see how the SEB action materialised as this might then determine whether or not the other actions would proceed. The aim was to save potentially unnecessary proceedings and costs.

4. Accordingly, against this background, I had some sympathy for the JoLs for the position in which they then found themselves in not being able to secure agreement of stays in all cases pending the determination of their lead case, the SEB action. In particular the Defendants resisting the present applications have refused to agree stays. Moreover, by the time of the hearing of the applications the trial of the SEB action was imminent with a judgment expected within a month or two. So there was not long to wait.

5. However, with the benefit of further more detailed analysis of the position in relation to these actions, and submissions on the relevant legal principles, the question of whether a stay could properly be granted has had to be reconsidered. And with this further analysis, the principal action, the SEB action, looks less and less like any kind of real "test case". Indeed it is conceded by the JoLs, rightly I think, that the SEB action is not a "test case" in the classic sense.

Jurisdiction

6. The question raised was whether there is any jurisdiction to stay the five actions pending the determination of the SEB action.

7. The JoLs asked the Court to exercise its inherent jurisdiction and case management powers to grant the stays sought by their summonses. The basis on which they sought the stays, in summary, is that particular findings in the SEB action "may be applicable" or "will be relevant" to these other actions and that if they serve to narrow the issues in these actions it will result in a time and costs saving for the parties.

8. Mr Golaszewski, on behalf of the JoLs, referred to the Overriding Objective in the Preamble to the Grand Court Rules 1995 (Revised Edition). In paragraph 1.1 this sets out such overriding objective as being *"to enable the Court to deal with every cause or matter in a just, expeditious and economical way."* Paragraph 1.2 provides that dealing with a cause or matter justly includes, as far as practicable, the matters there set out, including *"saving expense"* and *"dealing with the cause or matter in ways which are proportionate".* Paragraph 2 requires the Court to seek to give effect to the overriding objective when it *"(a) applies, or exercises any discretion given to it by these Rules; or (b) interprets the meaning of any Rule."* And paragraph 2.2 provides that *"These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits."* The Preamble goes on to set out the Court's duty to manage proceedings in accordance with the overriding objective. It is submitted, on behalf of the JoLs, that there is the power to grant the stays sought in accordance with the overriding objective and that this would be the way of achieving such objective.

9. It was also pointed out by Mr Golaszewski that the overriding objective referred to is set out in the Financial Services Division Guide, in Section A, paragraph 4.

10. In addition Mr Golaszewski cited the case of **Cigna Worldwide Insurance Company v Ace Limited** [2012] 1 CILR 55. Cresswell J, in that case, held that the Court has power to grant a stay pending determination of an issue in another court, this being *"a case management power to stay rather than a jurisdictional stay"*. But that case was specifically about staying a Cayman action pending the outcome of related foreign proceedings in accordance with the particular established principles in **Spilliada Maritime Corp v Cansulex Ltd** [1987] AC at 482 484, and other authorities referred to. I do not think that it is relevant or helpful in the present wholly different context.

11. Mr Walton, in response, on behalf of the Defendants represented by him, submitted that there is no scope here for reliance on inherent jurisdiction for the grant of stays of the actions. He referred to the principles set out in **In re Sphinx Group** [2012] 2 CILR N-11, where the Chief Justice held that:

> *"inherent jurisdiction could ... only be used in so far as (a) local circumstances permitted; (b) there was a lacuna in local procedure; and (c)* [referring to the adoption of English rules or practice] *provisions would not be applied which would be inconsistent with, or would involve a different approach from, local law"*.

12. As Mr Walton pointed out, and I accept, there is no such lacuna in local procedure. The circumstances in which the Court may grant stays of proceedings pending the determination of another action are delimited by GCR O.4, r.4(1) which provides that:

> *"Where two or more causes or matters are pending in the same Division of the Court and it appears to the Court that –*
>
> *(a) Some common question of fact or law arises in both or all of them; or*
>
> *(b) The rights or relief claimed are in respect of or arise out of the same transaction or series of transactions; or*
>
> *(c) For some other reason it is desirable to make an order under this Rule*

The Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any one of them to be stayed until after the determination of any other of them;

13. There does not appear to be any local authority which provides guidance on the point which arises here in relation to multiple actions, as to when the Court will exercise its jurisdiction under GCR O.4, r.4(1) to stay one or more proceedings pending the determination of a lead case. The rule is, however, expressed in terms identical to those of the former RSC O.4, r.9 (1) and assistance may be derived from English authorities which address this question.

14. These English authorities establish the principle of staying multiple proceedings pending the trial of one of the actions if it can properly be regarded as a "test case". The authorities on the point are conveniently summarised in the commentary on the rule in the Supreme Court Practice (1999 edition) where in paragraph 4/9/2 it is stated:

> "[After discussing the possibility of consolidating certain actions only up to the determination of liability] *But more commonly an order would be made staying the later actions pending the decision of the action which is nearer trial, and which may perhaps be expedited, in the hope and expectation that the decision of liability in the test action will be accepted in the other actions … and that damages in the latter actions may even be agreed; and by consent an order may be made whereby the parties in the subsequent actions may agree to be bound by the decision of liability in the first"*

15. The cases of **Amos v Chadwick** (1878) 9 Ch. D 459 (CA) and **Bennett v Lord Bury** (1880) 5 C.P.D 339 are cited in support. **Amos v Chadwick** was one of 78 actions commenced by separate plaintiffs against the same defendants, each involving a claim for damages on the ground that the defendants as promoters of a company had issued a prospectus containing a fraudulent misrepresentation which induced the particular plaintiff to apply for its shares. The main issue before the Court was whether one of the 78 actions should be substituted for another, **Robinson v**

Chadwick, as the test action for the other actions: Robinson was originally intended and ordered to be the test action upon the plaintiffs in all actions having undertaken, subject to certain qualifications, that it should serve that purpose, but it had not led to a decision on the merits because Robinson failed to appear at trial and was non suited. The defendants appealed. In dismissing the appeal, the Court of Appeal provided guidance on test actions. Brett LJ, at page 464, said:

> *"It seems to me that no such order as this ought to be made unless the questions in the actions are substantially the same, and the evidence would be substantially the same if they were all tried. But when one of them is ordered to be tried as a test action, that, as it seems to me, means that it is to be tried upon evidence which would be evidence in the other actions."*

Bennett v Lord Bury was decided to similar effect. It was one of 38 actions commenced by separate plaintiffs against the same defendants, each suing the directors of a company for having misappropriated money deposited with the company for investment. Certain defendants applied to rescind an order staying the proceedings in 37 of the actions until after the trial of **Hull v Bury**, which had been made upon all plaintiffs undertaking that **Hull v Bury** should be treated as a test action and decisive of their respective rights, subject to appropriate qualifications. In dismissing the appeal, Lindley J, at page 344, said:

> *"I must confess I do not see how the defendants can be hurt by this order. It is true that it has the effect of keeping several actions hanging over their heads … On the other hand, the order prevents the defendants from being subjected to the unnecessary burden of the costs of thirty-eight actions, when the whole matter in controversy may be settled in one"*

16. There is also a somewhat more modern English case on the point, a decision of the Court of Appeal in **Perry v Croydon Borough Council** [1938] 3 All ER 670. This defines the relevant jurisdiction in no uncertain terms. Greer LJ, at pages 672-673, stated that:

> *"It is only in cases where the issues are identical, and where one case inevitably decides all the other cases, such as the cases … where there were similar policies of*

insurance, where one is agreed by both parties to be a test action, or where there are similar contracts in the form agreed …where the sole question is the meaning of a term in a special contract in a form which has been signed by, it may be, 50 or 60 different plaintiffs, the sole question being the meaning of the particular clause …in which it is proper, right and just that there should be a test action, and that other actions should be stayed until the hearing of the test action."

17. Mackinnon LJ, with whom Slesser LJ agreed, went on at page 673 to say:

"For the application of this very sensible procedure, by which many actions are stayed pending the trial of one action, it is, I think, essential that the test action shall raise precisely the same cause of action as that sought to be stayed."

18. Mr Walton submits that these English authorities consistently and forcefully state that the Court will not stay an action pending the determination of another unless (a) the same issues fall to be decided in each; and (b) the action which is to proceed as the test action can produce a judgment which is expected to render further litigation in the other stayed action unnecessary.

19. Mr Golaszewski, submits that the similarities between the cases are such as to justify a stay of the other actions, if not under the inherent jurisdiction of the Court, then on the basis of O.4, r.4(1). He relies particularly on O.4, r.4 (1)(c) which allows the Court to grant a stay if *"for some other reason it is desirable to make an order under this Rule"*. This, he submits, brings in the case management considerations in favour of a stay for which he contends.

Application of the principles to these actions

20. Applying the principles from the authorities to the present proceedings, there is no real question of the SEB action being a test case.

21. It is submitted on behalf of the JoLs that there are obvious similarities between the SEB action and the other actions. However, as already mentioned, it is also accepted that the SEB action is not a test case in the classic sense. Although it is conceded

that there will be differences in the preference claims, payments having been made to different parties at different times, nevertheless it is contended that the findings in the SEB action may serve to narrow the issues that fall for determination in the other actions.

22. The analysis of the JoLs in support of their contentions is as follows:

(1) The legal issues involved in both the SEB action and the other actions will be similar as they are all preference claims based on section 145 of the Companies Law.

(2) Findings in the SEB action may be applicable to the other actions on the issues of –

(a) solvency of the Fund at the time of the relevant payments;
(b) whether payments by the Fund amounted to a preference over the other creditors;
(c) awareness of insolvency at the time the payments were made; and
(d) whether payments were made with a view to giving a preference over other creditors.

(3) The ruling in the SEB action of who was the controlling mind of the Fund in the payment of redemptions will be relevant to the other actions.

23. In addition, it is submitted that if the JoLs are unsuccessful in the SEB action, depending on the reasons, this will impact on the decision by the JoLs whether or not to prosecute some or all of the other actions. The point made is that if there is a decision to discontinue some or all of these other actions, this would result in an obvious saving of time and costs.

24. As to these points, in response it is submitted on behalf of the Defendants that the matter falls to be determined in accordance with the applicable rule (O.4, r.4 (1)), which I accept, and that on an application of the established principles, as the SEB action is not a test case, there is no proper basis for staying these other actions. At the most, it is accepted, there may be a narrowing of issues, for example in relation

to the question of solvency. However, it is contended that in other key respects there are material differences between the actions.

25. The dissimilarities referred to have particular significance, it is submitted, in relation to each payment made to each particular Defendant. A particular point made is that in the SEB action there is a specific allegation that the payments were made to allow investments to be made in another fund, whereas no such allegations have been made in the pre-action correspondence with the Defendants in these actions. It is contended that the question of dominant intention to prefer will have to be determined on the evidence in each action. Accordingly, both Mr Walton and Mr Huskisson, on behalf of the Defendants they respectively represent, submit that their clients are entitled to see how the case is put against these Defendants, so that decisions can be made on what course to take. I accept that there is good reason why statements of claim should be served.

26. Mention should also be made of reliance by the Defendants on the so-called rule in **Hollington v Hewthorn** [1943] KB 587, which is applicable in this jurisdiction for the reasons set out in a recent Ruling of mine in the case of **Kabushiki Kaisha Sigma v Trustcorp and Hideo Seto** (dated 19 August 2015). In accordance with this rule any findings which the Court makes in the SEB action will be inadmissible in the other actions. Nevertheless, parties would be well advised to consider carefully how likely it will be that, on the same evidence, different findings will be made on key issues, particularly relating to solvency and the controlling mind of the Fund.

27. Various points and counterpoints have also been made about hardship of time delay, costs and prejudice in relation to staying the actions. However, I have not found it necessary to adjudicate on these points in reaching my decision.

Conclusion

28. Having considered the submissions, I felt bound to conclude that, on an application of the established principles, these actions cannot properly be stayed in accordance with GCR O.4, r.4(1). The SEB action cannot serve as a test action, in the required sense, for these other actions. As it cannot do so, it would not be right, in my view, to

override the principles referred to by allowing stays nevertheless to be granted for *"some other reason"* (in accordance with r.4(1)(c)) unless clearly shown to be justified as an overriding reason. Whilst I have some sympathy with the position of the JoLs and their desire, if possible, to streamline the proceedings and save costs (which may anyway prove possible to an extent) I do not think that they can take the analysis of the position far enough to justify staying these actions, even for the limited time sought.

29. The most that I have felt able to allow is further time for service of the statement of claim in each action.

Approved this 21st day of December 2015

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