

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2002/0197

In the Matter of Livingston International Fund Ltd. (In Liquidation)

AND

In the Matter of the International Business Companies Act, Cap. 291

AND

In the Matter of the Companies Act, Cap. 285

Appearances:

Mr. Paul Dennis for the Official Liquidator, Mr. Andrew Bickerton

Mr. Gerard St. C. Farara, QC, for 18 named creditors

Mr. Clyde Williams for Amas Hedge Fund Ltd.

Mr. Michael Fay for Alpstar Fund Ltd., with him Mr. Blaney

Mr. Michael Pringle for Alternative Investment Managers Selection plc, and Somers (Dublin) Ltd.

Ms. Susan V. Demers for Banque NSMD Re W Finance Capital+, MeesPierson (Global Custody Services) NV, Fortis Global Custody Services NV re Auriga International Advisors Ltd. and Citco Global Custody (NA) NV Re Concept INV

Mrs. Benedicta Samuels-Richardson holding Watching Brief for Glenwood Institutional Fund Ltd. and Man Glenwood Alternative Strategies 1 Ltd.

2004 December 13, 23

JUDGMENT

- [1] **RAWLINS, J:** On 3rd December 2002, this Court granted an Order winding up the Livingston International Fund Limited ("the Fund"). The Fund was incorporated here as an International Business Company (IBC) on 23rd December 1994. Mr. Andrew D. Bickerton, the Official Liquidator of the Fund, referred certain issues to the Court for determination and directions. These issues arose because interested parties articulated concerns and positions that were contrary to some of the recommendations that the Liquidator made in his Reports. Their concerns related mainly to the calculation of the Net Asset Values (NAV's) and the payment dates and valuations for unpaid redemptions and outstanding redemption requests that preceded the suspension of redemption payments.

- [2] A judgment was issued on 19th May 2004. It confirmed the recommendation that the Liquidator made that the former shareholders with outstanding requests for redemptions that were made prior to the suspension redemptions were creditors in the liquidation in an amount that was to be calculated in accordance with the NAV's as at 21st June 2002. It also confirmed that the former shareholders with unpaid redemptions were creditors in the Liquidation in an amount that was to be calculated in accordance with the NAV values as at 19th July 2002. This group included the Alpstar Fund Ltd. The judgment further agreed that Amas Hedge Fund Ltd. (AMAS) should be confirmed as a creditor of the Fund in an amount to be calculated with the NAV date as of 16th August 2002. It further determined that Somers (Dublin) Limited A/C 1010248 (Somers) was a creditor in the liquidation in respect of the shares that it held for Alternative Investment Managers Selection plc (AIMS).

The Issues

- [3] The Liquidator's Third Report is dated 21st September 2004. It was filed on 4th October 2004. The Liquidator raised further issues for determination. Some issues arose out of the directions that were given in the judgment of 19th May 2004. These include costs and interest. Additionally, AIMS issued a Summons that sought Orders that relate to Claim No. BVIHCV2002/0190 that it instituted against the Fund on 30th October 2002. There is also a Summons that was filed on behalf of the Liquidator for sanctioning Orders.
- [4] This Judgment seeks to determine the questions that were raised and to afford further directions. For this purpose I shall briefly set out the issues that are to be determined. I shall then consider them and provide a summary of the Order.

The Issues

Issues from the Third Report

- [5] In his Third Report, the Liquidator stated that he made an interim distribution to all creditors/investors. He paid the creditors as of 21st June and 19th July 2002 in full because their entitlements would be unaffected by any future decision of the Court. The Creditors

as of 16th August and 20th September 2002 and the remaining shareholders had an interim distribution that was set at 80% of their calculated minimum entitlements. He said that this was done in order to allow for potential recalculation if a further decision by the Court requires this to be done.

- [6] The Liquidator raised 2 questions for the Court to determine. The first is concerned with the NAV that should be used to calculate the entitlement of AMAS, which was confirmed as a creditor in an amount to be calculated with the August 2002 calculations. The question that he raised is whether the August 2002 redemptions should be calculated at the sum of \$2,737.56 or \$1,807.63 as he had recalculated them. The Liquidator recommended the latter. The former was apparently calculated and circulated to some investors by the Fund's Trading Manager. The second question that the Liquidator raised was whether interest is payable on the distributions to creditors. He recommended that interest should not be paid.

AIMS/Somers Application

- [7] Solicitors for AIMS and Somers brought their Application on 1st October 2004. In that Application they prayed for an order lifting the stay on the claim that AIMS brought against the Fund. In Claim No. BVIHCV2002/0190, AIMS applied for a Freezing Order against the Fund on 15th October 2002. The Order was granted on 16th October 2002. It froze assets of the Fund up to the value of \$7,250,004.40. The Fund petitioned on 23rd October 2002 to be wound up. **Section 118 of the Companies Act, Cap. 285 of the Laws of the British Virgin Islands** deemed the winding up to have commenced on that date. **Section 121 of the Companies Act** automatically stayed all proceedings in Claim No. BVIHCV2002/0190 when the winding up Order was made on 3rd December 2004. AIMS issued the formal claim in its claim proceedings on 30th October 2002. In their Application of 1st October 2004, AIMS and Somers also prayed for permission to enter judgment against the Fund on that claim in the amount of \$6,653,189.30 as at December 2002.
- [8] Mr. Pringle acted wisely and correctly when he withdrew the Application to lift the stay. I would consider matters that arose in Claim No. BVIHCV2002/0190 in these liquidation

proceedings to the extent that it is convenient to do so in order to save litigation time. The central issues in that claim were determined in these proceedings. Once the liquidation proceedings commenced, all related matters were subsumed hereunder. **Section 121 of the Companies Act** was intended to prevent a multiplicity of parallel litigation.

- [9] It would also be quite anomalous to enter judgment in Claim No. BVIHCV2002/0190 when it was overtaken by the liquidation proceedings. The Claim was filed after the winding up petition was filed. Solicitors for AIMS proved the same debt that they sought to pursue in the claim in the liquidation proceedings. They were paid their entitlement.
- [10] In their Application of 1st October 2004, Solicitors for AIMS further prayed for an Order that the Fund should also pay their prescribed costs on Claim No. BVIHCV2002/0190 in accordance with Appendix C of the prescribed tariff in the CPR based on the sum of \$6,653,189.30 at the percentage rate of 45%, as well as the costs of their injunction proceedings in an amount to be assessed. They also prayed for an Order that they should be paid the costs of their Application of 1st October 2004 in an amount to be assessed, and, in addition, their costs occasioned by the liquidation proceedings.
- [11] AIMS and Somers may be entitled to costs in the injunction proceedings because those proceedings were instituted prior to the winding up petition. It is my view that they instituted those proceedings in order to protect their interest in the Fund. Those proceedings did not advance very far before the winding up Order. I see no reason why they should not have those costs. I would therefore make an Order that they should be paid those costs to be agreed with the Liquidator or be assessed.
- [12] With respect to the prayer by AIMS and Somers for costs in their actual claim that was brought in Claim No. BVIHCV2002/0190, there is no good principle upon which this prayer is founded. It will therefore be dismissed. It was instituted after the winding up petition was filed. They will be paid their reasonable costs in the liquidation proceedings. They also pray for this in their Application. Paragraph 7 of the winding up Order provides for the costs of the winding up to be paid out of the assets of the Fund, in priority to other debts.

- [13] The interested parties who entered these proceedings did so in order to protect and advance their interest in the Fund. In the event, they also assisted the Court in the determination of the issues by their submissions. I saw nothing in the proceedings that would cause me to consider visiting any aspect of the costs in these proceedings upon any interested party. Accordingly, all reasonable costs in these proceedings shall be in the liquidation and shall be paid in priority to other debts.
- [14] There is provision for the parties to submit Bills of Costs to the Liquidator for agreement and payment. If he takes the view that any claim for costs is unreasonable, the party who submitted it will have liberty to apply to the Court for assessment. The parties shall submit all claims for costs to the Liquidator on or before 17th January 2005.
- [15] AIMS and Somers also pray for an Order that the Fund as the defendant in Claim No. BVIHCV2002/0190 should pay to them within 14 days interest on the sum of \$6,653,189.30 in the amount of \$911.40 per day from 3rd December 2002 until 13th July 2004 being the date of payment thereof at the rate of 5% per annum. The question whether they, or in fact other parties, are entitled to interest on their entitlement under the liquidation will be considered later in this judgment.
- [16] Alternatively, Solicitors for AIMS and Somers pray for a number of Orders in the liquidation proceedings. As indicated in the foregoing paragraph, their prayer in relation to interest entitlement will be considered. Whether they are entitled to any costs at all on their Application of 1st October 2004 will depend, in the main, on their success on this issue. They pray for an Order admitting them as creditors in the winding up of the Fund in the amount of \$6,653,189.30 as at 3rd December 2002. There is no principle upon which they could be further admitted as creditors as at 3rd December 2002 in light of my decision in the judgment of 19th May 2004. It determined that 28th June 2002 was the NAV date for the redemption of AIMS' shares. (See Paragraph 91 of the judgment.). This prayer is therefore dismissed.

- [17] AIMS and Somers also pray for an Order that their claim in Claim No. BVIHCV2002/0190 should be dismissed by consent upon payment of that interest and costs. I do not think that I should make an Order to dismiss their claim at this stage upon their receipt of interest and costs, in the event that they subsequently find it necessary to apply in those claim proceedings. However, I shall give them permission to discontinue those proceedings under Part 37.2(2) of the Rules, upon obtaining the necessary consent from the Liquidator, at such time as they think convenient. In any case, Claim No. BVIHCV2002/0190 must be brought up for report on Tuesday the 4th day of February 2005, if not sooner discontinued.

The Liquidator's Summons

- [18] This Judgment also considers a Summons that was filed on behalf of the Liquidator on 1st November 2004. It prays for 4 Orders. The first is for an Order to sanction the actions of the Liquidator to date in the Liquidation of the Fund. There were no dissenting submissions during the hearing. In any case, it is my view that the Liquidator's conduct of the liquidation of the Fund to date has been quite professional. I shall therefore sanction his actions. I shall also make an Order in accordance with the second prayer to permit the Liquidator to continue to administer the liquidation substantially in accordance with the recommendations that he made in the Third Report.
- [19] The third prayer in the Summons is for an Order to approve the Liquidator's costs and expenses to date that are disclosed in his Third Report. At the hearing, it was suggested that the Liquidator should provide further particulars of his costs and expenses to the Court and to Solicitors for the interested parties in these proceedings. My own view was that the amount claimed appears to be reasonable. In the interest of judicial time, therefore, I shall approve the sum that he claims, unless any party objects. The Liquidator shall communicate particulars of his costs and expenses to Solicitors for the interested parties who participated in the liquidation proceedings by 15th January 2005. If there is no objection this direction shall stand. In the event that there is any objection, notice of it shall be communicated to the Liquidator by 31st January 2005 and Solicitors for the Liquidator shall apply to the Court for further consideration.

[20] The fourth prayer is for an Order that the costs of the Liquidator's Summons should be paid from the Fund. There is no reason, and none was proffered, why this Order should not be made. I shall therefore grant this prayer.

[21] There are now only 3 questions for determination. I shall determine, first, the question whether the Liquidator shall apply the August 2002 NAV calculations purportedly calculated by the Trading Manager, or the calculations by the Liquidator. The second question relates to the claim by AIMS and Somers that they are entitled to judgment interest. The third question is whether other creditors are entitled to interest on the amounts to which they are entitled in the liquidation. Apparently two (2) sets of creditors submitted that claim to the Liquidator.

The Applicable August 2002 NAV

[22] In the judgment of 19th May 2004, I noted the divergence of opinions regarding how the August 2002 NAV should actually be calculated. I gave no direction for its calculation because the issue was not canvassed at the hearing. A central decision in the judgment was that the Liquidator should not recalculate NAV's that were calculated in accordance with the Articles of the Fund, which were already communicated to investors by the Fund's Administrator. This decision was for the purpose of business efficacy. Accordingly, I directed that the Liquidator should proceed on the original NAV's that the Fund's Administrator provided to investors of the Fund.

[23] Premised on this decision and direction, AMAS contends that its investment in the Fund should be redeemed in an amount that is calculated by reference to a NAV of \$2,737.56 per share. Mr. Williams, Counsel for AMAS, insisted that this is the NAV for August 2002 that was calculated in accordance with the Articles of the Fund and communicated to AMAS. However, the Fund's Administrator did not communicate this.

[24] In his Third Report, the Liquidator stated that the Confidential Offering Memorandum for investors who converted into the merged Fund stated that the Fund's Administrator would

determine NAV's. The Liquidator therefore took the view that the NAV for August 2002 that was calculated and apparently communicated to some investors by the Trading Manager, and upon which AMAS relies, is informal and non-binding on the Fund. The Liquidator exhibited a letter dated 11th June 2003 that the Fund's Administrator sent to him as Exhibit 41 to his Third Report. Paragraph 4 of that letter states that the Administrator did not publish any NAV calculation for August 2002. The Liquidator gave \$1,807.63 as his recalculated valuation per share for redemption for August 2002.

[25] Because NAV calculations for the final period for redemptions up to 23rd September 2002 were not calculated and circulated by the Fund's Administrator to investors, I directed that the Liquidator could rely on his own calculations for that period. (See Paragraph 85 of the judgment of 19th May 2004). The Liquidator obviously sees a parallel between this position and the position of AMAS. This might be the basis for his recommendation in his Third Report that he should be permitted to rely on his own NAV calculation for August 2002.

[26] There is a common ground that AMAS could only benefit from August 2002 redemptions calculated at the sum of \$2,737.56 if this valuation was calculated in accordance with the constitutional documents of the Fund. The burden of proof is upon AMAS creditor that contends for this sum. They must establish, on a balance of probabilities, that the \$2,737.56 valuation was "... determined by or under the direction of the directors..." of the Fund. This is the essential requirement under Regulation 69 of the Amended Articles of Association of the merged Fund that was filed in the Registry of Corporate Affairs on 6th June 2002.

[27] Regulation 69 states:

"The Net Asset Valuation of the Company, for the purpose of issuing and redeeming share, **shall be determined by or under the direction of the directors** as at each applicable Valuation Date and on such other occasions as the directors may determine...In the event that there is disagreement between the directors and the auditors are unable to reach agreement, the final determination shall be made by the directors". [Emphasis added].

- [28] Mr. Williams submitted that the valuation for August 2002 that the Trading Manager calculated and communicated to AMAS (\$2,737.56) was determined by and under the direction of the directors because it exemplifies the course of dealing by which valuations were done. According to Mr. Williams, from 31st July 2000 when AMAS invested in the Fund, Livingston II provided AMAS with NAV calculations from the Trading Manager. This was always followed by a valuation from the Fund's Administrator. For the duration of AMAS' investment in the Fund, the valuations that both presented were always identical. The Directors of the Fund never issued a valuation. The Trading Manager initiated all valuations. The subsequent valuations that the Fund's Administrator issued on each occasion for the 2 years of AMAS' investment were the same. It is reasonable, therefore to accept the valuation, which the Trading Manager communicated for August 2002 as that which the Fund's Administrator would have confirmed.
- [29] Mr. Williams' submission is that a practice or course of dealing developed by which the function of determining NAV's was delegated to the Trading Manager's determination. He noted that the Fund's constitutional documents did not delegate NAV calculations to the Fund's Administrator. He insisted that even if the May 2002 Confidential Offering Memorandum purported to do so, that document is not applicable to AMAS because its investment preceded the merger and AMAS did not rely on it when it made the investment. The document is not a part of the contract between AMAS and the Fund.
- [30] I note that the Offering Memorandum was issued prior to AMAS' investment in the Fund. It clearly stated that the Fund's Administrator would determine NAV's. It also stated that all determinations that the Administrator made with regard to NAV's should be subject to oversight by the Board of Directors and the Hub Fund. (See at page 11, under the rubric "NET ASSET VALUES"). The original Memoranda and Articles of Association of the Fund and the Fund II did not specify this role for the Administrator. Mr. Williams insisted that even beyond this, the Administrator was not in a position to properly calculate NAV's. This, he said, was because he would not have been able to identify the trading positions of the Fund at any given point in time.

Findings

- [31] Neither the Affidavits nor any other documents that were filed in these proceedings elucidate, with certainty, the manner in which NAV's were actually calculated. There is insufficient evidence from which I might conclude, with certainty, that the Directors conferred responsibility upon the Trading Manager to determine NAV's. I see no express delegation of that responsibility to either the Trading Manager or to the Fund's Administrator for that matter. In any case, as Mr. Fay submitted, it is very doubtful that the Directors would have delegated that responsibility to the Trading Manager. They would have been mindful that it is critically important to the integrity of and confidence in the Fund to have someone other than the Trading Manager that placed trades to calculate NAV's.
- [32] In my view, AIMS failed to discharge its evidential burden to prove that the August 2002 valuation that it received was determined by or under the direction of the Directors of the Fund. I agree with the submission that Mr. Fay made that AMAS failed to adduce any evidence from the Directors as to whether they made or directed anyone to make the valuation. Additionally, AMAS has not particularized nor supported its allegation that a course of dealing developed by which the Trading Manager calculated and circulated NAV's as a matter of course under the direction or sanction of the Directors. There is no evidence to show that a practice that crystallized and developed that was sufficiently notorious to attract judicial notice, by which the Trading Manager calculated the NAV's.
- [33] At best, the evidence and submission on behalf of AMAS point to the possible calculation and the circulation of preliminary and unofficial NAV's by the Trading Manager. Each one that he issued was followed by one issued by the Fund's Administrator that apparently confirmed it. Even if both valuations were identical, there is no evidence from which to deduce that the Administrator simply rubberstamped the valuation that the Trading Manager first communicated. Whether the Administrator would have automatically reproduced the valuations that the Trading Manager issued for August is a matter of conjecture, not evidence. So too is the alleged course of dealing. Issuing valuations by the Fund's Administrator would have formed an integral part of any course of dealing. Without this the alleged course of dealing was incomplete in relation to the August NAV's.

- [34] In summary, AMAS failed to discharge its evidential burden to establish that the NAV that the Trading Manager circulated to some investors for August 2002 was determined by or under the direction of the Directors at the applicable valuation date 16th August 2002. In the premises, the Liquidator shall rely on his own calculation and apply the sum of \$1,807.63 for August 2002 NAV to which AMAS is entitled.

AIMS' Application for Judgment Interest

- [35] Solicitors for AIMS seek post liquidation judgment interest. Mr. Pringle agrees that such entitlement turns upon persuading the Court that the judgment dated 19th May 2004 and the Order or direction in it is a judgment under **section 2 of the Judgments Act, Cap. 35 of the Revised Laws of the British Virgin Islands, 1991** that triggers its entitlement to judgment interest.
- [36] Mr. Pringle noted in his submission that there is no statutory equivalent in this Territory to **section 189 of the Insolvency Act, 1986 (U.K)**, which regulates the accrual and payment of interest in liquidation proceedings. He also noted that AIMS could not rely on its contract with the Fund because it does not provide for such interest. He submitted, however, that it is within the definition of **section 2 of the Judgments Act**. It defines "judgment" to include an Order for the payment of money or costs or any other Order that has the operation of judgment.
- [37] According to Mr. Pringle's submissions, it did not matter that the 'judgment' was issued because the Liquidator sought the Court's directions. The purpose of the exercise was for the Court to adjudicate how much each creditor is to be paid. The judgment made an unequivocal finding that AIMS is owed an ascertainable sum of money. The Liquidator was directed to quantify it and to pay AIMS. This was a "judgment" which entitles AIMS to 5 % interest on its entitlement from the date of the judgment to the date of final payment.

- [38] These are ingenious submissions. They would not have been necessary had AIMS obtained judgment against the Fund in Claim No. BVIHCV2002/0190. Alas, however, the claims in that action were subsumed under the liquidation proceedings.
- [39] The judgment of 19th May 2004 was not a 'judgment' within the definition provided by the Judgments Act, notwithstanding that it was so headed. It was not a monetary judgment in favour of any of the creditors. It was simply a decision in the nature of directions to the Liquidator to clarify issues for the guidance of the Liquidator in the winding up, and in the interest of the creditors/investors. They are not entitled to judgment interest in the absence of statutory or contractual provision for it. The Application by AIMS for judgment interest on its proceeds from the Liquidation is accordingly dismissed.

Interest Otherwise Claimed

- [40] Mr. Farara, QC, and Mr. Fay contended that the interested parties whom they represent, who are creditors in the Fund, are entitled to interest on their entitlement with reference to 2 periods. They submitted they are entitled to interest at the rate of 5 % per annum for the 1st period. This is from the date on which they became creditors to the date of the presentation of the winding up petition, 23rd October 2002. They cite **rule 4.93 of the English Insolvency Rules 1986** and the decision of the Privy Council in **Cleaver and Bodden (the joint liquidators of the Transnational Insurance Company Limited v. Delta American Reinsurance Company** [2001] UK PC (6) (on Appeal from the Court of Appeal of the Cayman Islands.) The second period for which they claim interest is from 23rd October 2002 to the date when they are paid their full entitlements under the liquidation.
- [41] Interest that is claimed for the first period would not be a live issue had the winding up Order been made after 17th August 2004. A new Insolvency Act came into force on that date in this Territory. It specifically provides for the payment of interest for this period.

- [42] However Rule 4.93(1) of the English Insolvency Rules 1986 ("the 1986 Insolvency Rules") provides that where a debt is proved in liquidation bears interest, a creditor can prove that interest as part of the debt. It exempts interest for any period after a company goes into liquidation. This rule cannot therefore be applied with respect to the second period.
- [43] In **Cleaver v Bodden**, the Privy Council upheld a decision of the Court of Cayman Appeal, which held that rule 4.93 is applicable in the Cayman Islands. It thereby sanctioned a claim by Delta for interest in the amount of some \$151,953.00 that it proved pursuant to this rule.
- [44] Mr. Fay submitted that, similarly, Alpstar is entitled to prove for the period July–October 2002 because the Cayman Islands and this Territory have identical statutory regimes and use the 1986 Insolvency Rules. Our own Court of Appeal held, in **Hugh C. Marshall Sr. v Antigua Aggregate and Others** Civil Appeal No. 23 of 1999, that the 1986 Insolvency Rules are applicable in Antigua where insolvency rules were not promulgated. It held that they were applicable by virtue of **section 11 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act**, which is in identical terms as the parallel provision in this Territory. This Territory had no insolvency rules.
- [45] The Antigua section, as well as, **section 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap. 80 of the Revised Laws of the Virgin Islands, 1991**, provide that where the law of the Territory and the Court Rules contain no special provision, the jurisdiction that is vested in the High Court in civil proceedings:
- "... shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England."
- [46] In **Hugh Marshall**, our Court of Appeal held that this formulation means that the jurisdiction should be exercise only to adopt those English rules that could be used with convenience. Mr. Dennis, Counsel for the Liquidator, submitted, however, that the Court in this Territory adverted to the English rules only to guide matters of procedure in the

absence of local rules. In his view, entitlement to interest is a matter of substantive law, which cannot be imported into the substantive law of this Territory.

Findings

[47] It is instructive that in **Cleaver and Bodden**, Counsel for Transnational Insurance (in liquidation) contended, *inter alia*, the 1986 Insolvency Rules are subordinate legislation. According to their submissions, **section 189 of the English Insolvency Act**, expressly confers entitlement to interest on debts in insolvency in England. Sections 411-413 of that Act also confer statutory authority to make the Insolvency Rules. Without similar primary statutory underpinnings, rule 4.93, as subordinate legislation, cannot confer entitlement to interest in the Cayman Islands. The Grand Court Rules, and, in particular, Order 102, rule 17, which specifically applies the 1986 Insolvency Rules to liquidation in the Cayman Islands derive their validity from **section 19(3) of the Grand Court Law**. This enables rules to be made regulating pleading, practice and procedure, and generally providing for other matters that are reasonably necessary for or incidental to the administration of the Grand Court Law. Therefore, it is ultra vires and ineffective to apply rule 4.93 to Cayman Islands liquidations. (See Para. 55 of the judgment.).

[48] Under Order 102, rule 17, the 1986 Insolvency Rules apply in the Cayman Islands unless and until rules are made under the Companies Act, in so far as these rules are consistent with other rules that may be applied in these proceedings. (See Para. 51 of the judgment.). In **Cleaver and Bodden**, the Privy Council confirmed the decision of the Court of Appeal that Order 102, rule 17 applied the whole of rule 4.93 to Cayman Islands liquidations. The Privy Council said that rule 4.93 was subject only to the expressed reservations and limitations that rule 17 contains. (See Para. 56 of the judgment.). The Privy Council further stated:

“The boundary between substantive law and practice and procedure is often a difficult one to identify with precision and their Lordships consider that paragraphs (a) and (j) of section 19(3) of the Grand Court Law do not permit the interest provisions of rule 4.93 to be applied to Cayman Islands liquidations and are not disposed to disagree with the local judges on a point such as this.”

- [49] It is apparent that the statutory regime that sought to apply rule 4.93, and, in fact, the 1986 Insolvency Rules into Cayman Islands liquidations had peculiar difficulties that brought in issues of *ultra vires*. They have an express provision in subordinate legislation, which sought to incorporate rule 4.93 by reference. The Privy Council confirmed that it was effective.
- [50] On the other hand, prior to 17th August 2004, in this Territory, the 1986 Insolvency Rules were applicable " ... as nearly as may be in conformity with the law and practice administered for the time being ... in England". Primary legislation, to wit, **section 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act**, provided this.
- [51] I find that this statutory provision incorporated the 1986 Insolvency Rules by reference. It brought rule 4.93 interest provisions into these liquidation proceedings, to the extent that these provisions could be conveniently applied in this Territory. I see nothing that leads to the conclusion that it would be inconvenient to apply this provision in these proceedings. I also agree with Mr. Fay's submission that rule 4.93(6) and Paragraph 60 of the judgment in **Cleaver and Bodden** would mean that the creditors would be entitled to interest at the rate of 5% for the first period.
- [52] When I brought the draft judgment on 20th December 2004, it indicated that I thought that that there is an apparent impediment to the claim by creditors' to entitlement to interest for this period. This was based on submissions that Mr. Dennis made. He submitted that the payment of interest to creditors for any period would be inconsistent with Regulation 60 of the Fund's Articles of Association. It states:
- "Upon the redemption of a share, the holder ... shall cease to have any rights with respect thereto (except the right to receive the redemption proceeds and the right to receive any dividend declared but unpaid prior to the redemption being effected)."
- [53] I expressed the view that the words "Upon the redemption of a share ..." do not refer to the time at which the shareholder actually receives redemption proceeds. I stated that this was because the right to receive redemption proceeds is specifically preserved in the exception. I indicated that the words could therefore only refer to the time when the right

to redeem arises. At that time, a shareholder ceases to have any rights in relation to the shares, except the 2 rights that the Regulation preserved. My view, therefore, was that since investors did not preserve a right to be paid interest on their entitlement the recommendation that the Liquidator made that no interest should be paid on creditors' entitlements should be approved.

[54] At the presentation of the draft judgment I stated my discomfort on the issue. It was not fully canvassed in the submissions. Mr. Dennis reiterated his opposition to the claim for interest. I now relent, however, on the force of Mr. Fay's further submissions on the point. He submitted that Article 60 terminated any further right of shareholders as shareholders upon redemption, but not rights to which they are entitled as creditors. This is a sound statement of principle. I therefore find that the creditors are entitled to interest at the rate of 5% per annum on their entitlement on redemption proceeds from the date on which they became creditors to 23rd October 2002, the date on which the winding up petition was presented.

[55] The question of the entitlement of creditors of the Fund to interest for the second period does not fall under rule 4.93. In fact, the rule expressly exempts it. Notwithstanding this, Mr. Fay made a convincing case for it. He noted the statement in the Liquidator's Report that funds that were brought into the liquidation earned interest at the rate of 1% and then 1.37 per annum during the liquidation. He submitted that during the second period, the Funds were held on trust for the creditors by the Liquidator pending payment. His view is that to the extent that creditors funds earned the interest that the Liquidator reported, that interest should rightfully be paid to them. According to Mr. Fay, if they do not receive that interest, it would go towards providing a bonus to shareholders, whose actions do not merit it, and who should not receive the interest on monies that were held on trust for creditors.

[56] I cannot accede to this claim for the creditors to be paid interest on their redemption proceeds for the second period. In this regard I am mindful that the same rule, which was incorporated to provide for interest in the first period did not provide for payment for the second period. I therefore hold that creditors are not entitled to interest on their

redemption proceeds from 23rd October 2002 to the date when they are paid their full proceeds.

Summary of Order and Directions

[57] In summary then, the Order and directions are as follows:

1. The prayer that AIMS and Somers made in these proceedings by their Application dated 1st October 2004 to lift the stay that operates on Claim No. BVIHCV2002/0190 by virtue of section 121 of the Companies Act was withdrawn.
2. The prayer made in the said Application to enter judgment on its claim in Claim No. BVIHCV2002/0190 is dismissed.
3. The prayer AIMS and Somers made in the said Application for the costs of their injunction proceedings in Claim No. BVIHCV2002/0190 is granted, and the Liquidator shall pay those costs to be assessed if not agreed.
4. The prayer that was made in the said Application for costs on the actual claim in Claim No. BVIHCV2002/0190 is dismissed.
5. The prayer that was made in the said Application by AIMS and Somers for judgment interest on their redemption proceeds is dismissed.
6. The prayer that was made in the said Application to be admitted as creditors in the winding up of the Fund in the sum of \$6,653,189.30 as of 3rd December 2002 is dismissed.
7. Permission is hereby given to Solicitors for AIMS and Somers to discontinue their proceedings under Claim No. BVIHCV2002/0190 under Part 37.2(2) of the Rules, upon obtaining the necessary consent from the Liquidator.
8. Claim No. BVIHCV2002/0190 shall be brought up for report on Tuesday the 4th day of February 2005, if not sooner discontinued.
9. The prayer that was made on behalf of AIMS and Somers in the said Application in Claim No. BVIHCV2002/0190 for the costs occasioned by the Application is dismissed.
10. The Liquidator shall rely on his own calculation and apply the sum of \$1,807.63 for August 2002 NAV to which AMAS is entitled.

11. The creditors of the Fund are entitled to interest at the rate of 5% per annum on their entitlement on redemption proceeds from the date on which they became creditors to 23rd October 2002, the date on which the winding up petition was presented.
12. The creditors of the Fund are not entitled to interest on their redemption proceeds from 23rd October 2002 to the date when they were or are paid their full proceeds.
13. The Court hereby sanctions the actions of the Liquidator to date in the liquidation of the Fund.
14. The Liquidator shall continue to administer the liquidation substantially in accordance with the recommendations that he made in his Third Report in these proceedings.
15. The Liquidator's costs and expenses to date in the liquidation, which are disclosed in his Third Report, are hereby approved unless there is objection by a party to these proceedings.
16. For the purpose of Paragraph 15 of this Order, the Liquidator shall communicate particulars of his costs and expenses to Solicitors for the interested parties who participated in the liquidation proceedings by 15th January 2005.
17. The Liquidator shall recover the costs and expenses disclosed in the Third Report if no party gives notice of objection to reach him by 31st January 2005.
18. In the event that the Liquidator receives notice of objection by 31st January 2005, he shall apply to the Court for further consideration.
19. The costs occasioned by the Liquidator's Summons shall be costs in the liquidation, which shall be paid from the Fund.
20. The Liquidator shall pay the reasonable costs of the interested parties in the litigation proceedings on bills that are to be submitted to him on or before the 17th day of January 2005 for his consideration.
21. In the event that the Liquidator thinks that a claim for costs under Paragraph 20 of this Order is unreasonable, the party that submitted it to him has liberty to apply to the Court for assessment.
22. An Application under Paragraph 21 shall not be considered unless it is made by 17th February 2005.

23. All costs and expenses that are awarded in this Order shall be paid by the Liquidator in priority to other debts.
24. This Order shall be filed and served by Solicitors for the Liquidator.

Hugh A. Rawlins
High Court Judge