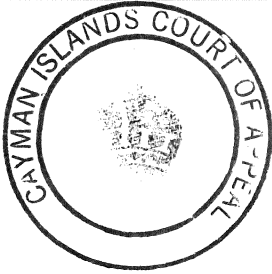


How do
9-12-09

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
Civil Appeals 13, 14, 15 and 16 of 2009

(FSD/G425-428 OF 2009)



HSH CAYMAN I GP LTD
HSH CAYMAN II GP LTD
HSH CAYMAN V GP LTD
HSH COINVEST (CAYMAN) GP LTD

W. Foster
JA

Appellants

-and-

ABN AMRO BANK NV LONDON BRANCH

Respondent

Before: The Rt. Hon. Sir John Chadwick, P
The Hon. Justice Forte, JA
The Hon. Justice Mottley, JA

Appearances: Philip Brook Smith Q.C., Colette Wilkins and Vahid Chittleborough for the Appellants, instructed by Walkers. Terence Mowschenson Q.C. and Jayson Wood for the Respondent, instructed by Appleby and Graeme Halkerston of Appleby for the Liquidators.

Heard: 3rd December 2009

Judgment delivered: 9th December 2009

JUDGMENT

Sir John Chadwick, President:

1. These are appeals from winding up orders made on 13 November 2009 by Justice Foster sitting in the Financial Services Division of the Grand Court. The orders were made on the petitions of the respondent, ABN AMRO Bank NV London Branch (“the Petitioner”). In the context of these appeals there are no material differences in the facts of each case. In those circumstances it will be convenient to refer only to the facts in the first of the four appeals (No 13 of 2009).

2. The appellant, HSH I Cayman GP Ltd (“the Company”) is the general partner of a limited partnership established in the Province of Alberta, Canada, pursuant to a limited partnership agreement dated 19 September 2006. The limited partnership, which bears a corresponding name (HSH Alberta I LP), was established as a special purpose vehicle for the sole purpose of acquiring, and financing the acquisition of, shares in a German bank, HSH Nordbank AG. On 19 October 2006 HSH Alberta I LP (hereafter “the Limited Partnership”), acting through the Company as its general partner, entered into a credit facility agreement with the Petitioner (as mandated lead arranger and as facility agent) and ABN AMRO Bank NV (as original lender) for the purpose of funding the acquisition. The facility agreement is expressed to be governed by English law.
3. The petition was presented on 8 September 2009 by the petitioner “as facility agent for the lenders set out in Schedule 1”. It appears from the petition that funds were duly advanced to the Limited Partnership by ABN AMRO Bank NV for the purposes of acquiring the shares in HSH Nordbank AG; that the Limited Partnership acquired those shares; and that the shares were, on acquisition and at the date of the petition, registered in the name of the Company as general partner of the Limited Partnership.
4. On 29 December 2006 ABN AMRO Bank NV purported to novate part of its rights and obligations under the facility agreement to five other banks. On 29 January 2007 ABN AMRO Bank NV and one of those other banks (The Royal Bank of Scotland plc) purported to novate part of their rights and obligations under the facility agreement to a seventh bank (Calyon). The validity of those novations is challenged by the Company; but nothing turns on that in the present context. The lenders set out in Schedule 1 to the petition (“the Lenders”) are ABN AMRO Bank NV, The Royal Bank of Scotland plc, three of the four other banks party to the novation of 29 December 2006 and Calyon.
5. It is alleged in the petition that, on 30 January 2009, the sum of €6,761,980.52 became due and payable by the Limited Partnership to the Lenders in accordance with the terms of the facility agreement. Further sums (respectively €1,320,179.31 and €1,141,123.51) are said to have become due and payable on 30 April 2009 and 31 July 2009. Together with interest accrued on those sums, the amount due and payable as at 21 August 2009 amounts to €9.41 million or thereabouts. It is not in dispute (i) that, pursuant to the laws

of the Province of Alberta, the general partner of a limited partnership is liable for the debts and obligations of the limited partnership, (ii) that, accordingly, the Company is liable to pay the debts due from the Limited Partnership and (iii) that the Company is unable to pay those debts to the Lenders.

6. In those circumstances it might be thought that there could be no answer to the petition; and that the order for winding up was properly made. Nevertheless, the Company appeals from that order.
7. The grounds of appeal appear from the Memorandum filed in this Court on 27 November 2009. They may fairly be summarised under two heads: (i) that the judge erred in failing to dismiss the petition having regard to the petitioner's failure to comply with relevant provisions of the Companies Winding Up Rules 2008; in the alternative, (ii) that the judge erred in refusing to grant an adjournment to await the outcome of a claim filed by the Limited Partner and others in the Commercial Court in London.
8. It is not in dispute that there was failure on the part of the petitioner to comply with the provisions of the Winding Up Rules in a number of respects. It will be necessary, in the course of this judgment, to identify both the relevant rules and the respects in which there was failure to comply. But, first, it is pertinent to note that the Winding Up Rules do not, themselves, contain, or incorporate, any general power to relieve from the consequences of such failure. In particular, the Winding Up Rules do not incorporate, in terms or by reference, the power conferred by Order 2, rule 1 of the Grand Court Rules.

The relevant provisions of the Rules

9. Order 2 rule 1 of the Grand Court Rules is in these terms (so far as material):

“(1) Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein, or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

...”

Paragraph (3) is not material in the present context. The obvious purpose of the rule – which is in the same terms as Order 2 rule 1 of the Rules of the Supreme Court formerly current in England and Wales – is to avoid the problem identified by the Court of Appeal of England and Wales in *In Re Pritchard, Pritchard v Deacon* [1963] 1 Ch 502. Indeed, as the Editorial Introduction to Order 2 (“Effect of Non-Compliance”) in the Supreme Court Practice 1999 explains, the rule (in that form) was introduced into the Rules of the Supreme Court in 1964 in the light of the decision in that case.

10. The Companies Winding Up Rules 2008 were made by the Insolvency Rules Committee – under power conferred by section 174 of the Companies Law (2007 Revision). The section is in these terms:

“174. The Court may, as often as circumstances require, make such rules concerning the mode of proceedings to be had for winding-up a company in the Court, as may from time to time seem necessary, but until such rules are made the general practice of the Court, including the practice in use at the commencement of this Law in winding-up companies, shall, so far as the same is applicable and not inconsistent with this law, apply to all proceedings for winding-up a company.”

11. Order 1 rule 2(1) of the Winding Up Rules provides for those rules to apply to every winding up petition presented on or after the commencement date (1 March 2009). Order 1 rule 4 provides for the application, in relation to winding up, of certain of the Grand Court Rules – as to service, the filing of affidavits, the form in which orders are to be made, and the lodgement of funds in Court – but Order 2 of the Grand Court Rules is not among them. Order 1 rule 2(4) of the Grand Court Rules (as amended in 2009) is in these terms (so far as material):

“(4) Except for orders 3 (Time), 4 (Assignment, Transfer and Consolidation of Proceedings), 5 (Mode of Beginning Proceedings), 38 Part II (Writs of Subpoena), 39 (Evidence by Deposition), 62 (Costs), 67 (Change of Attorney), 45-52 (Enforcement) and 52 (Committal) these Rules shall not apply to any proceedings which are-

...
(c) governed by the Companies Winding-Up rules 2008;
...”

12. We note that – at first sight, at least – the overriding objective (expressed in the preamble to the Grand Court Rules as revised in 2003) has no application to proceedings under the Winding Up Rules; save, perhaps, in so far as the Grand Court Rules are themselves incorporated in, or made applicable to, the Winding Up Rules. The overriding objective – “to deal with every cause or matter in a just, expeditious and economical way” – is given effect, in relation to the Grand Court Rules, by the Explanatory Memorandum published on 8 September 2003. The Memorandum makes clear, first, that the contents of the preamble are not rules of Court; and, second, that it is intended as a guide as to the manner in which judges will apply the Grand Court Rules. And there is nothing in the Winding Up Rules comparable to rule 7.51 of the English Insolvency Rules 1986 (SI 1986/1925) which makes the practice of the Grand Court in applying the Grand Court Rules generally applicable in a winding up.

13. Order 3, rule 5 of the Grand Court Rules – which is made applicable to winding up by Order 1, rule 2(4) – confers power on the Court in a winding up to extend or abridge time. It is in these terms (so far as material):

“(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

...”

But, as counsel for the appellant points out (correctly in our view) a power to extend time falls well short of a power to relieve from the consequences of a failure to comply

with other requirements of the rules within the categories described in Order 2 rule 1 – “. . . place, manner, form or content or [in] any other respect”.

14. We were referred to section 18 of the Grand Court Law (2008 Revision):

“18(1) Subject to this or any other law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.

(2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case.”

Winding up in England is governed by the Insolvency Rules 1986. Rules 7.51 and 7.55 of those rules provide:

“7.51 Principal court rules and practice to apply

The CPR, and the practice and procedure of the High Court and of the county court (including any practice direction) apply to insolvency proceedings in the High Court and county court as the case may be, in either case with any necessary modifications, except so far as inconsistent with the Rules.

7.55 Formal defects

No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the Court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.”

15. Having regard to Order 1 rule 4 of the Winding Up Rules, Rule 7.51 of the English Insolvency Rules 1986 can have no application to a winding up in this jurisdiction. Further, before the Companies Winding Up Rules 2008 were brought into force on 1 March 2009, there would have been no need for the Grand Court to have recourse, under section 18(2) of the Grand Court Law, to the practice in England or to apply rule 7.55 of the Insolvency Rules 1986. That is because (in circumstances to which rule 7.55 would otherwise have applied) the Grand Court could follow its own general practice under Order 2 rule 1 of the Grand Court Rules. It is necessary, therefore to ask whether it is now open to the Grand Court, in winding up, to adopt the English rule; and so fill the lacuna – that is to say, the absence from the Cayman rules relating to winding up of any express power to cure defects and irregularities in insolvency proceedings - which has opened up following the introduction of the Winding Up Rules on 1 March 2009.

16. The better view, we think, is that it has not been open to the Grand Court, in a winding up following 1 March 2009, to have recourse to rule 7.55 of the Insolvency Rules 1986. Section 18(2) of the Grand Court Law (2008 Revision) provides for the practice and procedure in similar matters in the High Court in England to apply “in any matter of practice or procedure for which no provision is made by this or any other law or by any Rules”. But section 174 of the Companies Law (2007 Revision) does make provision for the practice and procedure in winding up. It provides that the practice and procedure shall be governed by rules to be made by the Court; and *until such rules are made*, for the practice to be the general practice of the Court *including the practice in use at the commencement of this Law in winding up companies*. As we have explained, it was not the practice of the Grand Court to have recourse to rule 7.55 of the Insolvency Rules at the time of the commencement of the Companies Law. It did not need to do so: it could rely on its own powers under Order 2 rule 1 of the Grand Court Rules.

17. Be that as it may, the judge did not purport to rely on rule 7.55 of the English Insolvency Rules, or on any other rule. He relied on the inherent jurisdiction of the Court. In a short judgment (a Note of which, in the absence of a transcript, has been prepared by and agreed between the parties and approved by the judge) he said this:

“It is regrettable that there has not been strict compliance with the company’s winding-up rules, which are there for a purpose and are intended to be followed, but I accept that there is no prejudice to the four companies concerned, who do not dispute the debts. I have the inherent power to dispense with compliance and I do so here.”

18. That passage raises two questions: first, whether this was a case in which the judge could invoke an inherent power of the Court; and, if so, second, whether it was open to him to exercise that power as he did in the circumstances of this case. The appellant submits that each of those questions should be answered in the negative.

The inherent power

19. We were referred to the decision of the Court of Appeal of England and Wales in *Tombstone Limited v Raja and another* [2008] EWCA Civ 1444. [2009] 1WLR 1143. The issue before the Court in that case was whether the judge had been wrong to refuse,

as a matter of discretion, to set aside an order made against the appellant (Tombstone) some four and a half years earlier in proceedings to which it was not then party and at a hearing of which it had had no notice. It was said on behalf of Tombstone that it was entitled to have the order set aside as of right *ex debito justitiae* under the inherent jurisdiction of the court. The Court, after referring to its own earlier decisions in *In re Pritchard (supra)* and in *St George's Healthcare NHS Trust v S* [1998] 1 WLR 936, accepted that (prior to the introduction of the Civil Procedure Rules in England and Wales) a party affected by an order made without notice was entitled to have the order set aside *ex debito justitiae*: that is to say, in the exercise of a discretion by the court under its inherent jurisdiction which, in accordance with settled practice, could only be exercised in one way. The discretion was to be exercised in favour of the applicant without “a more general consideration of what was required by the interests of justice, having regard to all the circumstances of the case”.

20. The Court then went on to say this:

“[74] The relationship between the inherent powers of the court to control proceedings and the Rules of the Supreme Court was considered by Sir Jack Jacob in his Hamlyn lecture ‘The inherent jurisdiction of the court’: Current Legal Problems 1970 p 23, 50-51. He said that the powers of the court under its inherent jurisdiction ‘are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other . . . where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins’. In an illuminating article entitled ‘The inherent jurisdiction to regulate civil proceedings’ [1997] LQR 120, the late Professor Martin Dockray said at p 128 that the Rules of the Supreme Court may limit the inherent powers of the court where there is a conflict between them. Thus ‘the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid Rule of the Supreme Court’. In our judgment, this last statement was correct in law, being supported by the authorities cited in the article which included *Moore v Assignment Courier Ltd* [1977] 1 WLR 644F-645B and *Langley v North West Water Authority* [1991] 1 WLR 697, 709D.”

And, after expressing the view that that proposition was not put in doubt by observations in *Isaacs v Robertson* [1985] 1 AC 97, 103C or in *St George's Healthcare NHS Trust v S* (*ibid*, 965F), the Court continued:

“[76] The position pre-CPR, therefore, was that the inherent powers of the court could not be invoked to do something which was inconsistent with a rule. Thus, if a rule gave a wide discretion to the court to decide whether or not to make a particular order, the court could not exercise its inherent powers to make such an order *ex debito justitiae* as if it had no discretion, or a discretion which could only be exercised one way in accordance with the rules.

[77] The same position has obtained since the introduction of the CPR. The CPR are a ‘new procedural code with the overriding objective of enabling the court to deal with cases justly’ (rule 1.1(1)). There is no doubt that the court continues to have the inherent jurisdiction to regulate the conduct of civil litigation: see section 19(2)(b) of the Supreme Court Act 1981. The existence of the inherent jurisdiction is also implicitly acknowledged by CPR 3.1(1) which provides that the list of powers in that rule ‘is in addition to....any powers it may otherwise have’.

[78] In our judgment, therefore, where the subject-matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction. There is no point in exercising the court's inherent jurisdiction if that would involve adopting the same approach and would lead to the same result as an application of the rules. And it would be wrong to exercise the inherent jurisdiction of the court to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules.”

21. On the basis of that approach, the Court concluded that the question whether or not the order of which Tombstone complained should be set aside was to be determined by reference to the Civil Procedure Rules – and, in particular, by CPR 23.10 – and that, in addressing the question under that Rule, the court was bound to have regard to the overriding objective, expressed in CPR 1.1(1), of dealing with cases justly. The judge had been correct to take the view that he was entitled, in the exercise of his discretion, to refuse to set aside the order. But the Court went on to add this:

“[85] . . . if, contrary to the view we have expressed above, Tombstone's application to set aside fell outside the scope of the CPR and had to be dealt with under the inherent jurisdiction of the court, we would have held that the jurisdiction should be exercised conformably with the CPR. The CPR introduced a new code. It was intended to be comprehensive. If there is a lacuna, the omission should be made good in a way which is consistent with the rules. Our procedural regime would be incoherent if an application to set aside a judgment pursuant to the CPR involved the exercise of a discretion in accordance with the

overriding objective, but an application outside the rule involved the exercise of a narrower discretion or no discretion at all.”

22. The approach adopted by the Court of Appeal of England and Wales was referred to, without apparent disapproval, in the very recent decision of the Privy Council in *Texan Management Limited and others v Pacific Electric Wire and Cable Company Limited* [2009] UKPC 46:

“[57] . . . the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: *Raja v Van Hoogstraten (No 9)* [2008] EWCA Civ 1444, [2009] 1 WLR 1143. That decision concerned the court's power under the inherent jurisdiction to set aside an order made without notice *ex debito justitiae*. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction.”

23. In *Secretary of State for Communities and Local Government v Bovale Ltd and another* [2009] EWCA Civ 171 the Court of Appeal emphasised (*ibid*, [69] – [72]) that a court was not free, under the guise of exercising its inherent jurisdiction, to vary rules which had been laid down by the rule-making body empowered for that purpose by the legislature.

24. We conclude, therefore, that:

- (1) In relation to the failure to take any step within the period limited by the Winding Up Rules, the power to extend time conferred by Order 3, rule 5 of the Grand Court Rules – and made applicable to winding up proceedings by Order 1, rule 2(4) of those rules – is exercisable “on such terms as [the Court] thinks just” on an application for that purpose made before or after the expiration of that period: Order 3, rule 5(1) and (2) of the Grand Court Rules. There is no scope for the exercise of the inherent jurisdiction of the Court in relation to the extension of time.

- (2) If (contrary to what we think is the better view) recourse could be had to rule 7.55 of the Insolvency Rules 1986 pursuant to section 18(2) of the Grand Court Law, then no insolvency proceedings would be invalidated by any formal defect or by any irregularity; unless the Court were of the view that “substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court”: rule 7.55. Again, in such a case, there would be no scope for the exercise of the inherent jurisdiction of the Court in granting relief from the consequences of formal defects or irregularities.
- (3) In the absence of a power to relieve from the consequences of failure to comply with the Winding Up Rules either in the Rules themselves, or incorporated in the Rules by reference to the Grand Court Rules, or made applicable to winding up by the Grand Court Rules, or exercisable pursuant to section 18(2) of the Grand Court Law, the judge was entitled to invoke the inherent jurisdiction of the Court to control its own process. But, in exercising that power, he was not entitled to vary the scheme for the winding up of companies in this jurisdiction laid down by the Winding Up Rules.

25. Whether, in the circumstances of this case, the inherent jurisdiction of the Court to control its own process extended to relieving the petitioner from the consequences of the failures to comply with the Winding Up Rules which occurred in the present case – or (if it did) whether the powers under the inherent jurisdiction were properly exercised in the present case – are matters to which we shall return when we have identified what those failures were.

The failure to comply with the Winding Up Rules

26. The relevant provisions of the Companies Winding Up Rules 2008 are found in Order 3 (Winding Up Petitions and Orders), Parts I (General Provisions) and II (Creditor’s Petition):

“Form and content of petition (O.3, r.2)

2(1) ...

(2) Every winding up petition shall contain:-

...

- (e) The name and address of the qualified insolvency practitioner (and any foreign practitioner) whom the petitioner nominates for appointment as official liquidator.

Verification of petition (O.3, r.3)

3(1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.

(2) A creditor's petition in respect of debts due to two or more different creditors that must be separately verified by or on behalf of each creditor.

(3) The verifying affidavit shall be sworn by:-

- (a) the petitioner; or
- (b) a director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.

Nominated official liquidator's consent to act (O.3, r.4)

4(1) Every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator stating that:-

- (a) He is a qualified insolvency practitioner and meets the residence requirement contained in regulation 5;
- (b) Having made due enquiry, he believes that he and his firm meet the independence requirement contained in regulation 6;
- (c) He and/or his firm are in compliance with the insurance requirement contained in regulation 7; and
- (d) He is willing to act as official liquidator if so appointed by the Court.

...
[“Regulation” in that context is a reference to the Insolvency Practitioners Regulations 2008.]

Service of creditor's petition (O.3, r.5)

5.(1) ...

(2) Every creditor's petition shall be served, together with the verifying and supporting affidavits and notice of hearing (if the hearing date is not endorsed upon the petition itself), upon the company by delivering them to the company's registered office immediately after the petition has been presented.”

27. As we have said, the petition was presented on 8 September 2009. Save in two respects (as to which the Company makes no complaint) it complied with the formal requirements of Order 3 rule 2(2) of the Winding Up Rules. In particular, it contained (at paragraph 2 of the Prayer for Relief) the names, but not the addresses, of those nominated for appointment as official liquidators:

“David Walker and Daniel Schwarzmann of Pricewaterhouse Coopers (“the Liquidators) be appointed joint Official Liquidators of the Company.”

It did not include a statement about the countries in which it carries on its business (as required by Order 3, rule 2(2)(b): but, as we have said, no complaint is made about that.

28. The petition appeared on its face to have been presented on behalf of ABN AMRO Bank NV, London Branch “as facility agent for the lenders set out in Schedule 1(“the Lenders”)”. Paragraphs 23 to 31 set out particulars of the debts owed by the Limited Partner to “the Lenders”. Paragraph 35 asserts that the Company is liable to pay the debts due to the Lenders. The petition was verified by the affidavit of Paul Fillmore, sworn on 7 September 2009. Mr Fillmore stated in that affidavit that he was the Director of Financial Institutions – Global Restructuring Group with The Royal Bank of Scotland (“RBS”); and that he was authorised to make the affidavit on behalf of the Petitioner. Paragraphs 3 and 4 of the affidavit are in these terms:

“3. RBS is a creditor of the Company and has been working closely with the Petitioner in relation to these proceedings. I have been concerned in the matters giving rise to the Petition, and have the requisite knowledge of the matters referred to in the Petition by virtue of my position as Director of Financial Institutions – Global Restructuring Group with RBS and my ongoing involvement in this matter.

4. I have read the Petition. Based upon my own knowledge, and from information supplied to me by officers and employees of RBS, the Petitioner, other creditors of the company, and by legal Counsel (in relation to which I maintain privilege), I can confirm that all statements made in the Petition are true and correct to the best of my knowledge, information and belief.”

The complaints made on behalf of the Company are, first, that an affidavit in those terms does not meet the requirement in Order 3, rule 3(2) that a creditors’ petition in respect of debts due to two or more different petitioners must be separately verified by or on behalf of each creditor; and, second, that the affidavit does not meet the

requirement in Order 3, rule 3(3)(b) that the verifying affidavit shall be sworn by a director, officer or agent of the petitioner who has been concerned in “and has personal knowledge of” the matters giving rise to the petition.

29. We think there is force in each of those points. The petition is presented in respect of the several debts owed to the Lenders individually: strictly, as it seems to us, Order 3, rule 3(2) required that the petition be “separately verified” by or on behalf of each of the Lenders. That requirement was not satisfied by Mr Fillmore’s affidavit of 7th September 2009. Further, although it may be said that Mr Fillmore is an agent of the Petitioner and has been concerned in the matters giving rise to the petition, it cannot be said that he has “personal knowledge” of those matters, as Order 3, rule 3(3)(b) requires. He states, in terms, that he verifies the petition “from information supplied to me by officers and employees of RBS, the Petitioner, other creditors of the Company and by legal Counsel”.

30. It seems that the first of those defects (at least) was recognised by the Petitioner. On 4 and 5 November 2009 affidavits were sworn on behalf of each of the Lenders verifying the several debts owed to them. Copies of those affidavits (which had not, it seems, then been filed with the Court) were served on the Company.

31. As we have said, the persons nominated in the petition for appointment as official liquidators were David Walker and Daniel Schwarzmans, both of Pricewaterhouse Coopers. So far as appears from the material before the Court, no affidavit in support of the petition (required by Order 3, rule 4.4(1)) was ever sworn by Mr Schwarzmans. Mr Walker swore an affidavit on 1 September 2009 (some days before the date of the petition itself), which (as he stated) was made “in connection with the Petition of Royal Bank of Scotland PLC for the appointment of myself and Daniel Schwarzmans as official liquidators to HSH Cayman I GP Ltd . . .”. In that affidavit he qualified himself, and expressed his willingness to act, as required by Order 3, rule 4.4(1); but he did so, not in respect of the petition in the present case, but in respect of some other petition which (at the time) he thought that RBS had presented, or was about to present. After he had sworn his affidavit, the Cause number of the petition in the present case was added to it. The complaint made on behalf of the Company is that Mr Walker’s

affidavit of 1 September 2009 does not purport to be – and could not be – an affidavit supporting the petition for the purposes of Order 3, rule 4(1). There is obvious force in that complaint.

32. The liquidators appointed by the judge, in the winding up order which he made on 13 November 2009, were “David Walker and Ian Stokoe of Pricewaterhouse Coopers”. Mr Stokoe – although not nominated as a liquidator in the petition presented on 8 September 2009 – had sworn an affidavit on 4 September 2009 (again, some days before the date of the petition in the present case. He made that affidavit “in connection with the Petition of ABN AMRO Bank NV, London Branch for the appointment of myself and David Walker as official liquidators to HSH Cayman I GP Ltd”. In that affidavit he qualified himself, and expressed his willingness to act, as required by Order 3, rule 4(1); but, as in the case of Mr Walker, he did so, not in respect of the petition in the present case, but in respect of some other petition which (at the time) he thought that ABN AMRO Bank NV London Branch had presented, or was about to present in which he had been (or would be) nominated as a joint liquidator. And, as in the case of Mr Walker, after Mr Stokoe had sworn his affidavit, the Cause number of the petition in the present case was added to it. The complaint made on behalf of the Company is that Mr Stokoe’s affidavit of 4 September 2009 does not purport to be – and could not be – an affidavit supporting the petition for the purposes of Order 3, rule 4(1). There is obvious force in that complaint also.

33. It appears from the affidavit of Jerry Ramos, sworn on 1 October 2009, that the petition (but no other document) was served on 8 September 2009. It appears from the affidavit of Lindsay Luttermann, sworn on 12 November 2009, that the affidavit of Mr Fillmore, sworn on 7 September 2009 verifying the petition, was sealed by the court on 2 October 2009 and served on 5 October 2009; and that the affidavits of Mr Walker and Mr Stokoe were sealed by the court on 8 September 2009, but not served until 28 October 2009. The complaint made on behalf of the Company is that the verifying affidavit of Mr Fillmore and the supporting affidavits of Mr Walker and Mr Stokoe (in so far as they were capable of supporting the petition in the circumstances which we have described) were not served “together with” the petition; and were not served

“immediately after the petition has been presented” as required by Order 3 rule 5 (2). There is force in that complaint.

Irregularity or nullity

34. We have explained earlier in this judgment that the purpose of Order 2 rule 1 of the Grand Court Rules is to avoid the problem discussed in *In Re Pritchard (supra)*. The question in that case was whether proceedings brought under the Inheritance (Family Provision) Act 1938 in the local district registry (rather than in the central office of the High Court, as Order 54 of the Rules of the Supreme Court required) were a nullity; or whether the failure to bring the proceedings in the central office could be treated as an irregularity and so capable of cure under what was then Order 70, rule 1 of the Rules. The rule was in these terms:

“Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or any Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit”.

The Court accepted that, notwithstanding the apparent breadth of the rule, if the proceedings were a nullity, the rule could have no application to them: see *Craig v Kanssen* [1943] 1 KB 256, 262 (to which Lord Justice Upjohn referred at page 519) and the observations of Lord Denning in *MacFoy v United Africa Co Ltd* [1962] AC 152 (PC), 160.

35. The importance of the point, in that case, was that, if the proceedings were a nullity – as the Court held (Lord Denning, Master of the Rolls dissenting) - it was too late for the claimant to bring fresh proceedings under the Act: the strict time limit of six months within which such proceedings could be brought having expired. The relevance of the case, in the present context, lies in the observations of Lord Justice Upjohn as to the principles to be applied in deciding which side of the line – nullity or irregularity – failure to comply with procedural rules should fall. After reviewing the authorities, he said this, (*ibid*, 523):

“I do not think that the earlier cases or the later dicta upon them prevent me from saying that, in my judgment, the law when properly

understood is that ord. 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of ord. 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of a party entitled to complain of the defect *ex debito justitiae*. . . .

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see for example, *Whitehead v. Whitehead (or se Vaspur)* [[1962] 3 WLR 884, [1962] 3 All ER 800]. (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings. (iii) Proceedings which appear to be duly issued but failed to comply with a statutory requirement. See, for example, *Finnegan v. Cementation Co Limited*. [[[1953] 1 QB 688]]”

36. In the light of that guidance – and having regard, in particular, to the observation that a defect should not readily be treated as fundamental so as to render the proceedings a nullity - we are satisfied that none of the failures to comply with the requirements of the Winding Up Rules in the present case were so fundamental as to be incurable; provided that justice can be done by an appropriate exercise of discretion. But we keep in mind that there are cases - to which Lord Justice Upjohn referred in *In re Pritchard* (*supra*, 520-521), in a passage cited by the Court in *Tombstone* (at paragraph [72]) – where the settled practice of the court will require it to exercise its discretion in one way only.

Did the judge err in principle?

37. The judge took the view that it was enough for him to find (as he did) that “in the particular circumstances of this case there has been no prejudice whatever to the four companies concerned”. Given that premise, he dispensed with “strict adherence to the Rules in the interests of justice”. He did not ask himself why there had been a failure to comply with the Winding Up Rules; or whether that failure might have caused prejudice to others. In failing to do so, he fell into error. The correct approach, in a case where a party seeks to be relieved from failure to comply with procedural rules, was

explained by the Privy Council in *Ratnam v Cumarasamy and another* [1964] 2 All ER 933, 935:

“The Rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which steps in procedure are required to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.”

The Privy Council expressly rejected the submission, advanced as a general proposition on the basis of dicta of Lord Justice Bramwell in *Atwood v Chichester* (1878) 3 QBD 722, 723, that the application for relief should be granted “unless to do otherwise would result in irreparable mischief”.

38. It is not enough for a party who has not complied with the rules simply to say to the Court: “My non-compliance has caused no prejudice to the other party”: he must provide some reason why the Court should exercise its discretion in his favour. Lord Justice Neuberger made the point in these terms, in *Kuenyehia and others v International Hospitals Group Ltd* [2006] EWCA Civ 21:

“[33] . . . we do not consider that the claimants can rely on the absence of prejudice to the defendant as a reason for letting the Judge's decision stand. In our view, . . . the time limits in the CPR . . . are to be strictly observed, and extensions and other dispensations are to be sparingly accorded, especially when applied for after time has expired. While there may be exceptional cases, we consider that prejudice is only relevant in this sort of case to assist a defendant, where the court would otherwise think it right to dispense with service. In other words, prejudice to the defendant is a reason for not dispensing with service, but the absence of prejudice cannot usually, if ever, be a reason for dispensing with service.”

The principle was applied, recently, by Mr Justice Andrew Smith in *Brown and others v Innovatorone* [2009] EWHC 1376 (Comm), [38] – [44]; a decision to which our attention was drawn after the conclusion of the oral argument

39. There was no evidence before the judge to explain why the affidavits verifying and supporting the petition were not served together with the petition and immediately after the petition had been presented. It appears from a note of the hearing, prepared by the Company's advocates from contemporary notes, that the absence of any explanation

was drawn to the attention of the judge. In the course of his reply leading counsel for the petitioner informed the judge that: “The first verifying petitions (*sic*) were served as soon as they were released. That’s the explanation. . . . The affidavits came from England”. That is consistent with the Court stamp (dated 2 October 2009) which appears on the verifying affidavit of Mr Fillmore (sworn on 7 September 2009): but there is no explanation why the petitioner could not have waited for the affidavit to be filed (if that was required) before presenting and serving the petition. It is important to keep in mind the purpose of the rule which requires service of the verifying affidavit, with the petition, immediately after the petition has been presented (Order 3, rule 5 of the Winding Up Rules). It is not an irrelevant formality. The presentation of a petition is capable of having an immediate and serious effect on the company and those with whom it does business: the purpose of the rule is to give the company the earliest opportunity to satisfy itself whether or not there is a proper foundation for the petition, so that it can (if so advised) apply to strike it out or to stay proceedings.

40. The explanation for late service did not extend to the failure to serve affidavits of the nominated liquidators until 28 October 2009. The affidavits of both Mr Walker and (so far as relevant) Mr Stokoe were sworn in this jurisdiction: they were filed with the court on 8 September 2009, as appears from the Court stamp. And there was no explanation for the nomination as one of the joint liquidators, in the petition, of Mr Schwarzmänn. It is clear from the affidavits of Mr Walker and Mr Stokoe (read together) that the decision to substitute Mr Stokoe for Mr Schwarzmänn must have been made by 4 September 2009: that is to say, some days before the petition was presented. There may well have been a good reason for the decision to substitute Mr Stokoe for Mr Schwarzmänn: but, if so, some explanation of the decision to present a petition which did not include the names of the liquidators whom the petitioner was actually proposing for appointment was required. It is important to keep in mind that (as appears from Mr Stokoe’s affidavit) this is not a case in which the decision to substitute Mr Stokoe for Mr Schwarzmänn was made after the presentation of the petition; in response to some change of circumstances. This is a case in which the petition, when presented, did not reflect the decision that had already been taken. The petition, when presented, did not satisfy the requirements of Order 3, rule 2(2)(e).

41. The failure to state the petitioner's true intention as to the identity of its nominated liquidators is of importance in another respect. Order 3, rule 6 of the Winding Up Rules requires advertisement of the petition not less than seven days after service on the company. Order 3, rule 6(4)(e) requires that the advertisement shall contain a statement that a copy of the petition may be obtained from the petitioner's attorneys. Order 3, rule 8(2)(d) requires that any person who intends to appear and be heard on the petition must give notice to the petitioner's attorneys whether, in the event that a winding up order is made, he intends to support or oppose the appointment of the petitioner's nominees as liquidators: rule 8(3) requires that if creditor intends to oppose the appointment of the petitioner's nominee, he must nominate an alternative qualified insolvency practitioner who is willing to act. Failure to state the petitioner's true intention as to the identity of its nominated liquidators has the effect that other creditors are deprived of the opportunity to object to them.
42. It appears from the Note of the hearing to which we have referred that the judge treated the substitution of Mr Stokoe for Mr Schwarzmann – about which he was informed at the hearing – as a matter of little or no importance. He was wrong to take that view. At the risk of pedantry, it is important to observe that the office of liquidator is personal to the individual appointed. It is no answer to say that the nomination of one individual insolvency partner of a major international firm of accountants, rather than another, is an irrelevant formality. Before appointing Mr Stokoe as liquidator the judge needed to satisfy himself that there was no creditor of the company who might have wished to oppose that appointment if it had had the opportunity to do so: alternatively, that there was no prospect that a challenge to the appointment of Mr Stokoe could have succeeded in the circumstances.
43. For those reasons we are satisfied that the judge's decision to dispense with "strict adherence to the Rules in the interests of justice" cannot stand: he purported to exercise a discretion under the inherent jurisdiction on a basis which was flawed.

What order should be made by this Court?

44. Having reached that conclusion we must consider whether the winding up orders made on 13 September 2009 should be set aside. In our view that must be the result unless it

can be said that this Court has a proper evidentiary basis on which it can, itself, relieve the Petitioner from the consequences of its failure to comply with the Winding Up Rules.

45. In order to relieve the Petitioner from the consequences of its failure to comply with the Winding Up Rules (in the respects which we have indicated) it would be necessary, at the least, to take the following steps: (i) to direct amendment of the petitions, so as to reflect what was (at the time that it was presented) the intention of the Petitioner as to the nomination of persons to be appointed as liquidators; (ii) to direct re-service of the amended petitions; (iii) to direct that the amended petitions be properly verified; (iv) to direct that Mr Walker and Mr Stokoe file supporting affidavits which refer to the amended petitions; (v) to direct that the verifying and supporting affidavits be served on the Company together with the amended petitions; and (vi) to direct re-advertisement of the petitions in their amended form. We should emphasise that this is not a case in which the failures to comply with the Winding Up Rules can be cured by a retrospective extension of time to do so. An extension of time will not cure the underlying defect: that the petitions did not properly reflect the Petitioner's intention with respect to the nomination of liquidators. That has had the effect that the various affidavits which have been filed, verifying and supporting the petitions, have been made in verification and support of defective petitions.

46. There is no application before the Court inviting it make any directions of that nature; and no evidence on which the Court could be asked to do so. In particular, there is no evidence to explain why the Petitioner should have pursued the petitions with what can fairly be described as a cavalier disregard for its obligations under the Winding Up Rules. In those circumstances, we are satisfied that the only course open to this Court is to set aside the winding up orders which have been made.

47. In those circumstances it is unnecessary for us to consider whether the judge was correct to refuse an adjournment. But we think it appropriate to say this. In reaching his conclusion to refuse an adjournment the judge observed that he was "not satisfied that the claim form presented to the Court in London only yesterday is bona fide or has any merit". The judge was entitled to take the view that the timing of the filing of the claim

form in the Commercial Court in London was driven by tactical considerations; but there was no material on which he could reach the conclusion that the claim (whatever its merits) was made otherwise than in good faith; and, in our view he should have been cautious before expressing a view as to the merits of proceedings pending in another jurisdiction. If the claim has, indeed, no merits, then it can be expected that the defendants to those proceedings will take the steps open to them to have it struck out.

Conclusion

48. We allow the appeals, set aside the winding up orders that have been made and stay all further proceedings on the petitions. It will be for the Petitioner to decide whether to make application to the Grand Court for those stays to be lifted – and upon what terms – or to present fresh petitions. It will be for the Company to decide whether to apply to the Grand Court for the petitions to be dismissed or struck out.

Chadwick P

Forte JA

Mottley JA

