Neutral Citation Number: [2025] EWCA Civ 1137

Case No: CA-2024-002839.

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
Mr Justice Richard Smith
[2024] EWHC 2845 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 3 September 2025

Before :

LADY JUSTICE KING
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE SNOWDEN

- -

Between :

EAST RIDING OF YORKSHIRE COUNCIL (As administrating authority of the East Riding Pension Fund)	**Appellant/ Petitioner**
- and -	
KMG SICAV-SIF-GB STRATEGIC LAND FUND	**Respondent**

- -

Daniel Lewis (instructed by **Spector Constant & Williams**) for the **Appellant**
Daniel Lightman KC and Oliver Caplan (instructed by **Reynolds Porter Chamberlain LLP**) for **KMG SICAV-SIF-SA**

Hearing date: 30 April 2025
Further written submissions: 6 and 9 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30 am on Wednesday 3 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden:

1. The central issue in this (second) appeal is whether a "dedicated fund" of a Luxembourg specialised investment company is an unregistered company within the meaning of section 220 and hence capable of being wound up by the Court under section 221 of the Insolvency Act 1986 (the "1986 Act").

2. Sections 220 and 221 of the 1986 Act provide, so far as relevant,

> "220. **Meaning of "unregistered company"**
>
> For the purposes of this Part *"unregistered company"* includes any association and any company, with the exception of a 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 purpose of winding up its affairs; …"

3. In a comprehensive reserved judgment at first instance, Deputy ICC Judge Kyriakides held that the "dedicated fund" in question, the KMG SICAV-SIF-GB Strategic Land Fund (the "Sub-Fund"), was not an unregistered company capable of being wound up under the 1986 Act: see [2024] EWHC 1069 (Ch). She therefore dismissed the petition presented by East Riding of Yorkshire Council (the "Council"), which had claimed to be a contingent creditor of the Sub-Fund. That decision was upheld on appeal by Richard Smith J: see [2024] EWHC 2845 (Ch), [2025] Bus LR 1214, [2025] BCC 249.

4. For the reasons set out below, I also consider that the Sub-Fund is not an unregistered company within the meaning of the 1986 Act, and I would dismiss the appeal.

Background

5. The background to this matter is conveniently set out in paragraphs 1-13 of the judgment of Deputy ICC Judge Kyriakides, and can be summarised as follows.

6. The Sub-Fund is a so-called "Dedicated Fund" of a specialised investment company known as KMG SICAV-SIF-SA (the "Company"), which was incorporated as a public limited company under the laws of Luxembourg on 4 June 2008. The Company is regulated by the Commission de Surveillance du Secteur Financier (the "CSSF"), the Luxembourg equivalent of the UK Financial Conduct Authority.

7. The Company offers investments relating to one or more of the Company's Dedicated Funds to institutional investors. The Dedicated Funds are not separate legal entities, but are separate portfolios of assets owned by the Company and managed by it in accordance with a specific set of investment objectives. When investors invest in a Dedicated Fund, shares in the Company of a specific class corresponding to the Dedicated Fund are allotted to them. The rights of shareholders against the Company in respect of each such class are limited to the assets of the corresponding Dedicated Fund, and in the relations between the Company's shareholders, each Dedicated Fund is treated as a separate entity.

The Articles of the Company

8. The matters described above are provided for in the articles of association of the Company (the "Articles"). These include the following,

> "**Article 1: Name**
>
> There exists among the existing Shareholders and those who may become owners of Shares in the future, a Luxembourg company (the "Company") under the form of a public limited company (société anonyme) subject to the [law of] 10th August 1915 as amended relating to commercial companies (the "Law of 1915") and the law of 13th February 2007 relating to Specialised Investment Funds ("the Law of 2007").
>
> **Article 4: Purpose**
>
> The exclusive purpose of the Company is to invest the funds available to it in transferable securities … according to the Law of 2007 by means of spreading investment risks and affording its Shareholders the results of the management of its assets.
>
> **Article 5: Investment Objectives and Policies**
>
> (a) The purpose of the Company is to provide investors with the opportunity to invest in a professionally managed fund in order to achieve an optimum return from the capital invested.
>
> (b) The Company is restricted solely to Well-Informed Investors ...
>
> (c) The Company will seek to achieve its objectives, in accordance with the investment policies and guidelines established by the Board of Directors of the Company. For this purpose the Company offers a choice of Dedicated Funds as described in the Offering Document, which allows investors to make their own strategic allocation.
>
> …
>
> (g) The specific investment policies and risk spreading rules applicable to any particular Dedicated Fund shall be determined by the Board of Directors and disclosed in the Offering Document.

Article 6: Share Capital, Dedicated Funds, Classes-Categories of Shares

(a) The capital of the Company shall be represented by fully or partly paid up Shares of no par value …. The capital of the Company shall at any time be equal to the total net asset value of the Company.

…

(c) For each Dedicated Fund, a separate portfolio of investments and assets will be maintained. The different portfolios will be separately invested in accordance with their specific features as described in the Offering Document of the Company.

(d) The Company is one single entity; however, the rights of investors and creditors regarding a Dedicated Fund or raised by the constitution, operation or liquidation of a Dedicated Fund are limited to the assets of this Dedicated Fund, and the assets of the Dedicated Fund will be answerable exclusively for the rights of the Shareholders relating to this Dedicated Fund and for those of the creditors who claims arose in relation to the constitution, operation or liquidation of this Dedicated Fund. In the relations between the Company's Shareholders, each Dedicated Fund is treated as a separate entity…

...

(f) … in respect of each Dedicated Fund, the Board of Directors of the Company may decide to issue one or more classes of Shares (the "Classes"), and within each Class, one or several Category(ies) of Shares subject to specific features … as may be determined by the Board of Directors of the Company from time to time."

9. Articles 7 and 8 provide for the issue, transfer and redemption of Shares, the latter taking place at the Net Asset Value ("NAV") of the Shares, calculated by reference to the relevant Dedicated Fund. Articles 13.1 and 13.2 provide for the calculation of the NAV for each Dedicated Fund or Class of Shares at least once a year.

10. Article 13.3 provides that the Board of Directors of the Company might temporarily suspend the determination of the NAV of any particular Dedicated Fund or Class of Shares, and in consequence suspend the issue or redemption of Shares either generally or in one of a number of circumstances, which include where the disposal of assets attributable to such Dedicated Fund is not reasonably or normally practicable without being seriously detrimental to the interests of Shareholders.

11. The dissolution and liquidation of the Company is addressed in Articles 16.2 (a) to (f). This can only happen if certain conditions are met and the Shareholders at a general meeting of the Company pass a specific resolution and appoint one or more liquidators.

12. The liquidation of a Dedicated Fund is dealt with in Article 16.2(g) as follows,

> "In the event that for any reason whatsoever, the value of assets of a Class, Category or Dedicated Fund should fall down to such an amount considered by the Board of Directors as the minimum level under which the Class, Category or Dedicated Fund may no longer operate in an economically efficient way, or in the event that a significant change in the economic or political situation impacting such Class, Category or Dedicated Fund should have negative consequences on the investments of such Class, Category or Dedicated Fund … the Board of Directors may decide to conduct a liquidation or a compulsory redemption operation on all Shares of a Class, Category or Dedicated Fund … The Company shall send a notice to the Shareholders of the relevant Class, Category or Dedicated Fund, before the effective date of such liquidation or compulsory redemption. Such notice shall indicate the reasons for such liquidation/redemption as well as the procedures to be enforced. Unless otherwise stated by the Board of Directors, Shareholders of such Class, Category or Dedicated Fund, may not continue to apply for the redemption or the conversion of their Shares while awaiting for the enforcement of the decision to liquidate/to redeem compulsorily…"

13. Article 16.2(h) then provides for how the proceeds of such liquidation should be distributed,

> "Any of the above liquidations or any compulsory redemption may be settled through a distribution of the assets of the relevant Class(es), Category(ies) and/or Dedicated Funds wholly or partly in kind, to any Shareholder, in compliance with the conditions set forth by the Law of 1915 on commercial companies … and the principle of equal treatment of Shareholders…"

The Offering Document

14. The Articles are supplemented by an Offering Document issued by the Company and as amended from time to time. Section 3 explains, in relevant part,

> "In accordance with the Articles of Incorporation, the Board of Directors of the [Company] may issue Shares in each Dedicated Fund. A separate pool of assets is maintained for each Dedicated Fund and is invested in accordance with the investment objectives applicable to the relevant Dedicated Fund. As a result, the [Company] is an "umbrella fund" enabling investors to choose between one or more investment objectives by investing in one or more Dedicated Funds. Investors may choose which Dedicated Fund(s) may be most appropriate for their specific risk and return expectations as well as their diversification needs.
>
> Each Dedicated Fund is treated as a separate entity and operates independently, the relevant portfolio of assets being invested for the exclusive benefit of this Dedicated Fund. A purchase of

> Shares relating to one particular Dedicated Fund does not give the holder of such Shares any rights with respect to any other Dedicated Fund.
>
> The net proceeds from the subscription for each Dedicated Fund are invested in the specific portfolio of assets constituting that Dedicated Fund.
>
> With regard to third parties, any liability will be exclusively attributed to the Dedicated Fund.
>
> The specific investment policy and features of the Dedicated Funds are described in detail in the Appendices of this Offering Document."

15. The Offering Document also contains a section 21.1 (headed "Dissolution and Liquidation of the [Company]") that largely replicates Article 16.2(a) to (f) and a further section 21.2 (headed "Termination of a Class, Category and/or Dedicated Fund") that reproduces the text of Article 16.2(g).

The Sub-Fund

16. The Sub-Fund was launched in 2010. The relevant Appendix to the Offering Document relating to the Sub-Fund (originally called the "Lucent Strategic Land Fund") described its investment objective as achieving medium to long-term capital growth through investment in strategic land assets located within the United Kingdom. The Offering Document indicated that the Sub-Fund would have a primary focus in high growth areas where demand for new housing stock was most acute. It explained that loans of the monies in the Sub-Fund would be made to subsidiary companies incorporated in Luxembourg which 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. The Offering Document stated that the Sub-Fund would target an average return in excess of 12% per annum.

17. The Shares in the Company relating to the Sub-Fund comprised Class A, A2, B and C Shares (with sub-classes denominated in Sterling, US Dollars and Euros).

18. On 1 August 2014, the 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 circumstances and reasons for the decision to make that investment are not relevant to the issues which we have to decide.

19. In all, about £82 million was subscribed for Shares referrable to the Sub-Fund, and about £27 million worth of Shares were later redeemed. These monies were used to make loans to Luxembourg subsidiary companies that invested in four main projects in the UK. The main ones were in relation to land for new housing developments at Lincolnshire Lakes and at the Royal Pier Waterfront Southampton. Other investments were made in partnership with Allerdale Borough Council and Peterborough City Council.

The suspension of transactions in relation to the Sub-Fund and its liquidation

20. Separate financial statements were produced for each of the Company's Dedicated Funds. The audited financial statements of the Sub-Fund for the year ending 31 December 2015 showed total net assets of about £68 million. However, on 29 June

2016, the Company sent a notice to "shareholders and investors of the [Sub-Fund]" notifying them that the Board of Directors of the Company had decided, in accordance with Article 13.2 [sic] to suspend the calculation of the NAV, and the issue and redemption of Shares of the Sub-Fund. The reason given for the suspension was that the Sub-Fund had suffered a "significant exposure" on an option to acquire land, which, in the opinion of the Board, meant that the Sub-Fund could not be adequately valued in light of the uncertainties. The announcement also indicated that the Company's alternative investment fund manager ("AIFM") had taken over management of the Sub-Fund from the previous advisor.

21. Financial statements for the Sub-Fund for the year ended 31 December 2016 disclosed that the net assets of the Sub-Fund had decreased to £36.4 million. However, the auditors stated that they were unable to obtain sufficient audit evidence about the inter-company loans made by the Sub-Fund to express any opinion on the financial statements.

22. On 18 February 2019 a second notice was sent by the Company to Shareholders in relation to the Sub-Fund. That notice indicated that although the AIFM and the Board of the Company had continued to manage the Sub-Fund, to dispose of some assets and pursue disposals of the remaining assets, the continuing economic and political uncertainty surrounding Brexit had led the Board of the Company to conclude that it would be unable to operate the Sub-Fund in an economically efficient manner. The notice stated that the Board of the Company had therefore resolved (i) "to conduct a liquidation of all shares of the Sub-Fund … in order to ensure fair treatment of all of the Sub-Fund's shareholders" pursuant to Article 16.2; and (ii) to appoint a liquidator of the Sub-Fund who would act under the supervision of the Board.

23. A further notice was sent by the Company on 12 August 2019. This stated that a number of prospective buyers had withdrawn their interest in the Sub-Fund's assets, that consequently the likelihood of realising any sale proceeds had deteriorated, and there was the possibility that no value would be realised from the Sub-Fund.

24. On 11 December 2020 a final notice was sent by the Company to Shareholders, reciting the history of the matter, indicating that all creditors created by the operations of the Sub-Fund would be paid, but that the liquidation NAV of the Sub-Fund was zero and that consequently, "no distribution of liquidation proceeds to the Shareholders of the Sub-Fund will occur."

The Petition

25. On 3 May 2021, the Council presented a winding up petition to the Companies Court for the compulsory winding-up of the Sub-Fund under the 1986 Act (the "Petition"). Permission to serve the Petition out of the jurisdiction was granted and ultimately upheld on appeal by Michael Green J, who 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 sections 220 and 221 of the 1986 Act. The grounds on which the Council sought a winding up order were that the Sub-Fund had ceased to carry on business or was carrying on business only for the purpose of winding up its affairs, pursuant to section 221(5)(a) of the 1986 Act.

26. The Petition continued,

> "The [Sub-Fund] has been placed into liquidation by its directors. The [Council] holds 17,110,835 shares which it

> received in return for an investment of £20,000,000. [The Council] is a contingent creditor since (in accordance with the Luxembourg law relating to open-ended investment companies) it is converted into a creditor in the event that there is a recovery for distribution, for which purpose [the Council] seeks the appointment of a liquidator to investigate and make recovery. The Petitioner has a sufficient interest for the purposes of the ground in section 221(5)(a) of the [1986] Act."

The decision of Deputy ICCJ Kyriakides

27. After summarising the Background and setting out the relevant parts of the Articles and Offering Document, Deputy ICC Judge Kyriakides summarised the expert evidence that she had received as to Luxembourg law. She indicated there was little difference between the experts.

28. The expert evidence accepted by the deputy judge was that under Luxembourg law, a specialised investment company such as the Company is a so-called "umbrella fund", and that such companies can have multiple Dedicated Funds, each of which is a "compartment corresponding to a distinct part of the assets and liabilities" of the specialised investment company. The evidence was that a Dedicated Fund consists only of a pool of assets and is not itself a legal entity, it has no legal personality, it does not have any ability to act independently, and it cannot have legal rights or obligations.

29. The evidence also explained that although each Dedicated Fund is not a separate legal entity, it is *deemed to be* a separate entity for the purposes of relations between the shareholders of the specialised investment company. The assets in one Dedicated Fund are therefore not available to satisfy the rights of shareholders against the company in relation to any other Dedicated Fund.

30. The agreed expert evidence was that an investor would be a shareholder of the specialised investment company from the point at which it subscribed for shares until redemption of the shares, but might also become a creditor of the specialised investment company from time to time if it had a claim against the company that was certain and due. That might be the case following the declaration of dividends; or upon redemption of shares by the company in accordance with the articles; or if there was a surplus following liquidation of a Dedicated Fund and payment of creditors and the specialised investment company resolved that such surplus be distributed to the relevant shareholders.

31. As regards the liquidation of a Dedicated Fund, the expert evidence was,

> "… the relevant Luxembourg law governing insolvency procedures applies only to the opening of proceedings against a company having a legal personality and not to a Dedicated Fund;
>
> the only procedures available for an orderly liquidation of a Dedicated Fund are a voluntary liquidation or what is termed as a "judicial liquidation";…"

32. The evidence went on to explain that a voluntary liquidation is permissible in relation to a Dedicated Fund in accordance with the articles of the specialised investment company and a decision of the board of the company.

33. The evidence was that a judicial liquidation of a Dedicated Fund is a rarely invoked procedure under section 47 of the Law of 2007, under which a District Court dealing with commercial matters may pronounce the dissolution and order the liquidation of a Dedicated Fund. The District Court may make such order on the application of a public prosecutor, either acting on its own initiative or at the request of the CSSF in cases where the necessary regulatory authorisation for the Dedicated Fund has been withdrawn. The evidence did not go into any further detail as to how such judicial liquidation of a Dedicated Fund would be carried out. However, it noted that if a Dedicated Fund had been voluntarily liquidated, a judicial liquidation would no longer be possible, since the Dedicated Fund would no longer exist.

34. Deputy ICC Judge Kyriakides then turned to the interpretation and application of section 220(1) of the 1986 Act to the Sub-Fund. She recorded that leading counsel for the Council had accepted that the Sub-Fund was neither a company nor association within the meaning of section 220(1), but had submitted that the Sub-Fund was nevertheless a type of structure that had similarities to both, and which Parliament must therefore have intended should fall within the scope of the section and be capable of being wound up by the Court under section 221. In response, counsel for the Company contended that the Sub-Fund was neither a company nor an association and hence could not fall within section 220(1), and that in any event it was not the type of structure that Parliament could have intended should be wound up by the Court.

35. The deputy judge concluded that, as a matter of interpretation, and having regard to the legislative history, section 220(1) contained an exhaustive definition of an unregistered company that did not include any entities that were neither companies nor associations. In essence her reasoning was that the word "includes" in section 220(1) was designed to extend the natural meaning of "company" to include bodies such as associations, but went no further. Accordingly, since it was conceded that the Sub-Fund was neither a company nor an association, it fell outside the section.

36. In case she was wrong on that, 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. In that respect she accepted (at para 41) that the Sub-Fund "is a segregated "entity", in respect of which trade is conducted with a view to a profit", but she held that it lacked other characteristics that were necessary for it to be an entity that Parliament could have intended should be wound up. In particular she pointed out that the Sub-Fund did not have any "contributories" as defined in section 226(1) of the 1986 Act; it did not have any legal personality of its own, or the capacity to contract, or to incur legal rights and obligations; and neither did it have any board of directors or persons entitled to exercise any powers of management which a liquidator appointed by the Court could displace. The deputy judge therefore considered that it was very difficult to see how the provisions of the 1986 Act as regards winding up could be intended to apply to the Sub-Fund.

37. That was sufficient to decide the case against the Council. But the deputy judge also considered whether the Council was a contingent creditor of the Sub-Fund so as to be entitled to present a petition against the Sub-Fund under section 124(1) of the 1986 Act. She held that it was not.

38. The deputy judge referred to the expert evidence to the effect that a shareholder of a specialised investment company might be regarded as a contingent creditor under Luxembourg law if the liquidation of the relevant Dedicated Fund under the voluntary liquidation process in the articles was expected to yield a surplus which would be available for distribution. The deputy judge rejected a submission on behalf of the Sub-Fund that this could no longer occur because the liquidation of the Sub-Fund had been completed and it had ceased to exist. She also accepted a submission on behalf of the Council that there had been no satisfactory evidence explaining the collapse in the value of the Sub-Fund, so that it could not be said that there were no claims which might give rise to recoveries for the Sub-Fund. However, the deputy judge said that it was for the Council to demonstrate that it was a contingent creditor, and it could only do that if it could show that there were claims with a sufficiently high probability of success so that it was likely that there would be a surplus available for distribution. But the Council was not currently in a position to identify any such claims.

39. The deputy judge also went on to hold, however, that even if there could be shown to be the likelihood of a surplus arising in a liquidation of the Sub-Fund, it would be the Company that would be obliged to distribute that surplus to the Council by virtue of its rights as a Shareholder in accordance with the Articles of the Company. As such, she held, the Council could only be a contingent creditor of the Company and not of the Sub-Fund.

40. As the deputy judge had held that the jurisdictional grounds for making a winding up order had not been made out, she declined to indicate how she might have exercised her discretion whether to make a winding up order if she had had jurisdiction to do so.

The judgment of Richard Smith J

41. The Council appealed with the permission of Deputy ICCJ Kyriakides. Richard Smith J dismissed the appeal. Before him 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).

42. In essence Richard Smith J agreed with the deputy judge that there was nothing in any of the decided cases to support a proposition that section 220(1) extended to anything that was not an association or a company.

43. He also went on to hold that even if section 220(1) could be read more widely, the deputy judge had been entitled to conclude that there was nothing in the characteristics of the Sub-Fund to suggest that it was the type of body that Parliament intended should be wound up as an unregistered company. In particular, he accepted the submission that 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; that it could not itself own assets or incur legal obligations or liabilities; and that it had no board or management of its own, so there was a possibility that there would be a conflict in the exercise of management powers between the Board of the Company and any liquidator appointed by the Court of the Sub-Fund.

44. Richard Smith J also held that the deputy judge had been entitled to conclude on the evidence that there was insufficient evidence of any realistic prospect of a surplus arising in a liquidation of the Sub-Fund to make it a contingent creditor under Luxembourg law; and that even if there had been, that the deputy judge had also been entitled to conclude, as a matter of Luxembourg law, that the Council would be a creditor of the Company and not of the Sub-Fund.

45. Richard Smith J rejected a further argument by the Council that even if it was not a contingent creditor of the Sub-Fund, because it would otherwise be without a remedy for the inadequate conduct of the voluntary liquidation of the Sub-Fund, the court should (exceptionally) make a winding up order. This argument was said to be based upon the decision in *Re Russian & English Bank* [1932] 1 Ch 663. The judge held that he had "scant evidence" concerning the adequacy or otherwise of the available remedies for the Council in Luxembourg, so that the basis for exercising any such jurisdiction was not made out.

The appeal

46. The Council appeals with the permission of Asplin LJ. Its three grounds are,

    i) 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";

    ii) that Richard Smith J "erred in fact and law in holding that the Deputy ICC Judge was right to conclude that the [Council] was not a contingent creditor"; and

    iii) that Richard Smith J erred in the exercise of his discretion not to make a winding up order in relation to the Sub-Fund, applying the principles in *Re Russian & English Bank*.

    In response to Ground 3, the Company sought to rely upon a respondent's notice to the effect that the court could not in any event make a winding up order unless the petitioner could establish that it was, on the balance of probabilities, a creditor of the body subject to the petition.

47. At the hearing, Mr Lewis accepted that unless he succeeded on Ground 1 – i.e. that the Sub-Fund fell within section 220(1) of the 1986 Act - he could not maintain the Petition, irrespective of the outcome on Ground 2 or Ground 3.

Analysis

48. Given the way in which Ground 1 is framed, it is clear that the Council did not seek permission to appeal the finding of both lower courts that the concept of an unregistered company within section 220(1) of the 1986 Act is limited to bodies that are either an association or a company, and does not include bodies which are neither of those things.

49. That being so, it was surprising that the Council's skeleton argument for the appeal was equivocal as to whether the Sub-Fund was (i) an association, or (ii) a company within the meaning of section 220(1), instead contending that, "The descriptive terms "association" and "company" are extremely general, and properly construed cover a wide variety of business forms".

50. However, when questioned on this point at the hearing of the appeal, Mr Lewis clarified that his contention was that the Sub-Fund was an association. He added that the Sub-Fund also fulfilled the requirements of being carried on with a view to profit, and being an association of the sort that Parliament intended should be subject to the winding up process of the Court. Those were two tests which the parties agreed could be derived from the authorities – in particular *In Re The St. James' Club* (1852) 2 De G.M.&G. 383 ("*St. James' Club*") and *In Re International Tin Council* [1989] Ch 309 ("*ITC*").

The legal principles relevant to the winding up of an association

51. Although I accept that, as a matter of language, the word "association" is a very general one, capable of covering a wide variety of bodies, it has been given a narrower meaning in the context of the winding up legislation. That much is readily apparent from the old case of *St. James' Club.*

52. As its name suggests, the case concerned the affairs of a nineteenth century gentlemen's social club, whose members were elected and paid an annual subscription and an entrance fee to gain access to the club's premises and to enjoy its facilities. The club ran into financial difficulties, and its management committee, who had been sued by some tradesmen and suppliers, sought to have the club wound up by the court in order, among other things, to facilitate the collection of unpaid subscriptions and entrance fees.

53. The relevant legislation was the Joint Stock Companies Winding up Act 1849. That Act had extended the jurisdiction of the court to wind up trading companies under the similarly named Act of 1848, to "all partnerships, associations and companies … whether incorporated or unincorporated".

54. Lord Chancellor St. Leonards commented, at page 387, that the members of the club had no transmissible interest in the assets, and no interest in the partnership sense in transactions of the club, but had a simple right of admission to, and enjoyment of the club while it continued. In such circumstances, he stated, there would be very great difficulty in bringing such clubs within the operation of the Winding up Acts. He continued, at page 389,

> "The words [of the 1849 Act] are very wide, no doubt; but still, I must give a reasonable construction to the Act, which is *in pari materia*, and incorporated with the Act of the preceding year. I cannot hold it to apply to every association or company. If I were to do so, I might be called upon to carry the application much lower than to such a club as that now in question. A cricket club, an archery society, or a charitable society, would come under the operation of the Act, and indeed every club would be included. Though "associations" are mentioned, I cannot think that word is to be treated without regard to the particulars with which it is associated … I will not say what associations are within the Acts; but, bearing in mind that the individuals who form a club do not constitute a partnership, nor incur any liability as such, I think associations of that nature are not within the Winding-up Acts…"

55. In *ITC* at page 330D, the Court of Appeal held that *St. James' Club* is authority for the general proposition that "association" in what is now section 220(1) of the 1986 Act does not include an association that Parliament could not reasonably have intended should be subject to the winding up process under that Act.

56. In *ITC*, as Millett J explained at first instance, and the Court of Appeal agreed, this general test led to the conclusion that an association of sovereign states established by treaty could not be subjected to the winding up process of one of the member states,

> "Sovereign states are free, if they wish, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their number.

> But if they choose instead to carry it on through the medium of an international organisation, no one member state, by executive, legislative or judicial action, can assume the management of the enterprise and subject it to its own domestic law. For if one could, then all could; and the independence and international character of the organisation would be fragmented and destroyed; and if a member state has no such right, then a fortiori a non-member state has none. In my judgment, to impute to Parliament an intention, by general words only, to confer on the court a jurisdiction contrary to these principles and without precedent, is unacceptable."

57. The approach outlined in *St. James' Club* and approved in *ITC* requires the court to focus its attention, not only on the nature and constitution of the body in question, but also upon the nature of the process of winding up by the Court under the 1986 Act.

58. As regards the nature and constitution of the body in question, given that the winding up process under the 1986 Act is to be conducted by reference to legal rights and obligations, I consider that it is clear that to fall within section 220(1), an association must be comprised of persons who have some substantive *legal* relationship with each other, rather than persons who are connected for purely social or personal reasons or who merely share a common interest.

59. In my view, it was this consideration that underpinned the view of the Lord Chancellor in *St. James' Club* that social clubs in which the members had limited rights of enjoyment of the club's facilities, no interest in its assets whilst it continued, and no liability for any debts, should not be subjected to the winding up process of the Court under the 1849 Act.

60. The point was made more explicit in *Re Caledonian Employees Benevolent Society* [1928] SC 633 ("*Caledonian*"), which was referred to by Deputy ICC Judge Kyriakides in her judgment in the instant case. In *Caledonian*, Lord President Clyde held that something called a "workers' benevolent society" was not capable of being wound up as an unregistered company under the Companies (Consolidation) Act 1908. The "society" was in fact just a fund of money into which the employees of a particular company were required by their individual contracts of employment to pay small regular amounts, and from which grants were made for the assistance of sick former employees, their widows and dependents. The fund was not founded on any contract between any persons who could be said to be its members. The Lord President stated, at page 635,

> "It is not, I think, open to doubt that the fundamental and essential characteristic of the whole class of bodies described in the Act as companies, associations, and partnerships, is that they are bodies constituted by some species of contract of society, and founded on the contractual obligations thus undertaken by the members, or *socii, inter se*. It is very obvious that this is so in the case of both companies and partnerships. No doubt the word "association" is by itself capable of including a wide variety of much more loosely and irregularly constituted bodies of persons; but, looking to the context in which it appears in Part VIII of the [1908] Act, I see no reason to doubt that what is meant is a society (whatever its object) based on consensual contract among its constituent members

> whereby their mutual relations *inter se* with regard to some common object are regulated and enforced."

61. As regards the nature of winding up, the central point to make 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. The process is under the control of the liquidator appointed by the Court and is conducted for the benefit of creditors whose rights are admitted or established in the process. Those creditors receive *pari passu* distributions from the proceeds of realisation of such property in *pro tanto* discharge of their debts: see e.g. *Cambridge Gas Transportation v Navigator* [2006] UKPC 26 at [14]-[15] and *Parmalat Capital Finance v Food Holdings* [2008] UKPC 23 at [8].

62. The nature of this process is reflected in section 143(1) of the 1986 Act which provides,

> "The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised, and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it."

63. Given the essential nature of the winding up process is a means of collective enforcement of debts, it is also axiomatic that in the case of an association, 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 that any persons to whom a surplus may be distributed must be persons who have such entitlement as against the association.

64. For completeness, and because it was raised by the judge and in argument before us, I should add that the compulsory winding up process under the 1986 Act also contains provisions under which "contributories" can be called upon or ordered to pay money to the company (see e.g. sections 148-152). For the purposes of the winding up of an unregistered company, section 226 of the 1986 Act provides as follows,

> "(1) In the event of an unregistered company being wound up, every person is deemed a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of members among themselves, or to pay or contribute to the payment of the expenses of winding up the company.
>
> (2) Every contributory is liable to contribute to the company's assets all sums due from him in respect of any such liability as is mentioned above."

65. I should at once say, however, that I consider that this is something of a distraction in relation to Ground 1 in the instant case, because there is nothing to suggest that the existence of contributories as defined by section 226 is in any sense a precondition to the application of the winding up jurisdiction to an association, any more than the existence of contributories falling within the very similar definition in section 79 of the 1986 Act is a precondition to the power of the Court to make a winding up order in relation to a registered company.

The Sub-Fund

66. Applying these principles to the instant case, whether or not it is correct that section 220(1) is limited to bodies that are either companies or associations (as to which I express no view since the point was not taken on appeal before us), I have no doubt that the Sub-Fund is not an association which Parliament could have intended should be wound up by the Court under the 1986 Act.

67. The first and most obvious point to make is that the Sub-Fund is not in any sense a body whose existence was founded on some contractual obligations undertaken by any members between themselves. The Sub-Fund was simply a collection of assets owned by the Company which was managed and dealt with by the Company, separately from its other Dedicated Funds. It was not an association between legal persons at all.

68. It is also the case, as Mr Lewis accepted, that 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. Those assets were and at all times remained the assets of the Company. The investors made their investment in return for the issue of Shares in the Company, and their only rights in relation to the assets in the Sub-Fund were rights against the Company and each other as Shareholders under the Articles, as supplemented by the Offering Document issued by the Company.

69. Moreover, and consistently with the expert evidence, the provisions in Article 6(d) that the rights of investors regarding a Dedicated Fund are limited to the assets of the Dedicated Fund, and the assets of the Dedicated Fund are answerable exclusively for the rights of Shareholders relating to that Dedicated Fund, must be understood as referring solely to the rights of Shareholders against the Company. Article 6(d) simply provides that in giving effect to those rights of particular classes of Shareholders, the Company can only have recourse to the assets held by it in the relevant Dedicated Fund.

70. In short, 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.

71. That conclusion is entirely consistent with the expert evidence that the Sub-Fund was not a legal entity capable of entering into legal relations or obligations; that it could not incur any liabilities of its own; that it was not capable of owning property itself; and that it had no powers of management of its own affairs.

72. It is also readily apparent that the process of winding up by the Court could not be applied to the Sub-Fund itself. As indicated above, the primary purpose of a winding up under the 1986 Act is for a liquidator to conduct a collective process of enforcement for the benefit of creditors by getting in and realising the assets which comprise a debtor's estate and distributing the proceeds to creditors on account of their claims against the debtor.

73. But the Sub-Fund was not a debtor and it did not have creditors: as I have said, the expert evidence was that the Sub-Fund was simply a collection of assets which had no separate legal personality and could not enter into legal relations or incur any liabilities. The only persons who might be entitled, as creditors or members, to any distribution from the assets comprising the Sub-Fund were creditors or Shareholders of the Company. There is also force in the point that a liquidator appointed to the

Sub-Fund would have no powers of management of the assets and no right to sell them, because those powers were vested in the Company and its Board.

74. Again, put simply, if there was any body to which the winding up process under the 1986 Act could possibly be applied, it would be the Company and not the Sub-Fund.

75. I should also deal, briefly, with the point upon which Mr Lewis placed considerable weight at the hearing, namely that the expert evidence was that it was possible for the Sub-Fund to be the subject of a judicial winding up in Luxembourg. He contended that this showed that it was the type of body that ought to be capable of being wound up by the Court in England under the 1986 Act. I do not agree.

76. 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 that winding up provisions of the 1986 Act could be applied to it. There was no evidence about what the Luxembourg process would involve, save that it would appear that it would be available to the prosecuting authorities where the regulatory authorisation of an investment company to operate a Dedicated Fund had been withdrawn. While it would presumably involve a realisation of the assets comprised in the Dedicated Fund and some form of distribution under the control of the Luxembourg court, I do not see how it can simply be assumed that it would be a collective remedy comparable to a winding up under the 1986 Act. There are, for example, other processes for the winding up and distribution of the assets of clubs and funds that can be ordered by the English Court under its inherent jurisdiction which do not involve the application of the 1986 Act at all: see per Morritt J in *Re Witney Town FC* [1994] 2 BCLC 487 at page 491f-g, referring to *Re William Denby & Sons Sick and Benevolent Fund* [1971] 1 WLR 973.

77. For these reasons I would dismiss the appeal on Ground 1. That means, as Mr Lewis properly accepted, the appeal must fail in its entirety.

78. It also means that I do not think that we need to decide whether Richard Smith J was right on the other points that are the subject of Grounds 2 and 3.

79. Suffice to say, however, that in relation to Ground 2, even if the Council could have established that there was a realistic prospect of substantial recoveries being made in a properly conducted realisation of the assets held in the Sub-Fund, including from the pursuit of claims against managers or advisers, the expert evidence seems clear that any such claims would have to be made in the name of the Company and any rights that the Council might have to a distribution of such assets under Luxembourg law would derive entirely from the Council's rights as a Shareholder in the Company pursuant to Articles 16(g) and 16(h). That was certainly the scenario to which the expert evidence of Luxembourg law was directed.

80. As such, it would seem that the Council would, at best, be a contingent creditor *of the Company* as a matter of Luxembourg law and could not claim to be a contingent creditor *of the Sub-Fund* so as to be entitled to petition for its winding up in England. Indeed, I note that the allegation in the amended Petition (see paragraph 26 above) did not state in terms that the Council would be a contingent creditor of the Sub-Fund. Although Mr Lewis's skeleton argument suggested that a conclusion that the Council would be a contingent creditor of the Company and not the Sub-Fund would be to elevate form over substance, I would agree with Mr Lightman KC that Mr Lewis provided no logic or authority to support his submission that this legal distinction should simply be ignored.

81. Accordingly, I would dismiss the appeal.

Lady Justice Nicola Davies:

82. I agree.

Lady Justice King:

83. I also agree.