In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 24

IN THE MATTER OF FULL APEX (HOLDINGS) LIMITED (PROVISIONAL LIQUIDATORS APPOINTED)

AND IN THE MATTER OF THE COMPANIES ACT 1981

Before:	**Hon. Assistant Justice Duncan QC**
Appearances:	**Mr Rhys Williams, Conyers, for the Company**
	Mr Alex Potts QC, Kennedys, for Annuity & Life Re Ltd
	Mr Jan Woloniecki and Ms Kehinde George, ASW Law Limited, for the Joint Provisional Liquidators
Date of Hearing:	**25 - 26 June 2019** **19 November 2019**
Date of Judgment:	**12 March 2020**

JUDGMENT

Application by shareholder for substitution of petitioner pursuant to Section 27 of the Companies (Winding-up) Rules 1982 - Whether shareholder can use a contingent claim in proceedings under Section 111 of the Companies Act 1981 to obtain substitution for withdrawing petitioner in the capacity of a creditor - Tangible surplus test for substitution in the capacity of a shareholder - Lack of available accounting information qualification to the tangible surplus test- Discretion of the court to order substitution

Introduction

1. By Amended Summons filed on 2 April 2019 (the "Annuity Amended Summons") Annuity & Life Re Ltd ("Annuity") seeks the following relief:

   (a) Applications for substitution as Petitioner in these winding-up proceedings, the lifting of the stay in respect of proceedings 181 of 2011 (the "Section 111 Proceedings"), and consolidation of the Section 111 Proceedings with these winding-up proceedings (the three applications together are hereafter referred to as the "Substitution and Consolidation Application");
   (b) An application for the inspection and copying of the JPLs Reports;
   (c) An application for the production of an audited financial report of the Company's affairs;
   (d) An application for an order that the JPLs take appropriate action in China/Hong Kong to gain control of the Company's property; and
   (e) An application for the removal and replacement of the JPLs.

2. The history leading up to the Substitution and Consolidation Application is somewhat convoluted but essential to understand the arguments made by the parties who appeared before the Court[1]. Annuity's skeleton argument conveniently sets out the uncontroversial history, which I reproduce below with necessary amendments under the heading Background.

Background

3. On 21 June 2011, Annuity presented a Section 111 Petition (the "Section 111 Petition") against the Company, its two principal director shareholders, Ms Liang and Mr Guan, and another company, Full Excellent Limited. The Section 111 Petition complained of a range of prejudicial behaviour on the part of the management of the Company, including the

[1] The Petitioner did not appear at the hearing having filed an application to withdraw the Petition. The withdrawal application is adjourned pending the outcome of this hearing

transfer of shares in the Company's subsidiary, Favour Development Limited ("FDL"), to Full Excellent Limited at an undervalue (the "FDL Transaction") (the "Section 111 Proceedings").

4. On 6 February 2012, pursuant to an application by the Respondents to the Section 111 Petition, the Court granted leave to Annuity to amend the Section 111 Petition to further particularise its complaint in relation to the FDL Transaction but struck out the rest of the Section 111 Petition.

5. On 31 May 2012, the parties to the Section 111 Proceedings agreed by Consent Order that Annuity's claim be amended.

6. On 28 July 2012, while the Section 111 Proceedings were on-going, Full Excellent Limited retransferred the FDL shares back to the Company.

7. Following the reversal of the FDL Transaction, the Section 111 Proceedings continued into August 2013 with various applications for disclosure but did not progress actively beyond that stage.

8. On 20 June 2013, the Company guaranteed a US$46m loan facility from the Petitioner and its principals to the Company's wholly-owned BVI subsidiary, Jetzen Investment Limited (the "Borrower").

9. The Borrower and the Company defaulted on the facility and guarantee respectively, and on 15 January 2018, the Borrower was ordered to be wound up in the BVI with PwC appointed as liquidators. The petition debt was US$35.7m.

10. On 17 January 2018, the management of the Company arranged for the Borrower's valuable wholly-owned subsidiary, Pan-Asia PET Resin (Guangzhou) Co., Limited ("Pan-Asia") to be transferred out of the liquidators' control to a Hong Kong company, Genhero Ltd, owned by a Marshall Islands company, Rainbow Ltd. Annuity asserts both entities are controlled by the Company's management. Rainbow Ltd's owners are not identifiable on a public register (the "Pan-Asia Transaction").

11. Having discovered the Pan-Asia Transaction, on 8 February 2018 the Petitioners presented the Petition in these proceedings and issued an ex parte Summons for the urgent appointment of Joint Provisional Liquidators over the Company. On 9 February 2018, the Bermuda Court granted the appointment of PwC as Joint Provisional Liquidators ("JPLs") on the grounds of the risk of dissipation of assets. Walkers acted at that stage for the Petitioner and the JPLs. By operation of section 167(4) of the Companies Act 1981, the Section 111 Proceedings were automatically stayed from that date, as against the Company.

12. Annuity assert that the management of the Company, including Mr Tan who has sworn all of the Company's evidence in these proceedings, refused to cooperate with the JPLs after their appointment as officers of the Bermuda Court, by refusing them access to the Company's Hong Kong office and removing voluminous documentation from that office without the JPLs' permission. The Company reject these assertions. Consequently, the JPLs applied for and obtained a Letter of Request from the Bermuda Court in an effort to gain control.

13. On 8 March 2018, the Company filed a Summons for the variation of the JPLs' powers from "full powers" to "soft-touch" powers. In Mr Tan's Affidavit in support of that Summons, he gave evidence that, amongst other things:

(a) "The financial position of the Company is that it will be able to make the repayment in full, and needs only a short period of time to complete its restructuring";

(b) The Company's (unaudited) net profit for the first three quarters of 2017 was RMB 9,137,000 (US$1,372,975), revenue was increasing, the Company's current net assets were RMB346,502,000 (US$52,067,275) and its total net assets were RMB1,094,779,000 (US$164,507,453);

(c) In November 2017, the Company had completed a substantive upgrade and transformation of its key subsidiaries' production equipment allowing the Company to expand its market areas;

(d) That significant macro and micro-economic factors favoured the Company including Chinese governmental policy, and Pan-Asia entering into a Memorandum of

Understanding with, and being granted an Industrial Investment Licence by, the Saudi Government regarding a US$4.8 billion annual-turnover Saudi development project (the "Saudi Project"); and

(e) The majority of the Borrower's creditors, who allegedly held an aggregate of US$130m of the Borrower's debts, did not support the Borrower's liquidation and it was unlikely that the Saudi Project, which required US$4 billion in investment, would be feasible without the support of those creditors and with the liquidators of the Borrower and the JPLs of the Company having operational rather than supervisory powers over management.

14. Between 9 March 2018 and 27 April 2018, there followed five adjournments of the Petition and the Company Summons by Kawaley CJ, Hellman J and Subair Williams AJ. During this time, the JPLs had produced their first and second reports which they shared with the Petitioner, the Company and the Court. On 9 March 2018 and 13 April 2018 the Court ordered that the JPLs' first and second reports, respectively, be sealed on the Court file (these, and subsequent JPLs' reports, the "JPLs' Report(s)"), subject to any further Court Order. No reasoned Rulings were given in respect of those Orders. On each occasion, the Court adjourned the Petition, without re-advertisement, based on an understanding that the Petitioner acted for all of the Company's creditors, and that negotiations taking place outside of Court were capable of restoring the Company to a state of cash flow solvency within a short period.

15. On 27 April 2018, following a complaint by the JPLs that the Company and its subsidiaries' chops[2] were being withheld from the JPLs, Hellman J adjourned the Petition and the Company Summons with directions, and ordered, as an express condition of the adjournment, that the Company deliver the chops of Pan-Asia by no later than 5.00 pm on 30 April 2018 and the chops of any other subsidiaries which the JPLs may request within 48 hours of such a request.

[2] In China, company chops are mandatory for doing business. Every contract with a Chinese company must be executed by a person at the Chinese company with authority, and it must be chopped with the official company chop sometimes also referred to as a company seal

16. The Company breached this Order and Walkers issued a Summons for an immediate hearing on 4 May 2018. However, on account of further negotiations between the parties, the matter was adjourned a further three times by Hellman J and Subair Williams AJ, again without re-advertisement, before the Petitioner entered into a loan transfer agreement on 15 June 2018 (the "LTA") whereby an investor, Mr Chung (the "Investor") agreed to pay approximately US$22,250,743 over six instalments in exchange for the Petitioner's and its principals' rights to the sums owed under the facility agreement.

17. Two further adjournments were granted on 21 and 29 June 2018 to allow for payment before Annuity, frustrated that it had received no financial information about the Company since 13 November 2017, and frustrated by what it asserted was the ongoing lack of transparency, accountability, prejudice being suffered by minority shareholders, and its inability to pursue its own action, gave notice of intention to appear in support of the Petition on 30 October 2018.

18. At that time, although the Investor had paid the first two instalments under the LTA due on 21 June 2018 and 13 July 2018, he had only partially paid the third instalment due on 15 August 2018 and had entirely defaulted on the fourth, fifth and final instalments which were due to have been paid by 30 October 2018.

19. On 2 November 2018, a further adjournment was ordered by Subair Williams J to 14 December 2018 and, at that hearing, the Petitioner having lost patience with the Company/Investor and with Annuity voicing its transparency concerns, the Judge ordered the parties to file and serve evidence in support of their positions on the substantive Petition (to be heard on 11 January 2019).

20. On 4 January 2019, Annuity filed its Summons to inspect the JPLs' reports, and to be substituted in the event of the Petitioner seeking a withdrawal or further adjournment of the Petition.

21. On 11 January 2019, Subair Williams J adjourned the proceedings to 8 March 2019 following another agreement between the Petitioner and the Company to an adjournment (despite Annuity's objection). There had been a last-minute part-payment from the Investor

and Mr Tan's evidence was that, although all the money was available for the payment of the remaining sums due under the LTA, regulations restricting the amount of money which could be transferred out of the Peoples Republic of China were preventing payment. He explained that the payments could be made within two months.

22. On 28 February 2019, following correspondence between Kennedys on behalf of Annuity and Walkers, in which Annuity raised its concerns about the joint instruction of Walkers by the Petitioner and the JPLs, the JPLs filed a notice that they had changed their attorneys to ASW Law.

23. On 4 March 2019, Annuity filed a Summons for leave to amend its Summons and file the Annuity Amended Summons.

24. On the morning of the hearing of 8 March 2019, following another last-minute promise of partial payment, the Petitioner and the Company agreed to seek a further adjournment. At the hearing, Kessaram AJ granted Annuity's application to amend, adjourned the proceedings to 29 March 2019 (despite Annuity's objection) and, upon hearing Annuity's concerns about the absence of transparency in the liquidation and the prejudice being caused by delays, stated that the JPLs ought to provide a report to shareholders at least once in every year.

25. On 29 March 2019, the Petitioner and the Company had agreed before Court to seek another adjournment (despite Annuity's objections to a further adjournment), and the Judge assigned to hear the matter at short notice, Kiernan Bell AJ, had worked at Appleby while they were Annuity's attorneys during 2011 Proceedings. The matter was therefore adjourned to 12 April 2019.

26. On 12 April 2019, I gave directions for the hearing of the Annuity Amended Summons separately from the Petition and the Company Summons, which again, on the agreement between the Petitioner and the Company, was adjourned to 26 April 2019.

27. On 26 April 2019, the Petition and the Company Summons were adjourned to 3 May 2019 following the agreement between the Petitioner and the Company.

28. On 3 May 2019, the Petition and the Company Summons were adjourned to 17 May 2019 with a direction that the Petitioner would file its application to withdraw the Summons on or before 16 May 2019 following the agreement between the Petitioner and the Company.

29. On 16 May 2019, the Petitioner filed a Summons (the "Withdrawal Summons") for withdrawal of the Petition, which was expressed to be "conditional" upon the discharge of a condition under the LTA relating to the payment of the JPLs' costs.

30. On 17 May 2019, I adjourned the Petition and the Company Summons to 14 June 2019 for evidence to be filed in relation to the Withdrawal Summons.

31. On 13 June 2019, the "displaced board" of the Company, represented by Conyers, filed a Summons for the dismissal of the Petition (the "Dismissal Summons") and the discharge of the JPLs on the basis that the Petitioner had signed 'Loan Transfer Certificates' to the Investor's nominee, Skyblue Global International Limited ("Skyblue"). The Company's displaced board's position is that while the costs of the JPLs are taxable and to be paid by the Company, they do not form part of the petition debt upon which the Petitioner can seek to withhold its withdrawal of the Petition or make it conditional.

32. The Petitioner and the JPLs' position in relation to the Withdrawal Summons and the Dismissal Summons is that the withdrawal can be conditional upon the payment of the JPLs' costs. Annuity reserves its own position in this respect.

33. On 13 June 2019, Conyers, the legal representatives of the displaced board of the Company, filed a Notice of Intention to Appear on behalf of Skyblue, representing both the displaced board of the Company and a contingent creditor of the Company, being the Investor's nominee, in these proceedings.

34. On 25 June 2019, Annuity's Substitution and Consolidation Application was part-heard. The conclusion of the part-heard hearing was fixed for 19 and 20 September 2019. That hearing was also adjourned due to the closure of the Court as a result of Hurricane Humberto. The hearing was rescheduled for 19 and 20 November 2019.

35. On 19 July 2019, the Petitioner informed the Court that it unconditionally withdrew its Petition. As a result of Annuity's Substitution and Consolidation Application, the Petition and the Company's summons to dismiss the Petition were adjourned until the 27 September 2019; a date before which it was anticipated the Substitution and Consolidation Application would be resolved. The Petition was not heard on 27 September 2019 as a result of Hurricane Humberto.

36. On 13 December 2019, I handed down a ruling concerning the Petitioner's claim for costs against the Company.

Preliminary Issues

37. Before I consider the substantive issues in the Annuity Amended Summons, Mr Potts QC raised two preliminary points. First, he complained that the Company should not be permitted to rely upon the eighth affirmation of Mr Tan, which was served out of time on the 8 June 2019. Mr. Potts QC correctly pointed out the service of Mr Tan's eighth affirmation breached paragraph 2 of the Order of the Court dated 12 April 2019. Mr Potts QC next contended that it was impermissible for Mr Williams to appear for the displaced board of directors of the Company without identifying which of the five directors on the board provided him with instructions. Particularly because, at the same time, Mr Williams appears for Skyblue.

38. Both Mr Potts QC and Mr Williams agreed that the hearing should proceed and I should rule on the admissibility of Mr Tan's eighth affirmation in this judgment. I acknowledge Mr Tan's affirmation was filed and served out of time; however, in my view, it is important the Court should consider what appeared on its face to be relevant evidence. To this end, I did suggest that Mr Potts QC would, of course, be entitled to have a reasonable amount of time to respond to the Tan eighth affirmation. Mr Potts QC declined the invitation due to the protracted history of proceedings leading up to the hearing. I also note that Mr Williams correctly pointed out Mr Potts QC had previously filed and served affidavits on behalf of

his clients outside the strict time limits imposed by orders of the Court. I, therefore, rule Mr Tan's eighth affirmation is admissible.

39. Mr Williams confirmed he is instructed by all five members of the displaced board of the Company and is instructed by Skyblue. Mr Williams contended that since the JPLs agreed to convert the more coercive winding-up regime initially sanctioned by the Court into a "light touch" restructuring winding-up, Annuity would suffer no prejudice as a result of his dual instructions. Mr Potts QC did not make a compelling argument that his clients would be prejudiced. Importantly, Annuity did not make a specific application challenging Mr Williams' right to appear for both parties. Therefore, I make no order restraining Mr Williams acting for the displaced board and Skyblue in these proceedings.

The Substitution and Consolidation Application

40. The first ground of the Annuity Amended Summons seeks the following three heads of relief; first, substitution as Petitioner in these winding-up proceedings, second, the lifting of the stay in respect of the Section 111 Proceedings, and third, consolidation of the Section 111 Proceedings with these winding-up proceedings. I shall address the substitution application first.

41. Before Annuity can be substituted as Petitioner in these winding-up proceedings, it must first establish that it has a right to petition to the Court either in the capacity of a creditor or a contributory.

Does Annuity have Standing as a Creditor to Substitute for Withdrawing Petitioner?

42. The Annuity Notice of Appearance dated 30 October 2018, claimed Annuity had a right to appear and support the Petition in the following terms: "being a prospective contingent creditor of the above company for an amount to be assessed in circumstances where Annuity & Life Re Ltd is a Petitioner seeking relief against the company and others under Section 111 of the Companies Act 1981". This assertion was supported by paragraph 13

of the First Affidavit sworn by Mr William P Wells. Mr Potts QC did not address this point in his written argument and lightly touched upon the point in oral argument.

43. The point can be dealt with briefly. Annuity's Notice of Appearance claims it is a contingent creditor which can only be based upon a successful verdict in its Section 111 claim alleging minority oppression. As such, its status as a creditor is entirely premised on a positive outcome in the 2011 Proceedings.

44. However, a person whose only claim against a company is a debt which the Company asserts does not exist, may not present a petition for it to be wound up and does not have the standing to do so unless there is no substantial ground for the dispute about the existence of the debt. A person with a disputed contingent claim should be treated in the same way as a person with a disputed present claim – D French *Applications to Wind Up Companies, (*3rd Edition OUP) at paragraphs 7.359 and 7.378.

45. Mr Williams made both written and oral submissions on behalf of the Company rejecting Annuity's status as a creditor. Mr Williams first submitted that if Annuity was successful in the 2011 Proceedings, it could not be said that the Court will make an order against the Company, rather than against the shareholder respondents. Mr Williams's second point relied upon the judgment of former Chief Justice Kawaley in *Saturn Petrochemicals Holdings Limited v Titan Petrochemicals Limited* [2013] Bda LR 42, paragraphs 16 and 17 where he held that under Section 158(g) of the Companies Act, any sum owed by a company to a shareholder in his capacity as a shareholder is not a 'debt' owed by the company. As such, the shareholder is deemed not to be a creditor and so lacks the standing to petition. Once a contributory, always a contributory.

46. Based upon the arguments made by the Company and the binding dicta in *Saturn Petrochemicals Holdings Limited v Titan Petrochemicals Limited*, I find that Annuity is not a creditor for the purposes of being substituted for the existing Petitioner.

Does Annuity have Standing as a Contributory to Substitute for Withdrawing Petitioner?

47. The main thrust of Mr Potts QC's argument is that in its capacity as a contributory, Annuity has standing to be substituted for the existing Petitioner because when the Company is wound up, there will be surplus assets available in which Annuity can claim a tangible interest. His skeleton argument set out a number of propositions and references to the evidence in support of this argument. In paragraphs 49 through 51 and 53 of his skeleton argument, he contended:

> *"49. It is accepted that, in general terms, a contributory with no financial interest in the winding-up process or its outcome cannot petition to wind up a company and must therefore demonstrate, to the extent of a prima facie case, an interest in the winding-up. This rule is, however, subject to the implied qualification that it will not prevent a petition from proceeding where there has been a failure to supply reliable accounts and information, with the consequence that the Petitioner is unable to tell for sure whether or not there will be a surplus available for the contributories.*
>
> *50. Annuity's primary position is that it does not need to rely on the qualification. Mr Tan's own evidence, filed before Annuity entered its notice of appearance, strongly supports the position that assets will be available to contributories in the event of a winding-up and Annuity therefore does have a sufficient interest in the proceedings. As set out above:*
>
> *(a) The last audited financial figures for the Company demonstrate that the Company's net profit for the first three quarters of 2017 was RMB 9,137,000 (US$1,372,975), revenue was increasing , the Company's current net assets were RMB346,502,000 (US$52,067,275) and its total net assets were RMB1,094,779,000 (US$164,507,452.95).*
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> *(b) In November 2017, the Company had completed a substantive upgrade and transformation of its key subsidiaries' production equipment allowing the Company to expand its market areas.*

(c) Significant macro and micro-economic factors favour the Company including Chinese governmental policy, and Pan-Asia entering into a Memorandum of Understanding with, and being granted an Industrial Investment Licence by, the Saudi Government regarding a US$4.8billion annual-turnover Saudi development project (the "Saudi Project").

51. It is to be noted that figures referred to at 53(a) above are net of the Company's liabilities i.e. they constitute uncharged or partially uncharged assets of the Company beyond any debts it may have. Mr Tan's recent evidence that the Company is currently balance-sheet solvent fits with these financial reports.

53. Given that the Company and its subsidiaries have committed to the Saudi Arabian and Chinese Governments to invest US$250.4m of their own funds for the first stage of the Saudi Project, it can be inferred on the balance of probability that they either have the money, or have the assets to secure the finance, to complete the investment."

48. In paragraphs 51 and 55 of the skeleton argument, Mr Potts QC does set out the counter-argument that in the event a winding-up order is made, the Company will become insolvent. However, Mr Potts flatly rejects this argument firstly based upon the inferences he asks the Court to draw from evidence to the effect that on a winding- up the Company would still be solvent thereby maintaining Annuity's right to substitution for the existing Petitioner. And secondly, as a result of his analysis of the law.

"51. Mr Tan also gives evidence, however, that:

"If…a winding-up Order… is made against the Company, the Company will become hopeless [sic] insolvent and suffer a great depletion of assets"; and,
"a winding-up Order granted in Bermuda will necessarily see all onshore PRC secured creditors taking immediate actions to seek repayments of their respective loans and the Group's assets and operations would be harmed"; and,

"if a winding-up Order is made, it is at least anticipated that all onshore secured creditors will take actions against the Group and/or the Company, and a substantial portion of the assets of the Group would need to be fully utilised to pay these PRC onshore secured creditors"; and that as a result,

"the Company would suffer a great devaluation in its worth and the result of which would see the members of the Company receive nothing at the end of the liquidation."

This evidence is unsupported by any financial details, expert opinion or reliable, independent analysis and is unsustainable in the light of the audited financial reports showing net assets of US$163m.

55. *It is notable that, Mr Ferris' Fourth Affidavit does not say that there would be no assets in the event of a liquidation. Instead, he merely states that "it is possible that there will be no assets available for distribution to shareholders, such that they will receive no value for their shares in a liquidation" (with emphasis added) and even his evidence must be viewed through the lens of management not having cooperated with the JLPs [sic] and having acted to conceal the Company's information from them."*

49. In support of the contention the evidence suggests that on a winding-up the Company would be insolvent, Mr Williams combines the evidence of Mr Tan with the evidence of Mr Ferris asserting that the evidence of the Company is consistent with that of the JPLs; that although the Company is solvent, unsecured creditors would not receive any (or any meaningful) distribution in a winding-up as the value of the Company would be destroyed by any winding-up Order. If unsecured creditors would not receive payment in full, contributories would receive no money and therefore have no tangible interest.

50. In paragraph 44 of the Company's submissions, Mr Williams addresses the inferences he contends the Court should draw from the evidence concerning the Company's ability to pay shareholders a surplus in the event a winding-up order is made:

> *"44. Annuity asserts that it "does not accept…the mere, untested assertion by the Company's management that Annuity would receive nothing in the event of the Company being wound-up." Annuity then relies on its own mere, untested allegations against the Company's management as evidence that there is "ample scope" for claims against the directors and officers. It is worth remembering that these allegations date back to 2010/2011, and no allegations of fraud or dishonesty are pleaded. In any event, Annuity has failed to plead or put forward any evidence that there would be a material surplus to shareholders in the event of a winding-up."*

51. Annuity seeks leave to be substituted under Rule 27 of the Companies (Winding-up) Rules 1982 (the "Rules") which provides as follows:

> *"Substitution of creditor or contributory for withdrawing petitioner*
> *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."*

52. In *Re Lycatel (Ireland) Ltd* [2009] IEHC 264, a decision of the High Court in Ireland, the purpose of substitution was held to have been succinctly explained in a passage from French, *Applications to Wind Up Companies* (3rd Edition) paragraph 3.181:

> *"Without provision for substitution, an insolvent company could delay being wound up by paying off petitioning creditors one by one, forcing other creditors to present and advertise new petitions, then waiting until the petition by each creditor was at or near hearing before paying that creditor off too."*

53. Substitution reduces the time between hearings as all that is required is the amendment and re-advertising of the petition. More importantly, if a creditor is paid by the company and substitution is granted, any winding-up order will be deemed to have commenced on the date the first petition was presented. This forces the company to deal with all of its creditors fairly.

54. The jurisdiction to order substitution is therefore in the Court's discretion and may be on such terms as the Court thinks just. There is no 'right' to be substituted. Rule 27 effectively provides a three-limb test:

1. The court must be of the opinion that the applicant has a right to present a petition;
2. One of the circumstances set out in Rule 27 must have arisen, such as the Petitioner consenting to an adjournment, failing to appear, not applying for a winding-up order, or consenting to the withdrawal of the petition; and
3. The applicant must satisfy the Court that it ought to exercise its discretion in favour of granting substitution.

55. Annuity clearly can establish one of the requisite circumstances in Rule 27 because the Petitioner has formally applied to withdraw its winding-up Petition. However, Annuity must establish surplus assets will be available at the conclusion of the winding-up proceedings to demonstrate it has a tangible interest.

56. In *Re US Global Health-Moscow Ltd 1995 Civil Jur No 446* [1996] Bda LR 27, Ground J held that "*a contributory has no locus to petition to wind-up an insolvent company…*" citing *Re Rica Gold Washing Company*. In the Privy Council case of *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] UKPC 16, Lord Millet held (at paragraph 13) that: "*…it is well established that a shareholder with fully paid shares has no locus standi to present a winding-up petition unless there is prima facie evidence that there would be a surplus on a winding-up.*"

57. The classic statement of the law concerning whether a winding-up Petition by a shareholder can be maintained where there is a question concerning the existence of surplus assets of the company to pay the shareholder is found in *In re Rica Gold Washing Company* (1879) 11 Ch D 36 at page 43 where Jessel M.R. said:

> *"That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course, the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say "a sufficient interest," for the mere allegation of a surplus or of a probable surplus will not be sufficient. He must show what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding-up, would give him £5, I should say that would not be sufficient to induce the Court to interfere in his behalf. "*

In the case of *Re Bellador Silk, Ltd* [1965] 1 All E.R.667 at 672 F-I Plowman J held:

> *"One of the matters with which I am concerned is, therefore, whether the facts would justify the making of a winding-up order on the ground that it is just and equitable that*

the company should be wound up. The difficulty which I mentioned earlier when referring to certain aspects of this matter, now becomes relevant. It is this: that no contributory's petition to wind up a company can succeed on the facts unless he establishes, at least to the extent of a prima facie case, that he has a tangible interest in a liquidation (Re Rica Gold Washing Co (5)). If the whole of the assets are going to be swallowed up by the claims of creditors, he has no tangible interest and in such a case the facts would not justify the making of a winding-up order.

What is the position here? All the available figures demonstrate that if the company's silk stocks are taken at their book value, the solvency of the company is, at best, in the balance; but it is Moss Simmons' own evidence, and it is not disputed, that if the company were wound up, it would get very little value from those stocks and that he would be ruined by a liquidation. Moreover, Dr Roland in his first affidavit estimated that a receiver would be likely to realise less than fifty per cent of cost price and I see no reason for thinking that a liquidator would be in any better position than a receiver. I am quite satisfied, therefore, that on a liquidation the contributories would not get a penny-piece, even if the directors were to repay to the company all the moneys which they had ever received from it."

58. The evidence of the Company's last audited figures, investment in key subsidiaries and the grant of an Industrial Investment licence by the Saudi Government are significant indicators that the Company is on the cusp of pulling itself out of financial problems. This evidence must be weighed against its current financial position; that of a Company in financial difficulties which has been rescued by the investor Mr Chung and his nominee Skyblue.

59. The context and circumstances surrounding the financial rescue package are, therefore, critical considerations for an understanding of the financial viability of the Company. Mr Tan's evidence is that if a winding-up order is made, creditors will take action against the Group resulting in a great devaluation in the worth of the Company and a depletion in the Company's assets. More importantly, in paragraph 26 of his fourth affidavit, the joint provisional liquidator Mr. Ferris gives evidence that there is a possibility there will be no

assets available for distribution to shareholders such that they will receive no value for their shares in a liquidation.

60. It is a reasonable inference to draw that putting the Company into liquidation would negatively impact the creditors of the Company and the value of the Company's assets. At this stage of proceedings, I am not in a position to resolve the disputed evidence concerning the impact of winding-up proceedings on the value and viability of the Company.

61. *In re Rica Gold Washing Company* (1879) 11 Ch D 36 at page 43 Jessel M.R. imposed the burden upon the contributory to establish a surplus will be available for the benefit of shareholders when the company has been wound up. In my view Annuity has not discharged this burden. For these reasons, I prefer the evidence of Mr Ferris rather than the evidence of Mr Wells taken together with Annuity's analysis of the Company financial information.

62. I, therefore, find that on the surplus available to shareholders limb of the argument, Annuity has not established beyond a mere allegation or probability that there will be a surplus for distribution to shareholders on the winding-up of the Company and accordingly does not have sufficient interest in these winding-up proceedings.

63. Mr Potts QC makes two further arguments. First, he relies upon the evidence in the first affidavit of William Wells in support of the claims made in the draft Re-Amended Petition that the Company has engaged in an "extremely large and complex fraud". The basis for this allegation is the FDL and the Pan -Asia Transactions combined with the Company payment of a "Premium" in the sum of US$5.5m to reverse the FDL Transaction which Annuity submits ought never to have taken place. Annuity further complains that the Company engaged in “Hedging Transactions" resulting in substantial losses without a corresponding offset in its profit margins. Annuity claims the Premium and Hedging Transactions amounted to a failure of management. Mr Potts QC relies upon these allegations in support of the Substitution and Consolidation Application on the basis that any monies recouped from the fraud would increase the funds of the Company establishing the necessary surplus available for distribution to the shareholders in a winding-up.

64. In response to the allegation of systemic fraud, Mr Williams made the following arguments in paragraphs 60 and 61 of his skeleton argument:

> *"60. The absurdity of Annuity's allegations of "systemic fraud", "extremely large and complex fraud" and losses of "billions of dollars" is epitomised by the evidence given in support; a link to a "movie" called Chinese Hustle. Wells also refers to "anecdotal evidence" which "appears to confirm that the Company is not operating according to proper principles". The allegations that "management" (i) created phantom hedging transactions to "create false paper losses" and (ii) are "trying to get the liquidator…to transfer to management legal ownership of the entire company through a liquidation sale to a straw party" are examples of wholly unsupported and wholly unfounded statements made by Annuity in support of the application for substitution, and serve to undermine the application altogether.*
>
> *61. Annuity asserts that only 1 of the 9 allegations in the proposed winding-up petition are repeated in the 2011 Proceedings, being the FDL Transaction. That is misleading at best. As set out above, the FDL Transaction and the Premium are expressly addressed in the 2011 Proceedings, and Annuity asserts that it received evidence and has prepared an expert report in relation to the Hedging transaction. These events occurred seven years ago and were effectively abandoned by Annuity. As such, it is astonishing that Annuity now asserts that such conduct by the Company is evidence of an "extremely large and complex fraud" by the Company that justifies its winding-up. Even more astonishing when it is borne in mind that Annuity continued to purchase shares in the Company after issuing the 2011 Proceedings."*

65. *In re Rica Gold Washing Company* (1879) 11 Ch D 36, the Court commented on the burden imposed upon a shareholder seeking relief on the ground of fraud, which must at the same time, increase the assets of the company to establish the shareholders' standing to present a winding-up petition. At page 43, Jessel M.R. said:

> *"That being the state of the law, I will first of all mention generally how this petition is wrong, and then I will discuss it a little in detail. The petition contains vague allegations of fraud; but I have always understood it to be a rule in equity that where you allege fraud you must state the facts which constitute the fraud. You are not entitled on a petition any more than in an action to say to the other side, "You have defrauded me; you have obtained my money by fraud." You must state the facts which you say amount to a fraud, so that the other party may know what he has to meet. I agree that it is not necessary to state the evidence which shews the fraud, but you must state the facts which constitute the fraud. In the next place, of course you must shew that the relief to be obtained on the ground of the fraud would increase the assets of the company; and even then I am not prepared to go this length, that if a petitioner shews that there are no other possible available assets except those which may be obtained by the successful prosecution of proceedings against directors or others to get back money which they are liable to pay by reason of some fraud committed, that would as a general rule be sufficient to support a winding-up petition. I think it would not. I think the rule should be as a general rule, first establish your fraud, and get the money, and then present your petition to divide it - for that is the object of a winding-up petition by a fully paid-up shareholder".*

66. In my view, at this stage of the proceedings, it is impossible to say the evidence of fraud is conclusive or sufficiently well-founded to say the fruits of the fraud action will support the argument there are surplus finances in the Company to establish Annuity has a sufficient interest. Annuity must first establish the fraud it relies upon and then make application to be substituted for the withdrawing Petitioner. For these reasons, and based upon the judgment of Jessel M.R *in In Re Rica Gold Washing Company*, I find Annuity has not established the systemic fraud argument and therefore does not have sufficient interest in these winding-up proceedings.

67. The second point relied upon by Mr Potts QC is the qualification to the rule that a contributory must demonstrate a prima facie interest in the winding-up. The qualification can be established where the Company has failed to supply reliable accounts and information, with the consequence that the Petitioner is unable to tell for sure whether or not there will be a surplus available for contributories. In support of this contention, Annuity submits that the Company has not held an AGM since 28 April 2017, has not produced audited financial statements since its 2016 report and has failed to publish any financial statements since its Third Quarter statement, published on 13 November 2017. On behalf of the Company, Mr Tan's evidence in reply is that the requirement for the Company to produce a report or hold a meeting is without basis because the Board has been deprived of their powers by the appointment of the JPLs and that Annuity "should complain to the Court about the conduct of the JPLs".

68. In support of the evidence of Mr. Tan, Mr Williams submits the new allegations in the proposed winding-up petition concerning mismanagement of the company are trivial. Mr Williams asserts all of the steps Annuity says weren't taken by the Company fell due after the appointment of JPLs with full power, and so the displaced board were prohibited from taking them. Mr. Williams next contended that Annuity makes the unparticularised allegation that the Company should be wound up as it 'suspended' its business for over a year, despite (i) the fact that it is a holding company and JPLs have been in office for over a year, and (ii) a winding-up order will only be made if the Court is convinced that there is no intention to recommence business, which Annuity has not pleaded.

69. The JPLs support the position taken by Mr Williams submitting that the requirements under the Companies Act 1981 to hold an AGM, provide audited financial statements and publish financial information to the shareholders ceased to apply once the JPLs were appointed.

70. *In re Newman and Howard Ltd,* 1962 1 Ch. at page 262, the court held:

> *"There is no doubt that the general rule is as stated by the Court of Appeal in In re Rica Gold Washing Co. Ltd. 12 ; but it seems to me that from the very nature of the case there must be an implied qualification to that general rule. In the case where a*

petition is based on a failure to supply accounts and information, with the consequence that the petitioner is unable to tell whether or not there will be a surplus available for the contributories, it cannot really be the law that the petitioner is bound to allege and to verify on oath the statement that the company has surplus assets when, by reason of the company's own default, he is not in a position to tell whether or not that statement is true. Nor, I think, can it really be the law that the petitioner is bound in such a case to make some vague statement such as "the accounts may show that there will be surplus assets available for the contributories." I understand that, in practice, a qualification from the general rule is accepted in the case where a petition is based on the allegation that there are matters in connection with the company which require an investigation, and it seems to me that a comparable qualification must be implied here. The rule, as it seems to me, is simply inapplicable to a case such as the present. I conclude, therefore, that this petition is not demurrable and in the circumstances the result is that the petition will be dismissed, because that is what the petitioner asks for, but the company will pay the petitioner's costs of the petition. "

71. In *Re The Kent Coalfields Syndicate Limited* [1898] 1 QB 754 the English Court of Appeal considered an application by a member of the public to inspect the register of members of a company which was in voluntary liquidation. The court considered whether section 32 of the English Companies Act 1862 (the corresponding provision to section 66 of the Bermuda Companies Act) continued to apply once a company was in liquidation and held that it did not.

Smith LJ held at page 756 that:

"It appears to me that the true meaning of s. 32 is that it only applies to a company which has not gone into liquidation. The phraseology of the section seems to me to support this conclusion. It says that the register of members is to be kept at the registered office of the company except when closed as thereinafter mentioned. The closing there mentioned appears by the next section to refer to the time, of which notice is given by advertisement, during which the office is closed, for a period not exceeding

thirty days in a year. It seems to me that the language used is not applicable to the case where the register has passed into the hands of the liquidator, and can only apply to a going company. Then the register is to be open to inspection by any member, or by any other person on payment, during business hours for not less than two hours each day. Who are to give the inspection? Clearly the company; and if inspection is refused the company and directors permitting the refusal incur penalties. Why are they to incur penalties when they are not in default, and the inspection of the register is under the control of the person carrying on the liquidation? To read the section otherwise than as applicable to a company which is a going concern makes its provisions unreasonable."

And Chitty LJ held at page 757 that section 32:

"... occurs in a group of sections which relate to a company which is a going concern, and, though not conclusive, that fact is a point to be considered in determining the extent of the application of the section. The expressions used in the section tend to shew that its application is limited, and the latter part of the section relates to penalties as to which it would be unreasonable to say that they should be imposed on a company when it is no longer a going concern, and on directors when they have ceased to have authority over the register."

72. In relation to section 71 of the Companies Act 1981 which is the requirement to hold an AGM each year, it was held in *Sound Consolidated Industries Pty Ltd (in liq)* (1992) 6 ACSR 647 that the members of a company are not able to pass resolutions affecting the company after the beginning of the winding-up. Therefore, no purpose would be served in calling an AGM as any resolutions passed would be of no effect if the Company goes into liquidation.

73. Annuity relies upon *In re Newman and Howard Ltd* in support of the argument that Annuity fits squarely within the qualification to the general rule in *In re Rica Gold Washing Co Ltd*. Mr Potts QC forcefully argues Annuity cannot tell whether there will be a surplus available

for distribution to contributories on winding-up because the Company has failed to provide audited financial statements or any financial statements and has failed to hold an AGM at which shareholders could hold the Company to task on these matters. Additionally, the Company should not be permitted to rely upon its breaches of the Companies Act 1981 to stifle a proper determination of Annuity's substitution application.

74. The facts of *In re Newman and Howard Ltd* must be carefully considered. In that case, there was no provisional liquidation afoot when the court decided that a petitioning contributory deprived of the accounting information of a company is not bound to demonstrate there would be surplus assets available for the contributories in accordance with the rule in *In re Rica Gold Washing Co Ltd*. Furthermore, in this case, unlike *In re Newman and Howard Ltd*, the JPLs stated that it is possible that there will be no assets available for distribution to shareholders, such that they will receive no value for their shares in a liquidation.

75. Annuity rightly raises serious concerns that in the period leading up to 8 February 2018 when the Petitioner presented the Petition in these proceedings, the Company had not held an AGM since 28 April 2017, had not produced audited financial statements since its 2016 report and had failed to publish any financial statements since its Third Quarter statement, published on 13 November 2017.

76. The Company has been in provisional liquidation since 9 February 2018. The provisional liquidation has prevented both the Company and the JPLs from legally and practically holding an AGM and providing financial information under the provisions of the Companies Act 1981. The present state of the Company does not provide an excuse not to keep the shareholders of the Company updated with financial information. In this respect, I endorse the comments made by Kessaram AJ on 8 March 2019 when he stated the JPLs ought to provide a report to shareholders at least once every year.

77. In my view, the qualification to the rule in *In re Rica Gold Washing Co Ltd* does not apply to the facts in this case. The Company has been in provisional liquidation, and the JPLs are

of the view that there may be no surplus available for shareholders if the Company was wound-up. For these reasons, I reject Annuity's argument that because it has been deprived of financial information Annuity can rely upon the qualification and does not need to establish a surplus for distribution to shareholders on liquidation. Consequently, on the qualification due to lack of accounting information ground for substitution, I find Annuity does not possess sufficient interest in these winding-up proceedings.

Should the Court Exercise its Discretion to Order Substitution

78. I have come to the conclusion that Annuity does not possess the requisite standing to substitute the Petitioner in the capacity of creditor or contributory. Accordingly, there is no basis for the court to exercise its discretion and order substitution. However, in the event it is contended that in the absence of standing Annuity is entitled to discretionary consideration of the issue, I briefly set out reasons why I do not think it appropriate to exercise my discretion.

79. In *Commissioner of Inland Revenue v Bemelman Engineering Limited* (1990) 5 NZCLC 66,494, Master Towle held:

> *"I believe a court in exercising its discretion must have regard to all the circumstances of the particular case in order to form a view of what it may think just. One of those circumstances must be the details of the debt or the ground on which reliance is placed by the [creditor applying to be substituted], but other relevant circumstances would include the existence of supporting creditors, the trading position of the company, the attitude of the company to the application for substitution and any other special circumstances affecting the parties which may arise."*

80. In *Gamlestaden Fastigheter AB v Baltic Partners Ltd and others* [2007] Bus. L.R. 1521 at page 1531, Mr Moss QC made submissions to the Privy Council which the court adopted concerning the policy distinctions between a creditors petition and an unfair prejudice application. The equivalent of sections 161 and Section 111 respectively of the Bermuda

Companies Act 1981. The difference between a creditor's petition and an unfair prejudice petition and the manner in which both remedies can be employed is a significant consideration in this case because Annuity is seeking to exercise both avenues of challenge against the Company at the same time.

> *"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.*
>
> *33. Where relief is sought via an unfair prejudice application, on the other hand, the position is quite different. There is no public involvement or interest in the proceedings, other than the natural interest that may attend any proceedings heard in open court. The purpose of article 141, or of section 459, or of their counterpart in Hong Kong, is to provide a means of relief to persons unfairly prejudiced by the management of the company in which they hold shares"*

81. Annuity makes a number of serious allegations against the Company which it should be afforded an opportunity to ventilate before the courts. Section 164(2) of the Companies Act provides that when a Petition for winding-up by a contributory is on the ground that it is just and equitable to do so, the Court is required to consider whether an alternative remedy is available to the Petitioner that it would be unreasonable for him not to pursue. In this case, Annuity has already sought an alternative remedy by way of the Section 111 Petition in the 2011 Proceedings. Once the Petition in these proceedings is formally withdrawn, the automatic stay under section 167(4) of the Companies Act 1981 will be lifted. Annuity will be free to pursue the Section 111 Petition in the 2011 Proceedings. The Section 111 Petition could then be amended to include any additional allegations Annuity is desirous of making.

82. On behalf of the Company, Mr Tan has given evidence that if Annuity is substituted continuing the Petition, the Company will suffer prejudice. Mr. Tan's Sixth Affirmation identifies the prejudice as follows:

1. If a winding-up order is eventually made, all transactions of the Company from the commencement of the Petition will be void. Annuity acknowledges this prejudice caused by any delay in the hearing of a petition.
2. The senior management of the Company will be unable to progress the business causing uncertainty, and the Company will be prejudiced in raising finance, all of which will pose a risk to projects including the Saudi Project;
3. The reputation of the Company will be tarnished, in a jurisdiction in which reputation is held in incredibly high regard;
4. The listing status of the Company will be jeopardised, prejudicing all of its shareholders. Annuity acknowledges the value of the listing at paragraph 56 of its “re-amended petition”.
5. There will be prejudice suffered by the shareholders of the Company who are unable to transfer their shares.

83. Critically, the JPLs have reported that the majority of the creditors of the Company do not support winding-up the Company. Annuity will suffer comparatively less prejudice by not being substituted for the Petitioner. Annuity can proceed with its Section 111 Petition in the 2011 action. On the other hand, the Company will suffer financial damage which at this stage is incalculable but could impact the viability of the Company. For these reasons, I do not exercise my discretion to order that Annuity be substituted for the Petitioner.

Conclusion

84. In the circumstances the Court refuses Annuity's application for substitution of the Petitioner in the capacity of both creditor and contributory. The Court also refuses to exercise its discretion to substitute Annuity for the Petitioner in these winding-up proceedings.

85. The Petitioner has an extant application before the court to withdraw the petition, which is adjourned pending the outcome of the Substitution and Consolidation Application. The consequence of my decision refusing the substitution application means the Petitioner can proceed with its Withdrawal Application. The Court is therefore no longer required to consider the applications in Annuity's summons which seek relief in winding-up proceedings consequential upon a successful substitution application. I should add that I am grateful for the cogent submissions and arguments made by Mr. Potts QC and Mr. Woloniecki and Ms George for the JPLs with respect to those portions of Annuity's Amended Summons the court is now no longer required to address.

86. There does however remain Annuity's application for the production of audited financial reports of the Company's affairs. I have found that since 9 February 2018, the Company has been under the control of the JPLs. Consequently, the Company could not provide audited financial reports. In the circumstances, and bearing in mind the comments made by Kessaram AJ, I think it appropriate I hear the parties on the production of financial information for the shareholders, costs and any other consequential orders.

Dated this 12 March 2020

DELROY DUNCAN QC

ASSISTANT JUSTICE