In The Supreme Court of Bermuda

Civil Jurisdiction
(Commercial Court)

COMPANIES (WINDING UP)

2010: No. 352

IN THE MATTER OF COMPANY NO. EC 31586

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

(In Chambers)

Date of Hearing: October 29, November 1, 2010

Date of Ruling: November 4, 2010

Mr. David Kessaram, Cox Hallett Wilkinson, for
the Applicant/Petitioner (Muirfield Offshore Fund SPC, Ltd.)

Mr. Rod Attride-Stirling and Ms. Kehinde George,
Attride-Stirling & Woloniecki, for the Respondent

Introductory

1. On October 14, 2010, the Petitioner presented a winding-up petition against the Respondent mutual fund company based on three grounds. The first ground alleges insolvency based on a failure to comply with a statutory demand served in respect of a redemption debt. It is alleged that as of the Redemption Date (July 1, 2008), the Petitioner ceased to be a shareholder and became a creditor of the

Company. The second ground alleges that the Company should be wound-up under section 161(c) of the Companies Act because it has ceased carrying on business. The third ground alleges that is just and equitable for the Company to be wound-up by reason of, *inter alia*, conflicts of interest and bad faith in developing a plan for the distribution of the Company's assets.

2. On October 25, 2010, the Company applied *ex parte* on notice and obtained an interim injunction in the following terms:

    (1) MUIRFIELD OFFSHORE FUND SPC, LTD., the Petitioner named in the Petition presented to the Court on 14 October 2010 and its officers, employees, and agents, be restrained until further order from proceeding further upon the Petition, whether by advertising the Petition, publicising the fact that the Petition has been presented, or otherwise;
    (2) To the extent that the Petitioner has provided a copy of the Petition to any third party, such copy be recovered and the Petitioner take no step to further publicize the Petition, or provide a copy of the Petition to anyone;
    (3) That the Petition be removed from the list of proceedings, and the Court file be sealed;
    (4) That the Petition be removed from the file of the Registrar of Companies and all reference to the Petition be removed.

3. The Petitioner applies to discharge this *ex parte* injunction which was sought pending the determination of the Company's strike-out application which it has indicated it proposes to file. The Company contends that the relevant test for the grant of an injunction to restrain advertisement of a winding-up petition which has already been presented is whether the Respondent can show a risk of serious damage flowing from publication of the fact of the filing of the Petition or its contents. The Petitioner contends the relevant test is whether the Company can show that the Petition will likely be struck-out as an abuse of process, but disputes in any event that any risk of damage sufficient to outweigh the countervailing interests of other investors to receive a copy of the Petition has been made out.

Legal findings: principles applicable to the grant of interim injunctions restraining advertisement or publication of a winding-up petition pending the hearing of a strike-out application

4. The test for whether or not an injunction ought to be granted restraining the presentation of a winding-up petition is different to that applicable to the restraint of advertisement of the petition. However, in my judgment the nature of the difference will not always be the same and may depend on the facts and legal grounds of the relevant application. It is true that the English Court of Appeal appear to have suggested in *Re a company (No. 007924 of 1994)* [1995] 1 BCLC 440 that two rigidly distinct tests apply, and that this analysis has been academically cited with approval: Andrew Keay, '*McPherson's Law of Company Liquidation*', 1st England & Wales edition (Sweet & Maxwell: London, 2001) at page 102. In this case a public interest petition was presented against an actively trading insurance company which was not alleged to be insolvent. The company equally did not allege that the petitions were liable to be struck out; however it disputed the allegations that it had been carrying on business in breach of the Insurance Companies Act 1982 and sought to restrain advertisement of the petition until the merits of the allegations upon which the petition was based had been heard. It seems that the Court's power under the rules to direct that advertisement need not take place was engaged. The trial judge declined to restrain advertisement on the grounds that the company had to show that the petition was an abuse of process in reliance on cases where orders restraining presentation of a petition were sought. The Court of Appeal understandably held the wrong test had been applied.

5. Nourse LJ opined[1] as follows:

> "*It is helpful to start with a consideration of the purpose of advertisement. The primary purpose must be to give notice of the petition to those who are entitled to be heard on it, namely the creditors (whether actual, contingent or prospective) and contributories of the company. Although it was held in the early days of limited liability that the judge has a discretion to hear someone who has no such entitlement to be heard 'as amicus curiae, if you have an interest, that I may know what public grounds there are' (see Re Bradford Navigation Co (1870) 5 Ch App 600 at 603, per James LJ), it is difficult to think of circumstances in which the court would exercise that discretion in the case of a public interest petition, where the interests of the public generally are necessarily represented by the Secretary of State. The secondary, but no less important, purpose of advertisement must be to give notice to those who might trade with the company during the period between the presentation*

[1] Transcript, pages 5 -6; [1995] 1 W.L.R. 953 at 958-959.

of the petition and its final determination and who might thus be adversely affected by the provisions of s 127 of the 1986 Act.

In the light of those purposes, how ought the discretion to be exercised in the present case? Its principal features appear to be the following. First, there is no allegation, either in the petition or in the supporting evidence, that the company is insolvent. Second, on the assumption that the allegations made in the petitions will be proved, there is not, on the arguments we have heard, any substantial ground for thinking that the rights of the policyholders under policies unlawfully effected by the companies, whose rights will lie primarily, if not exclusively, against the insurers, will have been prejudiced. Third, it appears from the evidence in support of the petitions that the contributories of the companies are either their directors or companies owned or controlled by them. Fourth, the companies' undertakings to the court on 19 December will ensure that no further unlawful business is undertaken. Fifth, the order then made under s 127 will ensure that, in regard to business lawfully undertaken thereafter, third parties will be protected.

It therefore appears that a restraint on advertisement, at all events in the short term, would not deprive creditors of the companies, who may or may not include policyholders, of any significant advantage they would otherwise have had; that the contributories already have effective notice of the petitions; and that those who might trade with the companies during the period between the presentation of the petitions and their final determination will be protected by the order under s 127. Those considerations would not, however, together provide a sufficient ground for departing from the normal practice. Unless the companies can show that advertisement may, in the words of Brightman J, cause serious damage to the reputation and financial stability of the companies, advertisement there must be….

Although it has been well observed that the harmful effects of advertisement are liable to be exaggerated, as they may have been here, the companies' evidence is in my view sufficient to establish that it could cause serious damage to their reputation and financial stability. Adding that consideration, first, to the likelihood that if there is no advertisement

in the short term no significant disadvantage will be caused to those whose interests must also be considered and, secondly, to the likely imminence of the hearing of the application for a provisional liquidator, I have come to the view that we ought to direct that the petitions should not be advertised over that hearing. Thereafter the matter will rest with the decision of the judge conducting it.

I would therefore give the companies leave to appeal and allow their appeal accordingly."

6. Waite LJ agreed[2]:

"*Where, on the other hand, the company applies only for a direction against advertisement, the court is not so much concerned with protecting its own process from abuse as with the need to strike a fair balance between two different aspects of public policy. One is the concern of the court to ensure that the proceedings are brought to the attention of all those who may be presumed to have an interest in resisting or supporting them, ie actual, contingent and prospective creditors, contributories, and those dealing or proposing to deal with the company in the ordinary course of its business. The other is an appreciation by the court of the serious consequences for the reputation and financial stability of the company to which advertisement of the petition may give rise (see Re Golden Chemical Products Ltd [1976] 2 All ER 543 at 550, [1976] CH 300 at 309-310 per Brightman J). the circumstance of each particular case (given the starting point that the onus is on Re a company (No 007946 of 1993) [1994 1 BCLC 565, [1994] Ch 198) will determine how those objectives are to be reconciled.*

In the present case the judge incorrectly applied the abuse of process test to the issue of advertisement. His error requires the discretion under r.4.11 to be exercised by this court. For the reasons given by Nourse LJ, with which, as with all the reasoning in his judgment, I am in full agreement, I would exercise that discretion by ordering that the petitions should not be advertised over the relatively short period that is anticipated

[2] Transcript, page 7; [1995] 1 W.L.R. 953 at 960.

to elapse between now and the conclusion of the hearing of the application for the appointment of a provisional liquidator.

I too would allow the appeal."

7. *Re a company (No. 007924 of 1994)* concerned a public interest petition involving a solvent company where (a) the evidence suggested that other interested parties would not be "disadvantaged" if they were deprived of notice of the proceedings, and (b) restraint of advertisement was not based on the grounds that the petition was an abuse of the process of the court. The crucial analysis was held to require balancing (1) the rights of those entitled to receive notice of the proceedings pursuant to the advertisement rules, and (2) the risk that the company might suffer serious damage from advertisement of the petition. However this decision did not seem to prevent the High Court seven years later from restraining the petitioner from proceeding with (and advertising) a creditor's petition on abuse of process grounds in a case on which Mr. Kessaram relied: *JSF Finance and Currency Exchange Co. Ltd. –v- Akma Solutions Inc.* [2001] BCLC 307. Where it is contended that the petition is liable to be struck out, it is difficult to see why the merits of the strike-out application should have no bearing on an application to restrain advertisement pending the hearing of that interlocutory application. In my judgment, the merits of the strike-out application, if they are clear one way or another, may be taken into account alongside the rights of interested parties and the damage advertisement would cause.

8. In the context of a local public interest petition where "creditors" sought copies of the petition in circumstances where the company claimed they had no sufficient interest in the proceedings to justify being supplied with a copy of the petition under rule 22 of the Winding-Up Rules and that disclosing the petition would cause commercial damage, I reached the following conclusions:

"*57.The main significance of the character of the Petition is that the Court's primary task will be to resolve, as between the Petitioner and the Companies, whether the public interest requires that they be wound-up. This is supported by the case on which Mr. Ratneser relied, Re Get Me Tickets Ltd. [2006] EWHC 1058 (Transcript, paragraph 12).*

58.In the present case it is clear that the applicant creditors wish to support a winding-up order and would like to be able to appear not just on the hearing of the Petition, assuming it takes place, but on the hearing of the strike-out

application. As certain of the allegations relied upon in the Petition may have come to the authorities' attention through their defence of the various claims brought by IPOC, they may be able to lend certain logistical support to the Petitioner on certain evidential issues. But this would in reality arise out of their status as alleged debtors of IPOC, their status as creditors in truth being merely incidental to their defence of IPOC's claims. Their dominant commercial interest is in bringing IPOC's seemingly relentless pursuit of them and the "Megafon Stake" to an end. As explained in my provisional views on the conduct of the strike-out application which I have set out below, I am not minded to resolve any evidential issues at the interlocutory stage.

59. Two heads of opposition to the Applicants receiving copies of the Petition now were raised. Both relate to the central uncontested facts that (a) a strike-out application is pending, and (b) if the Applicants receive their copy now, it may subsequently be held that they were not entitled to receive the same.

60. The Respondents object to the Applicants appearing or being present at the strike-out application, and object to a copy of the Petition being supplied at any stage based on concerns as to what the Applicants will do elsewhere with the information contained in the pleading. The Petitioner felt that mere presence of the Applicants in the strike-out hearing would be a matter for the Court, but submitted they had no active role to play. Mr. Ratneser wanted to pursue the Petition fairly, not "willy nilly", and specifically contended that the rule 22 applications should not be acceded to at all until after the strike-out application is determined.

61. I have construed this latter submission as an application that, if I hold the Applicants come within rule 22, I should extend the time for the Petitioner to comply with the requests until after the determination of the strike-out application, provided that the Petition is not struck-out. The most important practical consideration which impacts on when the copy of the Petition is supplied arises from the pending strike-out application, which, if successful in part, might result in separate petitions for each company being filed. The Applicants would only have a right, in this eventuality, to receive a copy of the IPOC petition.

62. For these practical commonsense reasons, I find that it makes no sense to require the Petitioner to supply copies of the Petition in its present form to the Applicants at the present time. The Applicants have no discernable pressing interests as creditors to receive a copy of the Petition at this stage and no arguable right to be heard on the Companies' strike-out application if, for the reasons explained below, that application is substantially concerned with the issue of whether the composite Petition or nine separate petitions should proceed.

63. I do not think that it would be right in principle or realistic in practice to seek to restrict the use to which the Applicants make of the Petition once they

> *are supplied a copy. It is inherently prejudicial for third parties to receive a copy of a Petition which may be struck-out. In the present case, actual prejudice to IPOC in its wider litigation battle with the Applicants is the more tangible risk, which I also take into account.*
>
> *64. For these reasons, I find that the Petitioner's obligation to supply the Applicants with copies of the Petition under rule 22 of the Rules should be extended under rule 157 of the Companies (Winding-Up) Rules until after the determination of the strike-out application, but that this obligation shall be discharged in the event that the Petition is struck-out on the hearing of the Companies' pending strike-out application.*"[3]

9. This case illustrates that even where a petition has been advertised or otherwise come to the notice of interested parties, the Court may regulate the dissemination of the petition. However, again, in the solvent public interest petition context, the rights of creditors to participate either at the strike out stage (if there is a strike-out application) or at the hearing of the petition are significantly diluted. Correspondingly, it will be much easier to demonstrate that the risk of damage through dissemination of the petition outweighs third party creditors' rights to be fully apprised of the proceedings. Where restraint of publication to interested parties is sought in support of a strike-out application in respect of a creditor petition based on, *inter alia*, allegations of insolvency and which petition is notionally filed on behalf of the general body of unsecured creditors as a whole, the applicant will generally have to establish both (a) strong evidence that damage would result from disclosure of the contents of the petition and (b) a *prima facie* case that the petition is an abuse of process and likely to be struck out in any event. If both of these factors are not established, it is likely in most cases that the right of other creditors to participate in any pending strike-out application will prevail in favour of disclosure. Of course, even if there is a strong case for striking out based on an apparent lack of standing on behalf of the initial petitioner, the need for other creditors who might possess the requisite standing to be given an opportunity to appear at the strike-out application and apply to be substituted may come into play.

10. It is important to distinguish the concepts of advertisement of the petition in the narrow sense of placing an advertisement in an appointed newspaper from disclosing or publishing it to third parties for two reasons. Firstly, it may often be the case that third party creditors come to be aware of the winding-up proceedings before advertisement occurs. This is partly because the Bermudian practice is to

[3] *Re IPOC Capital Partners Limited* [2007] Bda L.R.33.

enter petitions filed in the public Cause Book[4] with the respondent company's name before service and/or advertisement occurs, but more fundamentally because the Rules permit advertisement to take place before service is effected and the respondent has an opportunity to apply for injunctive relief: *Re IPOC Capital Partners Limited* [2007] Bda L.R.33, at paragraphs 16-23. Secondly, winding-up petitions are frequently presented by one creditor in circumstances where collaboration of some sort is taking place with other like-minded creditors, so dissemination of the petition occurs without regard to advertisement at all.

11. But irrespective of the circumstances, if an application to strike-out the petition is filed before advertisement occurs, there will rarely be any useful purpose served in case management terms in proceeding with a hearing in open court of the petition before the strike-out application has been finally determined.

12. The relevant provisions in the Companies (Winding-Up) Rules 1982 are as follows:

> "***Presentation of petition***
> *18 A petition shall be presented at the Registry and the Registrar shall appoint the time and place at which the petition is to be heard. Notice of the time and place appointed for hearing the petition shall* [be] *written on the petition and sealed copies thereof, and the Registrar may, at any time before the petition has been advertised, alter the time appointed and fix another time.*
>
> ***Advertisement of a petition***
> *19 (1) Every petition shall be advertised not less than seven clear days before the hearing in an appointed newspaper.*
>
> *(2) The advertisement [Form 4] shall state the day on which the petition was presented, and the name and address of the petitioner, and of his attorney and shall contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner within the time and manner prescribed by rule 25 and an advertisement of a petition for the winding-up of a company by the Court which does not contain such a note shall be deemed irregular.*
>
> *(3) If the petitioner does not advertise the petition in the manner prescribed by this rule the appointment of the time and place at which the*

[4] The style of action heading for winding-up matters mandated by rule 7 makes it obvious from such entries that a winding-up petition has been presented.

petition is to be heard shall be cancelled by the Registrar and the petition shall be removed from the file unless a Judge or the Registrar shall otherwise direct.

Service of petition

20 Every petition shall, unless presented by the company, be served [Forms 5 and 6] upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer or servant of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator, if any, appointed for the purpose of winding-up the affairs of the company.

Verification of petition

21 Every petition shall be verified by an affidavit referring thereto. Such affidavit [Forms 7 and 8] shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some person who has been concerned in the matter on behalf of the corporation, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition.

Copy of petition to be furnished to creditor or contributory

22 Every contributory, and in the case of a petition for the winding-up of a company every creditor, of the company shall be entitled to be furnished by the attorney of the petitioner with a copy of the petition within two days after requiring same, on paying the reasonable costs of the copy….

Attendance before hearing to show compliance with rules

24 After a petition has been presented, the petitioner, shall on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statement therein and the affidavit of service, if any, have been duly filed, and that the provisions of the rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this rule...

Enlargement or abridgement of time

157 The Court may, in any case in which it shall see fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.

Formal defect not to invalidate proceedings

158 (1) No proceedings under the Act or the rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court."

13. Rules 18 and 19 (3) make it clear that no hearing of the Petition can take place at all unless the Petition has been advertised and imposes a mandatory duty on the Registrar to delist any hearing scheduled when the petition was issued. Rule 24 provides a further filter by providing that compliance with the Rules must be confirmed by the Registrar otherwise no order may be made at any hearing. Rule 157 confers on the Court an apparently unfettered discretion to abridge or extend any time period prescribed by the Rules, so time within which any advertisement takes place or any requests for copies of the petition must be complied with may both be extended. However, section 158 in effect provides that no departure from the Rules may be authorised which causes substantial injustice.

Findings: should the ex parte order restraining advertisement of the hearing of the Petition be discharged?

14. Although the Petition has been advertised once in the Wall Street Journal on the day the ex parte injunction was granted, I see no reason why the time for advertising the Petition should not be extended until such date, being not less than seven days before the rescheduled first return date of the Petition, as the Company's strike out application has been finally determined by this Court, provided that any strike-out application is filed no later than close of business on Friday November 5, 2010. I would vary the October 25, 2010 Order to that extent and, subject to hearing counsel as to the precise wording, in the terms set out in the penultimate paragraph of this Ruling below.

15. Mr. Kessaram advanced no compelling reason why the Petition should be formally advertised for the purposes of an initial hearing in open Court in circumstances where it is obvious that any strike-out application will not be finally heard before the presently scheduled return date of November 12, 2010.

16. The circumstances in which the Wall Street Journal advertisement occurred are not precisely clear. It is a matter of record that the company's legal advisers contacted the Court with a view to scheduling an urgent ex parte hearing on October 22, 2010. Mr. Attride-Stirling advised the Court that in discussions with the Petitioner's counsel he was left with the impression that no local

advertisement could be placed before Monday and so did not press for a Friday post-5.00pm or weekend hearing[5]. These assertions were not expressly challenged by Mr. Kessaram. In any event, the New York advertisement was published seven days after the Petition was served on the Company, so the Company had an adequate opportunity to apply to restrain publication if it failed to obtain a satisfactory undertaking from the Petitioner not to publish. Even if our Rules were amended, as they probably should be, to prohibit advertisement before service, the Petitioner's somewhat sneaky advertisement in the present case would not have constituted an abuse of the process of this Court.

Findings: should the Petition not be supplied to other actual or contingent and/or prospective creditors prior to the strike-out application being heard?

The merits of the strike-out application

17. Accepting that the Company has yet to finalize the evidential aspects of its proposed strike-out application, it was impossible to form anything more than a superficial view of the main contentions. The standing of the Petitioner as a creditor is challenged on the grounds that the Bye-laws permit payment rights to be suspended. This point is arguable, but so is the contrary position. A creditor's reliance on section 161(c) of the Act is novel. While it is arguable that the just and equitable allegations might be defeated following a full enquiry into the merits, it is difficult to see at this stage, based on the limited material before the Court at this point, how either (a) the relevant averments may be said to be clearly liable to be struck out, or (b) the Petitioner's standing as a prospective creditor can be said to be clearly subject to a serious challenge.

18. In these circumstances, I find that the case for restraining publicising the Petition to other investor creditors is not materially supported by the merits of the strike-out application which the Company's litigation attorneys have undertaken to file.

The risk of serious damage to the Company if the Petition is publicised to other investors

19. Other investors already know of the existence of the Petition through a combination of (a) the Wall Street Journal advertisement; (b) the entry of the present action in the Cause Book, and (c) the entry of the *inter partes* injunction

[5] At the ex parte hearing he also made reference to a standstill agreement entered into by the Company's corporate attorneys which did not expired until Friday afternoon, seemingly at 5.00pm.

hearing (and possibly the ex parte application as well) in the Court list. The Petitioner's evidence suggests that at least 40% of investors (in value) are already aware of the present proceedings[6]. Mr. Attride-Stirling candidly conceded that the injunction was sought as a damage limitation exercise. But what is the evidence as to the risk of damage?

20. The solvency of the Company in balance sheet terms is deposed to in paragraph 10 of the First James Dondero Affidavit. On the other hand, the deponent admits that since 2008 the Company has been seeking to devise a distribution plan for its assets after the directors voted for the Company to be dissolved and suspended redemption payments (and presumably the issue of shares to new investors) on October 15, 2008. If the Company's construction of its constitution is correct, it is not unable to pay its debts as they fall due because it has validly suspended any obligation to meet redemption claims such as that of the Petitioner. The significant point for present purposes is that the Company is more akin to an insurance company in run-off than a trading insurance company; it is not self-evident that its reputation will be damaged or that the value of its assets will depreciate if the wider public becomes aware of the existence and/or contents of the Petition.

21. The case on damage in evidential terms appears to be based on one sentence in the first Dondero Affidavit: "*The Company is solvent, based upon the information available to the Board, but the value that the Master Fund will be able to realise for its assets will be adversely affected by the possibility of liquidation proceedings against one of the Feeder Funds which will become known if the petition is advertised.*" This is an extremely general assertion of risk, with no suggestion that any specific substantial asset sales are currently in the works which may be prejudiced. It is also diluted by the assertion that the Company is solvent in balance sheet terms. If the real value of the assets exceeds liabilities, there should be no perception in the market that the Company is desperate to sell, in circumstances where its proposed liquidation was publicly announced in 2008 and the only dispute between the Company and its redemption creditors apparently centres on the distribution principles which should be applied. The failure to agree a liquidation plan in itself undermines the assertions that the Company is solvent save in a very technical legal and commercially artificial sense. The right of redemption creditors to be paid in the ordinary course of business within the time-limits prescribed by the Bye-laws has been suspended for two years.

[6] Second Affidavit of Geoffrey Stern, paragraph 14.

22. Moreover, while the evidence of damage explicitly (albeit weakly) supports the case for not permitting the Petition to be further advertised to the world at large (it appears that the November 1, 2010 advertisement is no longer accessible online), it provides no direct support for what I consider to be the central proposition. If it is right that publicity would damage the value of the Company's assets, the Company must demonstrate a credible risk that if the various unpaid investors receive copies of the Petition, they will deliberately, recklessly or carelessly disseminate its contents to the wider world and jeopardize their own economic interests.

23. Obviously the injunction application was prepared in some haste; such applications invariably are. The Court is bound to view the documentary evidence in this light and to take into account the submissions of counsel. Having viewed the evidence from a precautionary perspective at the *ex parte* stage, the *inter partes* hearing is designed to subject the injunction applicant's case to more rigorous scrutiny. There is obviously a potential risk that persons negotiating with the Company to purchase its assets may adopt a tougher negotiating line if they learn that the Company is facing a compulsory liquidation. But it's far from clear that the market value of the assets the Company has been seeking to liquidate since 2008 will be significantly impacted depending upon whether the company is being liquidated under an out of court plan or a Court-supervised one. Moreover, this Court is only concerned with the extent of the risk over the next few weeks when the strike-out application is still pending.

24. I find that there is no cogent evidence of any risk of *serious* damage (as opposed to *some* damage) to the Company's reputation and economic wellbeing occurring during this window of time on the assumption that: (a) the Petition is not further advertised, and (b) the Petition is only disclosed to persons whose economic interests are aligned with those of the Company in "run-off". Having regard to the limited rights of access to a winding-up file under rule 12, I see no justification for the extraordinary step of sealing the file, however.

25. If the strike-out application succeeds, which is not the only likely outcome at the present time, the solvency of the Company and the bona fides of its management will likely counteract to a material extent any interim negative publicity. If the Petition does proceed to a hearing in open Court, under normal principles applicable cases not involving confidential information or trade secrets, the public at large will have a right to know the respective arguments and averments, warts and all.

Rule 22 and the right of other creditors to participate in the strike-out application in support of the Petitioner or the Company

26. In my judgment there is no solid reason for this Court postponing the right of creditors of the same class as the Petitioner or contributories to receive copies of the Petition if they request one, irrespective of how they learn (or have learned) of the existence of the present proceedings. At a higher level than the prosaic procedural provisions of rule 22 of the Rules, the rights of creditors and contributories under section 6(8) (right of access to the Court) and section 10(1) (right to freely receive information) of the Constitution are brought into play by the present application to discharge the October 25, 2010 injunction. There is nothing in the present case which minimizes the normal right of interested parties to participate in the present proceedings, even at the strike-out stage, to any material extent.

Summary: balancing the right to participate with the risk of serious damage to the Company

27. On balance, the right of investor creditors to receive copies of the Petition in accordance with rule 22 prior to the strike-out hearing outweighs the risk that circulation amongst this group which is and may be presumed to be interested in preserving the value of the Company's assets will result in some wider disclosure which will undermine the marketable value of the assets the Company is seeking to liquidate over the few weeks between the date of this Ruling and the date when the strike-out application is finally determined by this Court. In addition, the proposed strike-out application cannot fairly be said at this stage to be sufficiently strong to fortify the case for restricting disclosure, notwithstanding this balancing of competing interests analysis.

28. Subject to hearing counsel on the precise wording of the Order, I would accordingly vary the October 25, 2010 Order to read in substance as follows:

> UPON READING the First and Second Affidavits sworn by James D. Dondero on behalf of the Respondent and the First and Second Affidavits sworn by Geoffrey Stern on behalf of the Petitioner
>
> UPON HEARING Counsel for the Petitioner and the Respondent

AND UPON THE COMPANY undertaking by its Counsel to abide by any Order this Court may hereafter make as to damages and to file its strike-out Summons on or before November 5, 2010

(1) MUIRFIELD OFFSHORE FUND SPC, LTD., the Petitioner named in the Petition presented to the Court on 14 October 2010 and its officers, employees, and agents, be restrained until after the final determination by this Court of the Respondent's application to strike-out the Petition from proceeding further upon the Petition, whether by advertising the Petition, publicising the fact that the Petition has been presented, or otherwise;
(2) For the avoidance of doubt, paragraph (1) of this Order is without prejudice to the Petitioner's obligation to comply with any requests for copies of the Petition duly made under rule 22 of the Companies (Winding-Up) Rules ;
(3) That any reference to the name of the Respondent to the Petition be removed from the list of proceedings and the Cause Book, ^^^^^^;
(4) That the Petition be removed from the file of the Registrar of Companies and all reference to the Petition be removed;
(5) That the Respondent shall be at liberty to file its strike-out Summons without a supporting Affidavit if this is necessary in order to comply with its undertaking to file the relevant application no later than November 5, 2010;
(6) That the time limited by rule 19(1) of the said Rules for advertising the Petition herein is extended to not less than seven days before such hearing date, if any, as the Registrar may appoint after the determination of the Company's strike-out application by this Court.

Conclusion

29. For the above reasons, the Ex Parte Interim Injunction granted on October 25, 2010 is varied but not discharged, essentially by continuing the restraint on public advertisement[7] but lifting the restriction on publicising the Petition to persons interested in the present proceedings. Unless either party applies by letter to the Registrar to be heard as to costs within 14 days, the costs of the present application shall be costs in the strike-out application.

Dated this 4th day of November, 2010 _____
KAWALEY J

[7] Primarily because no useful purpose will be served by advertisement of a hearing which is unlikely to take place on the presently appointed date.