In The Supreme Court of Bermuda

COMPANIES (WINDING-UP)

COMMERCIAL COURT

2011: No. 369

IN THE MATTER OF GEROVA FINANCIAL GROUP LIMITED

COMPANY NO: 44558

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING ON COSTS AND SUBSTITUTION APPLICATION

(In Chambers)

Date of Hearing: March 9, 2012
Date of Ruling: March 19, 2012

Mr. Cameron Hill, Sedgwick Chudleigh, for the Petitioners/Substitution Creditor

Mr. Martin Ouwehand, Appleby, for the Company

Introductory

1. The three Petitioners who presented the Petition on October 7, 2011 (Eric V. Seal, Aramid Entertainment Fund Ltd. and Marseilles Capital, LLC) seek, without opposition, to withdraw from the present proceedings. Their application for their costs was vigorously opposed.

2. Maxim Group LLC ("Maxim") seeks leave to be substituted and to amend the Petition. It appeared to me at the commencement of the hearing (which was estimated to last 2 hours but which took a full day) to be common ground that the Court was required to finally determine whether Maxim had standing to be substituted. In the event the Company submitted: (a) Maxim ought not to be substituted because its application was tainted by the improper purpose of Aramid Entertainment Fund Ltd. ("Aramid"); and (b) if Maxim was substituted, this should be on the basis that it was arguably a creditor, leaving its standing to be finally determined at the hearing of the Petition.

3. Both the application for costs and the substitution question raised important points of law and practice against a background of somewhat unusual facts.

Costs of the Petition to date

The Petition debts

4. The 1st Petitioner claimed $66,667 was due to him for consultancy services rendered to the Company under an October 26, 2010 letter agreement. A Default Judgment was entered in favour of the 1st Petitioner in the Superior Court of Marion County, Indiana, in the amount of $68,385.47 on June 29, 2011 ("the Seal Claim"). It was alleged that the Default Judgment was served on the Company's directors and US attorneys on July 14, 2011 and was not satisfied by the date the Petition was presented.

5. On October 7, 2011, the 1st Petitioner assigned the benefit of the Seal Claim to the 2nd Petitioner, Aramid. The first two Petitioners both petitioned on the basis of the Seal Debt.

6. The Third Petitioner, Marseilles, entered into a Share Repurchase Agreement on April 8, 2010 with the Company according to which the Company was obliged to pay $900,000 in twelve equal instalments commencing on the date of the agreement. Marseilles obtained summary judgment for $375,000 in respect of sums due under this agreement on May 12, 2011 from the United States District Court for the District of Southern Florida ("the Marseilles Claim"). This judgment was unsatisfied when the Petition was presented.

Grounds of Petition

7. The first ground for winding-up was, unsurprisingly, the Company's inability to pay its debts. In addition to the Petition debts, reference was made in the Petition to an unpaid judgment debt said to be unsatisfied and payable to Mr. Manley, a former Chairman and CEO of the Company and a principal of Marseilles.

8. The Petitioners also contended that it was just and equitable for the Company to be wound-up because:

    (1) the Company was formed as a special purpose acquisition company and its first acquisition was a failure and its second attempt at business disastrous. As a result, the Company since the beginning of 2011 has been in a distressed condition;
    (2) the proposed unwinding of the Stillwater transaction and distributions amount to a de facto voluntary liquidation while the Company is unable to pay its debts;
    (3) there is a risk of dissipation of assets, failure to publish adequate accounts, loss of substratum and a need for independent management.

Conduct of the Petition

9. The first return date of the Petition was November 10, 2011. On that date the Chief Justice gave directions for the filing of further evidence in response to the Petition and adjourned it for mention on December 9, 2011.

10. On November 30, 2011, the Petitioners issued a Summons seeking the appointment of joint provisional liquidators ("JPLs"). The return date for this Summons was December 8, 2011. Although an ex parte application, notice was given to the Company. This application was adjourned *sine die* with liberty to restore and costs reserved to the sooner of the restored hearing or the Petition.

11. The Chief Justice's notes in relation to the hearing record Mr. Hill as indicating that the 3rd Petitioner's claim had been settled, there were other creditors and this was why the Petition was being adjourned. It is unclear what indication, if any, was given of the status of the Seal Claim. However it is common ground that, as explained in the Second Affidavit of Eugene Scher sworn on behalf of the Company, the Default Judgment in favour of Eric Seal was set aside by the Indiana Marion County Superior Court on December 9, 2011, the day after the JPLs' appointment Summons was adjourned *sine die*.

12. According to the Affidavit of Kia Jam, a director of both CAC Group, Inc ("CAC") and the Company, on December 6, 2011 CAC bought the Marseilles Claim. CAC as a substantial creditor now opposed the Petition.

13. In summary, the JPLs' appointment Summons was issued at a time when the two Petition debts relied upon were judgment debts. The larger claim was effectively paid by a third party friendly to the Company, the day before the application was heard; the smaller default judgment was set aside the day after the Summons was adjourned.

Circumstances surrounding the Petitioners' reliance upon the Seal Claim

14. The 1st and 2nd Petitioners withdraw from the Petition because, although they do not formally concede that the Seal Claim is disputed *bona fide* on substantial grounds, they pragmatically concede that the setting aside of the Default Judgment post-Petition materially weakens their standing to Petition.

15. Why did Aramid take an assignment of the Seal Claim? The Company submitted that the Court should infer from the fact that (a) Aramid is suing the Company and being sued by the Company and its allies in two sets of US proceedings of far greater commercial consequence than the comparatively paltry sum which forms the basis of the Seal Debt, and that (b) Aramid has been "trawling" for creditors to support the Petition, that the 2nd Petitioner's standing as an actual creditor is impeached by its own personal collateral motives. The Petitioners counsel submitted that the Petition had been properly presented on the basis of a Default Judgment which was only subsequently set aside.

16. Mr. Ouwehand's surgical analysis of the evidence made it clear that Aramid's dominant commercial purpose must have lain beyond the four corners of the Seal Claim, which was worth less than $70,000. The 2nd Petitioner issued a Summons on November 4, 2011 seeking leave to prosecute its claim against the Company before the Supreme Court of the State of New York New York County ("the NY Court") in the event that a winding-up order was made. This signified the importance of those proceedings to Aramid; on the face of the October 24, 2011 Amended Complaint filed by Aramid and two other plaintiffs, $80 million is sought in damages. The Aramid NY Court plaintiffs are being sued by two of the defendants before the NY Court before the United States District Court for the Central District of California ("the California Court"). The Amended Complaint also dated October 24, 2011 and filed with the California Court seeks, *inter alia*, "*not less than $60 million*".

17. Moreover, when Maxim entered the stage as a potential substituting creditor, the Company's friendly debt-purchaser CAC had all but sealed a settlement of its claim only to be thwarted by Aramid concluding an as yet undisclosed deal with Maxim which involved "*more money*" than what the Company had to offer. Aramid's ongoing interest in the Petition was most vividly demonstrated by its filing a Notice of Intention to Appear on the January 12, 2012 hearing of the Petition "*as attorney for*" Maxim.

18. Whether presenting a winding-up petition as the assignee of a judgment creditor in circumstances where the petitioner's dominant motive is to pursue interests which are the subject of vigorously contested foreign proceedings renders a petition liable to be struck out on the grounds that it was improperly presented, or otherwise influences the costs

order to be made in connection with the 1st and 2nd Petitioners' withdrawal application, will be considered below.

Circumstances surrounding the Petitioners' reliance on the Marseilles Claim

19. The proposition that the Marseilles Claim was improperly relied upon and was tainted by Aramid's collateral purpose had far less coherence to it. If Marseilles was simply a proxy for Aramid, CAC would not have been able to buy its claim. The mere fact that Marseilles chose to use the same attorneys who may well have received instructions from Aramid does not undermine the logical inference that the 3rd Petitioner's dominant commercial interest flowed from the significant debt upon which it chose to petition for the Company's winding-up as an unsatisfied judgment creditor.

Legal principles applicable to the costs of withdrawing a winding-up petition

20. Both counsel accurately summarised the principles applicable to the factual circumstances they invited the Court to find existed in the present case.

21. Mr. Hill rightly submitted that where a petition has been reasonably and properly presented, the withdrawing petitioner is entitled to their costs. In *Re Lanaghan Bros Ltd*. [1977] 1 All ER 265 (where the petitioner obtained judgment in default and sent a letter before action in August and presented his petition the following January) , Brightman J held[1] as follows:

> "*The petitioning creditor has proceeded without any fault whatever on his part. He obtained a judgment in circumstances which the company did not seek to dispute. After a generous lapse of time the petition was presented. The company then woke up and succeeded in having the judgment set aside on the terms that it paid the costs of the plaintiff in any event. Now that the petition must be dismissed it seems to me only just that the petitioning creditor, if he be a creditor, should be given his costs of the petition, which he presented with complete propriety…*"

22. The same principle applies, more obviously, where the petition debt is paid before the hearing: French, '*Applications to Wind Up Companies*', 2nd edition, paragraph 4.6.2.3.

23. Of course where a petition is dismissed because it was improperly presented, for instance, being based on a disputed debt, the petitioner will ordinarily be required to pay the costs of the abortive petition as Mr. Ouwehand contended in reliance upon *Re Fernforest Ltd.*[1990] BCLC 693 on behalf of the Company.

[1] At pages 266-267.

24. The Company's counsel placed heavier emphasis on the proposition that the Petition was abusive because it was motivated by an improper or collateral purpose on Aramid's part. He cited the following dicta of Harman J in *Re a Company* [1983] BCLC 492 at 495 as authority for the principles applicable to the present case:

> "*Firstly it is trite law that the Companies Court is not, and should not be used as (despite the methods in fact often adopted) a debt collecting court. The proper remedy for debt collecting is an execution upon a judgment, a distress, a garnishee order, or some such procedure. On a petition in the Companies Court in contrast with an ordinary action there is not a true lis between the petitioner and the company which they can deal with as they will. The true position is that a creditor petitioning the Companies Court is invoking a class right…and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others rateably, or whether he has some private purpose in view…A judge has to decide whether the petition is for the benefit of the class of which the petitioner forms a part or is form some purpose of his own…*"

25. Mr. Hill rightly pointed out that Harman J's conclusion that the petition in that case was an abuse was crucially influenced by two findings ((1) a material financial benefit to the petitioner at the expense of all other creditors and (2) a failure to afford the company an opportunity to pay the debt pre-petition) which cannot be made in the present case:

> "*If the Petitioner can show that he and his class stand together and will benefit or suffer rateably, then his ill motive is nothing to the point. If the petition is properly brought, then the petitioner stands to get a valuable asset for itself and the rest of the class of creditors stand to get nothing…I have never heard of an action brought or payment demanded one afternoon in respect of an order for costs made in the morning. A fortiori I have never heard of a petition presented without any sort of demand for payment at all. The purpose of a petition is, it is true, not merely to obtain payment of a debt, but I cannot accept that it is right to present a petition when there has been no opportunity whatever for payment.*"[2]

26. I find as a matter of law that a petition is brought for an improper collateral purpose if the petitioner genuinely seeks a winding-up order but also hopes to achieve some personal benefit which will not accrue rateably to other creditors of his class. However the Court is not at this stage considering whether the Petition should be dismissed on such grounds.

[2] [1983] BCLC 492 at 495-496.

27. Despite Harman J's ritual incantation to the effect that winding-up proceedings ought not to be used for debt collection purposes, in my judgment there can be no impropriety in threatening or bringing winding-up proceedings where a company fails within a reasonable time to pay what reasonably appears to the unpaid creditor to be an undisputed debt. Having regard the constitutional right of access to the Court under section 6 (8) of the Bermuda Constitution and the complexity and potentially burdensome costs of enforcing judgments against offshore companies in a highly internationalized commercial environment, it can hardly be abusive to threaten or commence winding-up proceedings in the hope that one's debt will be paid more inexpensively and expeditiously than by other enforcement means. What is and will likely always be recognised as abusive is the actual or threatened presentation of a petition based on a debt which is in fact disputed in good faith on substantial grounds. Between these two boundary marks, however, lies a middle ground in which an infinite variety of potential instances of abusive or unreasonable conduct by a petitioning creditor may be found to exist.

28. Section 162(a) of the Companies Act 1981 provides for what is popularly known as a "statutory demand". If a statutory demand for a liquidated debt is served on a company's registered office and not paid within three weeks, the company is deemed to be insolvent. Where a company is solvent and has simply neglected to pay a debt which it cannot credibly dispute, this is a very cheap and effective debt collection mechanism as the debt will ordinarily be paid. If a company both fails to pay and fails to dispute the debt, the creditor can very properly present a petition based on both deemed insolvency and the strong inference that a company that does nothing in the face of the threat of winding-up must in real terms be unable to be its debts. However the statutory demand mechanism requires the creditor to give forewarning that a petition may be presented to afford the alleged debtor company an opportunity to pay first or restrain presentation of a petition based on a disputed debt.

29. Section 162 of the Act also provides that a company is also deemed to be insolvent:

> "(b) *if the execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part…"*

30. A petition may also be presented on the basis of deemed insolvency under section 162(b) where a judgment creditor has not simply obtained and served a judgment but also attempted to levy execution unsuccessfully. In these circumstances the judgment debtor would be deemed to know that the requirements of section 162(b) had been met. However section 162 (c) provides a broader ground of deemed insolvency, requiring

proof of either commercial insolvency or balance-sheet insolvency. Section 162 provides that a company will be deemed to be insolvent:

> "*(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts; in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.*"

31. Thus the statutory scheme does contemplate a petition being presented by, *inter alia*, a creditor in circumstances where it is asserted that the company is insolvent generally, having regard to not simply its failure to pay the petitioner's debt, but having regard to its financial position as a whole. Such petitions will ordinarily in practice be presented either by the company itself or by contingent or prospective creditors who fear that if they wait until they establish (through ordinary civil proceedings) a debt which is presently due, all of the company's assets may have been dissipated. Of course, such petitions may also be presented by large creditors with debts that are currently due in circumstances where it is obvious that no prospect of payment in full exists. Save for possibly encouraging the company to present its own petition and appoint provisional liquidators, in such cases no question of any forewarning of the petition logically arises.

32. However it seems to me that in most cases where a petitioning creditor has a comparatively modest presently due debt and the debtor company is not already involved in winding-up proceedings, one would expect some demand for payment to be made (coupled with a warning that winding-up proceedings may be commenced) before a petition is presented. Failure to take such a step could be found to be unreasonable because of the potentially draconian consequences of winding-up proceedings, in terms of both commercial damage and legal costs.

33. In relation to a petition which reasonably seeks to wind up a company on grounds of general insolvency in circumstances where it is contended that this course is where the best interests of all creditors lie, it may be entirely proper for a petitioning creditor whose standing is subject to challenge to seek to find other creditors to support the petition on the hypothesis that the majority of unsecured creditors will be prejudiced if a winding-up order is not made. What the interests of the majority of creditors truly are will often be difficult to ascertain, and the company may be able to pay off smaller creditors and persuade larger creditors that it has matters well in hand. Whether a petitioning creditor which is forced to abandon its petition because its standing to petition has been undermined post-petition, while continuing indirect attempts to wind-up its alleged debtor, has acted improperly in presenting and/or prosecuting its petition depends on a careful analysis of the pertinent facts. For reasons that are explored further below, in the

winding-up context because petitioners are representing class interests, it is always important to have clarity over what interests are truly being pursued.

34. Contingent and prospective creditors often have interests which conflict with actual creditors, and, because their claims are either payable in the future or might never crystallise at all, their right to petition is circumscribed. Section 163(1) provides:

> "*(c) the Court shall not give a hearing to a winding up petition presented by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court…*"

35. Mr. Ouwehand also submitted however that the definition of a "contingent creditor" was a technical one and that Aramid was not necessarily even a contingent creditor. I agree, although my appreciation of the subtleties of this definition was initially clouded by my previous encounters with the contingent creditor context in the insurance sphere[3]. Although this case was not referred to in argument, the following dicta of Bell J in *Bio Treat Technology Ltd.-v-Highbridge Asia Opportunities Master Fund LP* [2009] Bda LR 29:

> "*46. Mr. Riihiluoma referred to an Australian case, Community Development Pty. Ltd v Engwirda Construction Co. (1969) 120 CLR 455 , in which Kitto J. referred to the judgment of Pennycuick J. in In Re William Hockley Ltd [1962] 1 WLR 555 in the following terms:*
>
> > *'In In re William Hockley Ltd. , Pennycuick J. suggested as a definition of "a contingent creditor" what is perhaps rather a definition of "a contingent or prospective creditor", saying that in his opinion it denoted "a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date". The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of*

[3] In the insurance context, every policyholder will ordinarily be a contingent or prospective creditor without the need for any further analysis.

money will arise in a future event, whether it be an event that must happen or only an event that may happen.'

47. The critical words are of course 'under an existing obligation'. I indicated when dealing with the primary issue that in relation to those other rights which Highbridge might have against the Company, those were not issues for me to decide. However, in relation to the argument that Highbridge is a contingent or prospective creditor, the starting point is whether there is an existing obligation, with particular reference to its entitlement to definitive bonds. In this regard, it does seem to me that there is a distinction to be drawn between an existing obligation which may give rise to a liability, and an obligation which will lead to a contractual relationship between different parties, which once established may give rise to a liability.

36. And as far as costs are concerned, there is of course also a broader principle that disentitles a party who would otherwise be entitled to their costs to such an award if they have acted unreasonably: Order 62 rule 10.

Findings: 1st- 2nd Petitioners' costs

37. On balance the appropriate order to make as regards Aramid's costs is to make no order. I regard the 1st Petitioner as wholly irrelevant in practical terms to the present proceedings. In a straightforward case where a judgment creditor petitions based on a default judgment which is subsequently set aside, the petitioner might well be entitled to its costs: *Re Lanaghan Bros Ltd*. [1977] 1 All ER 265. In this case it is true, there was an interval of some four months between the entry of the judgment in default in July and the presentation of the Petition in November 2011. However, no warning was given that a petition might be presented as occurred in *Lanaghan*.

38. It might be said that the nature of the Petition, asserting 'real' insolvency and a positive case for winding-up would not entitle Aramid to seek payment of its debt at the expense of other creditors. However, if Aramid was acting reasonably, having regard to the only status it relied upon in presenting the Petition, that of a comparatively modest creditor with a presently due claim, it would surely have been more interested in obtaining payment than in actually winding the Company up. Aramid would have threatened to present a petition before it did so, and the Company could then have either ignored the threat or taken immediate steps to either pay the judgment debt or to apply to set it aside.

It did none of these things, it is obvious, because its primary goal was to pursue its far greater interests either:

(a) as a potential judgment creditor in relation to the tort claims being pursued before the NY Court; or
(b) as a contingent creditor without having to pass through the section 163 (1)(c) filter.

39. I say this is obvious because Aramid took an assignment of the Seal Claim on October 7, 2011, having commenced proceedings in the NY Court against the Company on or about July 25, 2011[4]. If it believed the Company to be insolvent, it is difficult to see what motive it would have for acquiring the Seal Claim save to enable it to petition as an actual creditor as it did exactly one month later. The chronology and the zeal with which Aramid has pursued a liquidation of the Company leads to the irresistible inference that its primary interests were motivated by its passive potential judgment creditor status rather than its active actual creditor status. I need not decide whether Aramid is in fact a contingent or prospective creditor, a point which was not fully argued and which is not easy to decipher from the evidence. At best its status as such is subject to doubt.

40. I am unable to find that its conduct constituted an abuse of process in that the 2nd Petitioner petitioned motivated by a collateral purpose in the legal sense described above. It is not presently clear what specific benefit (if any) Aramid would acquire from a winding-up which unsecured creditors generally would not also acquire. Mr. Ouwehand was unable to effectively respond to Mr. Hill's challenge to identify such a benefit.

41. Nevertheless, the cumulative effect of the intensive tactical manoeuvring which Aramid has deployed in relation to its prosecution of the present Petition passes a tipping point which requires this Court to find that it has acted unreasonably and should not be awarded its costs in relation to its abortive Petition. What this means in practical terms, taking into account the fact that the Petition is a joint one, will be explained below.

42. For completeness I should add that there is nothing inherently inappropriate in a petitioner acquiring his right to petition through taking an assignment of a debt shortly before presenting a petition. This occurred in a case (referred to in paragraph 3.077 of *McPherson* which was cited in argument) where substitution was allowed in respect of a creditor who was not a creditor when the original petition was presented: *Perak Pioneer-v-Petroliam Nasional* [1986] 1 A.C. 849;[1986] UKPC 24. But the context in which this assignment occurred bore no resemblance to the present facts.

[4] Exhibit "DLM-2/45" to the Second Molner Affidavit.

Findings: costs of 3rd Petitioner

43. The 3rd Petitioner's claim was purchased by CAC, a friendly creditor of the Company, as part of a wider settlement between Marseilles and the Company.

44. Applying recognised principles, Marseilles is entitled to its costs. I do not find that Marseilles' conduct of the Petition was to any material extent unreasonable in light of the circumstances in which it withdrew its support for the present proceedings.

Summary: costs order

45. In substance, the petition was presented by two withdrawing creditors, one of which has been awarded its costs and the other has not. There is no suggestion that it would be possible or rational in costs terms for an apportionment to be carried out of what time was spent in respect each creditor's claim. I accordingly award Marseilles 50% of the costs of the Petition.

Substitution application

Applicable legal principles

46. Maxim applied to be substituted by way of amendment to the Petition pursuant to the following provisions of the Companies (Winding-Up) Rules 1982:

> "***Substitution of creditor or contributory for withdrawing petitioner***
> *27 When a petitioner for an order that a company be wound up by the Court is not entitled to present a petition, or whether so entitled or not, where he (1) fails to advertise his petition within the time prescribed by these Rules or such extended time as the Registrar may allow or (2) consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called in Court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned, or (3) if appearing, does not apply for an order in the terms of the prayer of his petition, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the Court would have a right to present a petition, and who is desirous of prosecuting the petition. An order to substitute a petitioner may, where a petitioner fails to advertise his petition within the time prescribed by these rules or consents to withdraw his petition, be made in chambers at any time.*" [emphasis added]

47. Mr. Ouwehand's primary submission on the substitution application was that it ought to be refused because Maxim's interest in the Petition was as a result of Aramid "*trawling for potential petitioners*". He submitted further that if the Court was minded to allow substitution, the question of Maxim's standing ought not to be determined finally until the hearing of the Petition. Mr. Hill contended that substitution could not take place unless the Court, in accordance with the terms of rule 27, found that the substitution applicant had standing to present a petition.

48. In my judgment the Court has the power to grant substitution provisionally, pending a subsequent determination of any standing controversy which cannot conveniently be determined on the hearing of the substitution application. Rule 27 requires the Court to determine that a substituting creditor has "*a right to present a petition*" when making a substitution order, but the time for making the requisite determination can surely be extended under the following provisions of the Rules:

> "***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.*"

49. However, the normal course should be that the Court determines the issue of standing at the earliest opportunity; the onus is on the party seeking a postponement of this threshold determination to make out a case for postponement. According to *McPherson*:

> "*If the company wishes to object to a creditor being able to substitute, it must do so at the hearing of the application to substitute and not later at the hearing of the winding-up petition. Thus, once an order is made permitting substitution, the substituting creditor has standing to pursue the petition to wind up as the substituting creditor is taken to fall within the list of persons entitled to present a winding-up petition….*"[5]

50. If Maxim's application to be substituted was made in aid of Aramid's collateral purpose, may the substitution application be refused? Although I have already found that Aramid has not to date been shown to have any collateral purpose in relation to the Petition, assisting any such purpose would in my judgment potentially be highly relevant to (a) whether or not a substitution order was made, and/or (b) whether a winding-up order should be made on the amended Petition.

[5] Paragraph 3.077.

51. The relevant principles applicable to deciding whether or not a petition cannot be presented or pursued because the debt upon which it was based is disputed are well settled. They were helpfully summarised by Justice Indra Hariprasad-Charles in *Metalloyd Ltd.-v-Burwell Resources Ltd.*, Eastern Caribbean High Court (BVIHCV2006/0083), Judgment dated July 17, 2006 (unreported) as follows:

> "*[55] The principles of law are clear that if the Company has genuine and substantial grounds for disputing the debt, this court sitting as a Company Court should not allow the application to continue but should instead dismiss it so that the parties can determine any dispute in a civil court. The onus of proof that there are genuine and substantial grounds for disputing the debt lies on the Company. In Re a Company (No 001946 of 1991), ex parte Fin Soft Holding SA13, Harman J. at page 740 said: "In my view, the true test is: Is there a bona fide dispute? Meaning thereby: Is there a real dispute? That is, a real and not fanciful or insubstantial dispute about the debt. Alternatively, the test can be defined as: Is the debt disputed upon substantial grounds?…'Bona fides', in the sense of good faith, has nothing to do with the matter. I therefore, believe that the true question is, and always is: Is there a substantial dispute as to the debt upon which the petition is allegedly founded?'"*

52. *Re a Company (No 001946 of 1991), ex parte Fin Soft Holding SA*[1991] B.C.L.C. 737 was case where no substantial dispute was found to exist in relation to a petition debt based on a promissory note. The dispute was raised "*late in the day and the evidence indicated that the company was desperately seeking any defence which might justify its non-payment of the claim*": *McPherson*, paragraph 3.037. Whether a dispute is substantial is a question of judgment based on the facts of each case.

Findings: is Maxim a creditor?

53. Mr. Ouwehand advanced no convincing reasons as to why this Court should not determine this aspect of the standing issue at a hearing set down for two hours and which lasted a full day and in relation to which copious amounts of evidence had been filed.

54. It is common ground that Maxim was issued a promissory note on February 19, 2010 pursuant to a Settlement Agreement under which its obligation to pay Maxim an underwriting fee was deferred ("the Promissory Note"). Although the amounts said to be due and the due dates pleaded in the draft Amended Petition do not appear to me to perfectly match the terms of the Promissory Note (the pleaded amounts appear to be rounded down), it seems clear that at least $2 million is *prima facie* owed under the Note.

Demand for payment was made on the last date specified in the Note (December 15, 2011) and the Company failed to pay the Note.

55. On December 16, 2011, CAC, the Company's friendly debt-purchaser, commenced negotiations to purchase the Note from Maxim. The evidence shows that although a written agreement was almost consummated, Maxim pulled out at the last minute as a result of a better offer. On January 12, 2012, CAC filed a Complaint in the Superior Court for the State of California (County of Los Angeles) seeking to enforce an alleged oral agreement concluded by CAC and Maxim for the purchase of Maxim's Note.

56. On February 2, 2012 at 3.35 pm, Maxim filed its Summons seeking to be substituted as Petitioner in this Court. The same day the Company filed a Complaint against Maxim in the United States District Court for the Southern District of New York seeking, *inter alia*, a declaration that the Promissory Note and related release (presumably given by the Company to Maxim in the Settlement Agreement) are "*unenforceable because they are the result of a mistake on the part of Gerova*". Other complaints are made about the alleged assignment by Maxim of the Note which do not appear relevant to present concerns save to note that it is asserted that the note was not legally capable of being assigned.

57. The standing of Maxim as a creditor petitioning on the basis of an undisputed debt is, implicitly at least, challenged on two inconsistent grounds. Firstly that it entered into an oral agreement to assign the Note to CAC which is legally enforceable. Secondly, it is alleged that the Note is unenforceable as against the Company and cannot according to its terms be validly assigned to a third party.

58. The evidence before this Court clearly shows that no binding assignment agreement was reached with CAC by Maxim. It is further impossible to regard the disputes raised by the Company about the validity of the Note after attempts by CAC to purchase it failed as being either substantial or raised in good faith.

59. I find that Maxim is an actual creditor with standing to be substituted under rule 27 of the Rules as Petitioner as submitted by Mr. Hill on Maxim's behalf. However, in the exercise of my discretion under rule 157 of the Rules, I postpone any final determination of how (if at all) any agreement entered into between Aramid and Maxim impacts on its status as a creditor until the hearing of the Petition because this matter was not fully addressed either by the evidence or by way of argument.

Findings: is Maxim's substitution application to be refused because its Petition is advanced in furtherance of Aramid's New York litigation interests?

60. I have already rejected the contention that Aramid's pursuit of the Seal Claim through the present winding-up proceedings constituted an abuse of process on the grounds that it was motivated by an improper collateral purpose. The only argument positively advanced by the Company in its skeleton argument against the making of the substitution order was to the effect that Maxim's application was abusive because it was tainted by Aramid's improper purpose.

61. The precise nature of Aramid's involvement with the present proceedings is currently unclear. Aramid has characterised itself as Maxim's "agent" and has apparently reached an arrangement with Maxim which is more favourable than the terms upon which CAC was willing to take an assignment of Promissory Note. Although the precise nature of the ongoing involvement of Aramid is presently rather murky and will likely warrant further elucidation before the Court makes any final decision on whether or not to make a winding-up order, no sufficient grounds presently exist for refusing to make the substitution order Maxim seeks.

62. Accordingly leave to amend the Petition substantially in the form of the Draft Amended Petition placed before the Court is granted and Maxim is substituted as Petitioner in place of the original 1st to 3rd Petitioners.

Costs of substitution application

63. I view the costs of the substitution application as wholly distinct from the costs of the withdrawal application despite the overlapping manner in which such costs may in fact have been incurred. Counsel have yet to address these costs as judgment was reserved.

64. Unless either party applies to be heard as to costs by letter to the Registrar within 14 days, I would reserve these costs to be determined at the end of the hearing of the Petition. Maxim would ordinarily be entitled to the costs of a successful substitution application which was opposed. However, in all the circumstances of this peculiar case I am inclined open for determination at the hearing of the Petition the question of whether Maxim is truly pursuing this Petition or whether it is in substance merely a "front" for a potential judgment creditor which is not entitled to petition in its own right.

65. In the winding-up jurisdiction of the Court, there is a heightened need for transparency in terms of what interests petitioning or supporting or opposing creditors truly represent. This flows from the well recognised principle, alluded to in argument, that a petitioning

creditor is exercising representative rights on behalf of the class of creditors to which he belongs. It is entirely proper for the Company in response to the present Petition to put in issue for determination at the hearing of the Petition the question of what interests Maxim truly represents.

Conclusion

66. The 3rd Petitioner is awarded 50% of its costs of the Petition up to and including the withdrawal application and the contested hearing on costs.

67. Maxim's substitution and amendment applications are granted. However, unless either party applies to be heard as to costs within 14 days, the costs of this application are reserved to be determined after the hearing of the Petition.

68. The Company's invitation to the Court to defer a final determination of Maxim's standing as a creditor to the hearing of the Petition is rejected subject to one important caveat. The Court does defer for final determination at the hearing of the Petition (together with all issues touching upon the Petition's merits) the question of whether or not Maxim, the substituted Petitioner, truly represents the interests of unsecured creditors as suggested by its claim.

Dated this 19th day of March 2012 _____

KAWALEY J