CASE DIGEST

ALEXANDER HEYLIN
NO5 CHAMBERS

EAST RIDING V KMG SICAV-SIF-GB STRATEGIC LAND FUND

[2025] EWCA Civ 1137

KEY TAKEAWAYS:

1. The Sub-Fund was not an association which Parliament could have intended should be wound up by the Court under section 221 Insolvency Act 1986. ("IA 1986").
2. Section 220(1) IA 1986 does not extend to anything other than an association or company, and to fall within it an association must be comprised of persons who have some substantive legal relationship with each other.
3. Given the essential nature of the winding up process as a means of collective enforcement of debts, it could not be applied to the Sub-Fund as it was not a debtor and did not have creditors.

ISSUE

Whether a Sub-Fund was an unregistered company within the meaning of s220 and hence capable of being wound up by the Court under s221 Insolvency Act 1986.

FACTUAL BACKGROUND

The KMG SICAV-SIF-GB Strategic Land Fund (the "Sub-Fund") was a so-called "Dedicated Fund" of a specialised investment company, KMG SICAV-SIF-SA (the "Company"). The Company was incorporated as a public limited company under the laws of Luxembourg and regulated by the Luxembourg equivalent of the UK Financial Conduct Authority. The Company offered investments relating to one or more of the Dedicated Funds to institutional investors. The Dedicated Funds were not separate legal entities, but separate portfolios of assets owned by the Company and managed by it in accordance with a specific set of investment objectives. When investors invested in a Dedicated Fund, shares in the Company of a specific class corresponding to the Dedicated Funds were allotted to them. The rights of shareholders against the Company in respect of each such class were limited to the assets of the corresponding Dedicated Funds, and in the relations between the Company's shareholders, each Dedicated Fund was treated as a separate entity (paras 6 & 7, CA judgment).

INSOLVENCY ACT 1986

220. Meaning of "unregistered company"

For the purposes of this Part "unregistered company" includes any association and any company registered under the Companies Act 2006 in any part of the United Kingdom.

221. Winding up of unregistered companies

(1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions … of this Act about winding up apply to an unregistered company with the exceptions and additions mentioned in the following subsections...

(5) The circumstances in which an unregistered company may be wound up are as follows -

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding up its affairs…

THE SUB-FUND

Loans of the monies in the Sub-Fund would be made to subsidiary companies incorporated in Luxembourg. These companies would acquire land which would be progressed through the planning process before being sold to a national house builder following the award of planning consent.

Shares in the Company relating to the Sub-Fund comprised Class A, A2, B and C Shares.

East Riding of Yorkshire Council invested £20 million belonging to the East Riding Pension Fund by subscribing for 17,110,835 Class C Sterling Shares in the Company.

THE PETITION

The Council presented a winding up petition to the Companies Court for the compulsory winding-up of the Sub-Fund under the Insolvency Act 1986.

Permission to serve the Petition out of the jurisdiction was granted and upheld on appeal by Michael Green J.

He also gave permission for the Petition to be amended to allege that although the Sub-Fund did not have separate legal personality, it was an unregistered company which could be wound up pursuant to s220 and s221 (s221(5)(a) in this case).

FIRST INSTANCE

[2024] EWHC 1069 (Ch)

Deputy ICC Judge Kyriakides

Held that the Sub-Fund was NOT an unregistered company capable of being wound up under the 1986 Act and dismissed the petition presented by East Riding of Yorkshire Council (the "Council"), which had claimed to be a contingent creditor of the Sub- Fund.

The deputy judge concluded that, as a matter of interpretation, and having regard to the legislative history, s220(1) contained an exhaustive definition of an unregistered company that did not include any entities that were neither companies nor associations.
The word "includes" in s220(1) was designed to extend the natural meaning of "company" to include bodies such as associations, but went no further. Since it was conceded that the Sub-Fund was neither a company nor an association, it fell outside the section.

In the alternative, the deputy judge went on to hold that the Sub-Fund was NOT the type of entity that Parliament could have intended should be wound up.
Although the Sub-Fund was "a segregated "entity", in respect of which trade is conducted with a view to a profit", it lacked other characteristics that were necessary for it to be such an entity.

FIRST APPEAL

[2024] EWHC 2845 (Ch)

Richard Smith J

Agreed with the deputy judge that there was nothing in any of the decided cases to support a proposition that s220(1) extended to anything that was not an association or a company, and so he upheld the first instance decision.

The Council changed its position and argued that the Sub-Fund was an "association", or that it was a body sufficiently similar to an association or a company that it fell within the (non-exhaustive) scope of section 220(1).

Even if s220(1) could be read more widely, there was nothing in the characteristics of the Sub-Fund to suggest that it was the type of body Parliament intended should be wound up as an unregistered company.
The deputy judge had been entitled to find on the evidence, and place reliance on the facts, that:

- the Sub-Fund did not have any contributories;
- it could not itself own assets or incur legal obligations or liabilities; and
- it had no board or management of its own.

SECOND APPEAL

[2025] EWCA Civ 1137

Lord Justice Snowden (with whom Lady Justice Nicola Davies and Lady Justice King agreed)

Considered that the Sub-Fund was NOT an unregistered company within the meaning of the 1986 Act and dismissed the appeal.

Ground 1, on which the appeal turned, was that Richard Smith J "erred in fact and law in holding that the Sub-Fund was not a company or association within the meaning of section 220".

When questioned, counsel for the Council clarified that their contention was that the Sub-Fund was an association. "Association" in s220(1) does not include an association that Parliament could not reasonably have intended should be subject to the winding up process (In Re The St James Club (1852) 2 De G.M.&G. 383; approved in In Re International Tin Council [1989] Ch 309).

NATURE AND CONSTRUCTION OF BODY

Given that the winding up process under the IA 1986 is to be conducted by reference to legal rights and obligations, Snowden LJ's view was that to fall within s220(1) an association must be compromised of persons who have some substantive legal relationship with each other.

NATURE OF WINDING UP

The central point to make, according to Snowden LJ, is that compulsory winding up by the Court under the 1986 Act is a process of collective enforcement of debts against the property of a debtor, as reflected in s143(1) IA 1986.

Given the essential nature of the winding up process as a means of collective enforcement of debts:

- the property that is subject to the process must be property which belongs to the association or to which the association is entitled;
- the creditors to whom the proceeds of realisation are to be distributed must be creditors of the association; and
- any persons to whom a surplus may be distributed must be persons who have such entitlement as against the association.

APPLYING PRINCIPLES TO CASE

Snowden LJ had no doubt that the Sub-Fund was NOT an association which Parliament could have intended should be wound up by the Court under the IA 1986.

- The Sub-Fund was NOT in any sense a body whose existence was founded on contractual obligations undertaken by any members between themselves.
- The investors who subscribed the money that the Company allocated to the Sub-Fund did not obtain any direct property rights in or over the assets comprising the Sub-Fund.
- The only legally relevant "association" between any persons was the relationship between the Shareholders of the Company in their capacity as such, and on the terms of the Articles as supplemented by the Offering Document. The Sub-Fund was merely a collection of assets that was in no sense an association between anyone.
- The process of winding up by the Court could not be applied to the Sub-Fund itself as the Sub-Fund was not a debtor and it did not have creditors.
- The fact that a Dedicated Fund might be made the subject of a liquidation process ordered by a court under a specific Luxembourg statute says nothing about whether the UK Parliament might reasonably intend that the winding up provisions of IA 1986 could be applied to it.