

## I'm a fund director, get me out of here!

Last year's judgement of the Grand Court of the Cayman Islands in *Weaveing Macro Fixed Income Fund Limited (In Liquidation) v Peterson and Ekstrom* (“**Weaving**”) spawned numerous commentaries and advisories which had Fund directors scurrying for cover. However, looking back now, the case said more about common sense and commercial best practice than it did about new law.

The case was in fact unremarkable in terms of general legal significance in the Cayman Islands and, notwithstanding bearish sentiment of some detractors, the investment funds industry generally. Of much more interest was that the particular factual situation provided a perfect opportunity to illustrate how not to be a fund director. Rather than leaving us with a rigid set of guidelines and prescriptions for managing the often complex and opaque web of duties and obligations, which it would have been very easy to do, the judgment instead provides us with a clear common sense guide on what to avoid.

### Housekeeping Tips for Investment Managers and Fund Promoters

#### 1. Look at your board

If you are not then chances are your investors or their due diligence consultants are. Who are your Board members and how much do you actually know about them? Do they have the experience and skill set to properly serve the interest of the fund and its shareholders? Sure you say, they have a great CV. It reads well – they have university qualifications and 10 years plus experience in financial services, but how much do they actually know about the mechanics of *your* fund, *your* specific investment or trading strategy or *your* investors?

It often surprises me that investment managers and fund promoters will insist on rigorous beauty parades for their lawyers and pour over the finer details of their auditors terms of engagement (both of which they should do of course) but are quite willing to hand over arguably the most important job in the fund structure (and their reputation with it) to people they have not so much as interviewed. Having a quality CV and proven commercial background in the industry are a given for any service provider, but as investment managers and fund promoters know better than anyone, that is no guarantee of future success.

## 2. Look at your governance structure

Looking solely at the Board of Directors, especially in today's operational risk environment, may not always be enough. An analysis of the factual situation of Weaving will lead most observers to question how a pattern of conduct, which we would surely all agree now looks egregious, was allowed to continue for as long as it did? It is easy to simply say lack of experience and poor practice and while these are undoubtedly significant contributing factors investment managers and fund promoters should also look at the governance architecture of the fund as a whole.

In light of this, investment managers and fund promoters should take a long look at their governance infrastructure. In other words, how much operational support does the board have? Ask yourself how often you have seen examples of the types of basic failures the board was criticized for in Weaving: undated or unsigned minutes; resolutions signed with information incomplete or missing; counterparts not signed or returned; or any number of other follow up actions left unattended. There is no escaping the fact that responsibility for good corporate housekeeping rests with the directors, but there is also no harm in ensuring they have good help and a more integrated service provider network around them.

## Rules of Engagement for Directors

### 1. Ask yourself questions

If you are a director of a fund, the focus of the Weaving judgment is all about how you carry out your role. What the Grand Court is telling you in Weaving is that you are expected to be an active participant in the life (and often also the death) of the fund. So the questions to ask yourself, as a director, are: How active are you? How often do you meet? How well do you understand the business mechanics of the fund? Do you understand the investment manager's philosophy or trading strategy? Should you? Are you expected to? The answer is, in short: yes, you are.

As a director you are expected to perform a high level supervisory role and common sense suggests that it would be difficult to properly perform that role without at least a working knowledge of what is going on around you. What it seems clear you ought not to do, is to assume you can simply rely *carte blanche* on service providers or (God forbid) fund counsel to fill you in (the so called "automaton" in Weaving). One of the main failings of the board highlighted by the Grand Court in Weaving was the failure to properly engage themselves in the affairs of the fund. This does not mean having to know every conceivable minute detail or rigorously monitoring the day to day activities of the fund—it is simply about using your best efforts to do the best job possible.

## 2. Checklists are not the answer

Lawyers are often asked post-Weaving whether boards should be adopting checklists or written policies and procedures manuals or similar. Arguably, anything that enhances the governance architecture of the fund is a good idea and has its place, but as they say, the road to hell is paved with good intentions. If checklists and manuals are introduced, directors should be vigilant to ensure that these do not simply become a crutch to lean on in the same way as relying on a fund's service providers did in Weaving; nor should directors see them as an exhaustive list of everything they might be expected to do or as a prescription that will magically cure boards of all defaults and liability.

The Weaving judgment does not mean you have to hit the panic button. Directors should instead reflect on what lessons can be learned from the judgment and where (or how) those lessons can be applied in practice. Directors may be forgiven for having feared the worst at the time of the judgment (and in the midst of much of the overstated analysis that followed). Fears over the impact on the duties and obligations of directors have however proved unfounded and directors should now look to Weaving for some common sense wisdom on how best to properly discharge the duties of skill, care and diligence they owe under Cayman Islands law.

### Further Information

*The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.*

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