



CH-2024-000131

Neutral Citation Number: [2024] EWHC 2845 (Ch)

Case No: CH-2024-000131

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 08/11/2024

**Before :**

**MR JUSTICE RICHARD SMITH**

**Between:**

**EAST RIDING OF YORKSHIRE COUNCIL AS  
ADMINISTRATING AUTHORITY OF THE EAST  
RIDING PENSION FUND**

**Appellant**

**- and -**

**KMG SICAV-SIF-GB  
STRATEGIC LAND FUND**

**Respondent**

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**Mr Daniel Lewis (instructed by Spector Constant & Williams) for the Appellant**  
**Daniel Lightman KC and Oliver Caplan (instructed by Reynolds Porter Chamberlain LLP)**  
**for the Respondent**

Hearing date: 4 September 2024

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**Approved Judgment**

**This judgment was handed down remotely at 10.30 am on Friday 8 November 2024 by  
circulation to the parties or their representatives by e-mail and by release to the  
National Archives.**

**Mr Justice Richard Smith:**

**Introduction**

1. This judgment concerns an appeal against the order of ICC Judge Kyriakides (**Judge**) dated 10 May 2024 (**Order**) by which she dismissed a petition dated 13 May 2021 (as amended on 31 July 2023) presented by the Appellant, East Riding of Yorkshire Council as Administrating Authority of the East Riding Pension Fund (**Petition**) for the reasons given in her related judgment (**Judgment**). The Petition sought the compulsory winding-up of KMG SICAV-GB Strategic Land Fund (formerly known as KMG SICAV-SIF-Lucent Land Fund) (**Sub-Fund**) as an unregistered company pursuant to ss.220-221 of the Insolvency Act 1986 (**IA**).
2. The Appellant accepted the Judge’s characterisation of matters in paragraphs 1-14 of her Judgment which, with appropriate minor amendment, I gratefully adopt and summarise by way of introduction to this judgment on the related appeal.
3. The Sub-Fund is a “Dedicated Fund” of an investment company known as KMG SICAV-SIF-SA (**Fund**), incorporated under the laws of Luxembourg on 4 June 2008. The Fund is a public limited company constituted as an SICAV-FIA, a specialised investment fund. The Fund is subject to the law of the Grand Duchy of Luxembourg dated 13 February 2007 (as amended) relating to specialised investment funds (**Law of 2007**) and the law of the Grand Duchy of Luxembourg dated 1915 on commercial companies (as also amended). The Fund is regulated by the Commission de Surveillance du Secteur Financier (**CSSF**), the Luxembourg equivalent of the Financial Conduct Authority.
4. The Fund offers investments to those considered “Well-Informed Investors” under Luxembourg law, such as institutional investors. Those investors can invest in one or more of the Fund’s Dedicated Funds. These Dedicated Funds, of which the Sub-Fund is one, each have their own separate pool of assets and specific investment objectives. When investors invest in a Dedicated Fund, shares in the Fund representing the value of their investment are allotted to them.
5. The Articles of Association of the Fund (**Articles**), the Fund’s Offering Document (**OD**) and the Law of 2007, as they were also considered in the Judgment, explain, among other things, the structure and status of the Fund as a specialised investment fund, the structure and status of the Dedicated Funds, the rights and status of creditors and investors and how the Fund and/ or a Dedicated Fund may be wound up.

6. The Appellant, a ‘Well-Informed Investor’, invested the sum of £20 million in the Sub-Fund, receiving in return 17,110,835 shares in the Fund on the basis that its rights to capital and income were restricted to the assets of the Sub-Fund. Details of the Investment Objective, the Investment Policy and Liquidity Strategy of the Sub-Fund were set out in the Appendix to the OD. Pursuant to its stated Investment Objective, the Sub-Fund was invested in UK land assets through four Luxembourg subsidiaries of the Fund specifically incorporated for that purpose.
7. Although sums totalling £80 million were originally invested into the Sub-Fund, its value later reduced to £55 million following a £27 million share redemption. On 29 June 2016, the Fund sent notice to the Sub-Fund investors that the Board of Directors of the Fund had decided, in accordance with Article 13.2 of the Articles and the applicable provisions of the OD, to suspend until further notice the calculation of the Net Asset Value of the Sub-Fund shares as well as their issue, switching or redemption. The reason given was that the Sub-Fund had suffered a significant exposure on an option to acquire land which, in the opinion of the Board, meant that the Sub-Fund could not be adequately valued.
8. Audited financial statements for the Fund and the Sub-Fund for the year ended 31 December 2016, signed off by KPMG on 29 July 2017, disclosed that the value of the Sub-Fund had decreased to £36.4 million. In the unaudited part of the accounts, the reduction in value was attributed to the uncertainty of the outcome of the Brexit negotiations and the consequent uncertainty regarding the future values of real estate in all sectors of the UK property market.
9. The suspension notified on 29 June 2016 continued. On 18 February 2019, the Fund sent further notice to the Sub-Fund investors, notifying them that continued economic uncertainty since the Brexit referendum and political uncertainty meant that the Board of Directors had decided to conduct a liquidation of all the Sub-Fund shares pursuant to Article 16 and that it had decided to appoint ME Business Solutions S.à.r.l. as liquidator of the Sub-Fund under the Board’s supervision.
10. A further notice was sent to investors on 12 August 2019. This stated that there was the possibility that no value would be realised from the Sub-Fund’s investments and an investor call would be organised for September 2019. This was held on 27 September 2019.
11. On 11 December 2020, a final notice was sent to the Sub-Fund investors, informing them that the liquidation Net Asset Value was zero and that no distribution would, therefore, be made to them. All creditors of the Sub-Fund had, however, been repaid in full.

### **Procedural aspects**

12. Since it is not possible under Luxembourg bankruptcy laws to obtain a winding-up order against the Sub-Fund, the Appellant presented the Petition in this jurisdiction on 13 May 2021 for the Sub-Fund to be wound up as an unregistered company under ss.220-221 IA.
13. On 18 May 2021, ICC Judge Prentis gave permission for the Appellant to serve the Petition out of the jurisdiction on the Fund in Luxembourg. On 28 June 2021, the Fund applied to set aside ICC Judge Prentis' order. Pursuant to directions made in respect of that set aside application, expert evidence was filed and served. The set aside application was heard by ICC Judge Burton on 28 April 2022. On 2 February 2023, she set aside the order permitting service out.
14. The Appellant subsequently appealed against that order and, on 24 July 2023, Mr Justice Michael Green granted the appeal, in turn setting aside ICC Judge Burton's order.
15. The Petition was heard on 19-20 March 2024, with the following principal jurisdictional issues considered, the Judge deciding (at headline level) that:-
  - (i) Since the Sub-Fund was neither an unregistered company within the natural meaning of that term, nor a company or association, it did not fall within s.220(1) IA and could not, therefore, be wound up by the Court ([34]-[38]);
  - (ii) Even if she was wrong about the construction of s.220(1), the proper characterisation of the Sub-Fund was such that Parliament could not reasonably have intended it to be wound up as an unregistered company ([39]-[61]);
  - (iii) Even if the Sub-Fund was an entity falling within s.220(1), the Appellant was not a contingent creditor, let alone of the Sub-Fund ([74]-[89]);
  - (iv) The Sub-Fund having ceased to carry on trade, the further jurisdictional requirement under s.221(5)(a) IA would have been satisfied ([90]-[92]); and
  - (v) Since only one out of three of the jurisdictional conditions necessary for a winding-up order had been met, the Judge declined to decide how she might otherwise have exercised her discretion ([93]).

### **Grounds of appeal**

16. The Judge gave permission to appeal against her order, the issue of jurisdiction relating to the winding-up of a foreign sub-fund being a novel point in view of the increasing use of these structures in many countries. As such, she considered that there was a compelling reason for the appeal to be heard. The grounds of appeal encompass the issues at 15(i)-(iii) and (v) above. I have addressed those below by reference to the Appellant's appeal skeleton as the arguments were grouped and honed in oral submission before me.

### **The Sub-Fund as an "unregistered company"**

#### **(a) Overview**

17. S.220 IA provides that:-

**"Meaning of "unregistered company".**

For the purpose of this Part, “unregistered company” includes any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom.”

18. The Appellant’s essential position was that the Sub-Fund is an unregistered company within the meaning of s.220(1), properly construed. Although, in giving permission to appeal, the Judge indicated the novelty of the situation, the Appellant said that this should not be overstated, it being well established that unregistered companies encompass (i) companies outside the jurisdiction and (ii) entities that are not incorporated. The only real novelty here was the combination of those two elements in the form of unincorporated entities based outside the jurisdiction, as to which, it would be anomalous if no effective remedy were available in England against foreign cellular structures offering investments in UK assets to UK investors. This was not a case of a contingent creditor seeking to bring an uncertain claim against a thriving company where the English Court might be slow to intervene. Rather, the Appellant’s claim arises in respect of a known, significant loss of the Sub-Fund’s assets, an entity which is no longer trading, if not already dissolved. As one of the UK investors in the Sub-Fund, the Appellant clearly has a sufficient interest in its winding-up.

(b) **The main authorities**

19. Before considering the Appellant’s arguments in detail, it is helpful to consider the main authorities relied on by the parties, starting with *In re St James Club* (1852) 2 De G M. & G 383; 42 ER 920, an appeal by a member of the St. James’s Club against an order of the Vice-Chancellor for the club’s dissolution and winding-up under the Joint Stock Companies Winding-Up Act 1848, as amended by the Joint Stock Companies Winding-Up Amendment Act 1849, s.1 of the latter extending the operation of the former in terms not dissimilar from s.220 IA:-

“notwithstanding anything in the said Act contained importing a more limited application thereof, the same shall apply to all partnerships, associations and companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated;”

20. A petition for the winding-up of the club was brought by certain members who were liable for its debts. The petition reported the club’s financial difficulties, the special resolution of the club’s general meeting to call upon each member to contribute £60 to meet the club’s liabilities, the failure of the members generally to meet that call and the special resolution to close the club and for the management committee to wind up its affairs. The Vice-Chancellor had held that the club was an ‘association’ within the meaning of the Acts but

the Lord Chancellor (sitting as the Court of Appeal in Chancery) found otherwise on appeal, holding (at [387]) that:-

“The question, whether clubs, in the ordinary acceptance of the term, are within the Winding-up Acts, depends upon the construction of these Acts; but before entering upon that consideration, it is necessary to consider the nature and constitution of such clubs: they are, generally speaking (and there is nothing particular in this club), all formed on this principle: the candidate must be elected, he must then pay an entrance fee, and also an annual sum or subscription. In this club there was a rule under which, if the person elected did not pay the entrance fee and annual subscription, he ceased to be a member; there was also an express rule, that if a member's conduct was objectionable out of the house, he might be dismissed from being a member. What, then, were the interests and liabilities of a member. He had an interest in the general assets as long as he remained a member, and if the club was broken up while he was a member, he might file a bill to have its assets administered in this Court, and he would be entitled to share in the furniture and effects of the club; but he had no transmissible interest, he had not an interest, in the ordinary sense of the term capital in partnership transactions; it was a simple right of admission to, and an enjoyment of, the club while it continued. Under such circumstances the difficulty would be very great in bringing clubs within the operation of the Winding-up Acts: and, in my opinion, any decision to that effect would be attended with much mischief.”

21. As to whether the legislature had intended that associations such as the club in question should fall within the Winding-Up Acts, the Lord Chancellor considered the context of the Acts and their application to commercial companies yielding profit from trade, concluding (at [389]) in relation to the extension of the Winding-Up Acts (recited above) that:-

“The words are very wide, no doubt; but still, I must give a reasonable construction to the Act, which is in *pari materiâ*, and incorporated with the Act of the preceding year. I cannot hold it to apply to every association or company. If I were to do so, I might be called upon to carry the application much lower than to such a club as that now in question. A cricket club, an archery society, or a charitable society, would come under the operation of the Act, and indeed every club would be included. Though “associations” are mentioned, I cannot think that word is to be treated without regard to the particulars with which it is associated. I shall do as Lord Bacon did in treating of the Statute of Uses, when he said, “The nature of a use is best discerned by considering what it is not” (Reading on the Statute of Uses, Bacon's Works, vol. 4, p. 161, ed. 1803), so I will not say what associations are within the Acts; but, bearing in mind that the individuals who form a club do not constitute a partnership, nor incur any liability as such, I think associations of that nature are not within the Winding-up Acts. I find in all these Acts to which I have referred, that every provision is inconsistent with including such an association as this club is. If such had been the intention of the Legislature, why should not the word “club” have been expressly mentioned? If, however, the Legislature has used ambiguous expressions, I will not extend their signification beyond their natural import. At first sight, the word “association” would seem to include the case of clubs, but in looking at the context, I am clearly of opinion that it does not.”

22. *In re International Tin Council* [1989] Ch 309 concerned a petition for the winding-up of the International Tin Council (ITC) (an international organisation) as an unregistered company under s.665 of the Companies Act 1985 which defined “unregistered company” in the following terms:-

“For the purposes of this Part, the expression ‘unregistered company’ includes any trustee savings bank certified under the enactments relating to such banks and any partnership (whether limited or not), any association and any company, with the following exceptions - (a) a railway company incorporated by Act of Parliament, (b) a company registered in any part of the United Kingdom under the Joint Stock Companies Acts or under the legislation (past or present) relating to companies in Great Britain, (c) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company, (d) a limited partnership registered in England and Wales or Northern Ireland.”

23. At first instance, Millett J held that, although the ITC fell within the literal meaning of “association” in s.665, Parliament could not have intended to subject it to the winding up jurisdiction of the English court. Having considered *In re St. James Club* (at [389]), Nourse LJ stated that:-

“Recognising the force of that decision, Mr. Barnes, for Kleinwort Benson, submitted that it went no further than to exclude from the application of section 665 associations which do not carry on business. He said that since the I.T.C. had carried on business, moreover on a massive scale, it was not excluded. In our opinion, Lord St. Leonards LC’s decision is of wider effect. He said that he would not say what associations were within the legislation. He only held that a members’ social club was not; on a ground which, if he would not state exhaustively what associations were included, cannot have been intended to be the only ground on which they could be excluded. In our opinion the decision establishes that the word “association” in what is now section 665 does not include an association which Parliament could not reasonably have intended should be subject to the winding up process.

When we look at I.T.A.6, it is obvious that it would have been against all reason for Parliament to have had such an intention in the case of the I.T.C. Mr. Morritt submitted that to approach the matter in this way is to rely on a treaty in order to construe a statute. We wholly disagree. We have to decide whether general words in a statute include the I.T.C. We are told by authority that those words do not include an association which Parliament could not reasonably have intended should be subject to the winding up process. So far we have not referred to I.T.A.6. We do so in order to see whether the attributes which it gives to the I.T.C. do or do not bring that association within the statute as we are told to construe it. We no more refer to I.T.A.6 in order to construe section 665 than Lord St. Leonards LC referred to the rules of the St. James’s Club in order to construe the Acts of 1848 and 1849.

In regard to the view that Parliament could not reasonably have intended that the I.T.C. should be subject to the winding up process the reasoning of Millett J. is unanswerable. He concluded his consideration of this question in words on which it is impossible to improve [1987] Ch. 419, 452D-E:

“Sovereign states are free, if they wish, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their number. But if they choose instead to carry it on through the medium of an international organisation, no one member state, by executive, legislative or judicial action, can assume the management of the enterprise and subject it to its own domestic law. For if one could, then all could; and the independence and international character of the organisation would be fragmented and destroyed. And if a member state has no such right, then a fortiori a non-member state has none. In my judgment, to impute to Parliament an intention, by general words only, to confer on the court a jurisdiction contrary to these principles and without precedent, is unacceptable.”

For these reasons we decide the question of jurisdiction in favour of the I.T.C.”

24. Finally, the Appellant referred me to *In the Construction Confederation* [2009] EWHC 3551 (Ch) concerning s.220 IA in the context of the winding-up of the Construction Confederation, an unincorporated association which was a substantial but heavily insolvent commercial organisation. HHJ Purle QC stated (at [3]) that the word “association” in s.220 “could hardly be wider and is on the face of it apt to apply to the present institution”. He went on to note (at [4]) that, in light of *ITC*, “not every unincorporated association is an association within the meaning of what is now section 220 of the 1986 Act”. Having also considered *Re St James* and *Re Witney Town Football and Social Club* [1993] BCC 874 (an ordinary member’s club also excluded from the s.220 jurisdiction), he concluded (at [6]) that each case will turn on its own facts and (at [7]) that the Confederation was an association within the meaning of the section, undertaking on a non-profit basis the business of providing lobbying services to the construction industry generally and other defined services to its members, with detailed constitutional provisions for the payment of liabilities, the members’ mutual subscription to the rules of the constitution and, most importantly, an obligation on members to contribute to its liabilities. As such, HHJ Purle QC considered the Confederation “to be within the contemplation of Parliament in 1986 when re-enacting provisions going back into the 19th century extending the winding-up jurisdiction to unregistered companies by reference to the concept of an association.”

(c) **The Judge’s suggested erroneous approach to s.220**

25. At the hearing before me, the Appellant summarised its overarching arguments as to the engagement of s.220 IA by reference to the following three suggested errors, namely that the Judge:-

- (i) wrongly concluded that the Appellant had conceded that the Sub-Fund was neither a “company” nor “association”, the latter being sufficiently wide to encompass the Sub-Fund;
- (ii) gave insufficient weight to the breadth of s.220(1); and
- (iii) failed properly to consider the characteristics of the Sub-Fund and whether Parliament would reasonably have considered that it should be amenable to the Court’s winding up jurisdiction.

**(d) The Appellant’s position as to the scope of s.220(1)**

26. As a preliminary point, I asked the Appellant whether it was arguing that the Sub-Fund was a company or an association for s.220(1) purposes. The Appellant confirmed that it was not arguing that the Sub-Fund was a company, at least not an *incorporated* company. As to whether the Sub-Fund was an association, the Appellant said it was, albeit the definition of unregistered company was sufficiently broad that this was not required for s.220(1) to be engaged.
27. The Respondent says that the Appellant’s position before me differed from that below, the Judgment recording (at [34]) the Appellant’s acknowledgement that the Sub-Fund was neither a company nor an association for the purpose of s.220(1), it not now being open to the Appellant to argue otherwise on this appeal. The Appellant, in turn, said that any acknowledgement was merely that the Sub-Fund could not be regarded as an *incorporated* company, “*not that it did not come within the definition of an association or company at all*”, the grounds of appeal (paragraph 2) contemplating that the reference in s.220(1) to an unregistered company “including any association” encompassed the Sub-Fund.
28. I found the Appellant’s argument before me unpersuasive. The Appellant’s position below on this point evolved in oral argument differently from its skeleton argument then before the Court and the Judgment fairly summarises (at [34]) the ‘landing point’ of the Appellant’s submission below, as confirmed in the following exchanges in reply (Transcript, Day 2, p.47):-

“THE JUDGE: And they have rights only as against a specific fund. So it is class rights, really, as to---- As I say, maybe you are not arguing it is an association. You are just arguing that it is an entity.

MISS HILLIARD: Yes, so I am arguing that it has the---- Just so everybody knows, I am arguing that it has all the features of the kind of entity----

THE JUDGE: That falls within s.220.

MISS HILLIARD: -- that falls within the section.

THE JUDGE: But you are not arguing that it is an association.

MISS HILLIARD: No. No.

THE JUDGE: Yes. That is very helpful. Thank you. So we do not need to go down that rabbit hole.

MR CAPLAN: Right. Well, it was---- (Inaudible - multiple people over-speaking) I will be very clear that that is what it said, of course, if it did say that, which it does not. So I must say I am a little bit surprised, and this comes back to my first submission, that the petitioner has kept its powder dry as to what this is because, in fact, within my friend's skeleton argument she says it is an association.

MISS HILLIARD: Yes. I know."

29. More pointedly still, the Appellant later acknowledged the following (Transcript, Day 2, p.88):-

"MISS HILLIARD: I think I have to say that, do I not, but I think this is, and I apologise to my learned friend for using the word "association" and "company" and probably if I had been thinking about it for longer, I would have come up with the word "entity".

THE JUDGE: Yes, "entity" is a better word. Yes."

(e) **The scope of s.220(1)**

30. In light of the above, I consider that the Respondent was entitled to the comment below that the Appellant had kept its "powder dry" as to what it was saying the Sub-Fund was for s.220(1) purposes. The Grounds of Appeal did not challenge the Judge's recording of the Appellant's acknowledgement that the Sub-Fund was neither a company nor an association. To the contrary, paragraph 4 appeared to repeat the Appellant's position below and I did not discern paragraph 2 to say otherwise. It was only in the skeleton and oral argument on appeal that the Appellant 'rowed back' on its acknowledgment below and argued that the express words of s.220(1) did, in fact, encompass the Sub-Fund, albeit also saying that this was not required in light of the breadth of that section.

31. The Appellant's equivocation in this regard may be explained, in part at least, by its position more broadly on s.220(1), expressed below as follows (Transcript, Day 2, p.15):-

"So what I say about section 220 is that, in a way, it is not necessary to come down and conclude that an entity is an association or even a company because a company is not necessarily an incorporated company. What one needs to do is focus on the features that are present in relation to the entity that one is referring to and to say, well, does that come within the concept that is created by the term "unregistered company". As I will develop the argument, I say that it does."

32. To a similar end, the Appellant argued before me that focusing on the words of s.220(1) is not helpful. Rather than reach a conclusion on whether the Sub-Fund is a company or an association for the purpose of that section, the Court should focus on the features of the Sub-Fund and consider whether Parliament reasonably intended it to be amenable to being wound up. Such an approach was said to be consistent with (i) the width of the section, expressed to be *inclusive* of any 'company' and 'association' and (ii) the related authorities. In sub-dividing the issues for determination into (i) whether s.220(1) fell properly to be

construed as a non-exhaustive provision and (ii) if so, whether the Sub-Fund is an entity that Parliament could have intended to be the subject of a winding-up process, the Judge was thereby said to have fallen into error at the outset.

33. I also found this argument unpersuasive. The (undefined) term “unregistered company” is expressed to be *inclusive* of certain entities which might not otherwise fall within its natural meaning. As the Judge acknowledged (at [37]), s.220(1) therefore has an enlarging effect but, those same “basic words”, having been used historically in the prior legislation outlined by the Judge (at [35]-[37]), I did not discern that the intention of Parliament was to extend the application of the section beyond the natural meaning of ‘unregistered companies’ as expanded by its express reference to any companies and associations. In this regard, the approach of the Judge to s.220(1) appears consistent with that taken in *ITC* to s.665 of the Companies Act 1985, the Court of Appeal noting there (at [329A]) that, it not being suggested that the Council was a company or partnership, the “sole question” was whether it was an “association” for s.665 purposes, the Court apparently considering the scope of s.665 to be framed by its express words (as also now feature in s.220(1)).
34. Where it seems to me that the Appellant (not the Judge) has fallen into error is to pray in aid the width of s.220(1) to suggest that the section is capable of encompassing entities that are neither a company nor an association. However, as *St. James’s, ITC* and *Construction Confederation* made clear, that width emanates from the inclusion of those “basic words” themselves, albeit as in *St. James’s* and *ITC*, their broad, literal interpretation *constrained* by whether Parliament could reasonably have intended the *associations* in those cases, with their particular characteristics, to be amenable to the Court’s winding-up jurisdiction. The authorities do not suggest a more open-textured approach, with the potential to encompass an even wider category of ‘entities’ than indicated by the express words of the section. Accordingly, given the Appellant’s acceptance in argument below that the Sub-Fund was neither a company nor an association, the Judge’s conclusion that it did not fall within s.220(1), and her upfront treatment of that issue, cannot, in my view, be criticised.
35. This disposes of the Appellant’s first two overarching arguments summarised above and, without permission to amend its grounds of appeal to contend that the Sub-Fund did fall within the scope of the express terms of s.220(1) after all, the third as well. However, that contention and the characteristics of the Sub-Fund more generally, were considered below and, again, before me. Having regard to the principles indicated in authorities such as *Morgan-Rowe v Woodgate* [2023] EWHC 2375 (KB) (at [49]-[65]) for raising new points

on appeal, I have decided that it would be appropriate to consider them here as well. To the extent necessary, I therefore give such permission.

**(f) The characteristics of the Sub-Fund**

36. The Appellant took me to a number of the features of the Sub-Fund, including as reflected in the Articles and the OD. Given the nature of the Fund and the different sub-funds and their investment activities, the OD is, perhaps unsurprisingly, lengthy, its provisions mirroring in not insignificant part aspects of the Articles. The Judgment summarised a number of both sets of provisions which, again, I gratefully adopt, starting with the Articles, as to which, the Judge identified the following relevant provisions (at [25]).

(i) Article 1, which states:-

“There exists among the existing Shareholders and those who may become owners of Shares in the future, a Luxembourg company (the “Company”) under the form of a public limited company (société anonyme) subject to the 10<sup>th</sup> August 1915 as amended relating to commercial companies (the “Law of 1915”) and the law of 13<sup>th</sup> February 2007 relating to Specialised Investment Funds (“the Law of 2007”).”

(ii) Article 2, which states:-

“The registered office of the Company is established in Luxembourg ...”.

(iii) Article 4, which states:-

“The exclusive purpose of the Company is to invest the funds available to it in transferable securities...according to the Law of 2007 by means of spreading investment risks and affording its Shareholders the results of the management of its assets”.

(iv) Article 5(a), which states:-

“The purpose of the Company is to provide investors with the opportunity to invest in a professionally managed fund in order to achieve an optimum return from the capital invested”.

(v) Article 6, which states:-

“(a) The capital of the Company shall be represented by fully or partly paid up Shares of no par value ....and shall at any time be equal to the total net asset value of the Company. ....”

(c) For each Dedicated Fund, a separate portfolio of investments and assets will be maintained. The different portfolios will be separately invested in accordance with their specific features as described in the Offering Document of the Company.

(d) The Company is one single entity; however, the rights of investors and creditors regarding a Dedicated Fund or raised by the constitution, operation or liquidation of a Dedicated Fund are limited to the assets of the Dedicated fund, and the assets of the Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors who claims arose in the constitution, operation or liquidation of this Dedicated Fund. In the relations between the Company's Shareholders, each Dedicated Fund is treated as a separate entity.....

(f) ... in respect of each Dedicated Fund, the Board of Directors of the Company may decide to issue one or more classes of Shares ("the "Classes"), and within each Class, one or more several Category(ies) of Shares subject to specific features....as may be determined by the Board of Directors of the Company from time to time".

(vi) Article 7.1, which states:-

“(a) The Company shall issue ordinary Shares (being referred as “Shares”) in registered form only ....

(c) All issued registered Shares of the Company shall be registered in the register of shareholders which shall be kept by the Company or by one or more persons designated thereto by the Company.....

(d) The inscription of the Shareholder's name in the register of Shares evidences his or her right of ownership of such registered Shares ...

(f) Shareholders wishing to transfer some or all of the Shares registered in their names should submit to the Registrar and Transfer Agent a Share transfer form or other appropriate documentation signed by the transferor and the transferee....”.

(vii) Article 8.1, which states:-

“(a) the Board of Directors may issue Shares of any Class or Category within each separate Dedicated Fund.”

(viii) Article 8.3, which states:-

“(a) Shareholders may only request redemption of their Shares in accordance with the conditions set-forth for each Dedicated Fund in the Offering Document.....”.

(ix) Articles 16.2(a)-(f), which deal with the voluntary liquidation and dissolution of the Fund. This can only happen if certain conditions are met and the Shareholders at a general meeting pass a winding-up resolution.

(x) Article 16(g), which states:-

“In the event that for any reason whatsoever, the value of assets of ... a Dedicated Fund should fall down to such an amount considered by the Board of Directors as the minimum level under which the ... Dedicated Fund may no

longer operate in an economically efficient way, or in the event that a significant change in the economic or political situation impacting such ... Dedicated Fund should have negative consequences on the investments of such ... Dedicated Fund ... the Board of Directors may decide to conduct a liquidation.... The Company shall send a notice to the Shareholders of the relevant ... Dedicated Fund before the effective date of such liquidation ....”; and

(xi) Article 17, which provides for the Fund to be managed by a Board of Directors.

37. The Judge also identified the following relevant provisions of the OD (at [24]):-

(i) Section 2, which contains the following definitions:-

**“Assets”**: a “resource managed by an entity as a result of transactions from which future economic benefits may be obtained and property or things having a value”;

**“Category”**: a “group of shares of each Class, which are sub-divided into capitalisation of income or distribution of dividends”

**“Class”**: a “group of shares of each Class, which are sub-divided, inter alia, in respect of their specific denominated currency, charging structure or other specific features”;

**“Dedicated Fund”**: “a separate portfolio of assets within the Fund”;

**“Fund”**: as a “Luxembourg société d’investissement à capital variable - specialised investment fund as more fully described in the section entitled “The Fund”, known as KMG SICAV-SIF”;

**“Shareholder”**: an “owner of the Shares”; and

**“Shares”**: “each share within any Dedicated Fund”.

(ii) Section 3, which states:-

“In accordance with the Articles of Incorporation, the Board of Directors of the Fund may issue Shares in each Dedicated Fund. A separate pool of assets is maintained for each Dedicated Fund and is invested in accordance with the investment objectives applicable to the relevant Dedicated Fund. As a result, the Fund is an “umbrella fund” enabling investors to choose between one or more investment objectives by investing in one or more Dedicated Funds. Investors may choose which Dedicated Fund(s) may be most appropriate for their specific risk and return expectations as well as their diversification needs.

Each Dedicated Fund is treated as a separate entity and operates independently, the relevant portfolio of assets being invested for the exclusive benefit of this Dedicated Fund. A purchase of Shares relating to one particular Dedicated Fund does not give the holder of such Shares any rights with respect to any other Dedicated Fund.

The net proceeds from each subscription for each Dedicated Fund are invested in the specific portfolio of assets constituting that Dedicated Fund.

With regard to third parties, any liability will be exclusively attributed to the Dedicated Fund.

Shares of different Classes or Categories within each Dedicated Fund may be issued, redeemed and converted at prices computed on the basis of the Net Asset Value per Share, within the relevant Dedicated Fund ....”.

(iii) Section 10 which states:-

“The Fund is one single entity; however the right of investors and creditors regarding a Dedicated Fund or raised by the constitution, operation or liquidation of a Dedicated Fund are limited to the assets of this Dedicated Fund and the assets of a Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors whose claim arose in relation to the constitution, operation or liquidation of this Dedicated Fund ....”

(As the Judge noted (at [24.3]), the wording of Section 10 is identical to Article 6, although the latter adds: “In relations between the Company’s shareholders, each Dedicated Fund is treated as a separate entity ....”; and

(iv) Section 21, which addresses the dissolution and liquidation of a Dedicated Fund as follows:-

“... the liquidator ... will realise the assets of ... the Dedicated Fund in the best interests of the Shareholders thereof and upon instructions given by the general meeting, the Custodian will distribute the net proceeds from such liquidation after deducting all liabilities and liquidation expenses relating thereto, amongst the Shareholders of the relevant ... Dedicated Fund in proportion to the number of Shares held by them.”

(g) **Luxembourg law evidence**

38. The Judge also had the benefit of certain expert evidence on Luxembourg law. This comprised the first and supplemental reports of Vandebulke for the Appellant (“**VB1**” and “**VB2**”) and a report from Elvinger for the Respondent. Vandebulke addressed the nature and status of the Fund and Sub-Fund and the amenability of the latter to being wound up as a matter Luxembourg law. Both firms addressed the ability of a person to bring suit against a Dedicated Fund to vindicate his rights and the potential creditor status of an investor. Ogier also provided an opinion on this last aspect for the Appellant. It is fair to say that the reports were brief and did not cover matters as fully or clearly as the Judge would have liked. In my view, she was entitled to that observation.

(h) **The Appellant’s criticisms**

39. Based on many of the matters indicated in the Articles and the OD, the Appellant says that the Sub-Fund clearly enjoyed all the characteristics of a company, albeit the Judge paid insufficient regard to those so-called ‘positive’ aspects and unduly emphasised other ‘negative aspects’ not prayed in aid by the Appellant but which she considered relevant to Parliament’s intention with respect to the engagement of s.220(1).
40. That the Judge had well in mind the suggested positive aspects was apparent from her recital (at [24]-[25]) of key aspects of the Articles and OD summarised above, as many of them too were relied on by the Appellant before me, and her distillation (at [31.8]) of those characteristics which the Appellant said the Sub-Fund shared with a company (many also emphasised before me), namely that:-
- (i) it is a separate entity from the Fund;
  - (ii) it comprises a separate pool of assets;
  - (iii) it operates independently;
  - (iv) the purchase of shares relating to the Sub-Fund does not give the holder of such shares any rights to any other Dedicated Fund within the Fund;
  - (v) the proceeds of the Sub-Fund were invested in a specific portfolio;
  - (vi) any liability owed to third parties was exclusively attributed to the Sub-Fund;
  - (vii) the Sub-Fund could be liquidated voluntarily under article 76(1) of the Law of 2007;
  - (viii) the Sub-Fund could be liquidated judicially under certain conditions under article 47(1) of the Law of 2007; and
  - (ix) the Sub-Fund was created for gain and profit with its stated objective of medium to long term capital growth, with an average return in excess of 12% per annum.

#### **Investors as contributories to the Sub-Fund**

41. As to the so-called ‘negative’ aspects, the Judge first noted (at [42]-[44]) that, even though the insolvency legislation envisages (under s.226(1) IA) the existence of contributories with respect to unregistered companies, the Sub-Fund has none. The Appellant argued that there was no prior requirement for such contributories for s.220(1) to be engaged. However, I did not discern the Judge to be saying that there was such a *requirement* rather than that the presence of such contributories is relevant to whether or not s.220(1) might be engaged. On the basis of authorities such as *St James’s*, *Witney* and *Construction Confederation* (concerning associations), as were expressly re-visited by the Judge on this point (at [43]), it is a relevant factor to which she properly had regard.
42. Of more substance in this context was the Appellant’s related argument before me that, although “*an investor is a notional shareholder of the fund (without it seems being a contributory)*”, Article 8.1 of the Articles “*provides that an investors’ [sic] shares are in or within the Sub-Fund*” (and the notices to shareholders refer to investors as being “*Shareholders of the Sub-Fund*” such that, even if they are shareholders of the Fund, they

*are also Shareholders in the Sub-Fund. It is the Sub-Fund that the Shareholders must look to for enforcement of their rights.”*

43. Unravelling these points, first, it is quite clear from Article 7 that investors are actual (not notional) shareholders in the Fund. Second, the Fund being a Luxembourg société anonyme, I did not understand the suggestion that its shareholders might not be contributories even if their obligation to contribute was limited. Third, how the investors might have been described by the Fund seemed of little import compared to what they actually are. Fourth, what Article 8.1 means depends on the legal status of the Sub-Fund.
44. As to that last point, the Judge properly directed herself to the relevant Luxembourg law evidence of the Appellant’s expert in VB1. Having been provided with the Articles and OD, Vandebulke were asked (at [5.1]) “[i]s the Dedicated Fund a legal entity as a matter of Luxembourg law?”, they responded that (emphasis in the original):-

“The Fund [i.e. the Company] is a so-called “umbrella fund” constituted with multiple “Dedicated Funds”. A “Dedicated Fund” is defined in the Offering Document .... as “a separate portfolio of assets within the Fund”.

According to article 71(1) of the Law of 2007 “Specialised investment funds may be constituted with multiple compartments, each compartment corresponding to a distinct part of the assets and liabilities of the specialised investment fund”.

45. Vandebulke went on to explain that, although ‘treated’ as a “separate entity” for the purpose of relations between investors, this:-

“ ... does not mean a separate “legal entity”. Indeed the fact that each compartment will be treated as a separate entity does not mean that a compartment is a “legal entity by itself”. A “legal entity” is commonly defined as an individual, company, or organisation that has legal rights and obligations. A legal entity has legal existence and the capacity to act independently through its own statutory bodies. A legal person holds rights which allow it to carry out its activities.

On the contrary, a compartment has no legal personality, and, as such, no agreement may be signed by, nor can any action be brought against a compartment in isolation.”

46. In light of that evidence, the Judge found (at [44]):-

“44. The Sub-Fund has no contributories in that:

44.1 it has no shareholder members. As shown by the Articles, including Article 7, and as explained in VB1, the shareholders are shareholders of the Company and not of the Dedicated Funds, albeit that under the Law of 2007, for the purposes of the relations between investors, each Dedicated Fund is deemed to be a separate entity, in other words, treated as if it were a separate entity. VB1 explains, however, that this does not mean that the Dedicated Fund has a separate legal personality; in reality, all that it is, is merely “a pool of assets part of an umbrella structure.” ....”

47. In light of the expert evidence, the Judge was entitled to find that investors were not contributories to the Sub-Fund, whether as shareholder (an investor's shareholding being in the Fund) or, in the absence of applicable rules creating a liability to contribute to the Sub-Fund, as member of an association.

**Assets and liabilities of the Sub-Fund**

48. The Appellant also criticises the Judge for her finding (at [45]) that the Sub-Fund lacked capacity to enter into contractual relations, acquire legal rights or incur legal obligations or liabilities. Although the Judge acknowledged that it was not necessary for an entity to have its own separate legal personality to be wound up under s.220(1), she also noted that an unincorporated company or association does have such capacity, whether in its own right in the case of the former, or by its members, trustees or a management committee in the case of the latter. This too was a relevant factor to which she properly had regard.

49. In this context, the Appellant argued that the meaning of Article 6 and Section 10 of the OD was that the Sub-Fund could incur legal obligations in its own right. I also found this argument unpersuasive. On their terms, these provisions (reflecting Article 71(5) of the Law of 2007) say nothing more than that such recourse as an investor or creditor may have with respect to a Dedicated Fund is limited solely to its assets, not that the Dedicated Fund has itself incurred the corresponding liability for which recourse might be sought. Given the evidence in VB1 noted above, the Judge was again entitled to conclude on this second 'negative' aspect that the Sub-Fund did not itself incur such obligations.

50. Although addressed separately, the fourth 'negative' aspect (addressed at [47]) gives rise to related issues, the Judge concluding that the Sub-Fund did not itself own any assets and was not liable in the legal sense for any debts or liabilities of the Fund, the assets and liabilities within the Sub-Fund being those of the Fund, the segregation provisions relating to the Sub-Fund affording limited recourse to those assets. As to these points, the Appellant first said that, for investors and creditors to have recourse only against the assets of the Sub-Fund, the Sub-Fund must owe a liability. Again, this does not follow; the fact that recourse for a claim relating to a portfolio of assets is limited to those assets does not mean that the relevant portfolio (here the Sub-Fund) is itself liable for the underlying claim.

51. Moreover, based on the evidence in VB2 and the Elvinger opinion, the Judge concluded (at [53]) that:-

*“ ... a creditor whose rights of recovery are limited to the assets of a Dedicated Fund may only recover against it by suing the Company itself. If the creditor's action is*

*successful and it obtains judgment against the Company, it will then be entitled to enforce that judgment, but only against the assets of the Dedicated Fund.”*

52. The Appellant accepted in its skeleton argument for the appeal (at [36(4)(ii)]) that this was a fair reading of that evidence but went on to say that:-

*“[p]roperly understood the requirement in Luxembourg that the Fund must nominally be the defendant in any court proceedings in Luxembourg is a procedural device. The experts do not say that the Sub-Fund is not a party that is not liable.”*

53. Again, I found this point unpersuasive, not being supported by the related expert evidence in VB2 and the Elvinger opinion, and seemingly also inconsistent with the evidence already noted from VB1 as to the nature and status of the Fund and the Sub-Fund.

54. The Appellant also suggested that a liquidator appointed by this Court could take proceedings in Luxembourg in his own name to recover assets for the Sub-Fund or, even if that were not possible, issue proceedings in this or other jurisdictions where his status would be recognised. However, as the Judge said (at [55]), it was not explained *“how a liquidator could pursue a claim that related to assets allocated to the Sub-Fund, but which belonged to the [Fund].”*

55. Just as the Appellant did below, it also prayed in aid before me the joint statement to the effect that the name of the Fund could be ‘borrowed’ or, reflecting language which, as the experts appeared to agree, reduced misunderstanding, that the Sub-Fund “benefits from” or “takes” the legal personality of the Fund, in particular when it is sued as a defendant (through the Fund).” According to the Appellant, the position of a liquidator of the Sub-Fund was akin to that of a trustee acting for the benefit of the investors.

56. Contrary to the Appellant’s suggestion, the Judge did not ignore this language but she considered (at [49]-[53]) the full evidence which led to that distillation in the joint experts’ statement. Having done so, the Judge found (at [56]) that there were multiple problems with the Appellant’s analysis, including that: (i) the argument still failed to distinguish between the entity owning the assets (the Fund) and the limited recourse available to the relevant portfolio of assets (the Sub-Fund) (ii) a creditor with a right of recourse to those assets has to sue the entity legally obligated to them (the Fund) to be able to enforce against the assets within the Sub-Fund (iii) the same position would obtain if proceedings were to be brought for the recovery of assets, namely that a liquidator would not be entitled to sue in the name of the Sub-Fund, the liquidator having no authority to bring a claim on the Fund’s behalf unless authorised by its Board and (iv) the trust analogy was unsupported and inapposite in circumstances in which, under English law at least, it is the Fund (not the

investors) which is beneficially entitled to the assets. In light of the expert evidence as a whole, and in the absence of clearer exposition, those findings were again open to her.

**Winding-up of the Sub-Fund under Luxembourg law**

57. The Appellant also relied in its skeleton argument before me (as it did below) on the provisions in the Articles for the voluntary winding-up of the Sub-Fund (as permitted by Article 71(6) of the Law of 2007). In this regard, I agree with the Judge's observation (at [57]) to the effect that this provision seems to say, unremarkably, that the Fund has the power to liquidate assets within a Dedicated Fund and to distribute them to the relevant investors and creditors with rights of recourse to the proceeds of those assets. As such, I also agree that this does appear to advance the analysis of whether the Sub-Fund is an entity falling within the scope of s.220(1).
58. I also agree that the potential amenability of the Sub-Fund to judicial winding-up under the same law (Article 47(1)) when its regulatory authorisation has been refused or withdrawn does appear to indicate, to a limited extent at least, that the Sub-Fund is treated under Luxembourg law as a separate entity. However, I also agree that the availability of judicial liquidation in Luxembourg in these limited circumstances sheds little light on whether it should be amenable to being wound up under s.220(1).

**No Board of Directors of the Sub-Fund**

59. The Judge also noted (at [46]) the third so-called 'negative factor', namely that, on a compulsory winding-up, the powers of the directors of the relevant company or the management committee of an association will cease. In this case, however, the Sub-Fund has no such directors or committee since the management powers of the Fund are vested in its Board of Directors and extend to the whole of the Fund, including each Dedicated Fund. Accordingly, if the Sub-Fund were to be compulsorily wound up, the powers of the Fund's directors would continue, including to deal with its assets and liabilities forming part of the Sub-Fund, giving rise to the risk of conflict and interference with the performance of any duties of a liquidator appointed upon the winding-up of the Sub-Fund under s.220(1).
60. As to this, the Appellant accepts that the powers of the Fund's Board might well continue to be exercised in Luxembourg, at least until the winding-up order is recognised there, albeit they are said to be no bar to a winding-up order being made in this jurisdiction or to the liquidator acting and making recoveries in those jurisdictions where his authority is recognised. Moreover, the English Court would not only have jurisdiction over those exercising management powers in this jurisdiction, enabling, for example, a liquidator appointed by it to call for relevant information, property or books and records of the Sub-

Fund, but the liquidator would also have power to commence proceedings in his own capacity, for example under s.212 IA, to examine the conduct of those involved in the promotion or management of the Sub-Fund, not limited to directors.

61. On this basis, the Appellant submitted before me that the presence of directors was not a meaningful ‘negative’ indicia. I disagree. The Judge’s point was not that the liquidator would not be able to take certain steps, including (without her deciding the point) potentially under s.212. Her point was the risk of conflict between the exercise of the functions of the officers of the Fund and of any liquidator of the Sub-Fund. That risk is not illusory but potentially very real, not least when the Sub-Fund’s portfolio of assets is vested in the Fund as a matter of Luxembourg law. As such, the Judge was right to have regard to it in considering whether s.220(1) was engaged here.

**Conclusion on the engagement of s.220(1)**

62. Pulling together these various threads, although the Judge paid appropriate regard to Appellant’s suggested ‘positive’ factors, it was apparent from her analysis of the Articles, the OD and the expert evidence that some factors were articulated in rather stark terms and/or the significance the Appellant attaches to them is overstated. For example, the Appellant says that the Sub-Fund is a separate entity from the Fund. In fact, the expert evidence shows that the Sub-Fund comprises a portfolio of assets belonging to, and invested under the umbrella structure of, the Fund. To the extent that the Sub-Fund can properly be said to operate independently or is treated as a separate entity, that is primarily concerned with relations between investors and maintaining proper segregation between the different Dedicated Funds, the respective assets by which they are constituted and the liabilities allocated to them, as such segregation is reflected in the Fund’s Articles and OD.
63. Moreover, looking at some of the other ‘positive’ characteristics indicated by the authorities, although an investor’s interest in the Sub-Fund is transmissible, that is achieved through the transfer or other disposal of shares in the Fund in accordance with the Articles. Likewise, although the activities of the Sub-Fund are undertaken with a view to certain investment objectives and a profit, those activities are directed by the Fund, the allocation of certain assets and liabilities to individual sub-funds enabling the Fund to offer investors multiple investment strategies. In this regard, there was much to be said in my view for the Respondent’s submission that the Appellant prays in aid characteristics of the Fund to elevate the Sub-Fund to a status it does not enjoy in its own right.
64. The Judge was also right to have regard to the ‘negative’ factors she did, those matters being relevant to Parliament’s intention with respect to the engagement of s.220(1). As

noted, on the basis of the authorities, the absence of contributories to the Sub-Fund is a relevant matter. Significantly in my view, since the assets and liabilities associated with the Sub-Fund are those of the Fund, and not the Sub-Fund itself, I agree that it is difficult to see how the insolvency legislation would operate in relation to the collection of assets or the proving of debts or how proceedings could be brought in respect of such debts. Also important is the fact that the directors of the Fund would be operating concurrently with any liquidator appointed for the Sub-Fund, with the risk of conflict described.

65. Finally, the Judge's analysis of the characteristics of the Sub-Fund proceeded on the basis that she was wrong as to the (expanded) definition of unregistered company including (only) 'any association' or 'any company'. I have already expressed my agreement with her primary finding in that regard. Given the Appellant's acknowledgement below that the Sub-Fund was neither, it was not necessary for the Judge to consider that point further. As noted, matters were put on a different basis before me, with the Appellant saying that, although not required, the Sub-Fund was an association or, possibly, an unincorporated company. In my view, however, the Judge's analysis reveals that the Sub-Fund was neither, even on the broad view of those terms. Indeed, one of the Appellant's refrains before me was that the Court should look behind labels to consider the substance of the Sub-Fund by reference to its characteristics. Having done so, it was clear to me, as it was to the Judge, that, in substance, the Sub-Fund was a portfolio of assets comprised within the umbrella structure of the Fund. It was also clear that the investors were not shareholders or members of the Sub-Fund; they were shareholders of the Fund.
66. Based on the Judge's analysis and reasoning to this point, I therefore agree that the Sub-Fund was not an entity that Parliament reasonably intended to be wound up as an unregistered company and I would dismiss this ground of appeal. However, two further factors reinforce that conclusion.

**Risk Transformation Regulations 2017 ("RT Regs")**

67. First, the Appellant relied below on the RT Regulations which apply to "Protected Cell Companies" ("PCCs") as may be registered by the UK Financial Conduct Authority and which may themselves have one or more "cells". If cells (with their considerable similarities to the Sub-Fund) can be wound up under English law, the Appellant says that this supports its view that the Sub-Fund was an entity which the Court can find was one Parliament reasonably intended to be subject to compulsory winding-up under the Insolvency Act 1986.

68. Although the Appellant re-affirmed its view that the Sub-Fund was closely analogous to a cell of a PCC formed under the RT Regs, this point was not pressed with such vigour before me, perhaps because of the Respondent's counter-argument that RT Reg 166(1) permits a cell of a PCC to be wound up "*as if it were an unregistered company ...*", the deeming language ("*as if*") indicating that Parliament did not consider a cell of a PCC (or similar entity such as the Sub-Fund) to be an unregistered company.
69. Given the specific application of the RT Regs, I did not consider these arguments as powerful as that made by the Respondent based on Schedule 2, paragraph 2 to the RT Regs, setting out the extensive modifications required to UK insolvency legislation for it to apply to a cell of a PCC. This brings sharply into focus the many difficulties of seeking to apply that legislation to an entity analogous to the Sub-Fund, including some identified by the Judge and, in my view, it too casts doubt on whether Parliament could reasonably have intended such entities to fall within the scope of s.220(1).

#### **The amenability of the Fund to winding up**

70. The Appellant also argued that it could not petition the Fund since all the other Dedicated Funds would then have to be wound up as well, not limited to the Sub-Fund. Although the implications of a winding-up order with reach beyond those assets constituting the Sub-Fund might well be relevant to the exercise of its discretion, the Court clearly does have jurisdiction to wind up the Fund as an unregistered company under s.220(1) without many of the confounding factors described that would arise in the same context for the Sub-Fund. In my view, the availability of the Fund as a potential target for winding up in connection with the losses incurred by one of its sub-funds is another factor relevant to whether Parliament could reasonably have intended the Sub-Fund to fall within the scope of s.220(1), further supporting a negative conclusion here.

#### **Contingent creditor**

71. Since the appeal fails at the s.220(1) hurdle, it is not necessary for me to address the other jurisdictional point. Nevertheless, since it was argued before me, albeit much more briefly, I have considered this as well. This concerns whether the Appellant was a contingent creditor so as to engage s.124(1) IA, entitling it to present a winding-up petition. The Appellant argued below that, even though a shareholder of an English incorporated company would not, ordinarily, be regarded as a creditor of a company with *locus* to present a winding-up petition *qua* creditor, as a matter of Luxembourg law, shareholders of a fund such as the Sub-Fund can be elevated to the status of contingent creditor if it can be determined that the liquidation will result in profits after the liquidator had successfully

explored and pursued available claims. The Fund accepts that a contingent creditor has the standing to present a winding-up petition but disputes the Appellant's claim to be a contingent creditor, let alone of the Sub-Fund.

72. This issue too turned largely on the Luxembourg law evidence, as to which, Vanderbulke, Elvinger and Ogier all provide related opinions, as summarised in the Judgment (at [64]-[68]). As to whether an investor was, by reason of his investment, a *creditor* in a Dedicated Fund when it was trading, in liquidation or otherwise, Vanderbulke and Elvinger agreed in the joint statement (at [5.2.3]) that:-

- (i) an investor in a Dedicated Fund is a shareholder of the Fund from the subscription for shares until (and during) the liquidation of the Fund;
- (ii) during the lifetime of the Fund/ Dedicated Fund (including when in liquidation), investors may, at a certain time, acquire the status of creditors of the Fund when they happen to own a claim against the Fund which is certain and due;
- (iii) this occurs, for example, when a distribution of dividends to the shareholders has been approved and is payable or upon the issue by the Fund of a redemption confirmation, in respect of the shares redemption price, or upon the liquidation of the Dedicated Fund, if and once a distribution of a liquidation surplus has been decided/ declared in favour of shareholders;
- (iv) shareholders that have invested in a Dedicated Fund can be distributed the net assets of the Dedicated Fund pro-rata their shareholding in the assets of the Dedicated Fund once all creditors' claims linked to the Dedicated Fund have been settled. If there are no assets in the Dedicated Fund to distribute to shareholders, the shareholders remain as such but, lacking any assets, the right to claim any proceeds cannot be exercised over the Dedicated Fund.

73. Ogier opined not dissimilarly that an investor gains an enforceable right to recover payment of either the interim liquidation dividend or the portion of the liquidation balance allocated to it, as applicable, as soon as a decision to distribute a liquidation dividend is made by the liquidator or when a portion of the liquidation balance is assigned to an investor upon completion of the Dedicated Fund's liquidation process. As to whether an investor is treated as a *contingent* creditor before a liquidation surplus is available for distribution, Ogier further opined that:-

- (i) caselaw generally requires that an investor may be considered a creditor of the fund or a compartment thereof only when their claim is certain, liquid and due;
- (ii) this recognition occurs when an investor is entitled to receive funds as a result of a dividend distribution, or when a portion of the liquidation balance is allocated to a shareholder upon completion;
- (iii) an investor may be regarded as a contingent creditor prior to the distribution of any excess proceeds from the liquidation;
- (iv) this is particularly pertinent if the liquidation is anticipated to yield a profit (with assets exceeding liabilities) potentially granting the investor a share of the final liquidation balance, irrespective of whether this was reflected in the financial statements prior to liquidation;

- (v) in these circumstances, the investor is viewed as possessing a claim against the fund or a specific compartment thereof that is undergoing liquidation, which is considered highly probable;
- (vi) this status allows them to initiate legal proceedings as a contingent creditor;
- (vii) if demonstrated that the liquidation will result in profits and a particular investor is entitled to a predetermined portion of these profits, the same rationale should be employed;
- (viii) however, this depends on proving that the liquidator did not adequately explore or pursue the available claims on behalf of the relevant investor.

74. The Appellant submitted below that, based on Ogier’s report, a shareholder could be elevated to the position of contingent creditor if it could be determined that the liquidation would result in profits after the liquidator had successfully explored and pursued available claims. As to this, the Judge accepted that there had not yet been a sufficient explanation of the losses suffered by the Sub-Fund and of what had happened to the investments of £55m remaining in the Sub-Fund after the prior redemption had occurred. She also noted, consistent with prior judicial comment in this case, the absence of evidence concerning the losses sustained by the Sub-Fund. As such, the Court was in no position to conclude that there were no viable claims from which the Sub-Fund might benefit or that its winding-up was closed and that it had ceased to exist.

75. Nevertheless, based on the expert evidence, the Judge did not agree that it was sufficient for a shareholder to be regarded as a contingent creditor under Luxembourg law where it was not known whether or not there were any claims that could be pursued. She reached that view having regard to (i) Ogier’s opinion that a profit in the liquidation must be anticipated for a shareholder to be a contingent creditor (ii) the ordinary meaning of ‘anticipated’ (ie: that something was expected to happen) and (iii) Ogier’s further statement that, in these circumstances, a shareholder was viewed as possessing a claim against the fund or a specific compartment “*which is considered highly probable*”. Logically, this suggested that the prospect of a surplus being produced must also be highly probable. The final two sentences of Ogier’s opinion (summarised at [73](vii)-(viii) above) did not indicate any lesser stringency and fell to be read in that light.

76. The Appellant’s overarching submission in its skeleton argument for appeal was that the Judge’s conclusions were not, or not sufficiently, supported by the expert evidence and that she was, therefore, manifestly wrong in her related interpretation. As the Appellant put it in its skeleton argument for appeal, a fair reading of the expert evidence was that, until a liquidation surplus was anticipated, the Shareholder was a *prospective* contingent creditor, not that it did not enjoy contingent creditor status at all. In this regard, the Appellant also

emphasised before me the Judge's findings (at [75]-[78]) as to the insufficient explanation to date for the substantial losses experienced by the Sub-Fund. In circumstances in which the value of the assets within the Sub-Fund had inexplicably reduced from £55m to nil, there was ample basis to conclude that a properly conducted liquidation would have resulted in profits and to infer that the liquidator appointed to the Sub-Fund did not, therefore, adequately explore or pursue available claims.

77. Despite the Appellant's complaints about the conduct of the liquidation of the Sub-Fund, and that it may turn out that there are viable claims in respect of the significant losses experienced, there is no basis for me to conclude that the Judge fell into error in reaching the conclusions she did. To the contrary, it seems to me that the findings she made were perfectly open to her, not least given (i) what Ogier said about a creditor possessing a claim which is *highly probable* where liquidation was *anticipated* to yield a profit (ii) the same rationale applying if it can be *demonstrated* that the liquidation *will* result in profits and that a particular investor is *entitled* to a predetermined portion of those profits (iii) Ogier's articulation of the position not being the clearest (iv) the context being the circumstances in which an investor and shareholder (not a creditor in the usual sense) can nevertheless claim to be a contingent creditor and (v) the specific and limited circumstances in which, as was common ground between all the experts, an investor can be considered a creditor if a claim is *certain and due*.

#### **The Fund or Sub-Fund as creditor**

78. This brings me to the further jurisdictional aspect considered by the Judge, namely that, if the investors were (contrary to the Judge's finding) contingent creditors under Luxembourg law after all, whether they enjoyed that status in relation to the Fund or the Sub-Fund. The experts' joint statement spoke only of investors potentially being creditors of the Fund, whereas Ogier's opinion spoke of them potentially being creditors of both.
79. Since under the Articles and Luxembourg law, a shareholder is a shareholder of the Fund, with a right to a return of capital on redemption or winding-up (assuming a surplus) from the assets of the Sub-Fund in which its capital has been invested, those rights deriving from its status as a shareholder of the Fund, the Judge concluded (at [86]) that it was more likely than not that, if there is a surplus in the Sub-Fund on a winding-up or an anticipated surplus, a shareholder would be a creditor or contingent creditor of the Fund rather than of the Sub-Fund, albeit the Fund would have to distribute that surplus to the Sub-Fund's investors.
80. The Judge had well in mind Ogier's apparent view that an investor could be considered to be a creditor of the Sub-Fund. However, not least given the limited explanation afforded

by Ogier for that view, and the expert evidence as a whole, including that traversed earlier concerning the legal status of the Sub-Fund, not itself addressed by Ogier in this context, the Judge's decision on this aspect too was one reasonably open to her such that, again, there is no basis for me to re-visit her findings.

### **The Appellant's alternative position**

81. Finally, and not unrelated to the prior point, the Appellant argued that, even if their opinion can be read as the Judge found, Ogier were only referring to the status of a shareholder to initiate proceedings as a contingent creditor; they were not opining on English law or the necessary standing to present a winding-up petition. If the petitioner would otherwise be without remedy, some other injustice would result or there was some other sufficient reason for the petition, the English Court could still, albeit exceptionally, make a winding-up order. The Court had done just that where the petition debt had been disputed or where a foreign company had already been dissolved (see, for example, *In Re Russian & English Bank* [1932] 1 Ch 663; *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liq.)* [2008] BCC 371 at [9] and *Re GBI Investments Ltd* [2010] 2 BCLC 624 at [80]- [90]).
82. To the same end, the Appellant said that the English Court should make a winding-up order here even if the investors would not be able to establish their contingent creditor status to the satisfaction of applicable Luxembourg law or they too would be without effective remedy. Despite the Appellant's concerns about the conduct of the liquidation of the Sub-Fund, I also found this argument unpersuasive. There was scant evidence before me (or the Judge) concerning the adequacy or otherwise of available remedies to the Appellant, for example, as to the regulatory action that might have been pursued locally by the Appellant or steps that could be taken against the Fund itself and, therefore, no sound basis for me to say that such exceptional circumstances were present in this case.

### **Discretion**

83. Given that I have declined to interfere with the Judge's decision on the above jurisdictional aspects, no question of the exercise of the Court's discretion arises.

### **Conclusion**

84. For all the above reasons, I dismiss the appeal. I would ask the parties to seek to agree the form of draft order for my consideration. To the extent that any consequential matters cannot be resolved by agreement and/ or a hearing is required, this can be arranged through my clerk.