IN THE GRAND COUR OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD NO. 15 OF 2018 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF ALPHA RE LIMITED (IN VOLUNTARY LIQUIDATION

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 23RD DAY OF FEBRUARY 2018

APPEARANCES: Mr. Fraser Hughes and Mr. Erik Bodden of Conyers Dill and Pearman, Attorneys-a-Law for the Joint Voluntary Liquidators of Alpha Re Limited (In Voluntary Liquidation);

Mr. Mark Goodman and Mr. Guy Cowan of Campbells, Attorneys-at-Law for Blue II Fund Ltd.

Mr. Tony Heaver-Wren of Appleby, Attorneys-at-Law for Great Western Insurance Company (represented by Mr. Brian Lindquist)

Mr. Marc Kish and Mr. Shaun Maloney of Ogier for HM Life Insurance

Ms. Audrey Rowe from the Compliance Division of Cayman Islands Monetary Authority (CIMA); with her Mr. Julian Myles, Ms. Angelina Partridge and Ms. Nina Myers (all for CIMA on a watching brief)

Also present – Ms. Eleanor Fisher and Ms. Tammy Fu of Kalo Advisors.

Petition for voluntary liquidation to continue under the supervision of the Court – challenge to the identity of the liquidators – concerns raised by major creditors – applicable principles

JUDGMENT

1. Alpha Re Limited ("Alpha Re"), was incorporated in this jurisdiction on 10 February 2011. It was founded for the purpose of providing reinsurance. To that end, it was

granted and maintained an unrestricted Class B Captive Insurance Licence, pursuant to the Insurance Law 2010, allowing it to enter into reinsurance agreements or treaties.

2. On 16 January 2018, Alpha Re was placed into voluntary liquidation by unanimous resolution passed at an extraordinary general meeting and Messrs. Hugh Dickson and John Royle of Grant Thornton Specialist Services (Cayman) Limited ("GTSS Cayman"), were appointed joint voluntary liquidators ("JVLs").

3. The JVLs now present a petition that the winding up of Alpha Re continues under the supervision of the Court and that they be appointed the joint official liquidators ("JOLs"). They also seek the usual ancillary orders for the conduct of the liquidation. The petition is grounded by an affidavit of Mr. Royle.

4. The appropriateness of the winding up order is indicated by the fact that the JVLs have not received a declaration of solvency in respect of Alpha Re pursuant to section 124(1) and (2) of the Companies Law[1]. Instead, each of the directors has confirmed in writing that a declaration of solvency will not be forthcoming. Indeed, the JVLs' petition states that all of the directors have stated their belief that Alpha Re is insolvent.

5. And so, the primary question to be resolved on the petition, is not whether Alpha Re should be wound up under the supervision of the Court but, for reasons to be explained, the identity of the liquidators. Depending on the answer to that question, there is a secondary question as to whether the firm of Conyers Dill and Pearman ("CDP") who now represent the JVLs and earlier acted for Alpha Re during the months leading up to

[1] Which provide: " (1) Where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within twenty-eight days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form in accordance with subsection (2).

(2) A declaration of solvency means a declaration or affidavit in the prescribed form to the effect that a full enquiry into the company's affairs has been made and that to the best of the directors' knowledge and belief the company will be able to pay its debts in full together with interest at the prescribed rate, within such period, not exceeding twelve months from the commencement of the winding up, as may be specified in the declaration"

the resolution for its voluntary liquidation, should be allowed to act as the legal advisers to the JOLs.

6. The JVLs, in petitioning for their own appointment as the JOLs, have nonetheless confirmed their wish to be regarded as remaining neutral on this issue. Through Mr. Hughes, they tell me that they seek to address the objections and concerns raised against their appointment on the basis of principle , which is that the objections do not meet the test of reasonableness and objectivity established in the case law and so required for the denial of their appointment.

7. While they have expressed the intention to retain the services of CDP if appointed[2], the JVLs say that this secondary question is not one to be resolved now but should await the outcome of the primary question. If they are appointed JOLs, the secondary question whether or not CDP should continue as their legal advisers, would be a matter on which they would seek the sanction and directions of the Court and act accordingly.

8. Certain creditors (or contingent creditors) have appeared to oppose the appointment of the JVLs and CDP. They are Great Western Insurance Company ("GWIC"); and HM Life Insurance Company and HM Life Insurance Company of New York (together "HM Life"). They oppose the appointments of the JVLs and CDP, even while they wish to see the winding up of Alpha Re continue under the supervision of the Court.

9. GWIC raises concerns about perceptions of conflicts of interest (to be explained) which they say meet the test for the denial of the appointments, even while emphasizing that they do not allege, nor do they need to allege, any actual conflict of interest on the part of either the JVLs or CDP.

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[2] Per the first affidavit of Mr. Brian Lindquist ("Mr. Lindquist") filed on behalf of GWIC at [7], as related to him by GWIC's U.S. and Cayman Counsel from conversations with the JVLs.

10. HM Life support GWIC's position, with Mr. Kish on their behalf elaborating on other specific concerns, also to be explained below.

11. Another party, Blue II, Ltd ("Blue II"), claiming also to be a creditor in the winding up, supports the appointments of the JVLs and CDP; in effect, through Mr. Goodman, supporting also the arguments put forward on behalf of the JVLs. There are however, specific concerns raised about Blue II itself on account of its connection to a Mr. Mark Graham,("Mr. Graham"), a shareholder of Alpha Re and manager of Blue Alternative Asset Management ("BAAM"), the former investment manager of Alpha Re.

12. GWIC's claim and its concerns are explained by Mr. Lindquist, Assistant General Counsel to GWIC.

13. A central concern of GWIC , is the role of BAAM, under the direction of Mr. Graham, in the alleged misappropriation of trust assets. These assets were placed with Alpha Re under a Novation Agreement by which Alpha Re agreed to renew and assume reinsurance obligations on behalf of GWIC which had been assumed by another reinsurer Ability Re, under a Coinsurance Agreement(respectively the "Novation Agreement" and the "Coinsurance Agreement").Under the Novation Agreement, Alpha Re replaced Ability Re as the reinsurer of GWIC under the Coinsurance Agreement and trust funds held on account by Ability Re were liquidated and transferred to Alpha Re, to be held on trust for the benefit of GWIC to meet Alpha Re's ongoing obligations under the Coinsurance Agreement.

14. Liquidation of the Ability Re account resulted in Alpha Re receiving over USD 153 million in cash. Alpha Re was obliged to deposit that cash into Trust Accounts and an

additional 4% into a Supplementary Trust Account, (together the "Trust Account") in accordance with the Novation Agreement and respective Trust Agreements.

15. Pursuant to the Novation Agreement, Alpha Re was required to fund the Trust Accounts with assets defined as "admitted assets under the Utah Insurance Code". This requirement is a vital control to assure GWIC that the assets to which it may look as the reserve from which Alpha Re's portion of liability for insurance claims is taken, are of a known character. This is required to enable GWIC to get reinsurance credit from the UTAH Insurance Department ("UID"), Utah being GWIC's domicile of incorporation. This is so, even while GWIC is a licensed and regulated insurance provider in 46 states of the United States and the District of Columbia, with more than 320,000 policy holders.

Alleged obfuscation and breaches by Alpha Re

16. According to Mr. Lindquist, in September 2016, the Federal Securities and Exchange Commission ("SEC") contacted GWIC and informed that the SEC was investigating Mr. Graham and BAAM, the investment manager of Alpha Re controlled by Mr. Graham. GWIC was immediately concerned about the Trust Accounts for which Alpha Re had selected BAAM to be investment manager and sought to exercise rights under the Coinsurance Agreement to inspect Alpha Re's books and records regarding the assets in the Trust Accounts. GWIC made requests for inspection in late September 2016, as well as a further request for documentary proof and evidence that the assets were safe, secure and undisturbed, with no impairment or shortfall in value.

17. On September 23, 2016, a Mr. Don Solow (whom Mr. Lindquist is informed is a shareholder of Alpha Re) contacted GWIC reporting that he had seen statements that indicated that the Trust Accounts had sustained large investment losses of around 20%.

18. On September 29, 2016, Mr. Gregory Tolaram, a director of Alpha Re, sent an email to GWIC stating that Alpha Re was "*actively undertaking to bring reinsurance trust collateral level to the amount required under the reinsurance agreement*" and that "*in the event we determine that is not feasible, the company plans to submit to you a proposal for the recapture of the liabilities.*"

19. The next day, Mr. Michael Hall of Aon Insurance Managers (Cayman) Limited, a manager acting on behalf of Alpha Re, sent an email to GWIC stating that the requested information would be forthcoming and that GWIC should "*please note that Alpha Re is actively undertaking to bring the reinsurance trust collateral to the amount required under the reinsurance agreement.*"

20. While from those communications it was to be inferred that the Trust Accounts were not properly funded, over the next sixteen months, despite its requests, GWIC sought unsuccessfully to obtain from Alpha Re any reliable or conclusive information about the status of the assets. During this time, there were however further representations from Alpha Re and further revelations to the following effect:

- That the trust assets had been invested almost exclusively in repurchase agreements with Cygnet 001 Master Trust and 2011 Series-C Trust, which GWIC understands is run or owned by people affiliated with Alpha Re.
- Alpha Re's representatives and lawyers have repeatedly told GWIC that Mr. Don Solow is not only a shareholder of Alpha Re but also owns Regatta Holdings, which is the Cayman Islands entity that established and owns Cygnet 001 Master Trust and 2011 Series-C Trust.

- Mr. Solow has been intimately involved with the dealings between GWIC and Alpha Re; he has frequently attended conference calls and meetings with representatives of Alpha Re, BAAM (including Mr. Graham), and GWIC. Mr. Solow and Mr. Graham were among the four people present at the EGM on 16 January 2018 when Alpha Re was placed into voluntary liquidation[3].
- GWIC had made repeated requests for information from BAAM, the entity controlled by Mr. Graham and which Alpha Re described as its investment manager. However, BAAM has claimed to owe no obligations to GWIC and has refused to provide to GWIC any substantive information regarding the assets of the Trust Accounts.
- In November 2016, Mr. Solow informed Mr. Lindquist by telephone that BAAM is also the "investment manager" for Cygnet Master Trust and 2011 Series-C Trust. That would mean, observes Mr. Lindquist, that BAAM (and Mr. Graham) served as the investment manager on both sides of the purported repurchase agreement of the Trust Account assets – for both the buyer and the seller.
- Alpha Re ceased making payments on accounts due under the Coinsurance Agreement from April 2017. This was a breach of the Coinsurance Agreement which entitled GWIC to give notice of termination, which it did. This then triggered a liability of Alpha Re to repay following a net accounting and settlement as to any balance due under the Novation Agreement.
- As the result of Alpha Re's failure to respond to the UID's request for assurances as to the status of the Trust Accounts, UID in September 2017 denied GWIC

[3] As appears from the Affidavit of Mr. Royle. (at page 7 of exhibit JR1 to his Affidavit).

reinsurance credit for any assets in the Trust Accounts and placed GWIC under supervision. This, states Mr. Lindquist, was a terrible blow for GWIC which was then forced to take legal action against Alpha Re.

- GWIC was eventually successful under arbitration proceedings instituted against Alpha Re pursuant to the Coinsurance Agreement. On 27 November 2017, the Arbitration Panel issued a final and binding interim award ("the Award") requiring Alpha Re to: (1) Deposit USD 126, 994,559.61 in cash and/or treasury bills into the Alpha Trust Accounts; and (2) establish an irrevocable letter of credit, subject to the Panel's control, in the amount of USD4,699,887.77 to cover unpaid monthly accounts due up to 9 October 2017.
- As Alpha Re failed to comply with the Award by the December 15, 2017 deadline, GWIC filed a petition in the US District Court for the Southern District of New York seeking confirmation of the Award and to have it entered as a judgment of that Court pursuant to 9 U.S.C. ch. 9, 13 and 207. Alpha Re did not oppose that petition and on December 21, 2017, the New York Court entered judgment confirming the Award and requiring Alpha Re to comply with its terms of payment ("the Judgment").
- The deadline for any appeal has passed but Alpha Re has failed to make any payment pursuant to either the Award or the Judgment. Alpha Re is said by Mr. Lindquist to be therefore currently liable to pay GWIC a sum of USD135,570,470.61 pursuant to GWIC's rights under the now terminated Coinsurance Agreement.

- It is therefore that sum (being the debt constituted by the Award and Judgment) that now constitutes GWIC's primary claim in the liquidation of Alpha Re.

21. In addition to the alleged Repurchase Agreements with entities affiliated with itself, Mr. Lindquist further reports that Alpha Re has recently indicated that the Trust Accounts includes a five year, USD100 million promissory note dated June 20, 2017. This Note is reported to have been provided by Giga Global Energy Opportunity Fund Ltd ("Giga") to Alpha Re. Giga is purportedly a company incorporated in the Republic of Seychelles. The promissory note is reported to be the subject of a Guaranty of the same date provided by China Ruifeng Renewable Energy Holdings Limited ("China Ruifeng") for the benefit of an affiliate of Alpha Re, Alpha Re Holdings (Cayman) Limited. The Note is regarded by GWIC as being of suspect value because:

- Alpha Re has provided no evidence that the Note and the Guaranty have been validly deposited in the Trust Accounts. The Note and Guaranty stand to the credit of another Alpha entity, not to the credit of the Trust Accounts;
- Nothing is known about the circumstances surrounding the creation of the Note and Guaranty or of the creditworthiness of the promissor Giga or the guarantor China Ruifeng. Alpha Re has indicated to GWIC that it did not negotiate the Note and Guaranty and was not involved in any due diligence, with the Note and Guaranty being entirely procured by BAAM;
- An interest payment was apparently due under the Note on 31 December 2017, but no information was provided to GWIC by Alpha Re as to whether that payment was received and, if it was made, what happened to those funds.

The need for investigations.

22. Against the background of that history, it appears highly likely to GWIC that the assets transferred at the time of the Novation Agreement have been misapplied and the Trust Accounts have been left with assets of very dubious value.

23. Mr. Lindquist avers that as GWIC's legal process closed in on Alpha Re, its representatives have become "increasingly desperate". In calls between himself and Mr. Graham, the latter threatened that if GWIC did not stay enforcement of the Judgment, Alpha Re's board of directors would "*take unilateral action which would harm GWIC*". Additionally, that this was even said by Alpha Re's representative, a Mr. Gordon, to the Arbitration Panel and to GWIC during the hearing of the proceedings in the United States.

24. From all the foregoing, it follows avers Mr. Lindquist, that the actions of Alpha Re and of its directors and service providers during the crucial period leading up to its liquidation will require particularly close scrutiny and for this reason, the independence, impartiality and objectivity of the incoming JOLs must be vouchsafed.

25. HM Life has similar concerns, in respect of assets worth some USD20 million placed with Alpha Re under a different reinsurance agreement. HM Life's position is explained in an affidavit by its Assistant Secretary, John Lee Sencak.

26. Mr. Sencak explains that Alpha Re's obligations to HM Life under its reinsurance agreement are supposed to be secured by assets held on the trusts of the same Master Trust to which GWIC assets are said to have been transferred – the Cignet 001 Master Trust. The Cignet 001 Master Trust is a series trust, meaning that within the Master Trust there are separate and distinct "series," which include segregated assets which are

intended to meet distributions due to the various beneficiaries in accordance with their respective rights and amounts required and placed in trust to meet Alpha Re's obligations to the beneficiaries, under their respective reinsurance agreements.

27. As a result of the Judgment obtained by GWIC against Alpha Re on 21 December 2017, HM Life has been prevented from accessing assets held by the trustee of the Cignet 001 Master Trust – Wilmington Savings Fund Society, FSB ("WSFS") - for the purposes of satisfying claims made against HM Life under its underlying insurance policies.

28. HM Life does not accept the circumstances or terms of that restraint of its assets as represented by WSFS, but nonetheless believes that Alpha Re has grossly disregarded its duties owed to HM Life, having breached their reinsurance agreements in many respects. Instead of challenging the WSFS restraint, HM Life has referred its dispute with Alpha Re to arbitration and will be asserting a claim against the Alpha Re liquidation estate for damages and interest.

29. Whilst HM Life, like GWIC, does not wish to make any allegations of impropriety against either the JVLs or CDP, it shares GWIC's desire to have clearly independent liquidators appointed and independent attorneys engaged, so that it can be assured that the investigations to be carried out by the official liquidators will be conducted with appropriate diligence and independence.

The concerns about the identity of the JOLs.

30. An immediate concern of GWIC and HM Life, is the hand which Mr. Graham seems to have had in the voluntary liquidation of Alpha Re and the appointment of the JVLs, following on an earlier engagement by Alpha Re of Grant Thornton (Cayman) ("GT Cayman"), an affiliate firm of GTSS, the JVLs' firm.

31. From affidavit evidence filed by Mr. Dara Keogh on behalf of GT Cayman[4], it appears that GT Cayman was engaged by the directors of Alpha Re from 20 October 2017 until the date of appointment of the JVLs – the 16 January 2018. He avers that GT Cayman's only role in that engagement was to assist Alpha Re in attempting to resolve a number of outstanding issues described as "*stemming from an inspection by the Cayman Islands Monetary Authority in March 2017*" ["CIMA"] and that GT Cayman "*was not engaged or asked to provide any advice, assurance, or opinions whatsoever. It was effectively a fact-gathering exercise to ultimately assist the board in response to CIMA's inspection*".

32. In response to a direct question from the Court, it was stated on behalf of GT Cayman[5] more specifically, that it rendered no advice or opinions in relation to the Trust Accounts held by Alpha Re.

33. While the terms of the engagement have been explained by Mr. Keogh and a copy of the contract of engagement provided in evidence, no disclosure of the work actually undertaken has been given. Nor has it been asserted that GT Cayman is precluded from giving this information[6].

34. There were, moreover, expressions of concern by both GWIC and HM Life about GT Cayman's role, on account of what appear to be contradicting information on this issue.

35. The Engagement Letter between Alpha Re (per Mr. Tolaram as COO) and GT Cayman (per Mr. Keogh) under the heading "Excluded Services" states: "*Grant Thornton is not*

[4] Mr. Keogh is a partner of GT Cayman.

[5] Per Mr. Hughes based on instructions.

[6] For instance, CIMA were present in Court on a "watching brief" and it must be inferred that their consent to disclosure to the Court of any submissions made by GT Cayman to them on behalf of Alpha Re could have been sought. I note however, that after the hearing a second affidavit was submitted by Mr. Keogh purporting to explain in more detail the nature of the work undertaken by GT Cayman. This affidavit was not requested or directed by the Court and so quite understandably met with objection from GWIC's attorneys, sent by email to the Deputy Clerk of Court. I have decided not to rely on this affidavit, not only because it was late and unsolicited by the Court but also because I would have been obliged to reopen the hearing to allow GWIC and HM Life (and perhaps Blue II) the opportunity to respond to it, which I regard as a disproportionate undertaking in the context of this matter.

being engaged to provide any form of attest report or opinion on financial data or internal controls."

36. However, under the actual Statement of Work ("SOW") exhibited to the Engagement Letter, the scope of services clearly states that " *Our services are advisory in nature only and will consist of reading corporate documents, organizational business plans, financial statements and other records, recalculating financial forecasts, making enquiries of shareholders and management, analyzing the information obtained during each phase below for management's review and consideration to facilitate Company's management with the development of it's (sic) management equity plan. Grant Thornton's Responsibilities and Deliverables include the following three phase process:*

Phase 1 : Understanding

- *Reading Cayman Islands Monetary Authority ("CIMA") Inspection Report*
- ...
- *Reading of recent Client audited financial statements*
- ..
- *Review of Client reinsurance program, including review of contracts and agreements*
- *Review of Client investment policy and investments in place*
- *Inquiries with Client Executives and General Counsel.*

Phase 2: Facilitation

- *Advise Client on resolving outstanding CIMA inspection items*
- ..

- *Advise Client on appropriate Risk Management Framework, including meeting all regulatory requirements on Rule for Risk Management.*
- ....

Phase 3: Feedback

- *Discuss feedback with Client on service offering."*

37. In addition to the clear implications of the SOW as extracted above, there is also evidence of communications between Mr. Keogh and Mr. Royle which appear to contradict GT Cayman's stated view of the terms of its engagement with Alpha Re. This arises from an email exchange between Mr. Royle and Mr. Patrick Corr[7] on 25 January 2018, exchanges which mention also the role of CDP, itself the second subject of concern expressed by both GWIC and HM Life and so to be excerpted here as well:

> *"Moving onto the prior roles of Grant Thornton Cayman and Conyers Dill & Pearman*
>
> *Having met Dara Keogh (Managing Partner of Grant Thornton Cayman "GT Cayman" yesterday, I now have a better understanding of their previous role. Firstly, I would say that GT Cayman and Grant Thornton Specialist Services (Cayman) Limited are separate legal entities. I am of the view that we are independent and will be happy to swear an affidavit to that effect as and when we seek Court Supervision (as well as being transparent regarding the GT Cayman role).*
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> *GT Cayman were engaged by the directors to investigate and resolve the outstanding issues stemming from the CIMA inspection in March 2017 and assist with corporate governance and regulatory issues. This engagement was entered into on 20 October 2017. GT Cayman appear to have done work which will be invaluable going forward for me to use and assist in my investigations. I can confirm that the firm I work for has previously never acted for Alpha, and GT Cayman never acted as its auditor, that role was fulfilled by Baker Tilly.*

[7] Mr. Patrick Corr is a lawyer with Sidley & Austin LLP, GWIC's United States and United Kingdom based legal advisers.

> *Conyers Dill & Pearman ("Conyers") was engaged by Alpha Re Ltd ("Alpha Re") on 2 November 2017. The purpose of its engagement was to provide advice to Alpha Re as to how to comply with regulatory requirements pursuant to requests from the Cayman Islands Monetary Authority ("CIMA"). During the course of that limited retainer, Conyers was advised of the 29 November 2017 Interim Award against Alpha Re in favour of GWIC.*
>
> *From that point, Conyers provided corporate advice to Alpha Re as to calling of shareholder meetings to consider and, if thought fit, resolve to put Alpha Re into voluntary liquidation, in addition to providing comments on correspondence with CIMA. Conyers provided no legal advice to the directors of Alpha Re, to any shareholder of Alpha Re or to any other related entities or service providers of Alpha Re."* [Emphasis added].

38. Notwithstanding the wide ambit of the services described as undertaken by GT Cayman and implying the delivery of advice or opinions on fiscal and regulatory issues, and per Mr. Royle in is email extracted above – "*to investigate and resolve the outstanding issues stemming from the CIMA inspection of March 2017*" – I am asked to accept at face value Mr. Keogh's evidence that GT Cayman's work for Alpha Re was merely a "*fact-gathering exercise*".

39. In the circumstances of this case, the Court should not be left to assess conflicting evidence on such an important issue and to proceed by surmise rather than by clear unambiguous evidence[8].

40. GT Cayman's engagement by Alpha Re was in October 2017, prompted by the CIMA inspection which began in March 2017, itself some six months after the SEC had contacted GWIC in September 2016 about its regulatory concerns about Alpha Re. It is therefore to be assumed that CIMA was aware of the SEC's concerns and would itself have been very concerned about Alpha Re's financial position. It follows that in the

[8] I also note here that Mr. Keogh's second affidavit which has not been admitted does not, in any event, resolve the apparent conflict with Mr. Royle's email of 25 January 2018.

absence of clear evidence as to the work actually undertaken by GT Cayman to '*investigate and resolve issues stemming from the CIMA inspection in March 2017*", it is to be inferred that Alpha Re's financial position was an important subject of GT Cayman's engagement.

41. In the absence of a clear explanation of the work undertaken by GT Cayman in respect of Alpha Re at that crucial stage shortly before its voluntary liquidation, the concern is that the JVLs if appointed JOLs, will find themselves, as members of GTSS, in a position of conflict of interest were they required to scrutinize or criticize the work of their affiliate firm. While this is obviously an important issue to be resolved in deciding whether the JVLs should be appointed as JOLs of Alpha Re, the lack of clarity over both the scope of GT Cayman's role in relation to Alpha Re and the nature of the work which it actually did, is unhelpful to the Court and indicates that it is safer to avoid any such potential conflict of interest by appointing different office holders.

42. Nor is this conclusion to be avoided by the fact that GTSS and GT Cayman are different legal entities and, as I have been told by Mr. Royle[9], "*do not share an office building, staff or IT infrastructure, so it is not possible for GTSS or GT Cayman to directly access each other's data*". Nor for present purposes does it matter that: "*There is no profit sharing arrangement between GTSS and GT Cayman*"[10].

43. The problem is one of perception because of the fact that GT Cayman and GTSS are affiliate entities, sharing the same global and highly recognizable Grant Thornton brand. As Mr. Lindquist aptly puts this concern[11] " *the fact that the two GT entities are separate legal entities and do not share a building or profits does not mask the fact that it is in*

[9] In his second affidavit filed in support of the petition, at [29] to [31].
[10] Ibid.
[11] Second affidavit at [14.3].

their common interest to protect and promote the GT brand and provides no assurance that the involvement of GT Cayman will in no way affect the decisions of the JVLs. [GWIC] simply does not believe that the distinction offered by Mr. Royale (sic) removes the issues that could colour the minds of the JVLs if appointed as JOLs: the majority of McDonalds may be franchises, but what is bad for the brand is bad for all the owners".

44. In the circumstances presented, these are also reasonable concerns of perception which the case law, to be discussed below, recognizes as to be taken into account.

45. Regrettably, there are still further concerns of perceptions about the objectivity of the JVLs which I feel obliged to address.

46. In their written submissions CDP on behalf of the JVLs frame the debate over the appointment of the JOLs in these terms:

> *"This application is being supported by one apparent creditor who (according to the Company's books and records and information provided by those claiming to be creditors) appears to hold a claim of approximately US$3m against the Company. Another apparent creditor, Great Western Insurance Company ("GWIC"), who appears to hold a claim of approximately US$4.7m alleges that the JVLs are conflicted pursuant to Regulation 6 of the Insolvency Practitioners Regulations, 2018 (the "IPR"). The application is unopposed by the remaining creditors who collectively appear to hold claims of approximately US$12m."*

47. In the context of a petition like the present, such an outline of the position taken or likely to be taken by creditors is an important factor for the Court to consider. This is because in an insolvency, the real economic interests are those of the creditors (not shareholders) and the Court will ascribe appropriate weight to the views and wishes of the creditors, depending on relevant considerations, not least of all, the extent of their claims.

48. Certain aspects of the passage quoted above from the JVLs' submissions were of understandable concern to both GWIC and HM Life (although the latter has been admitted only as having a contingent claim).

49. Firstly, the submission seems to put on equal footing a US$3m claim in the liquidation – that of Blue II – with GWIC's claim which is described as a US$4.7m claim (seemingly ignoring its judgment debt for US$126m[12]), for consideration by the Court in its ascription of weight to the views of the creditors. This is indeed a surprising stance for the JVLs to take when it is borne in mind that Blue II is controlled by some of the very people who are reasonably believed by GWIC to have failed properly to account for the Trust Funds entrusted to Alpha Re.

50. This is no less surprising simply because – as I am told by Mr. Hughes on behalf of the JVLs – they were unaware of the connection between Blue II and Mr. Graham, in particular. This is information which is accessible in the public domain[13] and which one would expect the JOLs to have obtained during due diligence checks before recognizing creditor claims.

51. The fact that Blue II is the only creditor of Alpha Re actively supporting the appointment of the JVLs' appointment as JOLs is, as Mr. Lindquist in my view reasonably expresses

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[12] Although I note that Mr. Royle in his second affidavit at [28] takes the position that GWIC's claim for US$126m is *"inconsistent with the Award granted by the Arbitration Panel. The Arbitration Panel ordered that the Company deposit US cash or Treasury bills into the Wilmington Trust account, i.e.: not to pay US$126m directly to GWIC and establish an irrevocable letter of credit subject to the Arbitration Panel control in an amount of (US$4.7m)"*

[13] Information that can be found on the internet at the website of the SEC reveals the connection: https://adviserinfo.sec.gov/IAPD/Content/Common/crdiapdBrouchure.aspx?BRCHRVRSNID=384237. A copy of this document was exhibited to Mr. Lindquist's second affidavit. Also, information found at http://www.trackhedgefunds.com/blue/capital-management-inc details Blue II Ltd as a sub fund of Blue Capital Management Inc, with the only key person listed (with more than 75% ownership) being Mark Graham. A copy of this was also exhibited to Mr. Lindquist's second affidavit. Mr. Graham appears to have created a large group of entities to which he routinely appends the name "Blue".

it[14]: "*just another reason for GWIC to be concerned to ensure that appropriate investigations are undertaken by completely independent liquidators*."

52. Indeed, in the context of this case, the JVLs themselves, in appearing to have ascribed to the views of Blue II equal weight, appear to have approached this application without regard to the well-established principle that the views of creditors who are related to the subject insolvent company are entitled to less weight than those of unrelated creditors[15].

53. Secondly, notwithstanding GWIC's clear standing and concerns as a creditor, the JVLs have expressed misgivings about GWIC's proposal to provide litigation funding in support of Alpha Re's efforts to recover the Trust assets, in ways which in my view, have caused GWIC reasonable misgivings: the impression is conveyed (albeit I accept unintentionally) that GWIC appears to be a professional litigation funder, taking its position on the identity of the JOLs in furtherance of "*a cottage industry of Cayman Insolvency Practitioners vying for appointments*" and "w*ith a full slate of alternate professionals ready to take over (Kalo, Mourant, Sidley, and a litigation funder)*"[16] per the JVLs' written submissions at [37]. Even while recognizing that properly regulated litigation funding now has a firm place in this jurisdiction[17] the JVLs' submissions continue in terms seen as vituperative at [32]: "*The key consideration of the Court is that such funding does not have a tendency to corrupt public justice. An important feature in any funding arrangement is the degree of control a funder can exercise over the funded party*".

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[14] At [11] of his second affidavit.

[15] See **In re Parmalat** 2006 CILR 171, upheld on appeal to the Court of Appeal 2006 CILR 480.

[16] "Kalo" is a reference to the firm of Cayman Insolvency Professionals proposed by GWIC for appointment as JOLs, Mourant is a Cayman and international law firm who would be proposed for appointment to advise Kalo, "Sidley" is Sidley &Austin and "a litigation funder" a cryptic reference to GWIC itself.

[17] Citing **A Company v A Funder** (unreported, 23 November 2017, FSD 68 of 2017, per Segal J.) and **In re ICP Strategic Credit Income Fund Ltd** 2014 (1) CILR 314.

54. While the submissions go on at [33] to cite the well-known requirements of independence and probity expected of official liquidators and the fact that as court-appointed officials they act subject to the direction of the Court[18], regrettably the imputation is left that GWIC has champertous motives in seeking the appointment of different office holders.

55. I think it is incumbent on me to make it clear that any such imputation is clearly unjustified here. The proposal for litigation funding was first raised by GWIC in a wholly unexceptional and unexceptionable way. This was in a letter from Appleby[19] to CDP (acting on behalf of the JVLs) on 1 February 2018, in which Appleby raised for the first time, GWIC's concerns about the suitability of the JVLs (and of CDP itself) on account of the perceived potential conflicts of interests. The letter goes on to explain GWIC's concerns about the admittedly parlous financial state of Alpha Re and the need for funding which GWIC would wish to provide but only to clearly independent liquidators, in these terms:

> *"Mr. Royle has confirmed that the only cash available is US$85000. Our client believes that significant claims may be brought by Alpha Re against those involved in the diversion of assets of Alpha Re, the Directors of Alpha Re, and those involved in Alpha Re's subsequent winding up. Our client is prepared to discuss funding a review of such claims, but is regrettably reluctant to do so with the JVLs in light of the foregoing [concerns about lack of independence].*
>
> *Accordingly, having made due enquiries, Eleanor Fisher and Tammy Fu of Kalo Advisors (the **Kalo Nominees**) have confirmed that they are entirely independent and prepared to take on the role of official liquidators. If appointed, they have confirmed that Mourant Ozannes would be conflict free to immediately advise them on potential litigation recovery options available to Alpha Re."*

56. Litigation funding agreements in the context of insolvent liquidations are now well recognized, where they meet with the approval of the Court, as a necessary means by

[18] Citing **In re ICP Strategic Credit Fund Ltd** (supra)
[19] GWIC's Cayman Islands attorneys.

which liquidators might pursue recoveries on behalf of creditors[20]. I consider that all that needs further be said here about this issue is that it was raised by Appleby on behalf of GWIC in a transparent and frank manner, undeserving of the pejorative connotations subsequently imputed, albeit perhaps unintentionally, in the JVLs submissions.

57. A regrettable consequence nonetheless, is the attrition of any reasonable expectation of GWIC reposing full faith and confidence in the JVLs.

Blue II

58. Blue II appeared by Mr. Goodman to argue in support of the appointment of the JVLs as JOLs. He submitted, among other things, that there is nothing in GWIC's evidence or submissions which persuades Blue II (or which should persuade the Court) that any sort of material conflict exists as a result of GT Cayman's historical involvement which would prevent the JVLs from being appointed. This applies *a fortiori* he submitted, where it is established that in keeping with the Court Practice[21] "*a qualified insolvency practitioner may be appointed as provisional liquidator notwithstanding that he personally has been retained by the company to give advice in connection with the application*".

59. If a qualified insolvency practitioner can properly be appointed as provisional liquidator over a company despite having been personally retained to provide advice to that company previously, it is submitted by Mr. Goodman, that there should be no reason why he cannot be appointed as an official liquidator in circumstances where an independent affiliate of his employer firm has given the subject company advice previously – the

[20] See, for instance, in *DD Growth Premium 2X Fund (in official liquidation)* 2013 (2) CILR 361; In *Re ICP Strategic* (above) and, the latest pronouncements of this Court per Segal J in A Company and A Funder (above).
[21] Here referencing paragraph C8.2 (b) of the Grand Court FSD Guide (second edition)

situation here with the JVLs as employees of GTSS and their relationship with GT Cayman.

60. He cited and relied upon ***In Re Wimbledon, SPC (in voluntary liquidation)***[22]. This was a case in which Justice Parker rejected the argument that a voluntary liquidator should not be appointed as official liquidator due to asserted conflict of interest arising from investigations into certain transactions[23] which had not involved him or any affiliated practice but were payments to attorneys who had been retained to advise the company in litigation involving a major creditor before the company was placed into voluntary liquidation.

61. One only needs cite the circumstances of ***Re Wimbledon*** to see the clear distinction from those of the present case, where the concern is that the JVLs, if appointed, may be called upon to scrutinize or criticize the work of their affiliate firm.

62. A further and I must say surprising argument, was raised by Mr. Goodman to the effect that notwithstanding the resolution of its shareholders to place Alpha Re into voluntary liquidation and the absence of a declaration of solvency from its directors, the views of GWIC as creditor should not be given any weight. This, because Alpha Re could nonetheless turn out, after full inquiry, to be balance sheet solvent, despite being now regarded as, he submits, as cash flow insolvent under section 92(d) of the Companies Law, which he says is the test for insolvency contemplated by section 124.

63. I regarded this as an impermissible argument, in light of the obvious import of the absence of the directors' declaration of solvency under section 124 of the Companies Law and Mr. Goodman cited no authority in support. In the absence of such a declaration

[22] Unreported judgment, per Parker J, dated 5 February 2018.
[23] Payments made to the attorneys.

that a company will be able to pay its debts in full within no longer than 12 months of the commencement of voluntary winding up, the company is deemed to be insolvent and an application shall be made to place the company into official liquidation under the supervision of the Court. No distinction is made in section 124 between cash flow and balance sheet insolvency. Instead, in my view the forward looking and ample period of 12 months seems to contemplate a balance sheet solvent company being able to trade its way out of an immediate cash flow state of insolvency during that period. If so, section 124 would allow the directors to issue their declaration of solvency. Accordingly, section 124 applies a presumption, albeit a rebuttable presumption[24], that in the absence of a declaration of solvency, the Company will be deemed to be insolvent and then the interest of creditors gain ascendancy.

64. In addition to the obvious position of conflict of interest in which Blue II stands requiring that less weight be ascribed to its views, I was unpersuaded by its arguments presented by Mr. Goodman.

The law on the independence test.

65. The relevant legal principles are simple and straightforward and are not the subject of disagreement.

66. The matter of the appointment of JVLs to be JOLs is intended ordinarily to be a non-contentious process. Once the requirements of Part II of the Insolvency Practitioners' Regulations ("IPR") are satisfied, the Court will ordinarily not need to second guess the qualifications or suitability of practitioners to be appointed as JOLs.

[24] See *In Re OVS Capital Management* 2017(1) CILR 232.

67. Similarly, I accept as the JVLs submit, that the purpose of Order 3 Rule 4 of the Companies Winding Rules 2018 (as amended) ("CWR"), is to ensure that proposed official liquidators conduct due enquiries to satisfy themselves that they meet the requisite independence requirements (among other requirements) of the IPR and swear an affidavit to that effect.

68. Regulation 6(2) of the IPR expressly states that: "*A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, he, or the firm of which he is a partner or employee, or the company of which he is a director or employee, has acted in relation to the company as its auditor.*"

69. Here neither GT Cayman nor GTSS acted as Alpha Re's auditor and so that primary requirement of independence is satisfied.

70. However, the CWR also recognizes that what might ordinarily be an administrative process by which JVLs are appointed JOLs, could be otherwise if a creditor or shareholder reasonably objects to the appointment.

71. In this regard, CWR Order 15 r.5(1) provides that an application by a qualified insolvency professional (who has sworn an affidavit that he is willing and properly able to accept appointment as official liquidator) for supervision orders, can proceed without a hearing if the Judge is satisfied that:

> *"a. notice of the petition has been given to the company's creditors and, if it appears to the voluntary liquidator that the company may in fact be solvent, to its shareholders; and*

b. *there is no reason to believe that any creditor or, if applicable, any shareholder objects to the appointment of the voluntary liquidator as official liquidator."*

72. Given that the requirements of competence, honesty and integrity are *prima facie* satisfied in this case, when presented with a challenge to the identity of proposed JOLs by a stakeholder, I accept that the Court ought to ensure that such a challenge is based upon a *bona fide* concern that the requirements of the IPR for independence have in fact, not been met.

73. There is already ample guidance from the case law for the determination of this question. Unsurprisingly, the test is an objective one.

74. As stated in ***Hadar Fund Ltd. (in voluntary liquidation)***[25]:

> *"The independence of insolvency practitioners from any particular company, as required by the Insolvency Practitioners' Regulations 2008, reg. 6(1) depends upon the existence (or non-existence) of professional or economic relations with that company which, in the opinion of the court, precludes the appearance of complete impartiality. It is not sufficient that the practitioners be honest and capable.*
>
> *When determining whether a particular professional or economic relationship leads to a conclusion about whether an insolvency practitioner can be properly regarded as independent, the court must identify the relationship and determine whether it is capable of impairing the appearance of independence and, if so, whether it is sufficiently material to the liquidation in question that a fair minded stakeholder*

[25] 2013 (2) CILR Note 4.

would reasonably object to the appointment of the nominated practitioner in question." [Emphasis added.]

75. To be emphasized is the importance of the objective assessment to be undertaken by the Court – the test is whether the relationship in question could objectively be seen as impairing independence and whether the cause for objection is such as to lead a fair-minded and objective stake-holder to object.

76. And appearances matter as much as the realities where the realities are not clearly established – if the appearances leave reasonable and objective cause for concern, the test would not be satisfied.

77. I accept, as Mr. Hughes submits, that when applying the test, the Court may rely on the proposed liquidators' evidence that internal conflicts clearance procedures have been conducted, as evidence that the requisite standards of independence prescribed by IPR reg. 6 are satisfied.

78. ***In HSH Cayman 1 GP Limited***[26] Justice Jones relied upon the evidence of the nominated liquidators' internal conflicts clearance procedures to take comfort that the nominated liquidators of PWC Cayman were independent, notwithstanding the previous valuation work done by PWC Germany in relation to a material investment (viz: HSH Nordbank) made by companies subject to the winding up application.

79. Justice Jones did not accede to the objection of the companies in liquidation to the appointment of PWC Cayman.

80. For one thing he was concerned about the bona fides of the objection. PWC Germany's role was first raised in correspondence at the beginning of January 2010 as a basis for objection although its role was well known much earlier to the objectors and could have

[26] 2010 (1) CILR 157.

been raised by them when the matter was earlier taken before Justice Foster and the Court of Appeal, but was not.

81. Moreover, Justice Jones was particularly impressed with the careful and comprehensive independence and conflicts check which PWC UK had conducted in accordance with PWC International's Global Risk Management Protocol, which itself comported with the Code of Ethics issued by the UK Joint Insolvency Committee – a code which Justice Jones recognized as appropriate to be applied as guidance by Cayman Insolvency Practitioners.

82. While Grant Thornton may well regard themselves as bound by similarly rigorous standards and protocols, evidence to that effect, showing that an objective peer review independence check has been undertaken, has not been presented here.

83. Instead, despite the bona fide concerns of GWIC and HM Life, I am here invited simply to rely upon GT Cayman's own assessment of the nature of the work it undertook for Alpha Re as presenting no potential conflict of interest for the JVLs of their affiliate firm and to do so in the face of the conflicting evidence in that regard, as discussed above.

84. ***In HSH Cayman*** does not serve as a good analogy here for the further reason that in this case Alpha Re, the company in liquidation was itself the object of the work undertaken by GT Cayman, the JVLs affiliate firm.

85. I am also invited by Mr. Hughes to have regard to concerns about work already done and costs and fees already incurred by the JVLs, the benefit of which would likely be lost if different liquidators are appointed now. Detailed evidence of that work was not, however, immediately available and Mr. Hughes requested time for its provision.

86. While delay resulting from an adjournment to allow nominated office holders to "*make their case*" would ordinarily not be allowed if likely to redound to the detriment of creditors[27], I postponed my decision in this matter to allow the JVLs to explain the nature, extent and value of the work already undertaken.

87. Having received those further submissions by way of a third affidavit from Mr. Royle, I am satisfied that a change of office holders at this stage would not unduly disrupt the liquidation nor add significantly or disproportionately to its expense.

88. Indeed, the work described by Mr. Royle as having been undertaken by the JVLs should be of assistance to new office holders and can, in my view, be readily assimilated for the purposes of going forward under court supervision.

89. I am pleased to be able to note that Mr. Royle in his third affidavit, has expressly confirmed that the JVLs will provide full cooperation to any freshly appointed officeholders.

Analysis and conclusion.

90. While the wishes of the creditors are not necessarily determinative of an issue like the present, they must be given proper weight and consideration. Going forward, it will be of crucial importance that the JOLs enjoy the full confidence and support of those having the real economic interests in the outcome of the liquidation.

91. While there is no reason to question either the competence or integrity of the JVLs, there are regrettably unresolved questions of perception arising from their connection to GT Cayman. These are such in my view, as could objectively give cause for concern whether they would be independent in any review of the work done or of any advice given by GT

[27] See **In the Matter of Bay Capital Asia Fund LP**, Cause FSD 116 of 2015, unrep. judgment delivered 1 October 2015.

Cayman in relation to Alpha Re at the crucial time just prior to Alpha Re being put into voluntary liquidation.

92. In my view, the objections of GWIC and HM Life in this regard, are objectively sustainable.

93. I am also concerned that views regrettably expressed during these proceedings, in particular as to GWIC's motives for seeking different office holders, will have soured the relationships and eroded trust and confidence.

94. GWIC must plainly be recognized as a very substantive creditor of Alpha Re, if not the most substantial creditor. All indications suggest that the Alpha Re estate will require funding in order effectively to pursue and achieve recoveries. It is a significant and relevant consideration that GWIC is not only concerned that patently independent JOLs are appointed but also that GWIC is prepared to go one step further, by negotiating funding options with the JOLs, if satisfied about their independence (and of course, with the approval of the Court). Funding could well enhance recoveries not only for the benefit of GWIC but for all stakeholders, as well.

95. Primarily for those reasons, I consider that it is in the best interests of the liquidation that new office holders are appointed.

96. The suitability of the Kalo Nominees, who have had no previous involvement with Alpha Re, is unquestioned and they have themselves filed the affidavits required by CWR O.3. r. 4, as to their qualification, independence, insurance and willingness to act.

97. I order that the liquidation of Alpha Re shall continue under the supervision of the Court and that the Kalo Nominees be appointed as the JOLs.

98. In the event, there is no need for me to resolve the second question – the suitability of CDP to advise in relation to the liquidation.

99. The Kalo Nominees intend to appoint Mourant Ozannes as their legal advisers and, if appropriate, an application for court approval of that appointment may be made. However, I make no observations about whether or not such an application would be needed.

100. Notwithstanding the outcome, the JVLs presentation of the petition was mandatory. While their responses to the objections of GWIC and HM Life have not carried the day, the JVLs' position taken in these proceedings were not outside the bounds of propriety. They are entitled to their costs of the petition to be paid out of the assets of Alpha Re as an expense of the liquidation and I so order.

Hon Anthony Smellie
Chief Justice
The Cayman Islands

GRAND COURT CAYMAN ISLANDS

2 March 2018.