

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

Cause Nos FSD 159,160, 161,162
and 169 of 2014 (NRLC)

5 IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
6 AND IN THE MATTER OF WEAVERING MACRO FIXED INCOME FUND LIMITED (IN
7 LIQUIDATION)

8 BETWEEN:

9 (1) IAN STOKOE
10 (2) DAVID WALKER
11 (3) HUGH DICKSON
12 (4) PAUL MCCANN

13 (AS JOINT OFFICIAL LIQUIDATORS OF WEAVERING MACRO FIXED INCOME FUND
14 LIMITED)

Plaintiffs

16 -and-

17 SOMERS DUBLIN LTD AND OTHERS

Defendants

20 **Appearances:** Mr Jan Golaszewski and Ms Amy Altneu of Carey Olsen on
21 behalf of the Plaintiffs in all Causes

22
23 Mr Jeremy Walton and Mr Andrew Jackson of Appleby (Cayman)
24 Ltd on behalf of the Defendants in Cause Nos FSD 159, 160, 161
25 and 162 of 2014 (NRLC)

26
27 Mr Ian Huskisson of Travers Thorp Alberga on behalf of the
28 Defendant in Cause No FSD 169 of 2014 (NRLC)

31 **Coram:** The Hon. Justice Nigel R.L. Clifford QC

33 **Heard:** Tuesday, 13 October 2015

36 **RULING**

- 37
38 1. In the five summonses before the Court the Joint Official Liquidators ("JoLs") of
39 Weaving Macro Fixed Income Fund Limited (In Official Liquidation) ("the Fund")
40 have applied for a general stay of the proceedings in each of the five relevant actions

*Note of Ex Tempore Ruling: Ian Stokoe et al –v- Somers Dublin Ltd and Others – FSD Nos. 159, 160, 161, 162 and 169 of 2014
Coram: The Hon Justice Nigel Clifford, QC. Date: 13 October 2015*

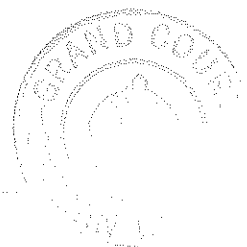
41 which they have brought, or, in the alternative, an extension of time to serve the
42 statement of claim in each of those actions. The stays sought have been until the
43 delivery of judgment at trial in Cause Number FSD 98 of 2014 between (1) Simon
44 Conway (2) David Walker as JoLs of the Fund and Skandinaviska Enskilda Banken
45 AB ("the SEB action").

46
47 2. On 13 October 2015, I heard the applications and refused the stays sought, but
48 granted extensions of 5 weeks for the service of the statements of claim. On that
49 occasion I gave a short *ex tempore* Ruling, a note of which has been approved by
50 me. However, I also thought it appropriate to give fuller written reasons for the Ruling
51 which I now do.

52
53 3. The background to these and other related actions is set out in a Ruling of mine
54 dated 9 April 2015. In that Ruling I declined to extend the validity of 24 writs which
55 had been issued by the JoLs, all claiming that redemption payments which had been
56 made out of the Fund constituted invalid preferences pursuant to section 145 of the
57 Companies Law (2013 Revision). The rationale underlying the Ruling, founded on the
58 relevant principles referred to, was for the JoLs to serve the writs and then either to
59 seek an extension of time to serve the statement of claim in each case or to apply to
60 stay the actions. I favoured the latter course to allow what was regarded as the
61 principal action, namely the SEB action, already in progress seeking the same relief,
62 to proceed. I also expressed the hope that this course might be agreed, on the
63 footing that it could make sense for parties to wait to see how the SEB action
64 materialised as this might then determine whether or not the other actions would
65 proceed. The aim was to save potentially unnecessary proceedings and costs.

66
67 4. Accordingly, against this background, I had some sympathy for the JoLs for the
68 position in which they then found themselves in not being able to secure agreement
69 of stays in all cases pending the determination of their lead case, the SEB action. In
70 particular the Defendants resisting the present applications have refused to agree
71 stays. Moreover, by the time of the hearing of the applications the trial of the SEB
72 action was imminent with a judgment expected within a month or two. So there was
73 not long to wait.

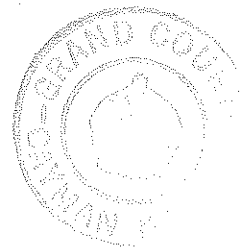
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- 75 5. However, with the benefit of further more detailed analysis of the position in relation
76 to these actions, and submissions on the relevant legal principles, the question of
77 whether a stay could properly be granted has had to be reconsidered. And with this
78 further analysis, the principal action, the SEB action, looks less and less like any kind
79 of real “test case”. Indeed it is conceded by the JoLs, rightly I think, that the SEB
80 action is not a “test case” in the classic sense.

81
82 **Jurisdiction**
83

- 84 6. The question raised was whether there is any jurisdiction to stay the five actions
85 pending the determination of the SEB action.
86
- 87 7. The JoLs asked the Court to exercise its inherent jurisdiction and case management
88 powers to grant the stays sought by their summonses. The basis on which they
89 sought the stays, in summary, is that particular findings in the SEB action “may be
90 applicable” or “will be relevant” to these other actions and that if they serve to narrow
91 the issues in these actions it will result in a time and costs saving for the parties.
92
- 93 8. Mr Golaszewski, on behalf of the JoLs, referred to the Overriding Objective in the
94 Preamble to the Grand Court Rules 1995 (Revised Edition). In paragraph 1.1 this
95 sets out such overriding objective as being “*to enable the Court to deal with every*
96 *cause or matter in a just, expeditious and economical way.*” Paragraph 1.2 provides
97 that dealing with a cause or matter justly includes, as far as practicable, the matters
98 there set out, including “*saving expense*” and “*dealing with the cause or matter in*
99 *ways which are proportionate*”. Paragraph 2 requires the Court to seek to give effect
100 to the overriding objective when it “(a) *applies, or exercises any discretion given to it*
101 *by these Rules; or (b) interprets the meaning of any Rule.*” And paragraph 2.2
102 provides that “*These Rules shall be liberally construed to give effect to the overriding*
103 *objective and, in particular, to secure the just, most expeditious and least expensive*
104 *determination of every cause or matter on its merits.*” The Preamble goes on to set
105 out the Court’s duty to manage proceedings in accordance with the overriding
106 objective. It is submitted, on behalf of the JoLs, that there is the power to grant the
107 stays sought in accordance with the overriding objective and that this would be the
108 way of achieving such objective.



- 109 9. It was also pointed out by Mr Golaszewski that the overriding objective referred to is
110 set out in the Financial Services Division Guide, in Section A, paragraph 4.
111
- 112 10. In addition Mr Golaszewski cited the case of **Cigna Worldwide Insurance Company**
113 **v Ace Limited** [2012] 1 CILR 55. Cresswell J, in that case, held that the Court has
114 power to grant a stay pending determination of an issue in another court, this being
115 “a case management power to stay rather than a jurisdictional stay”. But that case
116 was specifically about staying a Cayman action pending the outcome of related
117 foreign proceedings in accordance with the particular established principles in
118 **Spilliada Maritime Corp v Cansulex Ltd** [1987] AC at 482 484, and other
119 authorities referred to. I do not think that it is relevant or helpful in the present wholly
120 different context.
121
- 122 11. Mr Walton, in response, on behalf of the Defendants represented by him, submitted
123 that there is no scope here for reliance on inherent jurisdiction for the grant of stays
124 of the actions. He referred to the principles set out in **In re Sphinx Group** [2012] 2
125 CILR N-11, where the Chief Justice held that:
126
- 127 *“inherent jurisdiction could ... only be used in so far as (a) local circumstances*
128 *permitted; (b) there was a lacuna in local procedure; and (c) [referring to the*
129 *adoption of English rules or practice] provisions would not be applied which*
130 *would be inconsistent with, or would involve a different approach from, local law”.*
131
- 132 12. As Mr Walton pointed out, and I accept, there is no such lacuna in local procedure.
133 The circumstances in which the Court may grant stays of proceedings pending the
134 determination of another action are delimited by GCR O.4, r.4(1) which provides that:
135 *“Where two or more causes or matters are pending in the same Division of the*
136 *Court and it appears to the Court that –*
137 *(a) Some common question of fact or law arises in both or all of them; or*
138 *(b) The rights or relief claimed are in respect of or arise out of the same*
139 *transaction or series of transactions; or*
140 *(c) For some other reason it is desirable to make an order under this Rule*



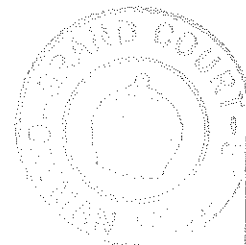
141 *The Court may order those causes or matters to be consolidated on such terms*
142 *as it thinks just or may order them to be tried at the same time or one*
143 *immediately after another or may order any one of them to be stayed until after*
144 *the determination of any other of them;*
145

146 13. There does not appear to be any local authority which provides guidance on the point
147 which arises here in relation to multiple actions, as to when the Court will exercise its
148 jurisdiction under GCR O.4, r.4(1) to stay one or more proceedings pending the
149 determination of a lead case. The rule is, however, expressed in terms identical to
150 those of the former RSC O.4, r.9 (1) and assistance may be derived from English
151 authorities which address this question.
152

153 14. These English authorities establish the principle of staying multiple proceedings
154 pending the trial of one of the actions if it can properly be regarded as a “test case”.
155 The authorities on the point are conveniently summarised in the commentary on the
156 rule in the Supreme Court Practice (1999 edition) where in paragraph 4/9/2 it is
157 stated:
158

159 *“[After discussing the possibility of consolidating certain actions only up to the*
160 *determination of liability] But more commonly an order would be made staying*
161 *the later actions pending the decision of the action which is nearer trial, and*
162 *which may perhaps be expedited, in the hope and expectation that the decision*
163 *of liability in the test action will be accepted in the other actions ... and that*
164 *damages in the latter actions may even be agreed; and by consent an order may*
165 *be made whereby the parties in the subsequent actions may agree to be bound*
166 *by the decision of liability in the first”*
167

168 15. The cases of **Amos v Chadwick** (1878) 9 Ch. D 459 (CA) and **Bennett v Lord Bury**
169 (1880) 5 C.P.D 339 are cited in support. **Amos v Chadwick** was one of 78 actions
170 commenced by separate plaintiffs against the same defendants, each involving a
171 claim for damages on the ground that the defendants as promoters of a company
172 had issued a prospectus containing a fraudulent misrepresentation which induced the
173 particular plaintiff to apply for its shares. The main issue before the Court was
174 whether one of the 78 actions should be substituted for another, **Robinson v**



175 **Chadwick**, as the test action for the other actions: Robinson was originally intended
176 and ordered to be the test action upon the plaintiffs in all actions having undertaken,
177 subject to certain qualifications, that it should serve that purpose, but it had not led to
178 a decision on the merits because Robinson failed to appear at trial and was non
179 suited. The defendants appealed. In dismissing the appeal, the Court of Appeal
180 provided guidance on test actions. Brett LJ, at page 464, said:

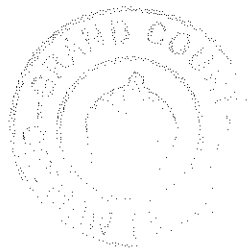
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182 *"It seems to me that no such order as this ought to be made unless the questions*
183 *in the actions are substantially the same, and the evidence would be substantially*
184 *the same if they were all tried. But when one of them is ordered to be tried as a*
185 *test action, that, as it seems to me, means that it is to be tried upon evidence*
186 *which would be evidence in the other actions."*

187
188 **Bennett v Lord Bury** was decided to similar effect. It was one of 38 actions
189 commenced by separate plaintiffs against the same defendants, each suing the
190 directors of a company for having misappropriated money deposited with the
191 company for investment. Certain defendants applied to rescind an order staying the
192 proceedings in 37 of the actions until after the trial of **Hull v Bury**, which had been
193 made upon all plaintiffs undertaking that **Hull v Bury** should be treated as a test
194 action and decisive of their respective rights, subject to appropriate qualifications. In
195 dismissing the appeal, Lindley J, at page 344, said:

196
197 *"I must confess I do not see how the defendants can be hurt by this order. It is*
198 *true that it has the effect of keeping several actions hanging over their heads ...*
199 *On the other hand, the order prevents the defendants from being subjected to the*
200 *unnecessary burden of the costs of thirty-eight actions, when the whole matter in*
201 *controversy may be settled in one"*

202
203 16. There is also a somewhat more modern English case on the point, a decision of the
204 Court of Appeal in **Perry v Croydon Borough Council** [1938] 3 All ER 670. This
205 defines the relevant jurisdiction in no uncertain terms. Greer LJ, at pages 672-673,
206 stated that:

207
208 *"It is only in cases where the issues are identical, and where one case inevitably*
209 *decides all the other cases, such as the cases ... where there were similar policies of*



210 *insurance, where one is agreed by both parties to be a test action, or where there are*
211 *similar contracts in the form agreed ...where the sole question is the meaning of a*
212 *term in a special contract in a form which has been signed by, it may be, 50 or 60*
213 *different plaintiffs, the sole question being the meaning of the particular clause ...in*
214 *which it is proper, right and just that there should be a test action, and that other*
215 *actions should be stayed until the hearing of the test action."*

216
217 17. Mackinnon LJ, with whom Slesser LJ agreed, went on at page 673 to say:

218
219 *"For the application of this very sensible procedure, by which many actions are*
220 *stayed pending the trial of one action, it is, I think, essential that the test action shall*
221 *raise precisely the same cause of action as that sought to be stayed."*

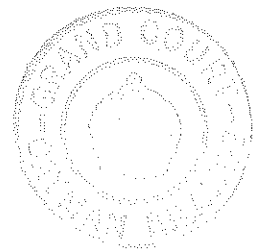
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223 18. Mr Walton submits that these English authorities consistently and forcefully state that
224 the Court will not stay an action pending the determination of another unless (a) the
225 same issues fall to be decided in each; and (b) the action which is to proceed as the
226 test action can produce a judgment which is expected to render further litigation in
227 the other stayed action unnecessary.

228
229 19. Mr Golaszewski, submits that the similarities between the cases are such as to
230 justify a stay of the other actions, if not under the inherent jurisdiction of the Court,
231 then on the basis of O.4, r.4(1). He relies particularly on O.4, r.4 (1)(c) which allows
232 the Court to grant a stay if *"for some other reason it is desirable to make an order*
233 *under this Rule"*. This, he submits, brings in the case management considerations in
234 favour of a stay for which he contends.

235
236 **Application of the principles to these actions**
237

238 20. Applying the principles from the authorities to the present proceedings, there is no
239 real question of the SEB action being a test case.

240
241 21. It is submitted on behalf of the JoLs that there are obvious similarities between the
242 SEB action and the other actions. However, as already mentioned, it is also accepted
243 that the SEB action is not a test case in the classic sense. Although it is conceded



244 that there will be differences in the preference claims, payments having been made
245 to different parties at different times, nevertheless it is contended that the findings in
246 the SEB action may serve to narrow the issues that fall for determination in the other
247 actions.

248

249 22. The analysis of the JoLs in support of their contentions is as follows:

250 (1) The legal issues involved in both the SEB action and the other actions will be
251 similar as they are all preference claims based on section 145 of the Companies
252 Law.

253

254 (2) Findings in the SEB action may be applicable to the other actions on the issues
255 of –

256

257 (a) solvency of the Fund at the time of the relevant payments;

258 (b) whether payments by the Fund amounted to a preference over the other
259 creditors;

260 (c) awareness of insolvency at the time the payments were made; and

261 (d) whether payments were made with a view to giving a preference over other
262 creditors.

263

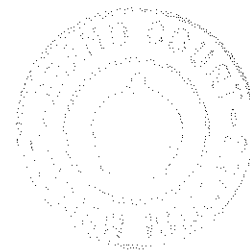
264 (3) The ruling in the SEB action of who was the controlling mind of the Fund in the
265 payment of redemptions will be relevant to the other actions.

266

267 23. In addition, it is submitted that if the JoLs are unsuccessful in the SEB action,
268 depending on the reasons, this will impact on the decision by the JoLs whether or not
269 to prosecute some or all of the other actions. The point made is that if there is a
270 decision to discontinue some or all of these other actions, this would result in an
271 obvious saving of time and costs.

272

273 24. As to these points, in response it is submitted on behalf of the Defendants that the
274 matter falls to be determined in accordance with the applicable rule (O.4, r.4 (1)),
275 which I accept, and that on an application of the established principles, as the SEB
276 action is not a test case, there is no proper basis for staying these other actions. At
277 the most, it is accepted, there may be a narrowing of issues, for example in relation



278 to the question of solvency. However, it is contended that in other key respects there
279 are material differences between the actions.

280

281 25. The dissimilarities referred to have particular significance, it is submitted, in relation
282 to each payment made to each particular Defendant. A particular point made is that
283 in the SEB action there is a specific allegation that the payments were made to allow
284 investments to be made in another fund, whereas no such allegations have been
285 made in the pre-action correspondence with the Defendants in these actions. It is
286 contended that the question of dominant intention to prefer will have to be
287 determined on the evidence in each action. Accordingly, both Mr Walton and Mr
288 Huskisson, on behalf of the Defendants they respectively represent, submit that their
289 clients are entitled to see how the case is put against these Defendants, so that
290 decisions can be made on what course to take. I accept that there is good reason
291 why statements of claim should be served.

292

293 26. Mention should also be made of reliance by the Defendants on the so-called rule in
294 **Hollington v Hewthorn** [1943] KB 587, which is applicable in this jurisdiction for the
295 reasons set out in a recent Ruling of mine in the case of **Kabushiki Kaisha Sigma v**
296 **Trustcorp and Hideo Seto** (dated 19 August 2015). In accordance with this rule any
297 findings which the Court makes in the SEB action will be inadmissible in the other
298 actions. Nevertheless, parties would be well advised to consider carefully how likely it
299 will be that, on the same evidence, different findings will be made on key issues,
300 particularly relating to solvency and the controlling mind of the Fund.

301

302 27. Various points and counterpoints have also been made about hardship of time delay,
303 costs and prejudice in relation to staying the actions. However, I have not found it
304 necessary to adjudicate on these points in reaching my decision.

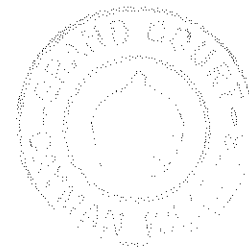
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307

Conclusion

308 28. Having considered the submissions, I felt bound to conclude that, on an application
309 of the established principles, these actions cannot properly be stayed in accordance
310 with GCR O.4, r.4(1). The SEB action cannot serve as a test action, in the required
311 sense, for these other actions. As it cannot do so, it would not be right, in my view, to



312 override the principles referred to by allowing stays nevertheless to be granted for
313 "some other reason" (in accordance with r.4(1)(c)) unless clearly shown to be justified
314 as an overriding reason. Whilst I have some sympathy with the position of the JoLs
315 and their desire, if possible, to streamline the proceedings and save costs (which
316 may anyway prove possible to an extent) I do not think that they can take the
317 analysis of the position far enough to justify staying these actions, even for the limited
318 time sought.

319

320 29. The most that I have felt able to allow is further time for service of the statement of
321 claim in each action.

322

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324 Approved this 21st day of December 2015

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329 The Hon. Justice Nigel R.L. Clifford, QC
330 JUDGE OF THE GRAND COURT

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