IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 84 of 2020

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)
AND IN THE MATTER OF DIVERSIFIED SETTLEMENTS FUND

Appearances:	**Mr. James Eldridge and Mr. Justin Naidu of Maples and Calder for the Petitioner**
	Mr. Christopher R. Parker Q.C. instructed by Mr. Richard Annette of Stuarts Law for the Respondent
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Hearing:	**30th June 2020**
Draft Judgment:	**12th October 2020**

HEADNOTE

Companies Law *- S. 92, 93, 94, 95 - Creditors Winding up Petition – Dispute on bona fide substantial grounds - Abuse of process.*

JUDGMENT

1. By Petition filed on the 5th May 2020, the Petitioner, Traded Life Policies Fund (In official Liquidation) (TLPF) seeks the winding up of the Company, Diversified Settlements Fund (DSF) and the appointment of Michael Penner and Michael Green of Deloitte as joint official liquidators. The application is made pursuant to s.92(e) of the ***Companies Law*** on the basis that it is just and equitable that DSF be wound up and, on the alternative basis, pursuant to s.92(d) of the Law, that it is unable to pay its debts.

2. In summary, the Petitioner's case is that DSF is indebted to it in the sum of at least $1,830,815.00, is insolvent and has failed to:

   i) Distribute its total net assets to the Petitioner, the Petitioner being so entitled by virtue of its being the sole economic stakeholder in DSF;
   ii) Repay loans made to it by the Petitioner;
   iii) Account for the transfer of the Petitioner's assets to DSF in connection with the Redemption of the Petitioner's shares in DSF in April 2016; and to
   iv) Keep proper books of accounts and to produce audited financial statements for the years 2015, 2016 and 2017 as is required by its Offering document.

3. Additionally, the Petitioner asserts that the conduct of DSF and its principals evidences the need for an immediate investigation by independent liquidators into its affairs for the benefit of innocent investors.

THE PETITION

4. The grounds for the Petition are stated to be:

i) The wishes of the sole economic stakeholder which include winding up so as to allow for a full investigation into the financial affairs of the Company in order to determine what has become of :

(a) The amount of $27,150,633 contributed and or loaned to DSF between 15th May 2014 and 24th June 2017, of which only $7,790,556 has been returned.

(b) The proceeds of the Fimberg Life Policy.

(c) The proceeds if any of the Alberta judgment.

ii) Loss of sub stratum, in that DSF has never operated in accordance with its Offering document and currently has no meaningful investment strategy or commercial purpose.

iii) Justifiable loss of trust and confidence in the management of DSF and the need to investigate DSF's affairs.

iv) DSF's inability to pay its debts following a formal demand for payment made on the 21st June 2018.

5. DSF opposes the Petition and, by Summons filed on the 18th June 2020, seeks an order that the Petition be struck out as an abuse of process or, in the alternative, be dismissed.

6. DSF, through its director, Jeremy Leach, states that there is in fact no indebtedness to the Petitioner and that the Petitioner is not a creditor of DSF. In response to the Petitioner's statutory demand dated 21st June 2018 which was served on DSF, DSF responded by letter dated 23rd July 2018 and indicated that it would seek injunctive relief as its view was that any winding up petition would be misconceived and would constitute an abuse of process.

7. The Petitioner has also filed a Writ of Summons dated 25th July 2019. Those proceedings are presently on going. DSF argues that many of the assertions raised in support of the basis that it is just and equitable that DSF be wound up are contested issues in the Writ action.

8. It is further asserted by DSF that now some almost two years later, the Petitioner without forewarning, and on the basis of a stale statutory demand, has determined to proceed with a winding up application. This at a time says Mr. Leach, when the defendants to the Writ action (being Mr. Leach and certain other entities) were engaged in a substantial discovery exercise. Mr. Leach gives his view that the Petition has been served as a way of diverting resources away for the Writ action and in order to seek an unfair advantage.

9. Additionally he and another witness on behalf of DSF state that despite the Petitioner agreeing by letter dated 13th July 2018 to give forewarning of 14 days prior to the presentation of the Petition, it failed to do so.

THE LAW

10. Section 92 of the *Companies Law* (2020 Revision) provides that a company may be wound up by the Court if *inter alia* the company is unable to pay its debts or the Court is of the opinion that it is just and equitable that the company should be wound up.

11. By s.93, a company shall be deemed to be unable to pay its debts if-

> *(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;*

(b) *execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or*

(c) *it is proved to the satisfaction of the Court that the company is unable to pay its debts.*

12. In the instant case the primary issue joined is whether the Petitioner has standing to bring this application. By s.94 of the Law, an application to the Court for the winding up of a company shall be by petition presented either by:

(a) *the company;*
(b) *any creditor or creditors (including any contingent or prospective creditor or creditors);*
(c) *any contributory or contributories; or*
(d) *subject to subsection (4), the Authority pursuant to the regulatory laws.*

13. Section 95 provides in part that:

(1) *"Upon hearing the winding up petition the Court may-*
(a) *dismiss the petition;*
(b) *adjourn the hearing conditionally or unconditionally;*
(c) *make a provisional order; or*
(d) *any other order that it thinks fit,*

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.

(2) *The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.*

APPLICABLE LEGAL PRINCIPLES

14. The parties have helpfully provided a significant number of authorities which set out the practical application of the relevant legal principles. There is agreement that the leading case

is ***In the Matter of GFN Corporation Limited.***[1] In that case, the Cayman Islands Court of Appeal (CICA) held that when hearing a petition based on a debt that is disputed, a court should first determine on a balance of probabilities the issue of whether the petitioner was in fact a creditor before making a winding up order on the basis of any applicable grounds. Petitions presented in circumstances where there is a *prima facie* disputed debt, would normally be dismissed or the proceedings stayed. If the Court doubts the *bona fides* of the dispute or if the Petitioner would otherwise be without a remedy, the Court would allow the petition to proceed. The effect of a number of relevant authorities was summarised in the following way:

> *(a) "A person with a good arguable case that a debt is due and owing to him from a company may present a petition to wind up as a "creditor" under s.96 of the Companies Law.*
>
> *(b) The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a bona fide and substantial dispute as to the existence of the debt upon which the petition is based.*
>
> *(c) In an appropriate case, however, the winding-up court can refuse to dismiss or stay the petition and can determine the question of a disputed debt in the petition itself.*
>
> *(d) Appropriate cases include those where the court doubts that the debt is actually disputed bona fide on substantial grounds, or where the creditor, if he established his debt, would otherwise lose his remedy altogether, or where other injustice might result.*
>
> *(e) Where the winding-up court decides to hear a petition based on a disputed debt, it will only make a winding-up order on the grounds that the company is unable to pay its debts or that it is just and equitable to wind up, having determined that the petitioner is, on a balance of probabilities, a creditor of the company.*
>
> *(f) The trilogy of Russian bank cases may constitute a single legitimate exception to para. (e) above. It is, however, beyond the scope of this judgment to express a concluded view on the correctness of those decisions."*

[1] 2009 CILR 650

15. The important principle discussed is that the Court cannot wind up a company at the behest of creditor without proof that his debt is, on a balance of probabilities, actually due and owing. The reasons for this were stated to be as follows:

> " *(a) it would be remarkable if the court were prepared to exercise a statutory jurisdiction to put into effect a process of collective execution against the assets of the company for the benefit of all the creditors at the behest of someone who had no legitimate interest in the affairs of the company;*
>
> *(b) since the legislature has laid down that only a creditor or contributory (or, in some cases, other specified persons) can present a petition to wind up, one would expect that creditor to establish his status before any final order is made at his instigation;*
>
> *(c) if it were to be held that a petitioning creditor could proceed to obtain a winding-up order without establishing his debt, companies would be at greater risk and have less protection from those wishing to damage them than the legislature can, it seems to me, have possibly intended; and*
>
> *(d) as I have shown, on a proper analysis, the authorities provide no significant support for the proposition that a winding-up order can be made without the petitioning creditor establishing his standing as a creditor."*

16. Given these reasons, the Court expressed the view that if a disputed debt was decided at the hearing of a petition, but a conclusion was reached that there was in fact no indebtedness to the petitioner, it would be inconceivable that the court would make a winding-up order at the request of that "non-creditor." This is so even where it is established that the company was insolvent, or that it was just and equitable that it be wound up. In such a case, the petitioner would not be a creditor with even a good and arguable case and any *"provisional standing would have been invalidated."*

17. In ***Parmalat Capital Finance Ltd. and Others v. Food Holdings Ltd (in Liquidation), Dairy Holdings Ltd. (in Liquidation)***[2] the Board stated the general principle as follows:-

[2] 2008 UKPC 23, paragraph 9

> *"The next question is whether the debt is disputed. If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute: see, for example, Brinds Ltd v Offshore Oil NL (1986) 2 BCC 98,916. But the Board does not find it necessary to examine the limits of the discretion because they consider that there is no substantial dispute."*

18. The fact of the issuance of a Writ which may bear upon the question raised in a creditor's petition is not a barrier to a company's court considering whether or not there is a *bona fide* dispute on substantial grounds. In ***Re Welsh Brick Industries, Ltd.***[3], a petition for winding up was presented almost two months after the petitioner had issued a writ for receipt of certain sums. The respondent company had subsequently been given unconditional leave to defend. The English Court of Appeal held that notwithstanding the grant of unconditional leave to defend, the court, on the hearing of the winding up petition, was not precluded from inquiring into the evidence and determining whether or not there was a *bona fide* dispute.

19. Much will turn on the nature of the dispute. Counsel on behalf of DSF submitted that the dispute in the instant case cannot be resolved by this Court without there being cross examination of Mr. Leach and that the Court is ill equipped to deal with any findings of breach of fiduciary duty on the hearing of a winding up petition.

20. In ***Tallington Lakes Limited and Another v. Ancasta Int. Boat Sales Limited***[4], the Applicant sought permission to appeal against the striking out of its winding up petition. The Appellate Court identified the practical issue as being "*the extent to which the court*

[3] 1946 2 ALLE.R. 197
[4] 2012 EWCA Civ. 1712

must go in determining whether there is a genuine dispute on substantial grounds"[5] The Court stated that while the court must, take a view as to whether, "on the evidence, there really is substance in the dispute. It is not, practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side."

21. In the case of ***Re Rochdale Drinks Distributors Limited, Comr of the Revenue and Rochdale Drinks***[6], the English Court of Appeal stated the well settled rule of practice and the practical issues surrounding this in the following way:-

> *"A well-settled rule of practice, which has long been familiar to users of the court's winding up jurisdiction, is that a debt that is wholly disputed on substantial grounds cannot ordinarily found the basis for the making of a winding up order. A petition based on a debt shown to be the subject of such a substantial dispute will ordinarily be dismissed. Perhaps more commonly, any such dispute as to the petition debt will be likely to provoke an early application by the company to restrain the advertisement of the petition and a successful application to that effect will be likely to result in the removal of the petition from the file (or, more colloquially, its striking out). In the present case, RDD's application of 18 March 2011 sought no such striking out: it sought no more than the discharge of the appointment of the provisional liquidator.*
>
> *It perhaps hardly needs to be said that the rule does not, however, entitle a company to do no more than assert that it disputes the debt and then expect the petition to be struck out or, if the hearing is the substantive one, dismissed. It is not sufficient for the company merely to raise a cloud of objections. It has, in the old-fashioned phrase, to condescend to particulars by properly explaining the basis of the claimed dispute and showing that it is a substantial one. If, despite the company's protestations, the alleged dispute can be seen on the papers to be no dispute at all, or to be no dispute as to part of the debt, the petition will ordinarily be allowed to proceed. If, however, the dispute is shown to be one whose resolution will require the sort of investigation that is normally within the province of a conventional trial, the settled practice is for the petition to be struck out or dismissed so that the parties can contest their differences before whichever other forum may be appropriate.*
> *In the present case, having reviewed the disputed trades, the judge concluded that whilst HMRC had shown an arguable, perhaps a good*

[5] Paragraph 41
[6] [2011] EWCA Civ 1116

> *arguable, case that in relation to some of the traders the (or some of the) supplies had not taken place, he was unable to conclude that the evidence was so strong as to show that there was no genuine or substantial issue to be tried as to whether the trade had actually occurred. He said that 'allegations of this seriousness, of forgery and fraud, have to be established to a high standard'. In his view those issues had to be tried in an appropriate forum, namely the Tax Chamber of the First-tier Tribunal; and it was wrong to use such a claim as the basis for the continued appointment of a provisional liquidator. He then considered whether a good prima facie case for a winding-up order was made out and came to the conclusion that it was not.*[7]"

22. This case is approached with these principles in mind.

THE EVIDENCE

23. The material before the Court consisted of the First Affidavit of Michael Green[8], the First and Second Affidavits of Michael Penner[9], the First and Second Affidavits of Jeremy Leach[10], the First Affidavit of Allison G. Kuntz,[11] the First Affidavit of Ogonna M. Brown[12] and the First Affidavit of Richard T.W. Annette[13].

THE BACKGROUND

24. The Petitioner was incorporated in the Cayman Islands on the 11th November 2010. It was registered with the Cayman Islands Monetary Authority as a mutual fund. By its Offering document dated September 2015, its stated purpose was to carry on the business of investing in Traded Life Polices or companies that invested in Traded Life Policies. On the 28th June 2017, by resolution of the sole voting shareholder, the Petitioner was placed into voluntary

[7] Paragraphs 79 and 80
[8] Dated 29th April 2020
[9] Dated 4th May and 12th June 2020
[10] Dated 1st and 19th June 2020
[11] Dated 5th June 2020
[12] Dated 5th June 2020
[13] Dated 19th June 2020

liquidation. By order of the Court made on the 21st July 2017, joint voluntary liquidators Michael Penner and Stuart Sysberma were appointed as Joint Official Liquidators ("JOLs").

25. DSF is a Cayman Islands company which was incorporated on the 22nd October 2008 as an exempted company which was limited by shares. DSF's investment process and methodology as described in its Offering document is to purchase life policies or portfolios of life policies to give maximum returns to the Fund's shareholders.[14]

26. The Petitioner claims that it is the sole economic stakeholder of DSL by virtue, it says, of the fact that it was the holder of record of all of the issued participating shares in DSF until April 2016 when those shares were redeemed ("The Redemption").

27. The Petitioner details a number of transactions between itself and DSF by which it says it is owed significant amounts of money. It is not disputed that during the course of its operations, there was a symbiotic inter- relationship between the Petitioner and DSF and a number of entities. At all material times the Petitioner, DSF and all the other parties to the transactions in question were part of a group of entities which were in some way controlled and/or operated by Mr. Jeremy Leach. He was responsible for engaging the Petitioner's professional service providers, including its Investment Manager, Investment Adviser, and its Administrator. The Petitioner's Offering document identified its directors to be William McClintock, acting in a non-executive capacity and Jeremy Leach in an executive captivity by virtue of the fact that he was also an executive director of the Manager and the Investment Adviser.[15]

[14] Page 28 of DSF Offering document
[15] Petitioner's Offering document, Page 133 of the hearing bundle

28. The Investment Manager of the Petitioner was another Cayman Islands Company, Managing Partners Limited (MPL). MPL was also the Investment Manager to DSF and the sole holder of its management shares. MPL is a company incorporated in the Cayman Islands. It was owned by the Mandrake Trust of which Mr. Leach is a beneficiary.

29. The Investment Advisor to both the Petitioner and DSF was MPL Asset Management SA (MPL AM). This is a company incorporated in Switzerland. It is also indirectly owned by the Mandrake Trust.

30. Taurus Administration Services S.L. (Taurus) is a company incorporated in Spain. In 2015 it was appointed as Administrator of the Petitioner and DSF following the resignation of the original Administrator, Apex Funds Services Ltd. (Apex). Taurus was owned jointly by Mr. Leach and his business associate Nicholas Calleja.

31. Thus prior to the appointment of the JOLs, the Petitioner and DSF had Mr. Leach as a common sole executive director. The two companies had a common Investment Manager, MPL, Investment Advisor, MPL AM and common Administrator, Taurus all of which entities were in some way under the control directly or indirectly of Mr. Leach.

32. By Article 23 of the Articles of DSF, Mr. Leach, as a director, was granted the power to manage the company and was thereby responsible for reviewing and signing off on each of its Offering documents. He was also part of DSF's Investment Strategy committee which was to convene monthly to review the current assets of the Fund and to specify the appropriate buying criteria. He negotiated the level of fees payable by DSF to its service providers and determined the amounts to be reimbursed to MPL.

33. The Petitioner points to the substantial fees paid to these administrative entities over the years and what it says was an absence of independent oversight in respect of the affairs of DSF.

34. The Petitioner states that as the sole executive director of the Petitioner, Mr. Leach was its guiding mind and in control from the inception of its management and affairs.[16] In his capacity as sole executive director, he was also part of the Investment Strategy committee which was to be convened on a monthly basis to review *inter alia* liquidity positions. He was also principally responsible for determining the methods by which the Petitioner's net and gross asset values were calculated. ("NAV" and "GAV").[17]

35. Mr. Leach in response to this suggestion of absence of independent oversight refers to his then co-director Mr. William McClintock and to Mr. McClintock's more than twenty years' experience in the management of Traded Life Policy assets. He asserts that Mr. McClintock was appointed as a non-executive director of the Petitioner specifically in order to provide independent oversight of the business. He points to the fact that there were other directors in respect of some of the named related entities. It is his view that a settlement agreement reached by the JOLs with Mr. McClintock which has removed him from the Writ action seems to have been done with a view to exaggerating his own role as being in control of the management and affairs of the Petitioner and of being its guiding mind.

[16] Page 19 of the Petitioners Offering document, page 133 of Exhibit MP 1
[17] Page 33 of the Petitioner's Offering document, page 147 of Exhibit MP 1

36. Mr. Leach rejects the assertion of the JOLs that the appointment of Taurus was a red flag because of his connection to it and states that it is not uncommon that fund administration and fund management companies are part of the same group or under common ownership.

INITIAL FORMATION OF THE PETITIONER

37. The Petitioner was set up as a phoenix fund to Traded Polices Fund ("TPF"). This was another company which had been set up and controlled and managed by Mr. Leach.

38. The evidence of Mr. Penner is that on or around the 29th November 2013, purportedly all of TPF's assets, consisting of a portfolio of 187 life policies and cash of US $119,082.00 were transferred to the Petitioner in exchange for approximately 1.3 million non-voting participating shares in the Petitioner. TPF investors who did not elect to redeem their shares in exchange for shares or bonds in the Petitioner nevertheless had their shares compulsorily exchanged for shares or bonds in the Petitioner. The Petitioner thus acquired substantially all its assets and investors from TPF. This included some 59,003 participating shares in DSF. Either in 2013 or subsequently in June 2014, the Petitioner also acquired shares held in DSF which had been previously held by another entity of which Mr. Leach was a director, Praesidium Investment Fund (PIF).

39. Pursuant to a Prospectus dated November 2013, the Petitioner issued two series of bonds with maturity periods of five years and one year. The Series 1 Bonds had a maturity price of 133 % of the original issue price and the Series 2 Bonds had a yield of 5 % per annum.

40. Mr. Penner states that from 2015, Mr. Leach must have been aware of the insolvency of the Petitioner given that:

i) On 11th May 2015, an independent actuary firm, Oliver Wyman concluded, following a review of the valuation of the Petitioner's life policy assets that the discount rate applied to its Life Policies was significantly lower than market rates and that when the market rate was used the value of the Fund would reduce by 46-55 %.

ii) Policies were marked at high values (values ascribed by MPL for the purpose of calculating the GAV), and correspondingly they generated high fees for the Petitioner's Investment Manager and other professional service providers. However when they were sold on the market they sold at prices significantly lower than the prices ascribed to them.

iii) On the 8th July 2015, the former administrator Apex, wrote to MPL raising the concerns of investors as to the valuations of the policies and the sale of policies at below valuations in order to meet premiums, management fees and fund costs.

iv) The Petitioner's auditors, Kinetic Partners Cayman LLP in respect of the audit of the Petitioner's 2014 financial statements concluded that the Petitioner's liabilities exceeded its assets and that there were was insufficient evidence to support the director's valuations of the Life Policies and included a disclaimer of opinion. The audit report for the year ending 15th November 2015 contained an adverse opinion.

41. The response of Mr. Leach to the JOLs was that the Petitioner was not insolvent as the maturity dates of the Bonds could be extended under the Petitioner's constitutional documents. The JOLs' view is that he must have been aware from the inception of the Petitioner that the Petitioner would be unable to pay its debts when they fell due yet he

continued to keep the Fund operational and to incur what they say were artificially inflated fees to its service providers.

42. On 21st October 2016, Mr. Leach sent an email to investors indicating the intention to appoint an advisor to advise as to the best options for liquidating the Fund and to work diligently to wind up its affairs as soon as possible.

43. For six months thereafter and before MPL passed a written resolution appointing the JVLs, the Fund remained in operation. One Bond holder was advised as late as January 2017 of the further extension of the maturity dates of his Bond.[18]

44. Mr. Penner states that following a review of matters, the JOLs have filed a writ action against Mr. Leach and entities controlled by him including, MPL, MPLAM and Taurus for possible breaches of fiduciary duties and other claims. They consider that DSF might have similar claims against Mr. Leach and his related companies. Mr. Penner states:

> *"This petition is intended in part, to enable the JOLs to investigate and if considered appropriate, pursue such claims for the benefit of the ultimate economic stakeholders of the Petitioner and DSF (who are one and the same, considering that the Petitioner is the sole economic stakeholder in DSF)".*

[18] Page 462 of MP-1

APEX FUND SERVICES

45. By notice given on the 11th August 2015, Apex resigned from its position as Administrator of DSF. In a letter to the Cayman Islands Monetary Authority dated 11th September 2015[19] Apex stated:

> *"Apex Fund Services Ltd has elected to resign because of a number of concerns relating to the operation of the fund which have been raised by Apex to the directors of the above funds which we feel have not been adequately addressed.*
> *These concerns include but are not limited to the investment strategy of the fund as currently executed by the appointed investment manager and the valuation policies of the fund as currently applied under the direction of the funds directors who we do not believe to be acting independently of the management company. The Management Company is currently Managing Partners Limited, Cayman Financial Center, P.O., Box 2510, KY1-1104, Grand Cayman, Cayman Islands.*
> *It is our Apex's opinion that the continuation of the fund is (a) (Sic) largely to the benefit of the investment management company and to the detriment of the funds' investors and we therefore believe the best course of action is to resign and notify CIMA of our concerns."*

SOLE ECONOMIC STAKEHOLDER

46. The Petitioner's claim that it is the sole economic stakeholder in DSF is said to be based on the fact that it was the holder of record of all of the issued participating shares in DSF until April 2016.

[19] Exhibit MP-1 page 277-278

47. By its Articles, DSF is authorised to issue two types of shares. Management shares which are non-participating voting shares[20] and which carried with them no economic interest in DSF. The second type is participating non-voting shares. The latter are entitled to participate in the surplus assets of DSF after the payment of all creditors and the return of the par value of the management shares to the holders thereof.[21] MPL was the sole holder of all of the management shares.

48. Mr. Leach's evidence is that by default, the Petitioner was the sole investor in DSF, and that DSF became a subsidiary of the Petitioner. While it was intended that DSF would also receive subscriptions from other non-related party investors, none materialised.[22] He says however that it is not correct that the Petitioner has been the only holder of participating shares in DSF since 2014.

49. He avers that given the effect of the Redemption which would have left DSF with no participating shareholders, on the 29th January 2016, the Directors of MPL, (himself and Mr. Calleja) passed a resolution resolving that MPL would subscribe US$5,000.00 into DSF's USD Growth shares. This was to be as at the October 2015 dealing date but this was delayed. MPL paid the funds on the 7th April 2016 prior to the Redemption. This was processed with an effective dealing date of 13th November 2015. MPL made a further subscription of US$10,000.00 in November 2017. This was in order that DSF would have the liquidity to issue payments to service providers.

[20] Article 17
[21] Article 18
[22] Paragraphs 20 and 21 of First Affidavit of Jeremy Leach.

POLICY EXCHANGE

50. On or about the 30th May 2014, the directors of the Petitioner produced a written exchange resolution, pursuant to which, the Petitioner transferred a portfolio of 30 Life Policies to DSF. These had a marked value of US $10,268,299.00. DSF transferred a portfolio of six Life Policies to the Petitioner with a marked value of US $16,505,592.00.

51. The written reason for the transfer was to positively adjust the net asset value of the Company which positive balance would offset part of the losses brought about by recent policy sales.

52. The JOLs say that there appeared to be no possible commercially legitimate explanation for the policy exchange. The six polices which the Petitioner received were realised for only 26.71% of the marked value, US $4,408,096.00.

THE REDEMPTION

53. In December 2015 the Petitioner requested Redemption of its shares in DSF. Mr. Penner states that it is understood from correspondence with DSF and MPL that by this time, the directors of both entities had lost confidence that DSF would receive needed subscriptions from new investors.

54. By Written Resolution dated 19th April 2016, the directors of DSF (Mr. Leach and Mr. McClintock) resolved that the Redemption of the Petitioner's Shares be settled by way of an in kind transfer of 13 Life Policies as listed in an attached schedule[23] and that the effective date of the Redemption would be six months earlier on the October 2015 dealing date.[24]

[23] Page 547 of Exhibit MP-1
[24] Page 545 of Exhibit MP-1

55. The Preamble to these two Resolutions stated *inter alia*:

> *"It was noted that 100% of the participating shares if the Company (the Shares) are owned by Traded Life Polices Fund, (TLPF") and that TLPF had submitted a redemption request to redeem its full holding of the Shares. It was also noted that the Company did not currently have sufficient liquidity available to fully satisfy the redemption with a cash settlement payment."*

56. Included in the list of 13 policies to be transferred was policy number 70877001 in respect of a Mr. Fimberg. This policy was not received by the Petitioner.

57. Also included in the list was policy number 7472463 in the name of a Mr. Halfon. Mr. Penner refers to this policy as one example of the "round robin" of Life Policies that often occurred between entities controlled by Mr. Leach. This had been acquired by DSF in July 2015 from another entity associated with or controlled by Mr. Leach for US$600,000.00. In October 2015, the directors of DSF remarked the policy as being of a value of US$4,853,121.00. This was the stated value on transfer to the Petitioner. The Petitioner sold this policy for US$157,000.00 as part of an arm's length sale.

58. The Petitioner sold 10 of the 12 policies received for a price of US$3,382,460.00 significantly below the marked value ascribed to the policies.

59. With respect to the valuation of policies of which criticism is made by the JOLs, Mr. Leach highlights the response made in the filed Defence to the Writ action. He asserts that the Life Policies were valued by a third party (Eagle Alliance Limited), using standard industry software with a discount rate of 2.5 % and that the Directors of the Petitioner acted in good

faith and applied a *"mark to model"* valuation methodology which is commonly used in the industry.

60. He adds that the Petitioners' Offering Memorandum distinguished between the carrying value and the potential realisable value of a Traded Life Policy. The latter was stated to have the possibility of a lower value than the prevailing value. In summary, policies sold before their maturity dates have the potential for attracting deep discounts from their fixed maturity values.

61. Between May 2014 and the Redemption date of April 2016, the Petitioner contributed to DSF US$8,423.000.00 in cash and 45 life policies with a combined marked value of US$18,269,818.00. The total contribution was $27,150,633.00. The amount returned in kind was $7,790,556.00. The Petitioner complains that despite having contributed the cash amount to DSF, it did not receive any cash proceeds or any other non-cash assets and did not receive back the remainder of the 30 life policies previously transferred.

62. Mr. Penner states that the effect of this is that despite being the sole economic stakeholder of DSF, only some of DSF's asset were transferred to it and that it should have received all of its surplus assets.

THE ALBERTA JUDGMENT

63. In July 2013, DSF commenced a claim in Alberta, Canada against certain defendants.[25] This sought to recover US$5,150,775. This amount had been paid by DSF to the defendants pursuant to a purchase agreement dated 24th August 2012 as part of an exchange for an

[25] Q life Corporation c.o.b., William R. Lenhard, William R. Lenhard as Trustee of ZWG Trust, The ZWG Trust (together with QLife and William R.Lenhard, American Insurance Marketing Corporation and Brent Spyksma

interest in a group life insurance policy. The Petitioner paid DSF's legal fees in respect of this claim through to the 24th June 2017.

64. DSF received judgment in its favour on the 25th May 2018 in the sum of US$5,150,775.00 together with pre-judgment interest and costs. MPL has advised the Petitioner that it does not agree that the Petitioner is entitled to any interest in the judgment.

65. Mr. Leach states that the Alberta claim was not thought to be of any value and therefore it was left out of the equation for the purpose of in-kind redemption. Nevertheless the claim was pursued and judgment obtained on the 9th May 2018. DSF is now seeking to enforce the judgment. Enforcement efforts have been exhausted in Canada and are ongoing in the United States. The principal defendant in that matter has filed for bankruptcy in Nevada. Mr. Leach maintains that the possibility of recovery seems doubtful. DSF has indicated that it will provide 15 days' notice to the JOLs if any proceeds from the claim are received or if its position on notice changes.

ALLEGED OUTSTANDING DEBTS

66. The Petition specifies the debts outstanding as being the proceeds of the unreceived Fimberg policy of US$400,000.00, an amount of US$23,000.00 paid by the Petitioner to DSF on the 16th March 2016 which it describes as a loan, advances totaling US $457,815.00 and New Subscriptions of US $950,000.00.

THE PROCEEDS OF THE FIMBERG POLICY

67. Despite being listed in April 2016 in the list of in kind assets to be received by the Petitioner on the Redemption, this policy had been sold by DSF two months earlier on the 27th January

2016 for US$400,000.00. The proceeds were received by DSF on the 23rd February 2016. The Petitioner did not receive any of the proceeds of the sale.

68. It is not agreed that this is a debt due to the Petitioner from DSF. The response of MPL to the JOLs made on the 10th January 2018 on behalf of DSF was that the Redemption arrangements entitled the Petitioner to receive assets owned by DSF and not cash. It was further stated that between the time of the sale and the Redemption resolution in April 2016, the proceeds were required to meet DSF's expenses and also premium costs in respect of Life Policies which were to be transferred to the Petitioner following the Redemption and the Petitioner would have benefitted from this.

69. Mr. Leach in his First Affidavit states that the inclusion of the Fimberg policy in the schedule to the 19th April 2016 Resolution was an error. As the policy had already been sold, it was not possible for DSF to transfer it to the Petitioner as part of the Redemption. He states further that the use of the funds in the manner described above was consistent with the terms of an agreement reached on the Redemption which will be detailed below.

70. Counsel on behalf of the Petitioner in his submissions points to the nature of some of the expenses which were said to have been paid with the proceeds of the Fimberg policy. These included a subscription fee of $35,000.00 charged by MPL to DSF in respect of an October 2015 subscription made by the Petitioner and also management fees charged by MPL to DSF for November 2015, being a percentage of the gross asset value of DSF.

71. Counsel on behalf of DSF submits that the fact that the policy was sold after the effective date of the Redemption does not impact upon the position that the sale proceeds had been received in February 2016 and used to defray DSF's liabilities to include policy premiums and other expenses.

THE MARCH 2016 LOAN

72. The JOLs assert that a review of the books of the Petitioner shows that on the 16th March 2016, the Petitioner made a loan to DSF of US$23,000.00. This is listed in the November 2016 NAV pack of the Petitioner as a receivable from DSF.[26] No formal documentation has been identified which shows the purpose or terms of this alleged loan.

73. In a 7th February 2018, response to the JOLs, DSF asserted that the March 2016 loan was used to pay the premium on a life policy which was thereafter transferred to the Petitioner about a month later and that the Petitioner therefore benefitted from the payment.

74. The JOLs say that even if this is the true nature of the payment it would still be an undocumented loan payable on demand.

75. Mr. Leach accepts that there was initial confusion about what DSF used this money for. While the JOLs had initially been advised that these funds had been used for the payment of premiums due on other DSF Traded Life Policies, it was subsequently confirmed that the monies were used in respect of a policy premium payment on the Weiss policy which was one of the policies subsequently transferred to the Petitioner.

He states:-

[26] Page 592-672 of Exhibit MP1

"It is a correct that the US$23,000.00 was recorded as a receivable in the petitioner's books, this was acknowledged by MPL as early as 9th January 2018 by e-mail to the JOLS ....this is no more than an accounting entry and MPL investigated this and subsequently reported that it was an administrative mistake."

76. He also says that premium risk had passed to the Petitioner given the imminent transfer of all of DSF's life policies to the Petitioner. It was necessary therefore to ensure that the policies did not lapse. There was no agreement or expectation that DSF would repay any such policy premium payments.

77. Counsel on behalf of DSF submits that the Petitioner would have directly benefitted by the policy not lapsing and being transferred to it in April 2016.

THE DSF ADVANCES

78. After the Redemption in April 2016 which was affective as at October 2015, between 30th March 2016 and 24th June 2017 the Petitioner made 49 payments totaling US $457,815.00 on behalf of DSF. These were for various fees to include DSF management, advisory, and directors' fees as well as legal fees in connection with the Alberta claim. According to Mr. Penner, a documentary analysis shows that the invoices and services relate to obligations of DSF after the Redemption date and at a time when the Petitioner was no longer a shareholder of DSF.

79. Mr. Penner points to these payments as being consistent with the fact that the Petitioner continued to be DSF's sole economic stakeholder who continued to fund the ongoing operating expenses of DSF even after the Redemption.

80. The payments included:

i) A Fimberg disposal fee which appears to be a policy movement fee that was charged twice by MPL to DSF.

ii) Administration fees charged by Taurus to DSF in 2016 and 2017.

iii) Fees charged by Mr. Leach to DSF in respect of two invoices dated, 4th September 2015, and others dated 18th November 2015, 12th February 2016 and 25th May 2016. The May invoice has the description, "directors fees for period 01.04.16 to 30.06.16 with a due date of 30th June 2016.[27]

iv) Directors' fees charged by Mr. Leach to DSF in respect of two invoices dated, 15th February 2017, (for 3rd and 4th Quarter of 2016), and one invoice dated 3rd April 2017 (for Quarter 1 of 2017).[28]

81. It is contended by the Petitioner that all of the loans pertaining to these advances are undocumented and are therefore payable on demand.

82. Mr. Leach on behalf of DSF accepts that these payments were made by the Petitioner with the exception of one payment made on the 27th September 2016 in the sum of US$ 38, 612.00. However it is not accepted that any part of these amounts constitute a debt owing to the Petitioner.

[27] Second Affidavit of Michael Penner, paragraph 40. Exhibits MP1 – pages 684 to 687
[28] Second Affidavit of Michael Penner, paragraph 40. Exhibits MP1 – pages 801 to 802 and 807

83. In response to this and to a number of the claimed debts, Mr. Leach asserts that in tandem with the April 2016 resolution, there was an unwritten agreement between the Petitioner and DSF that the Petitioner as the sole participating shareholder would cover any liabilities of DSF given the transfer of DSF's Traded Life Policies to the Petitioner. The transfer meant that DSF would no longer have the ability to profit from maturity proceeds and would not have the resources to cover liabilities. It had accrued expenses and costs to service providers. Thus he says that it was an integral part of the DSF Redemption Agreement that the Petitioner would cover any liabilities of DSF. He says that while the Redemption was properly approved by way of board resolutions, no written agreement was created to record the terms of the Redemption. This is the defence which is relied on as part of the Writ action.

84. He states that from the point of the decision being made and the finalisation of the process there was a four-month time lapse between December 2015 and the resolution date of April 2016. This was mainly due to the change in Administrators and the need to await the calculation of the Petitioner's NAV.

85. Mr. Leach states:

> *"Given that DSF's entire portfolio was being transferred to the Petitioner DSF no longer had the prospect of any further... there was no other source for such costs to be satisfied."*
>
> *"..... As had been anticipated, the amount of cash DSF retained was not sufficient to settle all liabilities and so the Petitioner thereafter settled DSF debts, which are now in part the subject of the Petition."*

86. To this specific item of the claim, Mr. Leach states that the Petitioner settled certain premiums on behalf of DSF in early 2016 and that "*any payments were made pursuant to and or in contemplation of the agreement referenced and in order to preserve the Petitioner's investment in DSF pending the transfer of the portfolio of Life Policies*". His account is that these payments were neither loans nor advances, they were payments made in accordance with the agreed redemption terms and there was no agreement or expectation that DSF would repay these amounts. He argues that the position which is being adopted by the Petitioner is that it was entitled to more than the net assets of DSF, to all its assets and at the same time complain that DSF had no assets from which to pay its debts to the Petitioner.

87. Counsel on behalf of the Petitioner in written submissions asks that the Court consider the nature of the invoices which were paid as part of these advances. They included:-

i) Disposal fees charged twice by MPL in the amount of $20,000. (Mr. Leach has accepted that the duplicate payment is an error and arrangements have been made for this to be repaid to the Petitioner).
ii) Administration fees charged by Taurus in 2016 and 2017.
iii) Legal fees in respect of the Alberta claim up until 24th June 2017, which was by then 18 months after the effective date of the Redemption.[29]

88. Counsel submits that separate from the question of what was left for Taurus to administer, there could be no legitimate reason for the Petitioner to be continuing to pay for the ongoing operational costs of DSF or in respect of the fees paid to Mr. Leach personally, or as to why the Petitioner should

29 First Affidavit of Michael Penner, paragraph 85

be continuing to pay for ongoing operational expenses of a company in which it no longer had an economic interest.

89. Counsel for DSF submits that these advances were made in accordance with the DSF Redemption terms and that the Petitioner had an obligation to make these payments. He submits that "they were the price for its receiving all the assets of DSF in kind."

THE NEW SUBSCRIPTIONS

90. Between 15th May 2014 and 17th November 2015, the Petitioner made 11 cash subscriptions for participating shares in DSF in the sum of US $8,400,000.00:

	Date	Amount US $
1	15th May 2014	2,800,000.00
2	22nd May 2014	2,000,000.00
3	28th August 2014	500,000.00
4	14th October 2014	200,000.00
5	14th November 2014	350,000.00
6	17th March 2015	100,000.00
7	13th April 2015	250,000.00
8	25th July 2015	1,000,000.00
9	17th August 2015	250,000.00
10	23rd October 2015	700,000.00
11	17th November 2015	250,000.00

91. These included two made after the date of purported redemption - US$700,000.00 on or about the 23rd October 2015 and US$250,000.00 on or about the 17th November 2015, (together the New Subscriptions). The Petitioner did not receive any additional participating shares in DSF.

92. Mr. Leach does not dispute that DSF received these amounts but states that at the time they were paid the DSF Redemption had not yet been agreed. His evidence is that these payments

were primarily used to provide liquidity to DSF to pay life policy premiums and operational costs so that DSF's policy portfolio could be preserved. He does not agree that the Petitioner is entitled to any repayment in respect of these subscriptions. He seeks to explain that additional shares were not issued to the Petitioner because of the timing of the payments and the subsequent agreement that the shares were to be redeemed. Given the imminent redemption, issuing new shares would have had no meaningful benefit. He refers to the written resolution of 19th April 2016 which states that the TLPF owned 100% of the participating shares of DSF and had submitted a redemption request to redeem its full holding of the shares. He argues that the Petitioner cannot sensibly expect, having received all the assets of DSF to leave it with a liability to repay these monies.

93. Counsel on behalf of the Petitioner submits that the explanation provided by Mr. Leach does not make sense. There would he argues have been no point to the Petitioner making new cash subscriptions if the Petitioner's participating shares were almost immediately to be redeemed. He submits further that the operational costs defrayed included:

i) A policy movement fee in the sum of $30,000.00 charged by MPL in respect of the Halfon Policy, for moving it from one entity that Mr. Leach controlled (Augury Hedge Fund) to another.

ii) Two subscription fees charged by MPL to DSF in respect of cash subscriptions made by the Petitioner into DSF in July and August 2015.

iii) Management fees charged by MPL to DSF in the amounts of US $143,286.78, a fee which was also charged to the Petitioner for managing the same asset. It was based on the GAV of the Petitioner's shares in DSF and the cash it retained.

94. Counsel submits that, where the Petitioner held all the participating shares in DSF, it is either that the Petitioner should properly have been a creditor for the amounts and they were not subscriptions at all or if MPL was a co-owner of the participating shares, then shares should have been issued or the amount of the New Subscriptions repaid to the Petitioner. In any event on either classification, says Counsel, the Petitioner is entitled to repayment of the New Subscriptions.

95. Counsel on behalf of DSF in response submits that the number of DSF Shares held by the Petitioner would not have affected the Redemption value that it received as it received DSF's entire portfolio of life policies. In other words that whether it was recorded as having additional shares it would have made no difference, there were no other assets for it to receive. He submits that the Petitioner suffered no prejudice from not being issued additional shares. There was no point in issuing additional shares when the Redemption was imminent.

THE WRITE –OFFS

96. Following their appointment the JOLs sought from the former administrator of the Petitioner, financial records for the period from November 2016 onwards. In October 2017, Taurus provided the JOLs with Net Asset Value Packs for 2016 and 2017 for the Petitioner. Included in the documents within the 2016 pack was the Petitioner's balance sheet as at 15th November 2016. This showed assets which included a receivable from DSF in the amount of US$1,523,427.97 and a working file which itemized the receivable as including:

i) The March 2016 loan;
ii) The DSF advances; and
iii) The Fimberg proceeds.

97. The 2017 NAV pack did not include this receivable. The books and records of the Petitioner show that the Petitioner did not receive any corresponding payment in this amount from DSF.

98. Mr. Penner states that there was however a "hidden tab" within the 2017 working documents received. This was labeled "Rec from DSF", and appears to list amounts owed by DSF to the Petitioner for the transaction period up to the 21st June 2017. The list included the three items identified above. The total shown was US$1,325,381.45.

99. Mr. Penner further states that it appears from the documentation that on or around 15th July 2017, Taurus was instructed either by the Petitioner or MPL to write off the Receivable. This would have been after the appointment of the JVLs and was done without their knowledge or approval. It was therefore defective being unauthorised by them and it is further said that if it had been authorised by Mr. Leach prior to the appointment of the JVLs it would have been improper.

100. In the said 7th February 2018, response to the JOLs, DSF asserted that the write off was necessary because following upon the Redemption, DSF had no liquidity and all balances had to be offset or written off. It was stated:

> *"DSF could have kept some of its policies to then repay TLP but in effect it transferred all its policy portfolio to TLPF and therefore had no assets to realise for liquidity purposes, which also meant that TLPF received an overstated amount of policies. In order to rectify the situation on both sides, the DSF Debt was written off which resulted in the correct net asset value transferred from DSF, showing on TLPF's Balance Sheet."*

101. Mr. Leach in his Second Affidavit denies any attempt to hide matters from the JOLs. He explains the write offs as another error.

> *"Fundamentally the receivable (and its component parts) was included in error and contrary (in respect of the payments made by TLPF on behalf of DSF) to the redemption agreement explained in my First Affidavit and indeed the past correspondence with the JOLs and Maples."*

102. Counsel on behalf of the Petitioner submits that this explanation is "simply insufficient" and does not explain how the error was made and by whom. It is urged that DSF has failed to provide an explanation in the face of a clear case to answer.

103. Counsel also submits that even if a debt is written off it remains owing and that in any event it could only have been released by agreement with the Petitioner (***Commissioner of Stamp Duties v. Bone.***)[30] Its removal from the books was not authorised by the JOLs and was therefore defective. It is a debt payable on demand which has not been repaid.

ABSENCE OF FINANCIAL INFORMATION

104. The JOLs have requested information relating to all these matters. They say that despite several requests and the Petitioner having made advances of US $44,284.00 over four payments to pay for audit services for DSF, they have not been provided with financial statements for DSF for the years 2015, 2016 and 2017.[31] This is against the background that the DSF Offering document provides that annual financial statements are to be prepared

[30] 1977 A.C. 511, 519, paragraph F
[31] US $44,284 over 4 payments between 30th March 2016 and 6th January 2017- paragraph 92, First Affidavit of Michael Penner

within six months from year end and investors are to be provided with copies thereof and that copies of audited financial statements would be made available to them upon request.[32] On 29th December 2017, MPL responded to the JOLs advising that no audit had been completed in respect of the financial statements of DSF and that DSF is not a regulated mutual fund and is not therefore required to produce financial statements.

105. Counsel on behalf of the Petitioner submits that s.59 of the ***Companies Law*** requires a company to keep proper books of account that give a true and fair view of the state of the company's affairs.

106. The complaint is that in the absence of receipt of proper financial statements the Petitioner and the JOLs have been unable to verify that the Petitioner has in fact received all of DSF's net assets at the time of the Redemption and to verify the propriety of other transactions entered into.

107. It is submitted that the absence leaves open the inference that the Petitioner did not in fact receive all of DSF's net assets. Further the absence of detailed records which evidence where all of the Petitioner's money and value went gives rise to the inference that DSF has no cogent answer.

DEMAND

108. On the 21st June 2108, the JOLs requested repayment of the outstanding debt consisting of:

[32] DSF Offering Document - Page 75 of Exhibit MP-1

- The Fimberg proceeds
- The March 2016 loan
- The DSF Advances
- The New Subscriptions

THE SUBMISSIONS

109. Counsel on behalf of the Petitioner submitted that in considering the Petitioner's standing to present the Petition, the Court need only be satisfied that the Petitioner is more likely, than not, to be a creditor (including a contingent or prospective creditor) of DSF. Counsel on behalf of the Petitioner referred to the evidence of Mr. Penner as to the level of contributions made to DSF and submitted that notwithstanding possible trading losses and legitimate expenses, there is what he described as a $19 million-gap which is unexplained. 70 % of the assets have simply gone missing.

110. Reliance is placed on the case of ***Wisniewski v. Central Manchester Health Authority***[33] which has been applied by the Cayman Islands Court of Appeal in the case of ***BTU Power Management Company v. Hayat***[34]. The Court held therein in the course of considering an appeal against a refusal of the Grand Court to order security for costs, that generally if an applicant established by evidence, even if weak that there was a prima facie case to answer and the respondent failed or refused to answer the case, a court could infer that there was no answer.

[33] [1998] P.I.Q. R. 324
[34] 2011 (1) CILR 315

111. Counsel invites the Court to draw an adverse inference given what he submits is the absence of explanation from DSF as to the discrepancy between the moneys and assets contributed by the Petitioner to DSF over the relevant three year period, and what the Petitioner received back from DSF; the non-provision by DSF of financial statements and a full financial reconciliation, the non-receipt of all of DSF's assets, the lack of reliability and integrity of the valuation methodology of life policies owned by entities controlled by Mr. Leach, by way of example, the Halfon Policy and the failure of DSF to fulfil its commercial purpose.

112. Counsel submits that the various loans made by the Petitioner to DSF provide clear evidence of the cash flow insolvency of DSF and urges that in considering the response of DSF, the Court should be alive to the risk of "smokescreens" and should look at the underlying merits and credibility of any allegations that the debts claimed are not real. Counsel referenced the cited case of ***Parmalat v. Food Holdings*** and emphasized the dicta therein that a Court retains a discretion to make a winding up order even though there is a dispute as to a debt.

113. Counsel submitted that the Court should find that the debts asserted by the Petitioner, as listed above, are also not capable of being disputed on any genuine grounds and that:

> *"In evaluating those claims, the Court ought not allow the waters to be muddied by contrived arguments that are contrary to the evidence before it in determining whether or not there is a real or substantial dispute in relation to the existence of a debt."*

114. Counsel on behalf of the Respondent submits that the Petitioner cannot show that it is creditor of DSF and thus has no *locus standi* to present the Petition. He argued that there is a *bona fide* dispute in respect of the debts claimed on substantial grounds. Counsel further

submits that there is no suggestion that the account given by Mr. Leach is untrue or that the unwritten agreement needed to be in writing, the suggestion is that it was improper. Counsel argues that it was proper for DSF to make provision for its creditors by having TLPF assume the burden of its debts. This given that TLPF was taking all of DSF's assets on the Redemption. The alternative to this would have been for DSF to sell all the Policies, discharge its liabilities and pay over the balance to the Petitioner.

115. Counsel argues that it is difficult to see how DSF could properly have consented to any arrangement whereby DSF parted with its ability to repay the Petitioner (by transferring its assets to TLPF) yet (as the Liquidators would have it) at the same time remained liable to the Petitioner. Counsel further submits that:

> *"The liquidators complain that the charges owing to the companies associated with Mr Leach were excessive, but that does not mean that they were not due and owing. The rate at which they were set is a matter between DSF and those companies and a matter about which the liquidators would appear to wish to have DSF complain, but the charges were payable. Thus the liquidators have in the Petition alleged that TLPF was under no obligation to meet the debts of DSF (simply ignoring the terms for the redemption in kind) but it is not alleged that DSF was not under an obligation to make the payments that were made."*

116. With respect to the Petitioner as sole economic stake holder it is submitted that the Petitioner was not a member of DSF after April 2016 and the asserted facts do not give it rights to which it is not entitled.

DISCUSSION

117. While the material presented on this hearing has been extensive and a number of issues have been raised, the issue before the Court is a narrow one. Issues such as the appropriateness or not of the level of fees charged and whether or not there has been any breach of fiduciary duties by anyone do not fall to be considered or determined on this application.

118. Counsel on behalf of DSF submitted that the Petition does not make an allegation that the Petitioner is a creditor based upon the allegedly missing $19 million and that there is no statement therein that any part of the $27 million paid to DSF by the Petitioner was still available to DSF at the date of the Redemption.

119. Paragraph 49.3 of the Petition states:

> *"DSF has failed to account adequately or at all for the very large and unexplained gap between the US $27,150,633 in value recorded by the directors contributed and/or loaned by the Petitioner to DSF and the mere $7,790,556 which it received from eventual realisations from the policies received from the Policy Exchange and upon the Redemption."*

120. Counsel argues that this does not properly raise the issue of the $19 million in the Petition as it is not specifically pleaded as a debt and is not therein being relied upon to establish that the Petitioner is a creditor of DSF. Counsel also submitted that the reference to an unexplained amount is misleading. This is because the $27 million is calculated principally on the marked value of the Life Polices while the lesser amount of $7.79 million is on the basis of what the Policies were actually sold for.

121. Counsel's submission as to the limited extent of the pleadings appears to be correct. I note that the pleadings identify in paragraph 50 the outstanding debt as collectively, the Fimberg proceeds the March 2016 Loan, the DSF Advances and the New Subscriptions.

Each of these are more particularised at paragraphs 34, 35, 38 41 of the Petition. Paragraph 44 details the Alberta Claim.

122. The Grounds for the Petition include at paragraph 54.1 seeking to *investigate* what has become of the total of the $27,150,633 contributed and/or loaned to DSF between May 2014 and 24th June 2017 in the form of cash and policies. The difference is not specifically pleaded as part of the outstanding debt.

123. Counsel's primary submission is that all of the outstanding debts which are pleaded are dealt with by way of the alleged unwritten agreement.

124. In summary DSF's responses to the specific debt claims amounts to this, an unwritten agreement as to the terms on which the Petitioner's shares in DSF would be redeemed together with at least three separate administrative errors which may have described these amounts inaccurately as a policy to be received, a loan or as receivables.

125. Counsel on behalf of DSF and Mr. Leach in his Affidavit have urged that these are all matters raised in the Writ action which should properly be dealt with as part of those proceedings.

126. Counsel for DSF submitted that the Court should not be influenced by the presence of red flags and that the central issue is what debts are alleged in the Petition. Counsel relied on the case of ***In re Fildes Bros. Ltd***.[35] He submitted that it is not open to the Petitioner to go beyond the alleged debt which must be clearly stated in the Petition and that the onus is on the Petitioner to prove that it has not received all of the net assets of DSF. Counsel stated that as pleaded, the justification for the assertion of non-receipt of all the net assets is the Alberta judgment and the Fimberg policy. Nowhere in the Petition is there an allegation that DSF held back any assets other than these items. This is against the background that the Petition is drafted in the knowledge of what was being said in response thereto, from the correspondence exchanged.

127. Counsel also points to what are said to be significant shortcomings in the way in which the Petition is framed. These include that the Petition states but makes no connection between the failure to provide financial information and the non-provision of all assets.

128. The response of Counsel on behalf of the Petitioner is that the fact of inability to fully articulate what exactly the Petitioner did not receive is not a deficiency in the pleadings, it is part of the Petitioner's case. Counsel submits:

> "*We know we did not receive everything we are entitled to because otherwise why on earth would there have been a resolution saying we only get a certain subset of what we are entitled to.*"

[35] 1970 1 W.L.R. 592

129. Counsel submits that in so far as the complaint that the Petitioner does not know what else there might be, the reason is the failure to provide the 2015 accounts which they are entitled to as a matter of law. In so far as DSF now says that the Petitioner is not entitled to company accounts because it is not a member, it was a member in 2015. The response received in the past had been that no audited accounts exist.

130. Counsel noted that the Resolution was effectively backdated and placed a limit on the assets to be recovered, to in kind assets which did not include any proceeds from the Alberta Litigation. It is also argued in support of the Petitioner's contention as to possible residual assets, that if the Petitioner was to receive everything DSF had because it was its sole participating shareholder, why would it need to issue new participating shares to MPL because there would have been nothing left. DSF would have had no assets so would not have needed a new participating shareholder.

131. Counsel on behalf of DSF conceded that the Petitioner is fully entitled to investigate the discrepancy between the sums appearing as receivables in the NAV Packs and Mr. Leach's account of the arrangement but says that the investigation ought to be by way of reasonable Writ action. Such an action would afford the opportunity for investigation, there could be disclosure and the opportunity to ask questions.

132. Counsel also submitted that the accounting entries that may not have been consistent with the alleged Redemption arrangement do not affect the validity of it, the arrangement being the transfer of DSF's Life Policies in return for the payment of DSF's liabilities. It was urged that the accounting records were not records compiled by Mr. Leach. They were compiled

by Taurus and this must have been in the context of being done at a fairly menial level by someone who was not necessarily privy to the agreement which had been reached at the board level. Taurus simply got the NAV packs wrong. It was also argued that the absence of a written agreement to record the Redemption terms was no doubt as a consequence of the arrangements being between associated companies and that this was not a case of Mr. Leach agreeing with himself given that Mr. McClintock would have provided independent oversight.

133. In ***GFN,*** the Appellate Court was of the view that the Court must remain flexible in its approach to cases of this kind. The Court noted that:

> *"There may well be cases where to compel the creditor to go off to another division of the court to establish his debt would effectively deprive him of any remedy at all. That may, of course, be inevitable where the court is convinced that the dispute is a genuine one, genuinely raised and persisted in, and one which cannot conveniently be determined in a short space of time on hearing the one application—and that, I think, must be particularly the case even in cases which can perhaps conveniently be dealt with where the grounds of dispute have been known to and canvassed with the petitioner well before the presentation of the petition. But it ought not, in my judgment, to be an inflexible rule that the Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground, and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings. Whilst I do not in any way, therefore, seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross-examination."*

134. In ***Re a Company (No 006685 of 1996)***[36] the Court held that the company's evidence as to the nature of the advertising agreement with the petitioning creditor would not be believed. The main reasons for disbelief included that the contemporary correspondence was inconsistent with the dispute which was then being raised and that there was no explanation in the Affidavit evidence as to why the dispute had not been raised earlier.

135. In this case not only was the agreement referenced by Mr. Leach an unwritten one, on Mr. Penner's evidence[37], there is no contemporaneous documentation, nor is it referred to in any correspondence in relation to the Redemption. Significantly, the fact of an agreement would be inconsistent with the recording in the Petitioner's books and records as of 15th November 2016, some seven months after the Redemption date in April 2016 of the amounts listed as receivables.

136. It is inexplicable to me how it is that if there was such an agreement which was integral to the Redemption occurring, this would not have been communicated so that it could be reflected in accounting entries or that it would not have been reflected in some contemporaneous document even in passing.

137. Counsel for the Petitioner in arguments has also highlighted the further inconsistency that the evidence on behalf of DSF given by Mr. Leach is that as at 29th January 2016, MPL was allowed to subscribe for a nominal amount of $5,000.00 worth of the participating shares in DSF and these shares were not redeemed. On what basis then asks Counsel rhetorically

[36] 1997 1 BCLC 639
[37] Second Affidavit paragraph 40

would the Petitioner agree to pay the expenses of DSF going forward if MPL was now a Participating Shareholder and entitled to the net assets of DSF.

138. At paragraph 89 et seq. Mr. Penner sets out a series of correspondence with DSF and MPL requesting explanations and with respect to repayment of the four items listed above. That correspondence began on the 9th November 2017. MPL responded on the 21st November 2017. The JOLs wrote again on the 21st December 2017, requesting an explanations for the March 2016 Loan and the status of the Fimberg proceeds, and copies of the 2015 statements for DSF. There was follow up correspondence exchanged in January and February 2018.

139. Then came the 21st June 2018 demand for payment. On the 11th July 2018, DSF through their attorneys provided a further response in which DSF asserted for the first time that there was an unwritten redemption agreement in place between DSF and the Petitioner. Mr. Penner states:

> *97. On 21 June 2018, the JOLs wrote to DSF requesting immediate payment of the Outstanding Debt and inviting MPL, as the sole remaining shareholder, to place the company into liquidation (see pages 1047 to 1059 of MP-1). DSF (via their Cayman Islands attorneys, wrote to the JOLs on 11 July 2018 to provide further responses (see at pages 1060 to 1071 of MP-1). However, the responses provided were in large part repetition of the previous explanations provided by DSF or MPL, <u>save for a new assertion based on the premise that there was allegedly an unwritten redemption agreement in place between DSF and the Petitioner (of which Mr Leach was the sole executive director of both entities). Notably this was the first time that DSF or MPL had raised the existence of the purported redemption agreement,</u> for which no*

documentary evidence has been provided. Notwithstanding the purported existence of the alleged agreement, the explanations provided by DSF for the Outstanding Debt and the JOLs' related queries remain wholly unsatisfactory." (Emphasis added.)

140. On the 3rd August 2018, DSF provided further detail that the Redemption decisions were taken by the Petitioner and the boards of directors of DSF in consultation with the Manager and Investment strategy Teams. The JOLs say that effectively this was Mr. Leach in the various capacities as director or member of each entity.

141. Counsel for DSF submitted that it is irrelevant that the NAV entries were corrected at a time when the Petitioner was in liquidation because all that was happening was that the accounting entries were being brought into line with the previously agreed arrangement.

142. Counsel's further point is that the pleading uses the word net assets which must mean that there is a recognition that liabilities of DSF have to feature. There is no allegation that there were other policies that DSF held back. The Petition thus does not make sense because it fixates on net assets without considering the consequences of the liabilities which have to be taken care of. This says Counsel was a perfectly sensible arrangement.

143. Counsel for the Petitioner says in response to the use of the words 'net assets' in the pleadings, that while it is accepted that a shareholder would never be entitled to redemption proceeds which render a company insolvent, the purported agreement would have included debts for which the Petitioner was never liable and that some 70% of the funds paid into DSF was not being returned. All that money and those assets would have remained with DSF.

144. It may as Counsel for DSF submits have been a perfectly sensible arrangement, but was this arrangement actually made? It appears that this was either an operation of the most relaxed kind, such that errors upon errors were made, and an agreement fundamental to the life of DSF was not recorded. The further aspect is that, not only was it not recorded, and the accounting entries which were made thereafter were inconsistent with it but also that no one thought to tell the JOLs in early course that this agreement had been made.

145. In my view this alleged agreement has all the hallmarks of an afterthought. So nebulous was it that it apparently had no end date. Even after the Redemption was completed and another participating shareholder was said to be on board, the Petitioner continued to pay the liabilities of DSF.

146. Counsel on behalf of DSF further submitted that while there is reference in the Petition to the 49 payments made by the Petitioner on behalf of DSF totaling approximately $457,000.00, there is no separate listing of each of the items of this claimed debt. There is no differentiation in the various payments making up the alleged debt and it is not specifically stated that the monies are being used for liabilities which arise after the Redemption. The Petition pleads this collectively and does not identify individual payments that do not seem to fall within the alleged Agreement. There is in the Petition an all for nothing approach and the answer was a Redemption Agreement.

147. Counsel submitted that notwithstanding paragraphs 9 and 10 of the Petition which state:

> *"Further, at the time when the Petitioner and DSF were under common control, the Petitioner made a number of loans to DSF, after its shares had been redeemed (as particularised more fully at paragraphs 35 to 40 below).*

The true basis for these loan remains unclear. Despite requests for repayment, these loan amounts remain unpaid.
In premise of the above (and is particularised more fully below), the Petitioner is a creditor of DSF."

148. Counsel argues that paragraph 39 effectively supersedes paragraph 9 and that in the later paragraph there is no allegation that DSF could pay these liabilities without the Advances.

149. Counsel on behalf of the Petitioner responds by submitting that the Respondent could have asked for further and better particulars and that in any event knew from the extensive correspondence exactly what these payments were.

150. I do not find the Petition to be defective in this respect as is urged by Counsel for DSF. It makes the clear assertion of after the fact payments. DSF provided the documents to the JOLs and very well knew the details thereof.

151. Counsel on behalf of the Petitioner submits that there are four reasons which suggest that the explanation in relation to the DSF advances is not credible:

1. How could DSF not have had money? Of the significant amounts received from the Petitioner, $750,000.00 of this had been received in October and November 2015. In addition, DSF had $400,000.00 from the Fimberg proceeds.
2. In the absence of documentation, what were the terms, was there a time limit, a cap on it, who agreed to it? DSF did keep resolutions, everything else was in writing. If it was such an integral part why it was not documented?
3. It is inconsistent with contemporaneous documentation. The Petitioner's own books characterise it as a debt.

4. The timing of the writing of the invoices. The Petitioner was paying well into 2017 for debts which were not owing at the time of the Redemption. Notably the last invoice was paid four days before the JOLs were appointed.

152. I found the last point to be the most telling, evidencing as it does an ad hoc approach rather than an agreement reached in relation to and at the time of the Redemption.

153. I formed the view that Counsel's submissions made on behalf of DSF as to particularisation and defective pleadings perhaps betrayed the realisation that these payments outside of the Redemption period and in respect of liabilities which arose *after* the Redemption when the Petitioner was no longer a shareholder do not and could not fit with the explanation given by Mr. Leach.

154. In the case of ***In Re Primus Investments Fund LP and Mayer Investments Funds L.P***[38], the Court considered the discretionary exercise involved in considering the nature of the dispute raised and stated:

> *"Each case will turn on its specific facts. A bona fide dispute on substantial grounds means a real dispute on which the respondent company has a real prospect of success (as opposed to a fanciful or insubstantial prospect of success): see Re A Company (No. 001946 of 1991) [1991] ex parte Fin Soft BCLC 737 at [740]; and Argentum Lex Wealth Management Ltd v Giannotti [2011] EWCA Civ 1341 at [17]. In the latter case, the Court of Appeal commented that the concept of a bona fide dispute on substantial grounds is similar to the test for obtaining permission to appeal viz. that there should be a realistic prospect of success: per Longmore LJ at §17."*

[38] Unreported 16th June 2020 FSD 76 and 77 of 2020

155. The Court concluded that while the winding up procedure is not suitable to resolve questions of disputed fact as there is no investigation akin to a trial with discovery of documents and cross examination, the Court should be live to smokescreens or contrived arguments presented late in the day. In an appropriate case the Court can determine the issues raised particularly in those cases where the court doubts that there are substantial grounds for the dispute. The Court further stated:

> *"As this Court said in Altair:*
>
> > *"I also bear in mind that an unwilling debtor may raise factual matters which cannot be easily determined without cross examination in order to assert a defence and in such circumstances the court should be astute to assess whether the defence put forward is genuine and of substance"- see Re A Company 6685 [1997] BCC 830 at § 832 and 835 per Chadwick J as he then was, at §44"*

156. The case of ***In Re Claybridge Shipping Co***[39] was cited with approval by Henderson J, in the case of ***In the matter of Parmalat Capital Finance Limited***[40]. The Court noted that it is not usually possible that the hearing of a winding up petition to determine the petitioner's status with certainty. A final determination being a matter for the official liquidator if one is appointed or for separate court proceedings if the petition is dismissed because of a bona fide dispute on substantial grounds that the debt is owing. The Court concluded that a demonstration of standing requires no more than that the alleged creditor has a "good arguable claim" to be a creditor.

[39] 1997 1 BCLC 572
[40] [2006] CILR 171

157. In ***Claybrige***, Lord Denning MR expressed the view that the Companies court should be able to look into the defence and stated:

> *"If it is obviously a"put up" job or if it is so insubstantial that a Queens Bench master would only give conditional leave to defend, then I should think the petition to wind up should stand."*

The learned Judge referred in the judgment to the case of ***In Re Tweeds Garages Ltd.***[41], where the amount due was not known with any exactness, all that was known was that something was due. This was held to be sufficient to justify a petition for winding up. Oliver LJ who agreed that the Petition should be allowed to proceed stated that on such an application a court had to take a view whether on the evidence there really is substance in the dispute which is raised. The learned Judge thought the argument presented in that case so tenuous that it could not be identified as one of *bona fides* or of substantiality. The Learned Judge stated:

> *"It is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross -examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings."*

158. In the instant case it is difficult to accept the assertion of DSF as to the existence of a Redemption Agreement in the context of all the matters raised above in particular the absence of contemporaneous documentation, the inconsistency with the contemporaneous documents and the relatively late assertion as to its existence. The assertion appears to me to be a contrivance. There is also the second factor that even if the alleged Redemption

[41] 1962 1 All E R 121

Agreement was in fact made, it is plain, on the face of the papers, that the Petitioner could not have been liable for liabilities which arose subsequent to the date of the Redemption.

159. Thus even if DSF's arguments as to the practical reason for the non-issuance of shares on the New Subscriptions, the passing of premium risk and assets net of accrued liabilities are to be considered, I am satisfied on a balance of probabilities that the debts claimed by the Petitioner in the form of Advances, that is the list of non-premium related expenditure incurred and paid on behalf of DSF, post the Redemption date are not *bona fide* disputed on substantial grounds and that the Petitioner is a creditor in at least the amount of these Advances in the sum of US $433,842.00.[42] I am therefore satisfied that the Petitioner has standing to bring this Petition.

160. The evidence points overwhelmingly to DSF being cash flow insolvent. This includes the Resolution itself, the use of the Petitioner's funds to defray expenses after the Redemption and the need to seek Subscriptions from MPL to meet its liabilities. From the material provided, (including the absence of an answer), I do draw this inference.

ABUSE OF PROCESS

161. There is a separate issue raised by the Respondent which is one that has caused me some question. It is unfortunate that room has been left for misunderstanding or uncertainty. The issue arose in the following way.

[42] Page 673 of Exhibit MP-1, less deductions of items 2 and 9.

162. Following service of the statutory demand on the 21st June 2018, DSF gave notice that any winding-up petition would be misconceived and would constitute an abuse of process. DSF put the Petitioner on notice that it would apply for injunctive relief if necessary.

163. By letter dated 13th July 2018, the Liquidators responded:

> *"So as to enable those [without prejudice] discussion to take place, the JOLs will agree not to file a winding up petition until at least 14 days after that meeting, provided such a meeting can be arranged in a timely fashion, as determined by the JOLs. However, if such a meeting does not take place in timely fashion (or if the JOLs revise their view as to whether this meeting might be fruitful), the JOLs reserve their right to file a winding up petition at any time provided they first give DSF 14 days' notice in writing."*

164. Mr. Leach states that further to the 13th July 2018 letter in which the JOLs agreed to provide 14 days' notice before issuing winding up proceedings, no meeting was ever arranged in respect of the matter. Whilst there was a "without prejudice" meeting on 21st January 2019, this was to discuss the letter before action dated 8th November 2018, it was not the "without prejudice" meeting that the 13th July letter had been referring to. It is said that it is simply wrong for Mr. Penner to characterise the meeting that took place on 21st January 2019 as the meeting "*contemplated in the above correspondence*", and that it is equally wrong to suggest that this is known to Mr Leach. Mr. Leach has also stated his belief that the Petition has been presented for the collateral purpose of distracting him from the onerous task of providing disclosure in the Writ Action. He says however, that the failure to give the promised notice renders the Petition an abuse irrespective of whether or not his belief is warranted.

165. Mr. Richard Annette, an Attorney on behalf of DSF in his Affidavit states that no such meeting ever took place and that the 21st January meeting was in response to the letter before action. To the best of his recollection, whilst DSF was briefly discussed at that meeting there was no reference made to the 14 day period or to the statutory demand[43].

166. Counsel on behalf of DSF submits that:

> *"In light of (1) DSF's intimation that it would apply for injunctive relief to restrain presentation of a winding up petition as an abuse of process, (2) the written confirmation given by the liquidators in their letter of 13 July 2018 that 14 days' notice would be given if there was no timely meeting to discuss the claims in the Statutory Demand, (3) the passage of time between the liquidators' letter of 13 July 2018 and the w/p meeting on 21 January 2019, (4) the fact that the meeting on 21 January 2019 was arranged to discuss the Letter Before Action that led to Writ Action it is clear that the liquidators should have provided DSF with 14 days' prior written notice.*

167. Counsel on behalf of DSF also submitted that the Court should mark its displeasure at its Officers breaking their promise by dismissing the Petition. Counsel relied on section 95 (2) of the Companies Law which provides that the Court shall dismiss or adjourn a petition that the petitioner is contractually obligated not to bring. He submitted that there are serious consequences when a party is prevented from making a restraint application. One remedy Counsel suggests is for the Court if it were to determine that there was a debt to give DSF some time to pay whatever debt may be found as a means of removing that prejudice.

[43] Paragraph 18 of the Affidavit of Richard Annette

168. The JOL's response is that that they abided by their undertaking, that the January Meeting was not only about the pending Writ action and that it satisfied the promise made in the 13th July letter. Counsel for the Petitioner has drawn my attention to the fact that the stated meeting was never only going to be about DSF. This was to be global settlement discussions which included the DSF Petition. The letter also stated:

> *"The JOLs note your request for a without prejudice meeting. The JOLs agree that a meeting would be helpful in the circumstances, however, the JOLS have a number of other matters that they would like to discuss (which are not specifically related to DSF) with the Company's directors and investment manager. We would therefore propose a broader meeting between the JOLs and Mr. Leach and Mr. McClintock (and respective legal counsel) to discuss these matters."*

169. Mr. Penner's evidence is that the meeting did take place, which was the first alternative contemplated in the letter and the JOLs for this reason did not and had no obligation to provide DSF with any further notice of the Petition prior to it being filed. Any attempt at distraction or a collateral purpose is strongly denied.

170. Counsel on behalf of the Petitioner submitted that in any event this is not an *ex parte* hearing, no *ex parte* orders have been sought. He submitted further that this is not a case where there can be serious consequences for DSF such as would be the case where there is a vibrant trading business. There is no dispute that DSF is a shell, and there would have been no need to apply for an injunction to prevent the presentation of a petition. DSF has not suffered prejudice and cannot be said to have suffered any serious consequences as a result.

171. On this aspect, I accept the submissions of the Petitioner. The terms of the 13th July letter made clear the broad nature of the proposed meeting. Against this background, I do not find that any misunderstanding or possible failure rises to the level of constituting an abuse of process or is such as to attract the remedies sought by DSF.

JUST AND EQUITABLE GROUND

172. I go on to consider whether the Petitioner, as a creditor of DSF has established on balance any of the other grounds for winding up which have been pleaded.

173. In ***Re ICP Strategic Income Fund***[44] Jones J expressed the view that the need for an investigation into the affairs of a company can constitute a free standing basis for the making of a winding up order on the just and equitable ground. The learned Judge also expressed the view that the mere fact that an entity has ceased to be viable as an open ended mutual fund would be sufficient justification for making a winding up order.

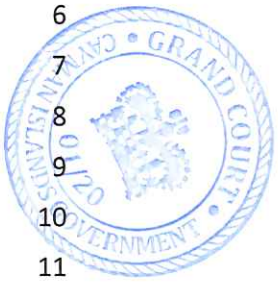
174. It was held in the case of ***In the Matter of Belmont Asset Based Lending limited***[45] that when it is shown that a company has lost it substratum, the Court would ordinarily make a compulsory winding up order on the just and equitable ground.

175. In the instant case there is said to be a clear and pressing need for an investigation into the Company's affairs. This is a submission which I accept. I consider that the letter written by Apex to the Cayman Islands Monetary Authority is of particular significance in highlighting such a need. It appears to be the case that Apex provided an additional layer of independent

[44] Unreported Grand Court 10th August 2010
[45] [2010] (1) CILR 83

oversight in its role as administrator which ceased on its resignation. I accept the submissions of Counsel on behalf of the Petitioner on this aspect. In my view there is a need for investigation into matters which include:

1. The significant gap between the level of investment by the Petitioner and the level of return.
2. Given the absence of proper accounting and noting the conflicting reasons given for the non-provision of accounts to the Petitioner:-
   i) The asset position of DSF before and at the date the Redemption given the fact that the Petitioner held 100% of the Participating Shares up to that time.
   ii) Whether the Petitioner in fact received all of the net assets of DSF at the time of Redemption.



FAILURE TO FULFIL COMMERCIAL PURPOSE

176. Mr. Penner states that the objective of DSF was to achieve long term capital growth by investing in a portfolio of Life Policies. It has never attracted external third party investors and has never and will never be able to fulfil its commercial purpose. The papers show that DSF has not had sufficient liquidity since at least December 2015. By that time it had become reliant on subscriptions from the Petitioner or Life Policy asset sales in order to provide funding to service periodic premium costs. In March 2016, it was said by its Manager to have a liquidity shortfall if US$1,883,822.06 after forecasted expenses.

177. After the Redemption, it became relatively inactive. It is said to have no remaining assets other than the Alberta Judgment. Mr. Penner refers to an 11th July 2018 letter received from Attorneys on behalf of DSF which stated that following on the transfer of assets to the Petitioner in the course of the Redemption, the NAV of DSF became minimal and DSF was

relatively inactive. There was no longer a need for monthly investment strategy meetings and the Investment Advisor agreement was terminated as such a service was no longer required by DSF. In summary the evidence appears to show that DSF does not continue to fulfil its commercial purpose.

CONCLUSIONS

178. Having considered all the material and submissions made, some of which have not been rehearsed herein, I conclude that the Petitioner has established on balance that DSF has failed to pay a substantial debt and is cash flow insolvent. I am also satisfied that on the alternative and separate ground the Petitioner has also established that there are areas of DSF's operations which require an independent investigation and that DSF does not continue to fulfill its commercial purpose. I am therefore satisfied that it is just and equitable that DSF be wound up.

179. The formal requirements for a winding up have been complied with. The application of the Petitioner for a winding up order is granted.

Dated this 15th day of October 2020

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court