



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 244 OF 2022 (IKJ)

IN THE MATTER OF SECTION 131(b) OF THE COMPANIES ACT (2022 REVISION)

**AND IN THE MATTER OF TOURADJI PRIVATE EQUITY ONSHORE FUND LTD (IN
VOLUNTARY LIQUIDATION)**

CAUSE NO: FSD 245 OF 2022 (IKJ)

IN THE MATTER OF SECTION 131(b) OF THE COMPANIES ACT (2022 REVISION)

**AND IN THE MATTER OF TOURADJI PRIVATE EQUITY OFFSHORE FUND LTD (IN
VOLUNTARY LIQUIDATION)**

CAUSE NO: FSD 246 OF 2022 (IKJ)

IN THE MATTER OF SECTION 131(b) OF THE COMPANIES ACT (2022 REVISION)

**AND IN THE MATTER OF TOURADJI PRIVATE EQUITY MASTER FUND LTD (IN
VOLUNTARY LIQUIDATION)**

IN COURT

Appearances:

Mr Harry Shaw of Campbells LLP on behalf of Glenmede Client Opportunities LLC and 9W Investment Fund I LP (jointly, “the Petitioners”) in FSD 244 and 245

Mr James Eggleton of Carey Olsen on behalf the Joint Voluntary Liquidators of the Master Fund, the Petitioners in FSD 246

Mr Jonathon Milne and Ms Alecia Johns of Conyers Dill & Pearman LLP on behalf of Touradji Capital Management LP (“TCM”)

Before: The Hon. Justice Kawaley

Heard: 14 December 2022

Date of Decision: 14 December 2022

Reasons Circulated: 26 January 2023

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HEADNOTE

Application to place voluntary liquidation of three funds under supervision of the Court- whether statutory grounds made out-jurisdictional challenge launched by former manager of funds- weight to be attached to professional judgment of experienced voluntary liquidators as to need for supervision- Companies Act (2022 Revision) section 131(b)

REASONS FOR DECISION

Introduction and Summary

1. 14 December 2022, I granted an Order in the following material terms:

“UPON the presentation by 9W Investment Fund I LP of a Petition dated 1 November 2022 seeking an order that the liquidation of Touradji Private Equity Onshore Fund Ltd (in Voluntary Liquidation) (the ‘Onshore Fund’) be continued under the supervision of the Court;

AND UPON the presentation by Glenmede Client Opportunities LLC of a Petition dated 1 November 2022 seeking an order that the liquidation of Touradji Private Equity Offshore Fund Ltd (in Voluntary Liquidation) (the ‘Offshore Fund’) be continued under the supervision of the Court;

AND UPON the presentation of a Petition dated 1 November 2022 against Touradji Private Equity Master Fund Ltd (in Voluntary Liquidation) (“Master Fund”) by Michael

Pearson and Nicola Cowan (in their capacity as Joint Voluntary Liquidators of the Master Fund) ('JVLs');

AND UPON the Court ordering amongst other things, at the hearing of a Directions Hearing on 15 November 2022, that the three proceedings be consolidated and case-managed together;

AND UPON the Court considering the affidavits and other evidence adduced in support of and in opposition to each of the Petitions;

AND UPON hearing from Counsel for the Petitioners for the Onshore Fund and the Offshore Fund, Counsel for the JVLs, and Counsel for Touradji Capital Management LP at a hearing in open court on 14 December 2022

IT IS ORDERED THAT:

1. The liquidation of each of the Onshore Fund, Offshore Fund, and Master Fund be continued under the supervision of the Court.

Michael Pearson and Nicola Cowan, both of FFP Limited, 2nd Floor, Harbour Centre, 159 Mary Street, George Town, Grand Cayman, be appointed as Joint Official Liquidators ('JOLs') of each of the Onshore Fund, Offshore Fund, and the Master Fund...."

2. The only controversy at the hearing, raised by TCM, the Funds' Manager, was whether the jurisdiction to make the Supervision Orders the Petitioners sought had been made out. The nature of the jurisdiction is such that when those economically interested in a voluntary liquidation seek to convert it into an official liquidation on rational grounds, the scope for a former manager to reasonably contest such petitions on jurisdictional grounds will be an increasingly narrow one. This is because it is now settled that former managers can essentially only assist the Court by raising points of principle while adopting a neutral position.
3. TCM's counsel, not without a few slips, narrowly managed to traverse this forensic tightrope without tumbling to the ground. However, the JVLs' counsel, whose oral submissions were adopted by counsel for the other two Petitioners, ultimately had little difficulty in satisfying me that the Supervision Order sought should be granted.

Legal principles

4. The relevant statutory jurisdiction was defined in the Companies Act (2022 Revision) as follows:
- “131. When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that*
-
- (a) ...*
- (b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.”*
- [Emphasis added]
5. It was common ground that the legal principles governing the jurisdiction to convert a voluntary liquidation to an official one under section 131(b) of the Act was authoritatively defined in the Cayman Islands Court of Appeal’s decision in *Re Asia Private Credit Fund et al* [2020 (1) CILR 134]. Counsel on both sides invited the Court to have regard to the following extracts in the leading judgment in that case delivered by Field JA, although they placed emphasis on different passages:

“89....s.131(b) provides for jurisdictional thresholds, one of which must be met before a supervision order can be made, namely, that supervision of the court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors. And the burden is on the applicant to satisfy the court that the threshold requirement has been met on the material before the court at the time the petition is heard.

90 The jurisdictional thresholds captured by the words ‘effective,’ ‘economic’ and ‘expeditious’ are open textured and of broad meaning as both McMillan, J. and Kawaley, J. observed. They overlap but at their core they connote separate concepts. The words ‘facilitate’ and ‘more’ are also open textured and of broad application. Mr. Cogley, Q.C., for both appellants, submitted that the effect of the words ‘will facilitate a more’ was that

the court had to be satisfied that upon the making of a supervision order, there and then, there would be an immediate concrete benefit for the contributories and/or the creditors not conferred by the voluntary liquidation presently on foot. It was not enough that one or other of the prescribed circumstances might or could occur. In my judgment, if a supervised liquidation is more suitable than a voluntary liquidation on the facts because it has the immediate potential for achieving a more thorough investigation, it will be more effective from the outset than the current voluntary liquidation which lacks such potential. And depending on the facts, for instance where an investigation is called for, it may well be that the appointment of official liquidators who cannot be dismissed by resolution in a general meeting in place of voluntary liquidators who can be so dismissed will immediately result in a more effective liquidation, particularly where the manager of a fund has appointed its own choice of voluntary liquidators in defiance of the choice of the stakeholder or stakeholders in the liquidation.

91 In deciding whether the threshold has been met, the court will make a judgment resulting from an evaluative process in which the words of para. (b) are considered in light of the evidence before it. This process is akin to but not the same as the exercise of a discretion properly so called. Although not truly the result of an exercise of discretion, since the court's decision is an exercise of judgment based on an evaluation of a number of different factors, it will be a decision that an appellate court ought to be slow to overturn unless the judge has misconstrued s.131 or the decision falls outside the generous ambit within which a reasonable disagreement is possible...

93 Contrary to the view of Kawaley, J., I also think that, given the evaluative nature of a decision on a s.131 application, the better view is that the court has to be satisfied on the material before it that one or more of the jurisdictional thresholds has been met rather than reaching a conclusion on the balance of probabilities, i.e. applying the civil standard of proof. In my judgment, the evaluation is akin to that which the court must undertake when deciding to give leave for the issue and service of a writ out of the jurisdiction as provided for in the Grand Court Rules, O.11, r.4(2):

'No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.' [Emphasis added.]'

6. For the purposes of the present contested Petitions, I would summarise the governing legal principles as follows:
- (a) the Court must be satisfied that the Petitioners have established that it is a proper case to grant relief under section 131(b), based on one or more of the statutory grounds, following an evaluative analysis of the evidence available;
 - (b) the jurisdictional ground(s) relied upon must be established as at the date of the hearing. This does not exclude reliance on evidence of historic matters, but the Court's jurisdiction cannot be validly invoked if grounds which may have existed in the past have dissipated altogether;
 - (c) it is not necessary that the court be satisfied that any or all of the powers of an official liquidator need to be immediately exercised. But it must be demonstrated that there at least will be "*an immediate potential*" for "*a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors*" resulting from the supervision sought; and
 - (d) in evaluating the evidence, the Court may take into account the practical implications of the general legal framework of an official liquidation, such as the elimination of the management shareholder's power to remove a voluntary liquidator. The latter consideration was adverted to by Field JA in *Re Asia Private Credit Fund et al* by way of illustration of a potential immediate benefit in a case where the manager's choice of liquidator was at odds with that of the stakeholders. Other analogous legal considerations can readily be found depending upon the specific factual impetus for seeking an official liquidation in any particular case.

The merits of the Petitions

7. The factual underpinnings of the Petitions were crisply summarized in the Skeleton Argument of Mr Shaw, on behalf of the Petitioners represented by Campbells in respect of the Onshore and Offshore Funds, as follows:

“14 The Onshore, Offshore and Master Funds have been in voluntary liquidation since 24 August 2018 following the expiry of their terms. The original voluntary liquidators were the Manager and a company (now known as IQEQ Corporate Services (Cayman) Limited) (“Original JVLs”). The independent voluntary liquidator, IQEQ, resigned and since early 2022 the Manager was the sole voluntary liquidator.

15 The Original JVLs failed to advance the liquidations or perform their statutory duties.11 In particular:

(d) no annual report, interim report, or accounts appear to have been produced, as required by s.126 of the Act and Companies Winding Up Rules, Order 13;

(e) no realisation plan was prepared;

(f) no annual general meeting was convened in any of the four years; and

(g) little if any information about assets and liabilities was provided to investors.

16 Given the lack of communication from the Original JVLs the Petitioners still have limited information in relation to the assets and liabilities of the Funds, four years on from the commencement of the voluntary liquidations. This is despite substantial developments regarding (i) the sale of the Sollus investment and (ii) the Manager’s defence of ongoing multi-million dollar litigation commenced by former employees of the Manager.

17 Following protracted correspondence between certain investors (represented by Campbells) and the Manager (represented by Conyers), the Manager eventually agreed to resign as voluntary liquidator on 5 August 2022 and to appoint the Replacement JVLs in its stead.

18 Campbells’ investor group, including the Petitioners, had hoped that the appointment of the Replacement JVLs would facilitate the advancement of the liquidations, however their appointment has not unblocked progress of the liquidations. Rather, the Replacement JVLs have been hampered by a lack of cooperation from the Manager and some other service providers (discussed further below).

19 The Petitioners and the Replacement JVLs agree that it is in the best interests of the Funds and their stakeholders for the liquidations to be brought under the supervision of the Court.”

8. The quoted passages largely summarized the evidence emanating from potentially partisan investors in Funds which had failed to deliver the expected returns. Far weightier was the evidence, set out in the Second Pearson Affidavit filed primarily in support of the Petition against the Master Fund filed by the JVLs, although Mr Pearson filed Affidavits in support of the other Petitions as well. Their counsel's Skeleton Argument summarized what I considered to be the most significant aspect of Mr Pearson's evidence as follows:

“35. The Replacement JVLs' best efforts at advancing the liquidations following their appointment appear for the most part either to have been resisted or ignored by Mr Touradji. The evidential record shows that, to date, the Manager has not been as helpful as it ought to have been in terms of providing the Replacement JVLs with the information and documents they need in order to wind down the Funds' affairs. Numerous, repeated requests for information and documentation have gone unanswered. The Replacement JVLs have had little engagement on the part of Mr Touradji. Further, the majority of Mr Touradji's minimal engagement appears to have occurred only recently, in the lead up to the hearing of the Petitions.

36. The Replacement JVLs' dealings with the Funds' former administrator, NAV Consulting ('Administrator') as at 28 October 2022, are summarised in the Second Affidavit of Michael Pearson. At paragraph 32, Mr Pearson notes that Mr Paul Johnson, being the account manager for the Funds, informed Replacement JVLs on a call dated 4 October 2022 that:

a. the Administrator faced difficulties getting: (i) their invoices paid; and (ii) engagement/timely responses from Mr Touradji;

b. the Administrator resigned in April 2021 and that their termination letter noted that they had been unable to provide proper services since June 2018 (prior to the voluntary liquidations of the Funds); and

c. the last NAV calculation was dated 30 June 2018. There had been an estimated NAV calculation as at 31 December 2018, but this had not been finalised or approved and that Mr Touradji had delayed the finalisation of the December 2018 accounts for reasons related to valuations.

37. It is worth noting that the Replacement JVLs' efforts at obtaining the information and documentation that they need to advance the liquidations, come at a cost. The Replacement JVLs are incurring time costs in relation to their requests for information and documentation, and those requests are, for the most part, not bearing fruit. A supervision order will, in that sense, be more economical.

38. As regards information gathering, the additional powers available to official liquidators (including under Section 101, 102 and 103) will likely be of valuable assistance.”

9. In addition to the averments reproduced above, Mr Pearson also significantly deposed that it was presently unclear whether the Funds were solvent or insolvent. Mr Pearson filed similar evidence in support of the Petitions presented against the Onshore and Offshore Funds. He has 20 years' experience in financial services and as an insolvency practitioner is well known to this Court. So is Ms Cowan, who has 12 years' financial services experience. Their stock in trade as official liquidators and otherwise is exercising sound commercial judgment and working effectively with liquidation stakeholders. The firm conclusions reached by Mr Pearson about the need for a Supervision Order to my mind could not be lightly dismissed. He was in Court at the hearing of the Petitions and was evidently not moved to modify his position that a Supervision Order was not required despite the eloquent pleas to the contrary advanced on behalf of the Manager. The Third Cowan Affidavit sworn after the Directions hearing provided further updating support for the need for an official liquidation to, *inter alia*, facilitate a more effective investigation of the Funds' affairs.
10. It was ambitious in the extreme for Mr Touradji, through TCM, to seek to undermine the reliability of the JVLs' professional judgments. In TCM's Skeleton, the following mission was defined:

“15...TCM acknowledges that its evidence on the threshold questions should be “measured, neutral and designed to assist the Court’... TCM simply wishes to assist the Court with its evaluative and objective decision-making process...”

17. Therefore, the sole question for this Honourable Court, on objective and proper analysis, at the time the Petitions are heard, is whether the supervision of the Court will (not may) facilitate a more effective, economic or expeditious liquidation of the Touradji Funds in the interests of the contributories and creditors.” [Emphasis added]

11. Mr Touradji (through his evidence sworn a mere two days before the hearing) asserted without substantiation that he held the largest economic stake in the Funds directly and indirectly. He did to some extent undermine the JVLs’ case about the need to investigate certain payments by proffering an explanation for them. He also demonstrated that he had in fact in early December responded to some requests for information, claiming that he was not at fault for any delay in responding. However, underpinning TCM’s entire stance appeared to me to be Mr Touradji’s desire to retain as much control as possible of the Funds’ affairs. Based on TCM’s evidence. Mr Milne submitted, for instance, in relation to one of the most significant underlying assets:

“37. It is entirely unclear to TCM why the JVLs consider it necessary or appropriate, at this stage, to make time-consuming and expensive recognition applications in multiple jurisdictions. Whether recognition is sought in Bermuda, Brazil and/or the US, such recognition will not assist in allowing the JVLs to take control of ‘underlying assets.’

38. The most expeditious, economical and effective course of action is for the JVLs to allow TCM to convene a call with all relevant parties (as TCM has been trying to get the JVLs to do) and to share documentation with the JVLs with appropriate confidentiality restrictions in place (see paragraphs 85 to 88 of Touradji 1).”

12. Of course, all the JVLs had suggested is that it might become necessary to make recognition applications and the idea that they should simply allow TCM to “convene a call” shone a revealing light as to why a Supervision Order was required. Clearly Mr Touradji despite reluctantly agreeing to appoint the JVLs was in reality unable to accept (a) that the JVLs’ professional judgment rather than his own should prevail in the winding-up of the Funds’ affairs and (b) that a proper liquidation process required the Manager to relinquish ultimate control of the Funds in question. For instance, a “significant” factor relied upon in oral argument in answer to the Petitioners’ contention that official liquidators’ powers were required to gain control of overseas bank accounts was the fact

that the JVLs had not sought the Manager's assistance in gaining such access. This implied that the JVLs' should have been content with an ongoing dependence on the cooperation of TCM when carrying out basic liquidation steps, at least abroad. Mr Milne expressly submitted that as regards the most significant overseas transaction the JVLs wished to investigate and/or monitor, Mr Touradji did not wish them to contact counterparties without his knowledge.

13. Rigorously scrutinized, TCM's purportedly neutral contentions that the jurisdictional basis for making a Supervision Order had not been established implicitly invited the Court to substitute Mr Touradji's judgment of where the best interests of the stakeholders lay for those of the stakeholders themselves and the independent professional judgment of the JVLs. As I observed in the course of Mr Eggleton's submissions on behalf of the JVLs:

"I don't want to be sarcastic, but in effect his evidence could be construed as saying: 'I don't think you need to investigate what I've done'...."

14. In the course of Mr Milne's argument, I asked the following question which I regarded as pivotal to the disposition of the three applications for a Supervision Order:

"...it's common ground that the Funds should be wound up. So why should the Manager's view that it would be better if the Joint Voluntary Liquidators continued as Joint Voluntary Liquidators, being dependent on the Manager to do what obviously needs to be done be acceded to, in circumstances where part of what they say they want to do, plausibly, is to investigate the way the Funds were managed by the Manager?..."

15. No answer to that question was proffered, the Manager's counsel preferring to focus attention on undermining any criticisms which had been made of his client and raising concerns about whether or not the Campbells investors had the Funds' best interests at heart. When I pressed counsel as to what the Manager's opposition to the Petitions was really motivated by, Mr Milne indicated that Mr Touradji was essentially concerned to avoid adverse findings being made against him in relation to the management of the Funds. I assured counsel that granting the Supervision Orders sought by the Petitioners did not in my judgment entail recording any adverse findings against TCM or Mr Touradji. Indeed, Mr Eggleton had confirmed in the JVLs' opening submissions that no allegations of wrongdoing by Mr Touradji were being advanced.

16. More substantively, counsel emphasised his client's concerns about the impact on the main underlying transaction that the appointment of official liquidators might have. This was a very nebulous point which was impossible to evaluate. However, to the extent that the JVLs took the contrary view as the impact of an official liquidation on the Funds' commercial interests, I preferred to rely on their judgement than that of the Manager. As I pointed out in the course of argument, the Petitioners did not need to demonstrate that the relevant powers would actually be deployed, and there may be economies gained through the threat of the deployment of official liquidators' powers with a view to avoiding wasteful Court applications.
17. In my judgment the evidence ultimately showed very clearly that the JVLs' judgment that an official liquidation was required was a sound one. Voluntary liquidations usually run smoothly when the process is a simple or clearly defined one with not too many rough edges. Where a voluntary liquidation of a fund has been administered by the manager and gone adrift as in the present case, the ship can only be steadied if professional liquidators are allowed to man the bridge and the manager is able to cede control to the minimum extent necessary. Depending on the personalities involved, and the complexities of the commercial context, many managers will be unable to cede control of what they understandably view as "their" ship. Mr Touradji's evidence strongly suggested that he is such a person. Three examples will suffice to explain why I arrived at this conclusion:
- (a) he made the incredible and unsupported assertion that: "*I have a very substantial economic interest being by far the largest investor*" (paragraphs 4). It beggared belief that if he had standing to intervene in the present proceedings as the largest investor he would have failed to do so and that the Petitioners should be oblivious of such status;
 - (b) he appeared to envisage that the JVLs should be content to rely upon TCM's ongoing collaboration and support rather than acting in an autonomous and independent manner: "*With better consultation and collaboration on the part of the JVLs, I am confident that this can be a streamlined and efficient liquidation process*" (paragraph 14);
 - (c) in addition to asserting the unsubstantiated standing of an investor in an Affidavit purportedly sworn to support the neutral position of the Manager, he appeared to believe that his own judgement that his conduct did not need to be investigated should

prevail over that of independent liquidators: *“As the most substantial investor, I am very concerned by the prospect of the JVLs making expensive and time-consuming applications for recognition abroad in multiple jurisdictions or carrying out unnecessary investigations in relation to fees that have been properly incurred”* (paragraph 95).

Summary of findings

18. Most of the Manager’s counsel’s argument focussed on seeking to demonstrate that the JVLs’ evidence painted a misleading picture of the extent to which, if any, the Manager had been guilty of obstructive conduct. There was some merit to some points of detail, but these submissions missed the more nuanced and significant points which weighed in favour of granting Supervision Orders. Accordingly, I did not find it necessary to resolve the factual controversies as to precisely how cooperative or uncooperative the Manager had been since the JVLs’ appointment. The following facts and matters in my judgement were ultimately capable of being relied upon by the Petitioners, none of which entailed any adverse findings against Mr Touradji or the Manager, TMC:

- (a) the Funds had been in voluntary liquidation for four years and there were no reliable recent financial records and no up to date register of members. The Manager had been one of the two joint voluntary liquidators for most of that four year period preceding the appointment of the JVLs;
- (b) there was a need to investigate the Funds’ financial affairs including substantial payments made shortly before the JVLs’ appointment in relation to overseas litigation based on an indemnity claim against the Master Fund;
- (c) it was unclear whether the Funds were solvent or insolvent, which accentuated the need for a proper investigation of the Funds’ financial position;
- (d) within less than six months of their appointment as Replacement JVLs, the JVLs formed the professional view that that the liquidation would be rendered more economic and effective if they were granted the powers of official liquidators. The Manager admittedly had no expertise in managing liquidations; its expertise lay in managing trading companies in the ordinary course of their business;

- (e) although in the 14 days leading up to the hearing of the Petitions the Manager had demonstrated a higher level of responsiveness to the JVLs' requests for information than previously, this enhanced degree of cooperation did not reduce to any material extent the JVLs' belief that a Supervision Order was required in relation to each of the three Funds;
 - (f) the JVLs' ability to gather information abroad from third parties would depend entirely upon voluntary cooperation absent recognition of their status as official liquidators or, alternatively, cooperation from the Manager;
 - (g) the Petitions were supported by all of the recognised economic stakeholders in the Funds (assuming them to be solvent) who chose to formally communicate their views to the Court.
19. I was satisfied that the liquidations would be made more effective, economic and/or expeditious if Supervision Orders were granted primarily because:
- (a) the Funds' affairs under the stewardship of the Manager needed to be independently investigated and the fact that the Manager would otherwise retain the legal power to remove the JVLs was in the circumstances of the present case more of a hindrance than a help;
 - (b) the fact that the Manager in the course of opposing the present applications on supposedly neutral grounds was unable to avoid substituting its view of how the liquidations should be conducted for that of the professional liquidators substantially made the case for replacing Management Shareholder control with Court supervision. It vividly vindicated the judgement of the JVLs that they could not effectively continue in their existing capacity because, even assuming the Manager genuinely wished to cooperate, Mr Touradji clearly found it difficult (if not impossible) to fully relinquish managerial control over the Funds to the extent that an effective, economic and expeditious liquidation required;

- (c) irrespective of whether it would be actually necessary to deploy any of the various statutory powers conferred on official liquidators in any specific way, it was obvious that the ready availability of such powers would enhance the negotiating power of the liquidators when dealing with the Manager and other third parties within the jurisdiction and particularly abroad.

Conclusion

20. For the above reasons, I granted Supervision Orders under section 131(b) of the Companies Act (2022 Revision) in respect of each of the Funds on 14 December 2022.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT