In The Supreme Court of Bermuda

COMPANIES (WINDING-UP)

COMMERCIAL COURT

2012: No. 242

IN THE MATTER OF TITAN PETROCHEMICALS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

SATURN PETROCHEMICALS HOLDINGS LIMITED

Petitioner

-v-

TITAN PETROCHEMICALS LIMITED

RULING ON STRIKE-OUT APPLICATION

(In Court)

Date of Hearing: May 1, 2013
Date of Ruling: May 10, 2013

Mr. Jan Woloniecki and Ms. Kehinde George, Attride-Stirling & Woloniecki, for the Petitioner
Mr. Paul Smith and Mr. Christian Luthi, Conyers Dill & Pearman, for the Company

Mr Cameron Hill, Sedgwick Chudleigh, for KTL Camden Inc ("KTL Camden"), a Supporting Creditor

Introductory

1. On July 9, 2012, the Petitioner, a shareholder of the company which had served a redemption notice, presented the Petition as a prospective and contingent creditor on the following bases:

    (a) as a prospective creditor on the ground that a redemption price of just under US$50 million (HK$384,358,271) would become payable on the Redemption Date; and

    (b) as a contingent creditor because payment of the prospective debt was contingent upon the Company being lawfully able to make the payment which the Petitioner believed (because of its balance-sheet and cash-flow insolvency) it would be unable to do.

2. The Petition was first heard on August 16, 2013 and has been adjourned on an essentially consensual basis since then while the Company, listed on the Hong Kong Stock Exchange, has pursued attempts to implement an out of court restructuring. On August 27, 2012, the Petitioner issued a Summons seeking the appointment of joint provisional liquidators; that application has been adjourned from time to time together with the Petition.

3. On March 12, 2013, the Company issued a Summons to strike-out the Petition which, after directions were ordered for the filing of evidence, was listed for effective hearing in Court on the same date as the Petition was scheduled to be mentioned. Also issued returnable for the same hearing date was a Summons issued on April 29, 2013 by KTL Camden to be substituted as a creditor should the Company's strike-out Summons be successful.

4. The Company presented a powerful case in support of the contentions that, even if the Petitioner technically had standing to petition (which, with the enthusiastic support of KTL Camden, it contested), its prosecution of the Petition was an abuse of process because it lacked sufficient interest in a winding-up. This argument had two limbs to it; both premised on the assumption that standing as a creditor and some realistic prospect of making a recovery in the liquidation were inextricably intertwined. Firstly, there was the somewhat technical argument that because of section 158(g) of the Companies Act 1981, its redemption claim would rank behind ordinary unsecured creditors' claims. The

Petitioner's pleaded case was that the Company was insolvent on a balance sheet basis and accordingly it had no prospect of any recovery. Second, and more practically, it was argued that because the Petitioner had on October 12, 2012 agreed to sell its redemption recovery rights to a third party (under an agreement the validity of which had very recently been referred to arbitration by the purchaser), it had no economic interest in the Petition debt in any event.

5. The Petitioner countered that the challenges to its standing as a creditor were misconceived and that the question of sufficient interest in a winding-up merely went to its prospects of successfully obtaining a winding-up order. If it had standing to petition, its pursuit of a weak Petition could not properly be characterised as abusive.

6. I reserved judgment on the Company's strike-out application and adjourned the Petition (as well as the substitution application) to the date of the present Judgment.

Findings: the Petitioner's standing

The impact of section 158(g) on standing as a creditor

7. Bearing in mind that the principles applicable to the standing to present winding-up petitions have been more or less settled for many years, the Company's belated challenge to the Petitioner's standing as a creditor had a somewhat odd ring to it. However, this response was also influenced by the fact that recent cases of winding-up petitions presented by redemption creditors have arisen in the context of Funds where the right to receive redemption proceeds often explicitly creates a debt.

8. Mr. Woloniecki submitted that the Company's analysis involved merging the distinct questions of standing to petition and sufficient interest to obtain a winding-up order. Mr. Smith, however, fundamentally relied on section 158(g) of the Companies Act 1981, which provides:

> "*(g) a sum due to any member of a company, in his character as a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.*" [emphasis added]

9. It is important to read this paragraph in the wider context of the section in which it appears, which on its face is concerned with the status of shareholders (contributories) after a winding-up order is made:

> "*158. Subject to section 158A, in the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following qualifications...*"

10. The submission that section 158(g) potentially had the effect of subordinating the Petitioner's which claim based on its redemption rights under the Company's bye-laws to the claims of third party creditors was not in dispute. This proposition was supported by *Soden -v- British Commonwealth Holdings Plc.* [1998] AC 298; but this was a case where the issue arose in the context of liquidator seeking directions as to the applicable distribution priorities. The question was whether the claim arose from the shareholder's contract with the company in relation to his shares or arose independently of that contract. This case shed no light on the connection between those distribution rights and the standing to present a petition.

11. Mr. Smith, supported by Mr. Hill for the would be substituting creditor KTL Camden, then submitted that the impact of section 158(g) was that the Petitioner lacked sufficient interest to obtain a winding-up order because, on the basis of its own pleaded case of balance sheet insolvency, it would not be entitled to any distribution in the liquidation. How this impacted on the Petitioner's standing as a contingent or prospective creditor was not clearly explained; moreover, this submission was supported by reference to cases concerning shareholders petitioning to wind-up on the just and equitable ground: *In re Rica Gold Washing Company* (1879) 11 Ch. D. 36: *In re Chesterfield Catering Co. Ltd.* [1975] 1 Ch. 373; *Re Bellador Silk, Ltd.* [1965] 1 All ER 667.

12. Mr. Woloniecki insisted that a creditor's prospects of recovery, which after all did not depend purely on an insolvent company's booked assets but might include recoveries made from claims against officers and directors, had no bearing on the right to obtain a winding-up order. He referred the Court to the following provision in the Act:

> "*164 (1) On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, <u>but the Court shall not refuse to make a winding-up order on the ground only that the assets of the</u>*

company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets." [emphasis added]

13. This provision was also only directly relevant to the issue of the discretion to make a winding-up order; however, it did undermine to a significant extent the proposition that an essential element of the right to present a winding-up petition was an ability to demonstrate the plausibility of a petitioning creditor obtaining a distribution from the liquidation estate. It is well recognised, on the other hand, that when considering whether or not to make a winding-up order on the merits at the effective hearing of the petition, the Court will ordinarily take into account the size of the petitioning creditor's stake if other creditors of equal rank oppose the making of a winding-up order.

14. Nevertheless, Mr. Smith was able to point to one authority which he contended directly supported his client's case that the Petitioner lacked standing because its claim was essentially a shareholder claim subordinated to the claims of unsecured creditors. The Eastern Caribbean Court of Appeal in *Westford Special Situations Fund Ltd-v- Barfield Nominees Limited et al*, HCVAP 2010/014, Judgment dated March 28, 2011 (George-Creque JA-as she then was) held as follows:

> "*[32] It is quite clear that the position, on reading sections 2, 9 and 197 of the [Insolvency Act], is that a redeeming shareholder claiming redemption proceeds has no locus to apply for the appointment of liquidators. For the foregoing reasons I consider that the learned trial judge was wrong in proceeding on the basis that the respondents, as redeemers claiming redemption proceeds, were creditors of the Fund with locus to apply for the appointment of liquidators for the purposes of the IA. Accordingly, their application ought to have been dismissed.*"

15. The Eastern Caribbean Court of Appeal (at paragraph [23] considered that the following statutory provision in the British Virgin Islands ("BVI") Insolvency Act was in substance analogous to the UK Insolvency Act 1986 section 74(f) (the counterpart of our own section 158(g)). The only noteworthy difference identified by Janice George-Creque JA (now Pereira CJ) was that the BVI provision "*expressly includes redemption proceeds within the class of sums which may become due to a member qua member*":

> *"197.A member, and a past member, of a company may not claim in the liquidation of the company for a sum due to him in his character as a member, whether by way of dividend, profits, redemption proceeds or otherwise, but such sum is to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves."*

16. The BVI distinctive wording, stating that a member or past member "*may not claim in the liquidation*" at first blush seems significant; it seemed to me that it signified that under BVI law, there was a complete bar to 'shareholder claims' whereas under Bermudian law, the bar was merely a qualified one. But, on closer analysis the counterpart in section 158(g) to the BVI's "*may not claim*" is the following crucial wording: "*a sum due to any member of a company, in his character as a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member...*" (emphasis added). Simply read, this is another way of saying that, where a sum is due to a shareholder in his character as such, the relevant sum shall be deemed not to constitute a debt and the payee shall be deemed not to be a creditor in respect of any presently due sum. Finally, section 158(g) of the 1981 Act and section 197 of the BVI Insolvency Act both conclude by stating that "*any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories*[1] *among themselves.*" This further emphasises that a shareholder claim falls within the shareholder distribution pot rather than the creditor distribution pot. And the general scheme of the Act is that the character of the claim determines the character of the distribution rights.

17. In the present case it is clear that the redemption process was never completed at the date the Petition was presented so that the Petitioner was at that date still a shareholder incapable of petitioning as an actual creditor. Mr. Hill joined Mr. Smith in submitting (despite his client's support overall for a winding-up order), that the Petitioner's claim was accordingly a shareholder claim by virtue of the operation of section 158(g) of the Companies Act 1981. There is, I find, an implicit and necessary connection between the post-winding-up order distribution character of a shareholder's claim (expressly provided for in section 158(g)) and the pre-winding-up order character of the same claim (not expressly dealt with by section 158(g)). Once a creditor always a creditor. Once a contributory, always a contributory.

18. However, two important qualifications must be made to my general finding that BVI and Bermuda law are similar in the way they delineate the boundaries between creditor and shareholder claims. Firstly, *Westford Special Situations Fund Ltd-v- Barfield Nominees Limited et al* concerned a petition presented by a purported "actual" creditor. Secondly, I find that there is a crucial distinction between BVI's section 197 and Bermuda's section 158(g). The BVI provision expressly applies to a *"member, and a past member, of a company*" and, for the avoidance of doubt, makes it explicitly clear that redemption claims are caught by the provision. The Bermuda provision applies only to current members and to claims in relation to "*a sum due to any member of a company, in his character as a member*". The section is drafted in such a way which is inconsistent with

[1] The BVI term is "*members*".

the proposition that the term "member" includes "past member". This is clear if one looks at section 158 as a whole:

> "***Liability as contributories of present and past members***
> *158. Subject to section 158A, in the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following qualifications—*
>
> *(a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;*
> *(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;*
> *(c) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;*
> *(d) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member;*
> *(e) in the case of a company limited by guarantee, no contribution shall, subject to the special provisions relating to mutual companies, be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;*
> *(ee) in the case of an unlimited liability company there shall be no limitation on the liability of any member;*
> *(f) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;*
> *(g) a sum due to any member of a company, in his character as a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.*"

19. So under Bermuda law there is no impediment to a former member who has effectively redeemed his shares and is seeking to enforce a bare payment obligation acquiring the status of a creditor. Because once he ceases to be a member, the payment is no longer due to him in his capacity as a member but as a former member to whom the company owes a debt, albeit one arising out of the bye-laws. Section 158(g) would not in these circumstances in my judgment apply, as regards creditor standing or distribution rights[2]. I accept that *obiter dicta* in *Culross Global SPC Limited-v-Strategic Turnaround Master Partnership Limited* [2010] UKPC 33 (at paragraph 42) suggests that a redemption creditor's claim would still rank behind outside creditors at the distribution stage. However the Caymanian statutory framework appears to me to be materially different[3]. And the distribution status of a redemption creditor's claim is not in issue in the case at Bar in any event.

20. It remains to consider how these general legal findings impact on the Petition filed by the Petitioner in the present case as a prospective or contingent creditor on the express basis that the Petitioner was at the Petition date still a member of the Company.

The Petitioner's standing as a prospective or contingent creditor

21. Mr. Woloniecki submitted that *Westford Special Situations Fund Ltd-v- Barfield Nominees Limited et al* ought not to be followed and that it was clear under Bermuda law that a redemption creditor had standing to petition to wind-up a company.

22. One submission he advanced, which in my judgment is not directly responsive to the merits of the standing argument (although it may well be relevant on the issue of costs), was that in First Wong the Petitioner's standing as a creditor had been admitted. It was no longer open to the Company to challenge its standing as a creditor. It is true that First Wong, filed on behalf of the Company:

    (a) admits the redemption price the Petitioner contends is payable (paragraph 12);

[2] This point was not addressed in argument and, when a draft of the present Judgment was circulated for editorial corrections, Mr. Hill kindly drew the Court's attention to a decision contradicting my conclusion on this peripheral issue which it was too late for me to consider at that stage: *In re Consolidated Goldfields of New Zealand Ld* [1953] 1 Ch. 589.

[3] Although the relevant statutory provision does not appear in the report of the case, section 37 ("Redemption and purchase of shares") the Caymanian Companies Law 2009 expressly provides that redemption rights which have vested before the commencement of a liquidation can be enforced by the redeemer in the liquidation: section 37(7)(a). Crucially, section 37(7)(b)(i) expressly provides that "*all other debts and liabilities of the company (other than any due to members in their character as such)*" shall be paid in priority to any such pre-liquidation redemption claims.

(b) admits the Company is insolvent on a cash-flow basis (paragraph 14); and

(c) admits the Petitioner in respect of its redemption claim is one of the Company's "*major creditors, contingent creditors or potential creditors*" (paragraph 15).

23. It is, on the face of it, unreasonable for the Company to expressly concede the Petitioner's standing in its evidence in response to the Petition on August 15, 2012 and to challenge the Petitioner's standing for the first time by way of a Summons filed nearly seven months later. But the winding-up jurisdiction is statutory in nature and jurisdiction cannot be conferred by consent. The Company's standing argument requires careful scrutiny, however, because the way it has been raised suggests that it is far from an obvious straightforward legal and factual proposition.

24. The most important substantive issue which arises in answer to the strike-out application is the Petitioner's asserted standing as prospective or contingent creditor. As it was conceded when the Petition was presented that the Petitioner would probably not become an actual creditor because the Company would be unable to lawfully complete the redemption on the redemption date, did the Petition on its face not contain the negation of the status relied upon? The factual foundation for the Petitioner's standing seems to me to fall outside the normal framing of claims which come before this Court although in principle unusual facts ought not to be permitted to cloud the appropriate legal analysis.

25. Typically, a contingent creditor's primary case is that although the respondent company disputes the validity of the petitioner's claim, the petitioner believes that its claim will be established. In the present case, the Petitioner's positive case was, in effect, that it could not (because of the Company's insolvency) become an actual creditor at the earliest possible redemption date. The Company's case, on the other hand and somewhat bizarrely, incorporated the following elements in its response to the Petition:

(a) the redemption amount claimed was payable but could not be paid immediately because the Company was cash-flow insolvent; and

(b) there was indeed a reasonable prospect that the Company might return to solvency so that (by necessary implication):

(i) it was possible that the incomplete redemption might be completed; and

(ii) to the extent that payment was not promptly made, the Petitioner would become an actual creditor.

26. On superficial analysis, therefore, the Petition itself seems to undermine the Petitioner's standing while the Company's initial evidential response appeared to fortify it. The Petition provides as follows:

> "*15. Paragraph 5.1(i) of the Schedule to the bye-laws provides that the redemption notice must be served 30 Business Days before the Redemption Date which means that the Redemption Date has not yet occurred. However, the Petitioner is presenting this petition as a prospective creditor, on the basis that the redemption price will become payable in the future, when the Redemption Date occurs; and as a contingent creditor, on the basis that payment of the redemption price is contingent on the Company being permitted to pay the redemption price in accordance with the Bermuda Companies Act …the Petitioner believes that the Company is not presently permitted under the Companies Act 1981…to pay the redemption price.*
>
> *16. As detailed below, the Company is unable to pay its debts and therefore the Petitioner considers that the Company will be unable to pay the redemption price.*"

27. The Petitioner's case, purposively read, asserts that within 30 business days of its July 4, 2012 redemption notice, sent pursuant to an existing contractual relationship, the Company will be liable to pay the redemption amount unless, as is believed, the Company is insolvent. In this event the payment obligation is deferred to a future date uncertain i.e. when (if ever) the Company returns to solvency. The logical inconsistency claiming creditor status while asserting insolvency only arises if one assumes, which is not pleaded, that the very existence of the redemption obligation (as opposed to the ability to satisfy the related payment obligation) is conditional upon the Company's ability to pay. Paragraph 5.1 of the Schedule to the Bye-laws, pleaded in paragraph 13 of the Petition, provides as follows:

> "*5.1 At any time on or after the 5th anniversary of the date of issue of the Preferred Shares:*
>
> *(i)A Preferred Shareholder may deliver a notice in writing at least 30 Business Days before the Redemption Date to the Company at its Specified Office together with certificate(s) for the Preferred Shares to be redeemed requiring the Company to redeem all but not part only of the*

> *outstanding Preferred Shares then registered in its name at the redemption amount per Preferred Share equal to the Notional Value…*
>
> *Whereupon subject to the requirements of the Companies Act, the Company shall pay to the Preferred Shareholder within 30 Business Days from receipt of such notice or the earliest date permitted under the Bermuda Companies Act whichever is later, the aforesaid redemption amount…*"

28. Although it might be argued that the redemption process and the payment obligation are entirely integrated so that the obligation of the Company to redeem itself is conditional upon the ability to lawfully effect the payment, it is far from plain and obvious that this is so. It is also from far clear whether, the Petitioner having done all in its power to divest itself of shareholder status by tendering its certificates for redemption, the Company's inability to pay the redemption price entitles the Company to suspend the redemption process altogether and keep the Petitioner listed as a shareholder, as opposed to completing all aspects of the redemption process apart from effecting payment. So the Petition is not internally inconsistent as a purely formal pleading.

29. Lord Mance, considering whether a Caymanian Fund's failure to complete the redemption process deprived the redemption creditor of the status of a creditor capable of petitioning in *Culross Global SPC Limited-v-Strategic Turnaround Master Partnership Limited* [2010] UKPC 33, opined as follows:

> "*16… The issue is not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company which is (as the Respondent was) due to make such payment upon or after a certain redemption date; and the fact that a person's name continues to remain on a company's register as member does not mean that it should have done so under the provisions of the Articles: see e.g. Reese River Silver Mining Company Ltd v Smith (1869) 4 HL 64, 80; Michaels v Harley House (Marylebone) Ltd [1997] 2 BCLC 166, 174.*"

30. The quoted analysis arose in the context of a petition presented by a purported actual creditor. The central question in that case was whether or not the unpaid redeemer had ceased to be a shareholder and had become instead an unpaid creditor. It is noteworthy that the possibility of the Caymanian petitioner being a contingent or prospective creditor in the alternative was not considered in that case. The Caymanian equivalent of our own section 158(g) was considered in *obiter dicta* in that case. Instead, the following passage

from the same Judgment suggests (somewhat obliquely) a clear demarcation line between former members who are "current creditors" and "continuing members":

> "*42. The Respondents' written case also advances a point considered briefly by the Court of Appeal, to the effect that, even if the Appellant was a current creditor as at 10 June 2008, nonetheless it did not have standing to petition on the ground that the Respondent was insolvent, since in that event the only persons interested would be outside creditors, behind which it would rank: see Walton v Edge (para 36 above). The point was not developed orally before the Board. The Court of Appeal rejected it on the grounds that on the evidence the Respondent may prove solvent and that the Appellant could then still petition on the ground that winding up was just and equitable, and it permitted amendment of the petition to aver this. But the Board also notes that, insolvency, whether in the sense of inability to pay debts as they fell due or in the sense that liabilities exceeded assets, would not necessarily mean that the Respondent lacked sufficient assets to make any payment in a winding up to the Appellant as a current creditor ranking behind outside creditors, but ahead of continuing members of the Respondent.*"

31. What are the implications of section 158(g) of the Companies Act 1981 for the ability of a shareholder to acquire the status of an actual creditor entitled to petition in such capacity? This question turns crucially on whether or not it is legally possible for a redemption creditor whose shares have been redeemed and whose name has been removed from the share register, but who has simply not been paid, to acquire the status of creditor, pre-petition, so that:

    (a) the redemption creditor is no longer a shareholder at all; and

    (b) the Company's payment obligation is a 'free-standing' debt which not payable to the redemption creditor "*in his character as a member*" at all because section 158(g) only applies to persons who at the date of the presentation of the petition are members of the insolvent company.

32. This Court has recently held that where the redemption process in relation to a Fund has been completed in all respects save for payment of the redemption price, the redemption creditors are entitled to petition as creditors: *BNY AIS Nominees Ltd-v- Stewardship Credit Arbitrage Fund Ltd.* [2008] Bda LR 67 (Bell J). Based on an analysis of the

relevant contract between the redeeming shareholder and the company, the Judicial Committee found that once redemption proceeds became payable, the redeeming shareholder became a creditor in *Culross Global SPC Limited-v-Strategic Turnaround Master Partnership Limited* [2010] UKPC 33[4], which the Company's counsel placed before the Court. So based on my finding that section 158(g) only applies to current members of the company, it is legally possible for a former shareholder to become a creditor beyond the scope of section 158(g) in respect of a claim for payment of the redemption price. In neither of the two cases mentioned does consideration appear to have been given to the possibility that if the redemption process had not been completed pre-winding-up, the alternative standing of contingent or prospective creditor could have been relied upon.

33. In my judgment it is ultimately clear that a redeeming shareholder who is still a shareholder at the date of the petition lacks the standing to petition as a contingent and/or prospective creditor on the grounds of insolvency. It is well settled that the relevant standing must exist at the date of presentation of the Petition. Where a petitioner is a shareholder or member at that date, its rights are circumscribed by section 158 (g), which it is worth remembering provides as follows:

> "*(g) a sum due to any member of a company, in his character as a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.*"

34. Wherever a company is insolvent, and the Company is alleged by the Petitioner to be both commercially and cash-flow insolvent, there is implicitly competition between member claims and independent creditor claims, and a member's claim does not by operation of law constitute "*a debt payable by the company*". There can be in legal terms no prospect or possibility of the member's status changing to that of an actual creditor, or the contingent redemption claim being transformed into a debt. The commercial possibility that the prospective liquidation may turn out to be a solvent one cannot be permitted to extinguish the clear need for the statutory scheme to have clear demarcating lines between creditors and members at the date when a petition is presented which will (if a winding-up order is made) be the date of the commencement of the winding-up.

[4] It appears from paragraph 42 of the Judgment that the Caymanian Court of Appeal rejected the argument that the redemption creditor lacked standing because it would rank behind outside creditors, a point which was not seriously pursued before the Board. As discussed below, the Caymanian statute expressly provides that a redemption claim ranks behind outside creditor claims in the event of insolvency.

35. Reference to a few statutory provisions fortifies me in the view that a continuing shareholder at the date of the presentation of the Petition cannot take on the cloak of a creditor because he has an outstanding contingent or prospective redemption claim against the insolvent company. The most important provision is perhaps the following:

> "*166 (1)In a winding-up by the Court, any disposition of the property of the company, including things in action, and <u>any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void</u>.*" [emphasis added]

36. Although share transfers after the commencement of a winding-up can be validated by the Court, the general rule is that the status of members is frozen as at the date of presentation of a petition. On reflection, it would be surprising if this were not so. Section 171 requires a provisional liquidator after a winding-up order has been made to summon separate meetings of creditors and contributories. Would contributories with contingent or prospective 'creditor' claims be entitled to vote at the contributories' meeting or at the creditors meeting or at both? Section 158(g) seeks to eliminate the potential confusion that lack of clarity on such standing issues would create by drawing a clear dividing line between shareholder claims and creditor claims. Thus:

    (a) a continuing shareholder with a claim which does not depend on his status as a member (e.g. director's fees, wages) can be both a shareholder and a creditor in respect of his separate claims;

    (b) a former shareholder can only be a creditor as regards any qualifying claim; and

    (c) a continuing shareholder cannot also be a creditor in respect of obligations owed to him in his capacity as a continuing shareholder. Otherwise, every shareholder with a potential claim for dividends or redemption monies would be entitled to claim contingent creditor status.

37. This appears to me to be the general winding-up scheme of the Act which may well be modified by special contractual arrangements between companies and their members, in particular, in the mutual fund and segregated account company context. However, the statutory rules governing preference share redemptions, which govern the present case, appear to contemplate as a mandatory rule that cash-flow insolvency alone suffices to freeze any pending and incomplete redemption process. By necessary implication, the

redeeming member's status as a member is frozen together with the redemption process. The governing statutory provision is section 42 (2) of the Companies Act, which provides as follows:

> "*(2) Subject to this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by or determined in accordance with the bye-laws of the company; however, no redemption of preference shares may be effected if, on the date on which the redemption is to be effected, there are reasonable grounds for believing that the company is, or after the redemption would be, unable to pay its liabilities as they become due.*"

Conclusion: standing of Petitioner as a contingent and/or prospective creditor

38. The correct legal position must be that the Petitioner continues to be a shareholder only entitled, whether on a preferred basis or otherwise, to participate in the Company's liquidation after all creditors' claims have been satisfied in full. It cannot prove in the liquidation with other creditors in respect of its contingent claim because the corresponding obligation owed by the Company is owed to the Petitioner qua contributory/member/shareholder. It follows that the Petitioner lacks the requisite standing to petition as a creditor. According to '*McPherson's Law of Company Liquidation*', 2nd edition, at paragraph 3.013:

> "*It is obviously not easy to formulate a test, at once both simple and comprehensive, for determining who is entitled to petition for a winding-up order in the capacity as a creditor…The only test which seems capable of resolving all difficulties on this point is that suggested by Crossman J in North Bucks Furniture Depositories Ltd, Re…namely that the term 'creditor' includes every person who has the right to prove in winding up.*"

39. The Petitioner did not enjoy the status as a contingent or prospective creditor because at the date of the Petition it was admittedly still a member of the Company. As the Petition alleged that the Company was insolvent on a cash-flow and balance-sheet basis, section 158(g) of the Companies Act 1981 (as read with the wider statutory insolvency scheme) was engaged and its contingent or prospective redemption claim could not arguably become a freestanding debt as opposed to an obligation to be dealt with in the context of the adjustment of the rights of contributories.

40. I have reached this conclusion with some difficulty and with the tentative hope that the apparent paucity of case law on this topic reflects the fact that the reasoning set out above

is so well recognised that few petitions like the present Petition have ever been presented. The Company itself did not identify the point until months after the presentation of the Petition. My own provisional view was that the standing complaint was somewhat technical and that the abuse of process argument had greater merit. Nevertheless, the view that I have adopted does seem to accord with the general principle that a shareholder has no standing to petition on the grounds of insolvency. As the Judicial Committee of the Privy Council held in *Gamlestaden Fastigheter AB v. Baltic Partners Ltd & Ors (Jersey)* [2007] UKPC 26 (per Lord Scott) :

> "*32. Mr Moss supported his submission by reference, in particular, to the well established rule that a shareholder cannot petition for a winding-up order to be made in respect of a company that is insolvent. The reason is that the petitioning shareholder cannot obtain any benefit from the winding-up. The company's assets will be realised; dividends may be paid to creditors but nothing, if the company is insolvent, will go to the members. The rule that Mr Moss prays in aid is a long established one and one on which their Lordships cast no doubt. But there is a significant difference between a creditor's winding-up petition and an Article 141 (or section 459) application. The former is seeking an order to put the company into an insolvent liquidation that will affect the interests of all creditors as well as of all members. It will involve the administration of the liquidation either by the Viscount (or, in England, the Official Receiver) and his officials or by a professional liquidator who, in carrying out his duties, will be an officer of the court. The liquidation, although from a financial point of view carried out for the benefit of creditors, is a public act or process in which the public has an interest. It seems to their Lordships quite right that a member with no financial interest in the process or its outcome should be denied locus standi to initiate the process.*"

41. Although the Petitioner purports to rely on the status of a contingent or prospective creditor, its only true status in relation to its incomplete redemption claim is, by virtue of section 158(g) of the Companies Act 1981, is that of a member or contributory of the Company.

42. Before considering whether to exercise my discretion in favour of striking-out the Petition, I will consider the alternative abuse of process ground in case primary finding is found to be wrong.

Findings: is the Petition liable to be struck-out on grounds of abuse of process?

43. The Company's alternative case on abuse of process seemed to me, at first blush, far more straightforward. It is based on the contention that the Petitioner does not stand to benefit from a winding-up because of the impact of section 158(g) and because it has no economic interest in its claim as a result of the Petitioner's agreeing to sell its shares and the related redemption rights to a third party, Docile Bright Investments Ltd. ("Docile Bright") under the October 12, 2012 "Pref SPA".

44. However, the Petitioner argues that completion of the Pref SPA is conditional upon completion of a related agreement known as the Secondary SPA to which it is not a party. And the validity of both agreements is disputed and subject to arbitration in Hong Kong. It contends that the strike-out application is itself an abuse of process, diverting attention from the Company's admitted insolvency and the need for independent management.

45. It is common ground that Docile Bright is an affiliate of Guandong Zenrong Energy Co. Ltd ("GZE") and that GZE has made a restructuring proposal to the Company characterising itself as a 'White Knight" in respect of the Titan Group as a whole. The Pref SPA has by its terms sought to regulate the conduct of the present Petition pending the completion of these agreements and that GZE is supportive of the Company's approach of adjourning the Petition from time to time. Some Note-holders are supportive of the Company; others are supportive of the Petitioner. At least one creditor has switched sides. Applying traditional notions of abuse of process in relation to winding-up proceedings to such a fluid and multifaceted commercial context as the present case appears to be is far from a straightforward matter.

46. Two points are self-evident. Because the Company is in restructuring mode, the usual prejudice which would flow from the pursuit of a Petition with slim prospects of success is almost completely muted. The present application to strike-out the Petition can only sensibly be viewed as motivated more by concerns about gaining leverage in the on-going out-of-court restructuring negotiations than by genuine concerns about abuse of process in the traditional insolvency sense. Secondly, because the Petitioner's economic stake as a creditor in the Company, practically viewed, hangs by a very slender thread indeed (assuming my primary finding that it is not a creditor at all is found to be wrong), it has become almost abusive in the traditional sense for the Petitioner to continue to control the present winding-up proceedings with those with a far greater and less opaque stake (such as KTL Camden) playing only a supportive role.

47. I say almost abusive because the Company has not only admitted the Petitioner has standing to petition before belatedly adopting a contrary position. The Company has been content to work with the Petitioner in consensually adjourning the Petition, presumably in the hope that the initial GZE proposal would bear fruit, until adopting its recently overtly hostile position towards the Petition. In the alternative to striking-the Petition out, the Company seeks a lengthy adjournment sufficient to enable it to pursue further restructuring proposals. It also points out that new management is now in place anyway; so that concerns about the involvement of persons responsible for its BVI subsidiary going into liquidation no longer validly exist. Mr. Woloniecki confirmed that his client was not presently minded to pursue an application to appoint provisional liquidators.

48. The abuse of process arguments lacked substance in certain respects. The complaint about the Petitioner's limited interest was not a ground for striking-out on an interlocutory application, as opposed to dismissing the Petition on its merits and/or refusing to grant a winding-up order. The limited economic interest the Petitioner retained in the wake of the Pref SPA did not make the Petition debt a disputed one. It simply cast further doubt on the weight to be attached to any representations made by the current Petitioner. It was alleged that the Petition was motivated by an improper purpose without plausibly explaining what the improper purpose was.

49. Because of the Company's own vacillating attitude towards the Petition since its initial presentation, I would decline to exercise my discretion in favour of striking-out at this stage even if any abuse of process on the Petitioner's part had been made out. This assumes, contrary to my primary finding, that the Petitioner's standing to Petition was able to withstand a vigorous and belated attack.

50. Having regard to the Court's duty to actively manage cases under Order 1A of the Rules, in particular with a view to saving costs, it would be an abuse of process for the Petitioner to insist on continuing to prosecute the present Petition (assuming it was found to have standing to do so) and to decline to withdraw the present Petition to allow KTL Camden to make an application for substitution.

Findings: discretion to strike-out Petition for lack of standing

51. The authorities relied upon by Mr. Woloniecki on the discretion to strike-out concerned cases involving disputed facts. In general terms it is true that a Petition should only be struck-out where it is bound to fail or where it is plain and obvious that it cannot succeed. A challenge to standing is more fundamental and must be dealt with on its merits when it is raised. As Bell J observed in *Bio-Treat Technology Ltd v Highbridge Asia Opportunities Master Fund LP & Highbridge* [2009] Bda LR 29:

> "*38. Mr. Riihiluoma's submissions require the Court's discretion to be exercised in the interest of fairness and justice. This argument is essentially the same as that made in relation to the Precious Wise pledge, which is dealt with below, and I will deal with the issue of discretion under that heading. So far as Mr. Hargun's argument is concerned, the point is academic given the view I have taken of Highbridge's status. My reaction is that it is incumbent upon the Court to take a view on locus, and not allow a petition to proceed on the basis of arguability on locus. This appears to be the position taken in French on Applications to Wind Up Companies.*"

52. In my judgment there are no discretionary factors which can properly justify my declining to strike-out the Petition on the grounds that the Petitioner lacks standing to prosecute it and lacked the requisite standing to present in in the capacity relied upon.

53. It is in my experience unprecedented for a respondent to admit a petitioner's standing and only challenge it several months later. This is clearly a factor which is only relevant in terms of providing a potential basis for departing from the usual rule that costs follow the event. The fact that the Company is undoubtedly insolvent is a consideration which clearly requires the Court to afford any creditor wishing to be substituted a reasonable opportunity to make the necessary application, as submitted by the Petitioner's counsel by way of fall-back position.

54. Accordingly, I find that I should exercise my discretion to strike-out the Petition. However if the parties are not ready to proceed with the substitution application which Mr. Hill said his client was willing to make at today's hearing, I would propose to make the following Order. I will adjourn rather than immediately strike-out the Petition to a date to be fixed after the handing down of this Judgment to afford to facilitate the hearing in Chambers during the adjournment of KTL Camden's application for substitution. This is an application which Mr Hill has already demonstrated has very good prospects of success.

55. Subject to hearing counsel I would reserve the costs of the Company's strike-out application until the next hearing of the Petition.

Dated this 10th day of May, 2013 _____

IAN R.C. KAWALEY CJ