



In The Supreme Court of Bermuda

COMMERCIAL COURT

2010: No 269

BETWEEN:

XENA INVESTMENTS LTD.

Plaintiff

-and-

**NEW STREAM CAPITAL FUND LIMITED
(In Liquidation)**

Defendant

EX TEMPORE RULING

(In Chambers)

January 26, 2011

Mr. Kevin Taylor, Marshall Diel & Myers, for the Plaintiff

Mr. Martin Ouwehand, Appleby, for the Defendant

Introductory

1. This is an application under section 167(4) of the Companies Act 1981 for leave to pursue the present action against the Defendant which is now in liquidation.
2. The commercial rationale for the application is a very understandable one.

3. The Plaintiff claims to be a redemption creditor in respect of Class K shares in the Defendant and fears that Tensor Endowment Ltd., another Class K shareholder which obtained a judgment against the Defendant before the liquidation commenced, may have put itself in a position to gain priority over other Class K redemption creditors which are merely account owners by virtue of the provisions of the Segregated Account Companies Act 2000.

The application

4. This concern arises in part, perhaps, due to an aside made by me in paragraph 15 of my Judgment in *UBS Fund Services (Cayman) Ltd. and Tensor Endowment Ltd.-v-New Stream Capital Fund Ltd.* [2010] Bda LR 38. The 2000 Act distinguishes the distribution priority rights of account owners and creditors. It is far from clear how that dispute will be resolved. The present dispute turns upon a construction of the terms and effect of section 167(4) of the Companies Act 1981. Section 167 (4) is derived from section 231 of the Companies Act 1948 (UK) and provides as follows:

“When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.”

5. It is clear from all the authorities that there is a strong presumption against allowing unsecured creditors to establish their debts by ordinary writ action. This presumption even extends to equitable claims. In the present case the essence of the complaint is that ‘Tensor’ is possibly in a position to gain a priority. The rationale underlying the statutory liquidation stay is that some creditors may gain a variety of advantages if, by happenstance, they obtain a judgment or levy execution before a winding-up commences. The effect of lifting the stay would be to give the Plaintiff priority over other account owners of the same class, contrary to the rationale underlying section 167(4).

Determination

6. In all the circumstances, the only proper way for this Court to exercise its discretion is to refuse the application. [After hearing counsel] Costs are awarded to the Defendant to be taxed, if not agreed, on the standard basis.

Dated this 26th day of January, 2011

KAWALEY J