IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD: 167 of 2010 (AJJ)

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)

AND

IN THE MATTER OF WYSER-PRATTE EUROVALUE FUND, LTD.

Coram:	The Hon. Mr. Justice Jones, QC
Appearances:	Petitioner – Mr. Tom Lowe, QC with Ms. Laura Hatfield and Mr. Sam Dawson of Solomon Harris
	Company – Mr. Robin Hollington, QC with Ms. Colette Wilkins and Mr. Rupert Bell of Walkers
	Russell Funds – Mr. Fraser Hughes of Conyers, Dill & Pearman
Heard:	Wednesday 8th and Thursday 9th September 2010

REASONS

1. This is a petition for an order that Wyser-Pratte EuroValue Fund, Ltd. ("the Company") be compulsorily wound up by order of the Court and that two qualified insolvency practitioners be appointed as joint official liquidators. The Petitioner is UBS Fund Services (Cayman) Ltd. in its capacity as trustee as of the AIFAM Event Driven Fund Trust ("the Petitioner"). It is not in dispute that the Company is solvent, applying a balance sheet test, and that the Petitioner has *locus standi* to present a petition on the just and equitable ground contained in Section 92 (e) of the Companies Law (2009 Revision).

I concluded that the Petitioner has made out a case for relief but determined, in the exercise of my discretion, that it would not be appropriate to make an immediate winding up order. Instead, I adjourned the petition until the first available date for hearing after 16th November 2010 and made alternative orders pursuant to the power contained in Section 95 (3) (b) of the Companies Law (2010 Revision). I now give my reasons for this Ruling.

General Factual background

2. The underlying factual background is not disputed in any material respect and can be stated shortly in the following way. The Company was incorporated as an exempted company under the Companies Law (1999 Revision) on 5th June 2000 to carry on business as an open ended investment fund as part of a typical "master feeder" structure. It was duly registered with the Cayman Islands Monetary Authority ("CIMA") pursuant to Section 4(3) (c) of the Mutual Funds Law. The Company's management structure is typical of that of many thousands of corporate investment funds domiciled in the Cayman Islands. The investment management functions are delegated to Wyser-Pratte Management Co. Inc. ("the Investment Manager") pursuant to an investment management agreement dated 3rd October 2005. The Company's administration, including the preparation of financial statements and determination of net asset values, is delegated to SEI Global Services Inc. ("the Administrator") pursuant to the terms of an administration agreement. The Investment Manager carries on business in New York and the Administrator carries on business in Dublin. They perform their contractual obligations under the overall supervision of the Company's board of directors,

comprising Mr. Jason Santamaria and Mr. Sebastian Freitag ("the Directors"). It is relevant to bear in mind that Messrs Santamaria and Freitag are "independent directors" in that neither of them are employees or associates of either the Investment Manager or Administrator. Mr. Santamaria is a principal of Santamaria and Martina LLC, a management consulting firm based in California. He was previously employed as a business analysis with McKenzie & Company and as an investment banker with Morgan Stanley. Mr. Freitag is managing director of Freitag & Co., an investment bank carrying on business in Frankfurt, Germany. Earlier in his career he also worked as business analysis with McKenzie & Company.

3. The Company was originally set up as a "feeder fund", the whole of whose assets were invested in Wyser-Pratte EuroValue Master Fund, L.P., a Cayman Islands limited partnership formed on 15th September 2005 for this purpose ("the Master Fund"). At some stage there were two feeder funds, but the audited financial statements reflect that the Company was the Master Fund's only feeder after 1st January 2008. In these circumstances, having concluded that the Company was to be wound down and terminated by means of a compulsory redemption plan, the continuation of the master/feeder structure obviously served no useful purpose and it was terminated with effect from 1st January 2010. As explained in the audited financial statements for the year ended 31st December 2009, the Company's directors resolved that it would redeem its entire investment in the Master Fund, which then transferred all its assets and liabilities to the Company at fair value at the close of business on 31st December 2009 in exchange for the Company's interest in the Master Fund. The Master Fund was then dissolved.

4. The Petitioner is also an investment fund domiciled in the Cayman Islands. Details of its legal and management structure have not been put in evidence, but it appears to be typical of that of many unit trusts established in this jurisdiction. Its trustee is UBS Fund Services (Cayman) Ltd. Its investment manager is AIFAM LLC which is part of an investment management group based in New York. On or about 23rd April 2007 the Petitioner subscribed for shares in the Company to the value of US$2m and on 1st May was issued 1,500,075.113335 Class A participating shares at a net asset value of US$1,269.75 per share. There is no material distinction between the Company's two classes of shares except that the A shares are denominated in US dollars and the B shares are denominated in Euros. I note that the minimum subscription was either $2m or €1m. The Petitioner presently holds 879.73 Class A participating shares, representing approximately 0.85% of the economic value of the Company. It is relevant to note that the shares carry the right to vote at general meetings of the Company.

Redemption of the Petitioner's shares

5. By letter dated 26th March 2008 the Petitioner sought a full redemption of all its shares on the next Redemption Day (defined to mean the last business of each calendar quarter) which was 30th June 2008. By an email transmitted two days later the Administrator acknowledged this request and impliedly accepted the Petitioner's right to redeem its shares at the NAV ruling on that date. However, by an email transmitted on 29th April 2008 the Investment Manager stated that "*as per the offering memorandum 'Redemption of Shares' your June 30, 2008 request is being prorated in accordance with the 10% limit"*. During the course of the telephone conference which took place the same day the

Investment Manager advised that a 10% limit had been placed on all 30th June 2008 redemptions because the Company had received redemption requests for that date equal to almost 40% of its total net asset value. As a result of this limitation, the Petitioner was able to redeem only 395,833 shares at a total value of US$319,070.43 net of all fees. The redemption price represented a net asset value of US$848.50 per share compared with the Petitioner's original subscription price of US$1,269.75 per share (representing, a 33% decline in value).

6. By a letter to investors dated 25th September 2008, the Investment Manager stated that the Directors had invoked the provisions of the Company's articles of association to suspend pending and future redemptions as of 30th September 2008. This letter did not specify the specific article upon which the Directors had relied, but it is common ground that they must have acted in reliance upon Article 59 (b) which states:

The directors may declare a suspension of the determination of the net asset value, the subscription for shares, the redemption and repurchase of shares, including the right to receive the redemption price, for the whole or any part of a period:

(a) ……

(b) *[for any period] during which in the opinion of the board of directors, upon consultation with the investment manager, disposal of investments by the company would not be reasonable or practical or would be prejudicial to the non redeeming shareholders".*

7. The letter to investors stated that :-

This decision was made in order to maintain an adequate voice in the fund's activist projects that are currently underway. Further redemptions from the fund will reduce the fund stakes in critical positions to the point of impairing the fund's ability to carry out existing activist agendas. It is important to note that the suspension is not a function of

liquidity in the traditional sense as all assets in the portfolio are publicly traded, exchange listed securities. Rather, the cause of the suspension is a simple function of protecting the presence or voice that the fund needs to act effectively as a catalyst for corporate change in the fund's current activist initiatives. It is our firm belief that granting redemption requests and further disposing of a portion of the fund's assets would be seriously prejudicial to the non-redeeming shareholders of the fund and the fund's investment program.

This suspension of redemptions remained in force without any modification for more than a year. Then, by letter dated 23rd October 2009, the Investment Manager gave notice of the Company's proposal to commence distributions to redeeming shareholders (without regard to the timing of their request) at the rate of 2.5% of their investment in the Company each quarter beginning with 31st December 2009. This letter stated:-

The directors and investment manager are now satisfied that with the improvement in the funds performance and the improving risk tolerance in the marketplace, action may now be taken. It is their current intention to allow each investor that has submitted a redemption request to redeem 2.5% of their investment in the fund each quarter, beginning at the close of business on December 31, 2009. The current plan is that all redeeming investors will receive a distribution in accordance with their interest in the fund, without the regard to the timing of any submitted redemption request. The distribution will be made in the form of compulsory redemption from the fund. The general suspension on redemptions will remain in place and the gate is not hereby being imposed.

Between 22nd and 25th January 2010 the Petitioner received a redemption payment totaling US$18,982.73 constituting 2.5% of the value of its shareholding as at 31st December 2009.

8. On 27th January 2010 a meeting took place between representatives of the Petitioner and the Company at the Investment Manager's office in New York. It was attended by Mr. Guy Wyser-Pratte (who is President and CEO of the Investment Manager) on behalf of

the Company and Mr. Sanjay Mitta and Ms. Mia-Margaret Laabs (who are employees of AIFAM group companies) on behalf of the Petitioner. What happened at this meeting is described in paragraph 18 of Mr. Wyser-Pratte's first affidavit and paragraph 6 of Ms. Laabs' affidavit. Mr. Wyser-Pratte describes having taken the Petitioner's investment managers through the Company's portfolio of assets in great detail. Because Mr. Mitta and Ms. Laabs apparently expressed no concern about the Company's operations or the types of assets in which it was invested, Mr. Wyser-Pratte felt that it had been a very positive meeting. However, Ms. Laabs says in her affidavit that it was a result of this meeting that she lost confidence in Mr. Wyser-Pratte and the Company's intended strategy, although she obviously did not express her concern to him because Mr. Wyser-Pratte came away from the meeting with the opposite impression. Since the Company had suspended redemptions since September 2008, her concern was that its Investment Manager should be focused on realizing assets, whereas Mr. Wyser-Pratte had made it clear that he intended to make new investments (although there is no evidence before the Court that any new investments were in fact made after September 2008).

The Wind Down/Compulsory Redemption Plan

9. On 25th March 2010 the Investment Manager distributed an important letter to investors setting out what was subsequently described by Mr. Santamaria in his first affidavit as "the Wind Down Plan" and by Mr. Wyser-Pratte in his affidavit as a "Compulsory Redemption Plan". These expressions are used inter-changeably. This letter stated :-

"We are writing to inform you that the general partner of Wyser-Pratte EuroValue, L.P. and the Board of Directors of Wyser-Pratte EuroValue Fund, Ltd. (collectively, the "Funds") have decided to immediately begin the process of winding down the Funds in

an orderly fashion ……Accordingly, the Funds have further decided to compulsorily redeem 10% of each investor's investment in the Funds as of March 31, 2010 (regardless of whether or not such investor has submitted a redemption request). All investors will receive a distribution in accordance with their interest in the Funds, without regard to the timing of any submitted redemption request. It is our goal that each quarter the Funds will distribute to every investor a minimum of 10% of their investment in the Funds, and, where it is deemed feasible, a greater portion of the investors' investment will be returned"……

10. I make the following observations about the Wind Down/Compulsory Redemption Plan. First, it appears to confirm a state of affairs which had existed since September 2008 when the Directors suspended redemptions and subscriptions. What proportion of shareholders had submitted redemption requests as at 30th September 2008 is not disclosed in the Company's affidavit evidence, but I was told by Counsel during the hearing that redemption notices had by then been received in respect of 90% of the shares in issue. I think that it is reasonable to infer that the remainder would have served notices if they had thought it necessary to do so in order to participate in the compulsory redemption plan. Second, the decision to implement the Wind Down/Compulsory Redemption Plan was made without any formal consultation with the shareholders. The Directors did not see fit to convene an EGM for the purpose of passing a special resolution authorizing them to implement the plan, either in the form set out in their letter or some variation of it.

11. I have no direct evidence from any of the shareholders about their response to the Wind Down Plan, but I can infer from what was said at the monthly management meeting held (by teleconference) on 9th July 2010 that the Investment Manager's timetable was unacceptable to many, if not most of them. The minutes of this meeting are exhibited to

Mr. Santamaria's first affidavit. Mr. Louis Morin (an employee of the Investment Manager) is recorded as having said that "*he had received enquiries from a number of shareholders that held shares which represented a significant amount of economic value of the Company, being approximately 50% - 60%, enquiring as to why the process of realization could not occur sooner."* The minutes record that Directors and Mr. Morin then reviewed the Company's portfolio in detail and each position was discussed as to events, liquidity and market conditions. They discussed an appropriate timeframe in which the realization of the Company's remaining assets could be feasibly achieved. Having regard to Mr. Morin's advice (which appears to have changed since the 25th March letter was written), the Directors instructed the Investment Managers to accelerate the Wind Down Plan by a year and complete it by 31st December 2010. Mr. Morin also proposed that the Investment Manager would waive its entitlement to any management fees falling due after 31st December 2010.

Acceleration of the Wind Down/Compulsory Redemption Plan

12. In the meantime, the winding up petition was presented to the Court on 6th July and served on the Company on 12th July, together with a summons for directions listed for hearing on 21st July 2010. It is clear that the petition was presented before the Petitioner became aware of the revised version of the Wind Down/Compulsory Redemption Plan formulated at the management meeting on 9th July. It is equally clear that the plan's timetable was accelerated initially in response to concerns expressed by shareholders generally and not in response to the winding up petition, which did not come to the attention of the Investment Manager and Directors until some days later.

13. The accelerated timetable for the Wind Down/Compulsory Redemption Plan was communicated to the shareholders by the Investment Manager's letter dated 20th July 2010 which stated :-

"Following consultation between the Directors of the Fund and the Investment Manager, the timetable for the wind down has now been accelerated such that the Fund will be attempting to realize the remaining assets by December 31, 2010.

In order to return cash to shareholders, we intend to make compulsory redemptions of a significant number of shares on September 30, 2010 and December 31, 2010. We do anticipate that some of the Fund's securities may not be sold entirely by December 31, 2010, due to the limited liquidity of some of the securities. These very few securities that remain will be sold as soon as possible in 2011. The Investment Manager will charge the Fund no fees past December 31, 2010. Following completion of this process, the Fund will, in accordance with its Offering Memorandum, make any necessary payments to creditors of the Fund (including the establishment of a reserve for liquidation expenses) and return any remaining proceeds of realization to shareholders by way of a final compulsory redemption). The Fund will then be formally liquidated and dissolved after its final audit".

This letter did not disclose that a winding up petition had been presented against the Company.

14. My order for directions made on 21st July 2010 required that copies of the petition, the verifying affidavit (without its exhibits), the supporting affidavits sworn by the nominated insolvency practitioners and the order itself be distributed to all shareholders by the Administrator. This was done on 28th July under cover of a letter signed by one of the Directors. It stated that the Directors considered it to be in the best interests of the Company to resist the petition because, in their opinion, the appointment of official liquidators would have a two-fold adverse effect, namely *"(a) delay the realization of the remaining assets of the [Company] and the distribution of proceeds.....; and (b) increase the expense of realizing the [Company's] remaining assets by adding a further*

layer of substantial additional costs that will be charged by the liquidators." The Directors' letter also stated that *"the Investment Manager has informed the Board that it expects the appointment of liquidators will likely result in severely reducing the value of certain assets held by the [Company]".*

15. The Wind Down/Compulsory Redemption Plan was accelerated further during the course of August. By a letter dated 5th August 2010 the Directors advised the shareholders that assets in the amount of US$30.2 million had been realised since 1st July (and therefore not reflected in the 30th June management accounts which had been distributed with the previous letter) and that a further US$7.7 million was likely to be realized by the 15th August. Based on these numbers, the Directors said that a further US$37.5 million (less expenses) would be distributed by means of a compulsory redemption as at 30th September 2010. However, the Directors also said that the remaining four investments were unlikely to be realized until the end of the year – a forecast which was revised by the Investment Manager immediately before the hearing of the petition.

16. By the time that Mr. Wyser-Pratte had sworn his second affidavit on 6th September 2010 the timeframe for the Wind Down Plan had accelerated even further. By this time, the Company had cash in hand of about US$42.7 million and investments in four listed securities, all of which are relatively illiquid, thinly traded stocks. He said that the investment in one stock was being sold in the market in tranches and should be completed by the end of September. As regards the other three, Mr. Wyser-Pratte's evidence is that he is currently negotiating "block trades" and anticipates that one will be concluded by early September, one by mid-late September and the last one between

September and October. In other words, by the time of the hearing, the Company's position was that its Wind Down Plan could and should be concluded by the end of October or thereabouts. Less than six months earlier the Investment Manager was saying that this process could not be done, or at least not in an "orderly manner", for another 15 months until the end of 2011.

17. I conclude that the Wind Down Plan was accelerated as a result of shareholder pressure, including that exerted by the presentation of the winding up petition. Left to its own devices, I think that the Investment Manager would have been content to perpetuate the exercise until the end of 2011.

The Petitioner's case: loss of substratum

18. The Petitioner's case is that the Company is liable to be would up on the just and equitable ground because it has ceased to carry out any investment business as set out in its offering documents, or at all, such that the Company's substratum has therefore wholly failed. In these circumstances, the Petitioner contends that the Company should be liquidated in accordance with the Companies Winding Up Rules under the direction of official liquidators, rather than informally by its Directors and Investment Manager pursuant to the Winding Down/Compulsory Redemption Plan. The Petitioner's counsel relies upon what I said in *Re Belmont Asset Based Lending Ltd* (unreported 19th January 2010).

> *"…… A company was said to have "lost its substratum" if the purpose for which it was formed can no longer be carried out) per Kekewich J. in Re Bristol Joint Stock Bank (1890) 44 Ch.D a703 at 712); or if the company has practically ceased to carry on business opportunity which is no longer*

available to it (Re Haven Gold Mining Co. (1882) 20 Ch.D 151). To translate these statements into a modern context, it can be said that it is just and equitable to make a winding up order in respect of an open ended corporate mutual fund if the circumstances are such that it has become impractical, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering document. If such a company, organized as an open ended mutual fund, has ceased to be viable for whatever reason, the Court will draw the inference that it is just and equitable for a winding up order to be made".

In my judgment the Company had certainly ceased to be a viable open ended mutual fund by the time the winding up petition was presented. Indeed, with the benefit of hindsight, I think that it had ceased to be viable in September 2008. By definition, a company cannot be said to be carrying on business as an open ended mutual fund if its ability to redeem shareholders in cash and its ability to accept new subscriptions has been terminated permanently.

The Company's Defence

19. The Company's case is that the undisputed factual circumstances do not lead to the conclusion that the Company has "lost its substratum" or "ceased to be viable as a mutual fund". It is said that a company is only liable to be wound up on this basis if there exists a state of affairs entirely outside what can fairly be said as having been in the contemplation of the investors when they subscribed for their shares. Counsel goes on to argue that the Wind Down/Compulsory Redemption Plan is "at the heart of what each shareholder signed up to when it made its investment". In support of this proposition, counsel relies in particular upon the decision of the Eastern Caribbean Supreme Court (British Virgin Islands) in ***Citco Global Custody NY –v- Y2K Finance Ltd*** (unreported, 25th November 2009). Bannister J. said (at paragraph 24) :-

"In the present case, Y2K's proposal is, as I have said, not merely that it should be wound up, but that before that is put in train suspension of NAV should end and the

shares of all requesting investors be redeemed out of the remaining available funds. Mr. Browne-Wilkinson QC and Mr. Jeffrey Chapman, who appeared together with Ms Arabella di lorio and Ms. Aisling Dwyer for Citco/Headstart characterised the proposed resumption of redemptions as 'a distribution of assets to be carried out by the directors', as if they were proposing some sort of informal and extra-statutory liquidation of their own devising. Although he put the point very persuasively I do not think that that is right. A redemption of the shares of those investors who wish to redeem is not a distribution by way of ad hoc liquidation, of the sort which Scott J (as he then was) so deplored in re Perfectair Holdings Ltd. [1990] BCLC 423. It is wholly different from liquidation both in law and in fact. It is a carrying on, albeit for the last time, of the business of Y2K in accordance with the contractual rights of members under Y2K's Articles of Association. If, after that has been done, there remains investors who do not wish to be redeemed, then liquidation must follow, since the surplus cannot lawfully be distributed in those circumstances except in accordance with the statutory scheme. But while Y2K is solvent (that fact is not challenged), it seems to me that there is nothing in the authorities which suggest that it would be a proper exercise of discretion for the Court to step in and shut the company down while it remains in a position to carry out the last of its commercial functions for the benefit of those of its investors who have requested that it should be exactly that".

20. In my judgment Counsel's submission is highly artificial and ignores the commercial realties. There is nothing in the Company's offering document which would lead its shareholders to anticipate that the suspension of redemptions and the imposition of a wind down plan is something which may happen "in the ordinary course of business". Nor is there anything in the offering document which suggests that a liquidation of the Company will necessarily be carried out under the supervision of its Directors, rather than professional insolvency practitioners; or that it will be carried out pursuant to a plan devised by the Investment Manager without shareholder approval; or that the Investment Manager will continue to be paid a percentage of NAV during the liquidation process; or that there will be no formal mechanism whereby the shareholders can intervene and influence the process. In fact the offering document is wholly silent about what will happen in the event that it becomes necessary to put the Company into liquidation.

21. The Company's offering document does warn shareholders that in certain circumstances their right to redeem may be limited or suspended altogether. It states (at page 41) under the heading *Limited Liquidity* that -

> *"An investment in the Fund provides limited liquidity since the Shares are not freely transferable and a shareholder generally may redeem Shares only on the first anniversary of its admission to the Fund and, thereafter, as of the end of each calendar quarter, upon at least 90 days' prior written notice to the Administrator……*
>
> *If redemption requests are received with respect of any Redemption Date (as defined below in "Redemption of Shares") for more than 10% of the value of the Fund's net assets, the Board of Directors may, in its sole discretion, (i) satisfy all such redemption requests or (ii) reduce all redemption requests pro rata so that only Shares giving rise to aggregate redemption proceeds equal to 10% of the Net Asset Value of the Fund as of the Redemption Date are redeemed……*
>
> *In addition, the Fund may limit or suspend redemption rights for any and all shareholders for any period during which, in the opinion of the Board of Directors, upon consultation with the Investment Manager, disposition of investments by the Fund would not be reasonable or practicable or would be prejudicial to the shareholders".……*

22. However, the offering document does not explain that a suspension of redemptions may be left in place indefinitely whilst the Investment Manager realizes the assets and carries out a long term liquidation plan, in this case for more than three years from September 2008 to December 2011. To the contrary, it seems to me that any shareholder who reads this section of the offering document would anticipate that its redemption rights will only be suspended temporarily in response to some exceptional event, such as a sudden influx of redemption notices, outside the control of the Directors.

23. The offering document also warns shareholders that in certain circumstances their shares may be compulsorily redeemed. It states (at page 58) under the heading *Compulsory Redemption* :

> *"The Board of Directors, in its sole and absolute determination, may compel redemption of all or any portion of a shareholder's Shares at any time immediately upon notice if the Fund or the shareholders as a whole could suffer any tax, fiscal, legal, regulatory, pecuniary or material administrative disadvantage, which it or they would not otherwise have suffered"……*

24. This statement does little more than re-state the terms of Article 57 of the Company's articles of association. Counsel for the Company argues that the power contained in Article 57 can properly be used (in combination with a suspension of redemptions under Article 59(b)) for the purpose of liquidating the Company. Even if Counsel's construction of Article 57 is right, which I very much doubt, the Company's offering document gives shareholders no clue that it might be used for this purpose. Quite simply, the offering document does not address what will happen in the event that it becomes necessary or appropriate to liquidate the Company. It does not say how or by whom a solvent liquidation will be conducted. In my judgment there is no basis upon which it can be said that it should have been within the reasonable contemplation of shareholders, at the time they subscribed for shares, that any liquidation would be carried out informally by the Investment Manager and that they should not expect to be able to invoke the provisions of Part V of the Companies Law.

Conclusions

25. The Company had probably ceased to be viable as an open ended mutual fund from September 2008. It is agreed by all concerned that it must be liquidated and ultimately dissolved. The real issue is how, when and under whose supervision is this to be done. The Investment Manager's Wind Down/Compulsory Redemption Plan was presented to the shareholders as a fait accompli. In my judgment it cannot be characterized as something which the shareholders should have anticipated as likely to happen in the ordinary course of business. It is a response to an extraordinary circumstance, namely the service of redemption notice by an overwhelming number of shareholders. The details have not been put in evidence, but I was told by Counsel for the Company that redemption notices have been served in respect of 90% of the shares. The Directors did not see fit to convene an EGM for the purpose of seeking shareholder approval. Therefore, in my judgment, the circumstances are such that it is just and equitable for the Company to be wound up pursuant to the provisions of Part V of the Companies Law.

26. Counsel for the Company argues that I should not come to this conclusion because the Petitioner has an "alternative remedy". He submits that I should dismiss the petition because the Wind Down/Compulsory Redemption Plan is itself an alternative remedy. I reject this proposition for the reasons already explained. The Wind Down/Compulsory Redemption Plan has not been approved by a special resolution passed at an EGM. Nor does it have implied approval in the sense of being something which should be anticipated in the ordinary course of business. If the Company is going to be liquidated, I see no basis for denying the shareholders' the right to have it done in accordance with the

provisions of the Companies Law. The only alternative to presenting a winding up petition is to requisition an EGM for the purpose of proposing a resolution that the Company be put into voluntary liquidation. However, I do not regard this as a practical alternative. By Article 80, an EGM can only be requisitioned by a shareholder or shareholders holding "at least a majority of the paid up voting share capital". The Petitioner holds only 0.5%. The largest single shareholder holds only 20%. Shareholders seeking to act in concert are faced with the problem that share registers of hedge funds are usually treated as confidential documents and the shareholders of the Company have no express right under the articles to call for a copy. It was therefore practically impossible for the Petitioner to requisition an EGM.

27. Having come to the conclusion that the petitioner has made out its case for relief, I have a wide range of discretionary powers under Section 95 and I concluded that I should not make an immediate winding up order for the following reasons. First, the petition has to some extent been overtaken by events. It was presented in response to the Wind Down/Compulsory Redemption Plan as originally formulated in the Investment Manager's letter of 25th March 2010. An important aspect of the plan, which was unacceptable both to the petitioner and most other shareholders, was the projected end-date of 31st December 2011. This projection was subsequently accelerated, firstly to 31st December 2010 then to 31st October or thereabouts. By the time of the hearing the projected end-date was so close that the appointment of official liquidators would serve little useful purpose. Another unacceptable aspect of the plan was its assumption that the Investment Manager would continue to receive 0.5% of NAV payable quarterly in

arrears. The effect of this fee structure is that the Investment Manager has a financial interest in delaying the Company's liquidation. By the time of the hearing, this concern had also been addressed to some extent because the Investment Manager agreed to waive any fee which might otherwise have become payable after 31st December 2010. Second, there is unchallenged evidence that the mere appointment of official liquidators will signal to the market that the Company is engaged in a "fire sale" of its assets. Even though all its remaining assets are listed securities, they are in fact relatively large positions (in some cases more than 5%) in small-cap companies whose shares are thinly traded and Mr. Wyser-Pratte's opinion is that the appointment of official liquidators could result in a significant loss in value.

28. For these reasons I decided to adjourn the petition pursuant to Section 95(1) (b). Having accepted Mr. Wyser-Pratte's evidence that the remaining assets are likely to be realized during September and the first part of October, it is anticipated that the "liquidation" can be brought to a conclusion by the end of that month, whereupon a final redemption of shares and distribution of cash will be made and final accounts will be prepared. The petition will be re-listed for hearing on the first open day after the 16th November. If the "liquidation" has been satisfactorily completed, it is anticipated that the Company will then ask the Court to make an order for dissolution.

29. I also decided to make an order under section 95(3) (b). As at the close of business on 2nd September, the Company held approximately US$42.7 million in cash. It has no liabilities other than fees and expenses payable to its various professional service providers. The Investment Manager intended to retain this cash until after 30th September

on the basis that the articles required that compulsory redemptions be done on a quarter day. However, delaying the distribution of this cash can have no possible benefit for the shareholders. Indeed, it would be detrimental to delay its distribution until after 30th September because it would then be included in the NAV for the purpose of calculating the Investment Manager's fee. The additional fee (0.5% of $40m) would far outweigh any interest which might be earned on this money during September. I therefore made an order that the Company shall make a distribution, by way of compulsory redemption of shares of all available cash held by the Company as at 31st August to all registered shareholders of the Company on or before 15th September.

30. Another aspect of the Directors' Wind Down Plan about which shareholders could legitimately complain is that it did not require the Investment Manager (or Administrator) to provide them with reports and accounts on a regular basis, whereas official liquidators would have a statutory obligation to do so. I therefore made an order pursuant to section 95(3) (a) and/or (b) that unaudited financial statements and NAV calculation be prepared as at 31st August and monthly thereafter and that they be distributed to the shareholders.

31. As regards costs, the general principle is that an order should be made in favour of the successful party. The Petitioner can claim to have been partially successful in that it made out a case for relief, albeit not exactly the relief it was asking for. However, I think that there is merit in the submission made by Counsel for the Russell Funds (which own about 20% of the Company). He said that the presentation of the petition was a justifiable response to the Wind Down/Compulsory Redemption Plan in its original form, but suggested that the Petitioner ought to have agreed to adjourn its petition in response to

the Directors' subsequent actions. The case management conference on 1st September provided the Petitioner with an opportunity to reconsider its position. I conclude that the Petitioner should have its costs on the indemnity basis on up to that point. I also made an order for costs in favour of the Russell Funds.

Dated: 26th October 2010

_____

Hon. Mr. Justice Andrew Jones, QC
Judge of the Grand Court