12-12-08

IN THE COURT OF APPEAL

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. 276 of 2008

Civil Appeal No. 13 of 2008

IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

AND IN THE MATTER OF STRATEGIC TURNAROUND MASTER PARTNERSHIP , LIMITED

BEFORE: THE HON. MR. JUSTICE FORTE, P. (Acting)
THE HON. MR. JUSTICE MOTTLEY, J.A.
THE HON. MR. JUSTICE VOS, J.A.

Heard: 4th, 5th & 8th December, 2008 Judgment delivered: 12th December 2008.

Appearances: Mr Anthony Akiwumi of Stuart Walker Hersant for the Appellant/ Applicant Company, Strategic Turnaround Master Partnership, Limited (the "Company").

Mr Ross McDonough and Mr Guy Manning of Campbells for the Respondent/ Petitioner, Culross Global Limited (the "Petitioner").

Judgment

Vos JA:

Introduction

1. This is an *inter partes* application for leave to appeal from a Ruling by Smellie C.J. on 28th November 2008, whereby he refused the Company's application to strike out the petition presented by Petitioner on 10th June 2008 to wind up the Company (the "Petition").

2. At the outset of this hearing, the Court invited the parties to address their substantive submissions rather than spending time on the question of leave to appeal. The parties agreed to do so.

3. The Petition to wind up the Company was premised on two bases under section 94 of the Companies Law (2007 Revision):-

(1) That the Company is unable to pay its debts; and

(2) The Court is of the opinion that it is just and equitable that the Company should be wound up.

4. On 18th June 2008 (8 days after the Petition), the Company issued an application to strike out the Petition. Mr Gary Herman's first affidavit in support of the application suggested that the presentation of the Petition was an abuse of the process of the Court.

5. The Chief Justice summarised his conclusions at the end of his Judgment. In essence, he held:-

(1) The Court has jurisdiction to stay or strike out a petition where it is disputed on bona fide and substantial grounds.

(2) The Petitioner, having complied with the rules of the Company, had effectively redeemed its shares as at the Redemption Date of 31st March 2008.

(3) At that time, a liability of the Company was created in favour of the Petitioner in the amount of the value of its shares.

(4) Until payment of the redemption proceeds, the Petitioner remained a shareholder bound by the rules of the Company.

(5) On 31st March 2008, the Petitioner became a creditor of the Company, in its capacity as a member, in the amount of the redemption proceeds, ranking ahead of other shareholders, but after third-party creditors.

(6) The purported exercise by the directors of the Company on 17th April 2008 of a power of suspension of the redemption was *ultra vires* the Articles of Association of the Company (the "Articles"), and the Confidential Explanatory Memorandum (the "CEM").

(7) As of 1st May 2008, the Petitioner was owed 90% of the redemption proceeds.

(8) The redemption proceeds were confirmed by the Administrator on 14th May 2008 to be US$980,508.97.

(9) The Petitioner had, therefore, standing to petition to wind up the Company, there being no bona fide or substantial dispute over the debt, and no abuse of process.

(10) Alternatively, the Petitioner should be allowed to petition on the just and equitable ground, even if the suspension was *intra*

vires, because of (a) the use of the directors' powers unfairly to prejudice the Petitioner, which had a legitimate expectation of the redemption of its shares and/or (b) the Company being estopped from denying the Petitioner's right to assert that it had already redeemed its shares.

6. The Company raises the following main points in support of its appeal:-

(1) The Petitioner was bound by the CEM (having agreed to the Subscription Agreement), which expressly allowed the Company to suspend redemption proceeds, and which is consistent with the power in the Articles to suspend redemptions.

(2) Redemption is a process, which had not been completed when the suspension took place on 17th April 2008, so the Company's action was not retrospective.

(3) There was no liquidated redemption sum payable on 31st March 2008, because the NAV (Net Asset Value) had not then been calculated, and the obligation to pay the redemption proceeds does not arise until 30 days after the Redemption Date.

(4) Article 53 is to be read subject to Article 55, so that the deemed debt arising on the redemption date under Article 53 can be suspended under Article 55.

(5) The Petitioner, as a continuing member of the Company, does not have *locus standi* to petition to wind up on the grounds of the Company's insolvency.

(6) There were no grounds for suggesting that the Petitioner had a justifiable claim to wind up on the just and equitable ground.

7. In response, the Petitioner seeks to support the Chief Justice's reasoning, but has served a Respondents' notice in which it also contends that the Chief Justice should have held that:-

(1) The Petitioner ceased to be a shareholder after 31st March 2008, and did not continue to be a shareholder until its name is removed from the register, and the redemption proceeds are paid; and

(2) The Company's obligation to pay the redemption proceeds fell due on 31st March 2008, and not after 30th April 2008.

Factual background

8. I gratefully adopt, with some additions, the essential elements of the factual background from the first 36 paragraphs of the Chief Justice's Ruling as follows.

9. The Company is an exempted limited company incorporated under the Companies Law (2007 Revision), and a regulated mutual fund pursuant to the Mutual Funds Law ("MFL"), and is registered with the Monetary Authority of the Cayman Islands ("CIMA") under section 4(3) of the MFL. As such, the Company was only permitted to offer its investments to sophisticated investors investing a minimum of US$50,000.

10. The assets of the Company are substantially invested in a 'master-feeder' structure in Strategic Turnaround Equity Partners L.P. (Cayman) (the "Master Fund"). Strategic Turnaround Equity Partners L.P., a Delaware limited partnership also invests in the Master Fund (the "On-Shore feeder"). Investors can subscribe for shares in either the Company or the On-Shore feeder.

11. The Feeder structure comprises an open-ended investment vehicle in which investors subscribe for shares and from which investments are redeemable at any time by the giving of redemption notices in accordance with the Articles, and subject to the rights of suspension to which further reference is made below.

12. In May 2007, the Petitioner subscribed for shares in the Company, for which it paid US$1,840,000.

13. On 31st October 2007, the Petitioner gave notice of its intention to redeem all its shares in the Company. The redemption date was identified as 31st March 2008. The Petitioner confirmed this date by an additional notice sent on 11th March 2008.

14. On 24th March 2008, Mr Gary Herman, a director of the Company, e-mailed Mr Nigel Blanshard of the Petitioner, to confirm that payment of 90% of the cash would be paid "*by the end of April 2008 as per the Offering Memorandum*".

15. On 11th April 2008, the Company's administrator, Citi Hedge Fund Services (Cayman) Limited, e-mailed the Petitioner's custodian's nominee, Banco Nominees (Isle of Man) Limited ("Banco") saying that full redemptions were approved for 31st March 2008, and that 90% of the redemption proceeds would be paid within 30 days, with the balance to follow upon completion of the annual audit.

16. On 17th April 2008, the directors of the Company resolved to "*suspend all redemptions at this time and that such action is in the best interests of the Company*", relying on Articles 55 and 56. The discussion in the Minutes concluded that the "*U.S. micro-cap turnaround sector, which is the primary investment sector for the Fund is extremely volatile and illiquid at the time*".

17. On 22nd April 2008, the directors of the Company resolved in writing that (a) it was in the best interests of the Company and all its shareholders that "*in accordance with the Articles the calculation of the net asset value of shares be suspended*"; (b) No shares in the Company be redeemed nor new shares issued until such time as the directors have lifted the suspension; and (c) All notices of redemption be suspended until such time as the directors have lifted the suspension. Paragraph 6 of the resolutions noted that "*The Directors believe that the Master Fund's portfolio values are temporarily depressed, impacted by low market volumes and the current period is one of extreme volatility or illiquidity as a result of which (a) disposal of a substantial part of the investments of the Master Fund would not be reasonably practicable and might seriously prejudice the shareholders of the Company or (b) it is not reasonably practicable for the Master Fund or the Company to determine fairly the value of their respective net assets. The Directors believe that liquidating positions at this depressed level will negatively impact all investor's interests in the Company*".

18. On 23rd April 2008, the Company's attorneys notified CIMA that redemptions had been suspended on 22nd April 2008.

19. On 28th April 2008, the Company gave notice to its shareholders that redemptions had been suspended.

20. On 30th April 2008, the NAV of the Company as at 31st March 2008 was determined.

21. On 1st May 2008, the Petitioner e-mailed Mr Herman of the Company saying the Administrator of your fund had undertaken that its redemption notice had been accepted, and had committed to pay 90% within 30 days of the effective date of that notice, and that the Administrator was in breach of that commitment, and threatened legal action.

22. On 14th May 2008, the Administrator notified the Petitioner that NAV applicable to its shares was, as at 31st March 2008, US$980,508.97.

23. On 25th June 2008, after the Petition on 10th June 2008, a special resolution of shareholders amended Articles 33.9 and 56 so as to permit the calculation of NAV despite the suspension of redemptions.

The Corporate Documents

24. Banco, on behalf of the Petitioner, signed a Subscription Agreement dated 31st October 2006, addressed to the Company agreeing to subscribe for shares in the Company, and that "*this subscription is being made and any shares of the Company hereby subscribed for will be held, subject to the terms and conditions of the [CEM], and the Memorandum and Articles of Association of the Company, as amended from time to time...*".

25. It is thus this Subscription Agreement, the Memorandum and Articles of Association and the CEM that make up the documents containing the constitution of the Company, and the contract between subscribing shareholders and the Company.

The Articles of Association of the Company

26. The Articles provided as follows (with emphasis added):-

> "*17. Subject to these Articles, **Shares shall be issued on the terms referred to in the Confidential Memorandum**, unless otherwise determined by the Directors.*
>
> *31. Subject to any provisions relating to the Shares set out in these Articles ..., a Member may redeem all or any of such Member's Shares by serving a Redemption Notice on the Company, to be received by the Company at least 60 Business days prior to the Redemption Date ... . The Company shall redeem such Shares at the Redemption Price being an amount equal to:*
>
> *31.1 The Net Asset Value per Share calculated on that Redemption Day ...*
>
> *32. ... If a suspension has been declared by the Directors the right of the Member to have his shares redeemed shall be suspended and during the period of suspension he may withdraw his Redemption Notice... If the Redemption Notice is not withdrawn the redemption of the Shares shall be made at the Redemption Price calculated at the Valuation Point on the Valuation Day next following the end of the Suspension.*
>
> 33. *Notwithstanding any other provisions of these Articles, the Directors may temporarily suspend redemptions in order to*

effect orderly liquidation of the Company's assets in relation to shares or if the Directors determine that the disposal of the Company's assets or the calculation of the Net Asset Value in relation to the shares is not practicable or reasonable and that it would prejudice the interests of the Members.

38. Any amount payable to a Member for the redemption of Shares shall be paid in Dollars. ***The Company shall remit redemption proceeds*** *(net of the costs of remittance) by cheque or wire transfer* ***within such period as the directors shall determine****. ...*

39. On a redemption of a Share the Directors shall have the power to divide in specie the whole or any part of the assets of the Company and appropriate such assets in satisfaction or part satisfaction of the Redemption Price and any other sums payable on redemption as provided in these Articles.

40. Once a share is redeemed the Member shall cease to be entitled to any rights in respect of it (except the right to receive a Dividend which has been declared prior to such redemption). ***The Member's name shall be removed from the Register of Members in respect of that Share and that Share shall be available for re-issue****, and until re-issue shall form part of the authorised and unissued capital of the Company.*

44. The procedure and timing for payment of the redemption proceeds upon a compulsory redemption shall follow the timing and procedure and timing set out in the Articles in relation to a redemption at the option of the Member.

45. A Member will have no Member rights with respect to the Shares to be ***compulsorily redeemed*** *after the close of business on the Redemption Day, except the right to receive the redemption proceeds therefor ...*

53. ***The price to be paid for shares which are to be redeemed shall be deemed to be a liability of the Company from the close of business on the Redemption Day*** *until the price is paid.*

55. **The Directors may, from time to time, in their absolute discretion and for any reason declare a suspension of the determination of the Net Asset Value of shares and the issue and redemption of the shares.**

56. ***A suspension shall take effect at such times as the Directors shall specify*** *but not later than the close of business*

on the Business Day next following the declaration and thereafter there shall be no determination of the Net Asset Value of Shares until the Directors shall declare the suspension at an end. ***The suspension shall terminate in any event on the day following the first Business day on which the condition giving rise to the suspension shall have ceased to exist, provided that the Directors shall not have declared a Suspension on other grounds****. Each declaration of suspension by the Directors shall be consistent with such official rules and regulations, if any, as shall have been promulgated by any authority having jurisdiction over the Company. To the extent not inconsistent with such official rules and regulations, the determination of the Directors shall be conclusive. The Directors shall promptly notify the Members of any such Suspension and shall promptly notify them upon termination of such Suspension.*

The relevant terms of the CEM

27. The Summary of the CEM included the following indications regarding the risk level of the investment:-

    (1) Under the heading "*Investment Objective and Approach*", it is stated that the Investment Adviser "*Believes that attractive risk-adjusted returns can be obtained through active portfolio management focused on the identification of inefficiently priced public securities of companies that have above average return potential, or are embarking on a turnaround*".

    (2) Under the heading "*Risk Factors*", it is provided that "*Investment in the Fund involves significant risk factors and is suitable only for persons who can bear the economic risk of the loss of their investment, who have limited need for liquidity in their investment and who meet the conditions set forth in this Memorandum*".

28. The Summary of the CEM also provides at page 5 that "***Shareholders shall have the right to require*** *all or, subject to the minimum holdings requirements, a portion of* ***their Shares to be redeemed on the last Business day of each calendar quarter*** *at the Redemption Price then prevailing ...*" (emphasis added).

29. There follows at pages 21ff an exposition of the numerous risks being taken by those investing in the Company, including those relating to the highly volatile markets in which it invested. No doubt, a high level of return was expected by those purchasing shares in it.

29. Pages 17-21 of the CEM deal with the subject of "*Redemptions*". It is stated that 60 days' notice of redemption is required. Page 18 includes the following under the heading of "*Payments upon Redemption*":-

> "*Payment of the Redemption Price will be made as soon as practicable but, **except in cases otherwise described herein**, a shareholder who is making a redemption will receive at least 90% of the Redemption Price no later than 30 days following the date of redemption*" (emphasis added).

30. Page 19 of the CEM includes the following under the heading: "*Suspension of Redemptions*":-

> "***The Board of Directors may declare a suspension of the determination of the Net Asset Value or subscription or redemption of the shares or the payment of redemption proceeds** for the whole or any part of any period when:*
>
> *(i) any market or exchange on which a substantial part of securities owned by the Fund are traded is closed ...*
>
> *(ii) **there exists any state of affairs which constitute a state of emergency or period of extreme volatility or illiquidity as a result of which (a) disposal of a substantial part of the investments of the Fund would not be reasonably practicable and might seriously prejudice the Shareholders or the Fund or (b) it is not reasonably practicable for the Fund to determine fairly the value of its net assets***" (emphasis added).

30. It will be observed that the terms of sub-paragraph (ii)(a) and (b) of this provision in the CEM were reflected pretty well verbatim in paragraph 6 of the note made in the Company's written resolutions of 22nd April 2008.

The issues to be determined

31. Against this background, it seems to me that the following seven main issues arise from the Chief Justice's judgment and the points argued in the lengthy written and oral submissions before us:-

(1) Did the Petitioner become a creditor on either (a) 31st March 2008; or (b) 30th April 2008?

(2) Did the Petitioner cease to be a member of the Company bound by the Articles and the CEM on 31st March 2008 (as it contends by way of Respondent's notice)?

(3) Did the Company have the power under the Articles and/or any other associated documentation to suspend either (a) the effective redemption (held to have occurred by the Chief Justice) on 31st March 2001 or (b) the payment of the redemption proceeds (if any) due to the Petitioner?

(4) Was the suspension contained in the resolutions of the 17th and 22nd April 2007 valid and effective?

(5) Even if the suspension was valid and effective, did the Petitioner nonetheless have the right to petition as a future creditor?

(6) In any case, did the Petitioner have *locus standi* to petition to wind up the Company on the grounds of the non-payment of the redemption proceeds?

(7) If the Petitioner was unable to petition on the grounds of the non-payment of the redemption proceeds, has it shown any basis for its 'just and equitable' ground in the Petition?

32. I shall deal with each of these issues in turn. But before doing so, I will make some general observations on the situation that has arisen.

33. The winding-up procedure is generally intended to be used in clear cases. It is not for the resolution of disputed debts or other contentious disputes that should properly be resolved by writ actions or other litigation processes. It is also not be used to put inappropriate pressure on a company (see, for example, Parmalat Capital Finance Limited v. Food Holdings Limited [2008] UKPC 23 at paragraph of Lord Hoffmann's speech).

34. All that said, what has arisen in this case is a genuine dispute as to the proper construction of the constitutional documents of an exempted limited company and a Mutual Fund. As is very common, the prospectus of the Fund contained detailed explanations of the investments in which prospective shareholders were invited to participate, and the terms on which the shareholdings that were to be subscribed for would be held.

35. Once these issues of construction and law have been resolved (which can be achieved on this strike out application) what will be left is a series of issues as to validity and propriety of the exercise of the powers contained in the Articles. The ultimate question is whether, in the Cayman Islands in the circumstances of this case, those issues can properly be resolved in a winding-up petition, or whether the Petitioner ought rather to have brought proceedings by way of writ action to enforce its claimed rights.

36. The answer to questions of this kind will not be the same in relation to every dispute concerning the redemption of shares in every mutual fund. But the principles should be relatively clear. The situation in the Cayman Islands is, however, specific and different from other jurisdictions, because of the nature of the Companies legislation here. As I mention in detail later in this judgment, the use of a 'just and equitable' petition has more work to do in the Cayman, because there is no unfair prejudice procedure at the moment. When the Companies (Amendment) Law 2007 is introduced in due course, the Court will have a range of new powers to remedy oppression of the minority, including ordering the purchase of shares. That procedure, however, will be introduced as part of the 'just and equitable' jurisdiction, so the position in Cayman will still be an individual one.

37. In this particular case, each side has (quite properly) addressed forensic arguments designed to influence the Court.

38. The Petitioner says that it had effectively redeemed its shares on 31st March 2008, and that the Company knew full well months in advance that that was going to happen. It says that the Company failed to make any arrangements to realise assets to pay the redemption proceeds, and that, having made express written representations that the redemption was accepted and would be paid, the Company effectively reneged on its obligations by resolving to suspend payments.

39. On the other hand, the Company says that the investments in the Fund are illiquid, as the CEM makes clear. It says that the market situation is exceptional, and that there is now a period of extreme volatility or illiquidity. As a result, the Company says, the Board *bona fide* decided that disposal of the investments made by the Fund would not be reasonably practicable and might seriously prejudice the Shareholders of the Fund as a whole. Accordingly, the Company contends that its directors were justified, even at the late stage that they did, in suspending payment of the redemption proceeds for the greater good of the Shareholders as a whole.

40. These forensic arguments do not much advance the resolution of the issues arising in this appeal. On a strike out, the Court cannot and will not resolve disputed issues of fact. It can resolve issues of construction and law, and decide whether the procedure adopted by the Petitioner is an appropriate one, or whether it constitutes an abuse of the Court's procedure.

41. The Court will, however, be astute on a strike out, to avoid tying the hands of the Court that will eventually have to determine the factual dispute between the parties. That is so, whether that dispute is eventually to be tried under the present Petition or in a writ action to be commenced as a result of the outcome of this appeal. Consequently,

nothing that I say in this judgment as to the facts, should be taken as, in any way, binding the Court that eventually tries the ultimate issues between the parties.

First issue: Did the Petitioner become a creditor on either (a) 31st March 2008 (as the Judge held); or (b) 30th April 2008 (as the Petitioner contends by way of Respondent's Notice)?

42. Mr Anthony Akiwumi, for the Company, argued strenuously that the Petitioner did not become a creditor of the Company, either on the Redemption Date of 31st March 2008, or on the 30th April 2008, when 30 days expired after the Redemption Date. Mr Akiwumi contended that it was impossible for there to be a debt until that debt was quantified. In support of this proposition, he relied on a series of authorities under the English Companies Act 1862, on which the Companies Law (2007 Revision) is based.

43. It seems to me, however, that his argument is fatally flawed. Article 53 provides expressly that "*[t]he price to be paid for shares which are to be redeemed shall be deemed to be a liability of the Company from the close of business on the Redemption Day [Date]*". The fact that debt is an unliquidated one, does not make it a prospective or non-existent one.

44. Paragraph 12.3 of the English Insolvency Rules 1986 (which presently apply in the Cayman Islands) provides for the kind of debts that can be proved in a winding up, stating expressly that they may be proved "*whether they are present or future, certain or contingent, ascertained or sounding only in damages*".

45. Mr Akiwumi relied on the recent case of Brac Construction Limited v. R. Broome and G.Broome [2006] CILR 185 for the proposition that prospective creditors could not petition under section 96 of the Companies Law (2007 Revision). All that was held, in that case however, is that a claimant bringing a resisted claim for breach of contract could not petition. The case did not decide, and could not have decided, that an existing, but unquantified debt, is not a debt at all.

46. I am, therefore, entirely satisfied that the Chief Justice was right to hold (as I believe he did) that the Petitioner became a creditor of the Company on 31st March 2008 in the amount of the redemption value of the redemption shares, that was yet to be quantified.

47. It is wrong in my judgment to suggest that there was no debt until the 30th April 2008, relying on the terms of the CEM that make 90% of the

debt payable on that date. The Petitioner was, as the Chief Justice held, a creditor on 31st March by virtue of the clear provision of Article 53.

48. The answer to this question does not necessarily answer subsequent issues as to whether the process of redemption was complete on 31st March 2008, and as to whether, even if there was a valid suspension, in April 2008, the Petitioner could validly petition on the basis of a future debt. I note, however, that some of the authorities that are cited below under those issues, are relevant to the issue dealt with in this section. They do not, however, ultimately affect the decision here reached.

Second Issue: Did the Petitioner cease to be a member of the Company bound by the majority of the Articles and the CEM on 31st March 2008 (as it contends by way of Respondent's notice)?

49. The Chief Justice reviewed a number of authorities in paragraphs 90 to 124 of his judgment. It seems to me that he correctly identified the principles to be drawn from these cases, which is simply that a redeeming shareholder remains a member of the company until he has received payment and his name has been removed from the register of members. The dicta of Cotton and Fry LJJ in Walker v. General Mutual Building Society [1887] LR 36 Ch D 777 at pages 783 and 786 make this very clear.

50. The Chief Justice also cited a number of authorities demonstrating that the redeeming shareholder draws his rights from his continuing position as a member of the company, and showing that, in a winding up, the Petitioner would rank behind unsecured creditors, and ahead of shareholders who have not served notice to redeem (see, for example, In Re Blackburn and District Benefit Building Society: Walton v. Edge and others [1884] L.R. 10 App. Cas. 33).

51. A similar, but not identical, priority position is enshrined in Cayman law by sections 37(7)(a) and (b) of the Companies Law (2007 Revision). These provisions expressly provide that the terms of redemption for shares, which are or are liable to be redeemed, but which have not been redeemed, at the date of the winding up, may still be enforced against the Company, but that amounts payable in these circumstances rank behind all other debts and liabilities of the Company.

52. Mr Ross McDonough, for the Petitioner, argued under this head that the process of redemption was actually completed on the 31st March

2008, and therefore at that date the Petitioner must have ceased to be a shareholder, whether or not the Company had removed its name from the Register. He said that this was an administrative act entirely within the control of the Company, over which the Petitioner had no control. In my judgment, this contention is gainsaid by any fair reading of the Articles, as the Chief Justice held in paragraph 119 of his Judgment. Article 40, in particular, provides, in effect, that the process of redemption is not over until the Member's name is removed from the Register and the Share is available for re-issue. That process was simply not completed on the expiry of the notice on 31st March 2008.

53. The Petitioner also argued that Article 45 expressly provides that, for a compulsory redemption, a member will have no member's rights after the Redemption Date. So, he contends, the position must be the same in redemptions by notice. But, in my judgment, this argument proves exactly the reverse of what Mr McDonough was seeking to prove. Article 45 expressly says that, for a compulsory redemption, member's rights are lost after the Redemption Date. That only needed to be stated if it were different from the position that would otherwise prevail when a Member served voluntary notice of redemption. This is because Article 44 otherwise makes clear that the provisions for voluntary redemptions (anyway as to timing and procedure) are applicable also to compulsory redemptions.

54. Accordingly, the provisions for compulsory redemptions seem to me to confirm that a Member voluntarily redeeming shares under the Articles will continue to be bound by the Articles *qua* member after the Redemption Date, and until his name is removed from the Register and the redemption proceeds are paid.

55. Finally, Mr McDonough relied in this connection on the Summary of the CEM relating to redemptions (quoted above) that indicates that there is a right to require redemption on the last Business Day of each quarter. This does not seem to me to be doing any more than identifying the Redemption Date, which is already made clear in the Articles.

56. I hold, therefore, as did the Chief Justice, that the Petitioner continued as a member of the Company bound by the majority of the Articles and the CEM, after 31st March 2008.

Third issue: Did the Company have the power under the Articles and/or any other associated documentation to suspend either (a) the effective redemption (held to have occurred by the Chief Justice) on 31st March 2008 or (b) the payment of the redemption proceeds (if any) due to the Petitioner?

57. This, like the issues that have preceded it, seems to me to be a pure question of law. It concerns the proper construction of Articles 17, 33 and 55, taken together with the passages on Redemption in the CEM.

58. The Chief Justice reached the conclusion at paragraphs 125 to 139 of his judgment that there was no power to suspend redemption payments, as opposed to suspending redemption in advance of the redemption date. I summarise his reasons as follows:-

(1) The power to suspend redemption payments could not comport with the more limited power in article 55 (paragraph 129).

(2) A power to suspend redemption payments would fly in the face of the promise at pages 17 and 18 of the CEM to pay 90% of the proceeds within 30 days of the Redemption Date (paragraph 131).

(3) The promise to pay was confirmed by Mr Herman in his e-mail of 24th March 2008, and by the Administrator in its e-mail dated 11th April 2008 (paragraph 132).

(4) The suspension on the 17th April 2008 was retrospective, because it came after the effective redemption of the shares. There was no power to grant a retrospective suspension (paragraphs 133-4).

(5) Article 17 gave force to the CEM only subject to the Articles themselves, and the Articles made the Petitioner a creditor from 31st March 2008 (paragraphs 137-8).

59. In my judgment, none of these five reasons is sufficient to outweigh the clearly expressed power to suspend redemption payments contained in the CEM:-

(1) First, the powers contained in articles 33 and 55 are entirely compatible with those contained in the CEM. The power in Articles 33 and 55 allows "*redemption*" to be suspended. "*[R]edemption*" in these articles must be referring to the entire process of redemption including (a) the notice to redeem (b) the debt that arises on the Redemption Date (c) valuation of the NAV at the Redemption Date and, as a consequence, the redemption sum (d) the payment of the redemption sum, and

(e) the removal of the Member from the Register. In the CEM, the suspension capability is spelt out in more detail where it is stated that "*The Board of Directors may declare a suspension of*" 3 specific aspects of that redemption process, namely (a) "*the determination of the Net Asset Value*", or (b) "*redemption of the shares*", or (c) "*the payment of redemption proceeds*". But this extra detail is not inconsistent with the Articles; it merely explains in detail how the powers in the articles may be used in practice.

(2) Secondly, the indication in the CEM that 90% will be paid within 30 days is not a promise. It is expressly stated to be: "*except in cases otherwise described herein*", and the power of suspension of payments is described on the following page of the CEM. But even if it were a promise, the power of suspension for the specific reasons contained in the CEM itself must qualify that promise.

(3) Thirdly, the e-mails relied upon by the Petitioner cannot nullify a power contained in the Articles. The grounds for the suspension could, in theory (I make no comment as to whether this was or was not the case), have arisen after the e-mails had been written.

(4) Fourthly, the suspension power exercised by the Company was a power to suspend the payment of redemption proceeds. Since the proceeds had not been paid in April 2008, when the resolutions were passed, the exercise of this power cannot have been retrospective. This point would only hold water if the Petitioner had been right to suggest that the redemption process was complete on 31st March 2008. As I have already held, however, the redemption was not complete on that date, not least because the proceeds had not been paid.

(5) Fifthly, Article 17 is indeed competent to incorporate the provisions relating to redemption contained in the CEM into the Articles. It is only if those provisions are inconsistent (which I have held in this instance they are not) that a problem would arise. Article 17 provides that "*Shares shall be issued on the terms referred to in the [CEM]*". The terms on which shares can be redeemed are all part and parcel of the terms on which shares are issued.

60. Looked at purely as a matter of construction, therefore, the Articles specifically incorporate the terms of the CEM as regards redemption, since, as I have said, the terms as to redemption are an important part of the terms on which shares are issued, and Article 17 expressly refers to the terms referred to in the CEM on the basis of which the shares are

issued. Of course, those terms are subject to the Articles. But, as I have already indicated, nothing in the Articles is inconsistent with the power of suspension, including the power to suspend the making of redemption payments, as described in the CEM.

even after the redemption date?

61. For these reasons, I answer this question by saying that the Company had the power under the Articles as explained in the CEM to suspend both (a) the effective redemption on 31st March 2008 and (b) the payment of the redemption proceeds due to the Petitioner. The 'effective redemption', which took place on 31st March 2008, in my judgment, means no more than the Member becoming a creditor on that date as provided for expressly in Article 53. It does not mean that the redemption process was at end.

creditor for what?

62. My holdings on this issue do not have any bearing on the question, which we do not decide on this appeal, namely whether the power was exercised properly. This is, however, an issue to which I shall return.

Fourth issue: Was the suspension contained in the resolutions of the 17th and 22nd April 2007 valid and effective?

63. The conclusions reached in relation to the previous issues lead to the conclusion that, as matters stand, the suspension contained in the resolutions of the 17th and 22nd April 2007 were prima facie valid. As a matter of law, there was power to suspend the payment of the redemption proceeds otherwise due on 31st March 2008. That power is expressed to be exercisable in certain circumstances described in the CEM, and is provided for in Articles 55 to be exercisable in the absolute discretion of the directors.

64. I make clear once again that this holding does not, and cannot, determine any of the facts, including whether the circumstances that the directors purportedly relied upon actually existed.

65. Moreover, this holding is obviously not an end to the matter, because, under the heading of the Petitioner's 'just and equitable' petition, it seeks to argue the factual matters to which I have made reference, and that the suspension is invalid on a number of additional grounds including breaches of duty and oppression of the minority.

Fifth Issue: Even if the suspension was valid and effective, did the Petitioner nonetheless have the right to petition as a future creditor?

66. Mr McDonough argues with some force that, even if (contrary to his primary case) the Petitioner's debt was suspended by the Company, (a) that debt will not go away; and (b) it is anyway a future debt on which a petition can be founded.

67. Mr McDonough relies on four English first instance cases, in particular, as showing that a future debt can found a petition:-

(1) In Tottenham Hotspur v. Edennote Limited [1994] BCC 681, Rattee J allowed a Petitioner to rely on an untaxed costs order to wind up a company. He relied on the definitions of "debt" in Rules 13.12(1)(b) and 13.12(3) of the English Insolvency Rules 1986 as showing that the debt can be unliquidated and future.

(2) In Re North Bucks Furniture Depositories Limited [1939] 1 All ER 549, Crossman J held that a liability for rates could found a petition, notwithstanding that the rates in question could not be enforced by action, but only by distress warrant.

(3) In Re Australian Joint Stock Bank (1897) WN 48, Vaughan Williams J made a winding up order founded on the just and equitable ground, where the creditor petitioned based on a debt payable in the future under a scheme of arrangement.

(4) In Re Melbourne Brewery and Distillery [1901] 1 Ch 453, Wright J held that a holder of a redeemable debenture, with no present claim for principal or interest, was not a creditor at all, and could not petition. The Judge seems to have suggested that Re Australian Joint Stock Bank was a case where a future creditor could petition, but that seems to have been a misreading of the very short report.

68. But these first instance cases in England do not, in my judgment, conclude the matter under the present law in the Cayman Islands. The Companies Law (2007 Revision), as Mr Akiwumi has been at pains to point out, is at present at least, in very different terms from its English equivalent. In England, the Insolvency Act 1986 includes section 123(2) which provides that:-

> "*A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities*".

69. No such provision has yet been introduced into Cayman law, and so far as I can see, it will not be introduced when the Companies (Amendment) Law 2007 comes into force.

70. Section 123(2) of the English Insolvency Act 1986 was introduced to allow the 'balance sheet' test to prove that a company is unable to pay its debts, in addition to the 'cash flow' test. Up until its introduction, a petitioner in England wishing to rely on the 'balance sheet' test had to petition on the 'just and equitable' ground. In effect, it was included in order to reverse the effect of two cases:-

(1) First in European Life Assurance Company (1869) LR 9 Eq 122, where the headnote reads "*The Court will not order a company to be wound up under the just and equitable clause by reason of any liabilities not immediately payable unless it is reasonably certain that the existing and probable assets will be insufficient to meet the existing liabilities, and will not in any case take into account the possible liabilities or profits which may accrue in respect of future business*". Sir W.M. James V-C said at page 127: "*I think that the Petitioners have not made out a case at all in any sense of inability to pay debts within the meaning of the Act of Parliament. I apprehend that Mr. Glasse is right in his construction that inability to pay debts must refer to debts absolutely due - that is to say, debts for which a creditor may go at once to the company's office and demand payment. The case has therefore been put, really and substantially, not upon the ground of actual inability to pay a debt actually due ...*". The Judge went on to hold that, if he had determined that the company was balance sheet insolvent, it would have been open to him to wind up on the 'just and equitable' ground.

(2) Secondly, in Re a Debtor Ex parte the Debtor v. Allen [1967] Ch 590, the Divisional Court held that only presently payable debts could be considered for the purposes of the debtor's ability to pay his debts under section 6 of the English Bankruptcy Act 1914.

71. It might be noted that these cases explain the Australian Joint Stock Bank case, which was simply a case in which a petitioner was unable to petition on the 'unable to pay its debts' ground as it had no present debt. The petitioner, therefore used the 'just and equitable' ground and sought (successfully as it appears) to show that the company was balance sheet insolvent. The other cases relied on Mr McDonough do not go beyond what I have set out above as their *ratio decidendi*. They certainly do not show that, before section 123(2) of the Insolvency Act 1986, a creditor could rely on a future debt as showing that a company was unable to pay its debts.

72. For these reasons, therefore, it seems to me that the Petitioner did not have the *locus standi* to petition on the 'unable to pay its debts' ground as a creditor with a future debt. The Petitioner's debt was one that was not presently due and payable. It had been suspended under the Articles and the CEM for an indeterminate period. Plainly, Mr McDonough is right in saying that the debt still exists, even it has been validly suspended. But, it is not presently due and payable in the sense that it is a debt "*for which a creditor may go at once to the company's office and demand payment*". Mr McDonough can also validly say that, under Insolvency Rule 12.3 (cited above), a future debt is provable in the liquidation. That does not, however, make the debt automatically capable of founding a valid creditor's petition.

73. Again, if the suspension is eventually shown to have been invalid, the debt would be presently due and payable. But that, in my judgment, is not the present position. This Court cannot assume that the company's actions are *male fide*: see Charles Forte Investments Limited v. Amanda [1964] 1 Ch 240, where Willmer LJ in the English Court of Appeal held at pages 252-5 that, in dealing with a Petition, the Court would not assume that the powers of the directors had been exercised otherwise than *bona fide* without clear evidence to that effect. The factual dispute as to the validity of the 17th and 22nd April 2008 resolutions is an evidential one that cannot be resolved on a strike out application.

74. In addition, the fact that there is a future debt, which will not go away, could, in theory, be used by the Petitioner, as it was in Re European Life Assurance Society, as evidence in support of an allegation that the Company was balance sheet insolvent and, therefore, that it was 'just and equitable' to wind up. In this case, however, it was common ground that the evidence at the hearing before the Chief Justice was that the Company was balance sheet solvent. That position may or may not be the same at any eventual hearing of this Petition.

Sixth issue: In any case, did the Petitioner have locus standi to petition to wind up the Company on the grounds of the non-payment of the redemption proceeds?

75. The point taken by the Company is that the Petitioner did not anyway have *locus standi* as a Member to petition on the grounds of the debt, because a Member can only petition if he has a tangible interest in the winding up (see In Re Rica Gold Washing Company (1897) L.R. 11 Ch. D. 36 per Jessel M.R., and a line of subsequent cases culminating in Gamlestaden Fastigheter AB v. Baltic Partners Limited [2007] UKPC 26 at paragraph 32). Since it was claimed in its Petition that the Company was insolvent, and since the Petitioner would rank behind

unsecured creditors, the Company submitted that it has failed to allege that it has such a tangible interest. Of course, if the Company were insolvent, it would be true that there would be nothing available for the Petitioner as a contributory ranking behind third party unsecured creditors.

76. In my judgment, however, as the Chief Justice held at paragraph 151, the evidence shows that the Company may well be solvent, so that it is at least possible that the Petitioner will have a financial interest in the outcome. In reality, the point is, as Mr McDonough suggested, simply a pleading point, which he has sought to rectify in paragraph 16A of the draft amended Petition, with which I will deal under the 'just and equitable' head below.

Seventh issue: If the Petitioner was unable to petition on the grounds of the non-payment of the redemption proceeds, has it shown any basis for its 'just and equitable' ground in the Petition?

77. The Chief Justice decided that, even if the Petitioner remains only a shareholder of a solvent company and was not a creditor for the redemption proceeds, it had a legitimate expectation that it could redeem its shares in accordance with the Articles, and that it would receive the proceeds of the redemption as indicated by the Company on 24th March 2008 and 11th April 2008. Put another way, the Chief Justice held that the Petitioner could argue that the Company was estopped from denying that the Petitioner should be paid.

78. The Chief Justice was also influenced by the Company telling the Petitioner that it was not going to pay "*until the market recovers*", and by the fact that the Petitioner is now, in effect, locked in so that it is exposed to the risk of the assets declining below the point at which it can be paid in full, without the upside of either an express right to interest or the ability to benefit from an increase in values.

79. In concluding, the Chief Justice held that the Petitioner had *locus standi* to petition on the just and equitable ground, and that it had a "*creditable case*".

80. The problem however, as was pointed out by the Court in the course of argument, is that there was no detailed pleading in the Petition supporting the claim that it was just and equitable that the Company should be wound up. It was clear that the Petitioner was not saying that the Company was balance sheet insolvent, and so should be wound

up on the 'just and equitable' ground as in Re European Life Assurance Society.

81. It transpired, however, that what the Petitioner was really saying was that, even if it was not a creditor (or perhaps not prima facie a creditor):-

(1) The Company had not properly or *bona fide* exercised its right of suspension of the payment of the redemption monies.

(2) The grounds upon which the directors purported to rely in resolving to exercise the right of suspension were not made out on the facts.

(3) The Directors had been faced with a number of conflicts between their duties to the Company, and their own interests or the interests of other interested parties.

(4) The conduct of the Company and the directors amounted to oppression of the Petitioner as a minority.

(5) The substratum of the Company had effectively gone, as a result of the dramatic fall in the NAV and the economic 'meltdown'.

82. At the invitation of the Court, the Petitioner put these grounds in a draft amended Petition placed before the Court on the third day of the hearing. The draft went further than what had been argued before the Chief Justice. But, in reality, it merely made the same complaint that the Petitioner had always made, which was that the Company had promised to pay, had no grounds for suspending payment, or refusing to pay, and that it was grossly unfair for the Petitioner, in these circumstances, to be forced to wait until the Company chooses, in its absolute discretion, to lift the suspension, and to pay.

83. Two questions arise for this Court:-

(1) Is it an abuse of the process of the Court for the Petitioner to litigate the complaints in the amended Petition under the 'just and equitable' ground for winding up, rather than by a writ action?

(2) Should the Petitioner be allowed leave to amend its Petition to plead out the complaints that underpin its claim to wind up on the just and equitable ground?

84. Before answering these questions, it is important to record in a little more detail, the reason why a case of this kind is more difficult in the

Cayman Islands than in England. As already mentioned, in Cayman there is not yet any statutory protection for minority shareholders as there has been in England since section 210 of the Companies Act 1948 was introduced.

85. The cases on the 'just and equitable' ground seem to have focused on small companies which are in the nature of quasi-partnerships. But the principles are long established, namely that the 'just and equitable' ground can be invoked even where the strict legal rights under the articles have been adhered to. In Ebrahimi v. Westbourne Galleries Ltd [1973] A.C. 360, Lord Wilberforce said this at pages 378–380 after reviewing many authorities:-

> *"The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumed by entering a company, nor the court to dispense him from it.* ***It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way***" (emphasis added).

86. This has been reiterated time and time again in cases of high authority, not least in the citation from Lord Hoffmann's speech in O'Neill v. Phillips [1999] 1 WLR 1092 cited by the Chief Justice at paragraph 161 of his judgment.

87. Two other citations from O'Neill v. Phillips explain how these concepts arose:-

(1) First at pages 1099-1100, Lord Hoffmann said the following immediately before citing the above passage from Ebrahimi:-

"First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carries over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in section 459 runs parallel to that which your Lordships' House, in In re Westbourne Galleries Ltd. [1973] A.C. 360, adopted in giving content to the concept of "just and equitable" as a ground for winding up".

(2) Secondly, Lord Hoffmann said this in relation to the concept of 'legitimate expectation' at:

"In In re Saul D. Harrison & Sons Plc. [1995] 1 B.C.L.C. 14, 19, I used the term "legitimate expectation," borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by

the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company.

It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case".

88. In CVC/ Opportunity Equity Partners Limited v. Luis Demarco Almeida [2002] UKPC 16, the Privy Council considered a similar situation to that which faces the Court in this case. Their Lordships held that a 'just and equitable' petition in the Cayman Islands was not an abuse of process where the Petitioner minority shareholder had refused an unreasonably low offer for his shares. Lord Millett, giving the Opinion of the Board, said at paragraph 53 that the petitioner can be restrained where he can achieve his objective by other means (apart from a just and equitable petition). But he distinguished the situation in Charles Forte Investments Limited v. Amanda [1964] 1 Ch 240 (which was heavily relied upon by Mr Akiwumi), where a petition was brought to bring inappropriate pressure on the company to register share transfers. In Charles Forte, it would have been more appropriate for the shareholder to have brought an action to rectify the register and the petition was struck out as an abuse of process.

89. The question then is whether the Petitioner's petition is a legitimate means of seeking the Court's review of the Company's exercise of what it claims to be its strict legal rights. There are two competing sides to this question.

90. The Company says that the Petitioner's appropriate course is to commence a writ action seeking to challenge the bona fides or propriety of the Company's decision to suspend payments. In that way, declarations and damages could be awarded to meet the causes of action established. The Company submits that a winding up petition is not appropriate since the liquidation of the Company is not what the Petitioner really wants – all it wants is its money back, and to get that that it must vitiate the Company's decision.

91. The Petitioner says that the Company is carrying on with its investments, notwithstanding a disastrous economic position. It says that the Company has wholly ignored its right to be redeemed, and has failed to make any provision to pay it off, despite having been perfectly capable of so doing. It submits, that, if it is right, and the Company's decision to suspend was neither *bona fide* nor valid, it will be entitled to wind up either as a creditor or on the just and equitable ground. It does not mind which. The Petitioner argues that it needs none of the relief that it could obtain in a writ action. It wants the Company stopped from continuing to retain its investments without paying the redemption proceeds that are long overdue.

92. In my judgment, it is impossible for this Court to say now that the 'just and equitable' petition is an abuse of the Court's processes or procedures – or even that it is bound to fail. Where there is no unfair prejudice statute, allowing a minority to seek the relief he really seeks – namely to be bought out (or in this case paid out) – the 'just and equitable' ground, as I have repeatedly said, quoting Lord Millett, has more work to do.

93. As Lord Millett pointed out in CVC supra at paragraph 16: "... *The only remedy available to a minority shareholder is to have the Company wound up. This is likely to be contrary to his own interests and proportionately more so to the interests of the majority, and it is not normally what the minority shareholder really wants. But the risk that the company may be wound up tends to concentrate minds and encourages the parties to negotiate an acceptable compromise*".

94. Thus, in my judgment, the Petition in this case is not an abuse of the process of the Court and should be allowed to stand. It is worth mentioning again that, even when the new Section 95(3) inserted by the Companies (Amendment) Law 2007 comes into force, it will allow a statutory remedy for minority shareholders by, for example, ordering the purchase of shares, but it will do so in the context of a

contributories' 'just and equitable' petition: there will, even then, be no free standing unfair prejudice petition in the Cayman Islands.

95. The second question posed above is whether the Petition can now be amended. In my judgment, it can. Mr Akiwumi was not able to point to any prejudice caused by the attempt to amend at a late stage in this strike out appeal. Amendments are frequently allowed in strike out applications so as to allow the real issues between the parties to be revealed and litigated. Here, the Company knew all along (as recorded in the Chief Justice's judgment) the bare bones of the case advanced on the 'just and equitable' ground. It has now been elaborated. But that elaboration will merely allow the trial of this Petition to take place in a more focused and, therefore, expeditious fashion.

96. Finally, Mr Akiwumi argued that there was no evidence to support the Petition. And it is true that the draft amended has not been verified on affidavit as it should be. But this is a technical point. All the allegations are supported by the facts contained in existing evidence. I would require the Petitioner to undertake to file an affidavit verifying the draft amended Petition. But I do not, otherwise, regard the absence of a formal verifying affidavit as significant. In any event, for reasons that appear in my conclusions set out below, the Petition may in fact be better amended after further amendments have been made by application to the Grand Court.

Conclusions

97. In conclusion, the Company will be granted leave to appeal, and the appeal will be allowed in part.

98. In my judgment, whilst the Chief Justice was right to conclude that the Petitioner became a creditor on 31st March 2008 in respect of the redemption proceeds, he was wrong to hold that the Company did not have power under the Articles and the CEM to suspend the payment of those redemption proceeds.

99. In the existing Petition, there is no clear allegation that the power to suspend the payment of redemption proceeds had been improperly exercised. There are now a series of allegations in the draft amended Petition to the effect that that power was improperly exercised, the April resolutions were *ultra vires*, and that the Company's conduct towards the Petitioner has been oppressive. If those allegations are made good, it is possible that the Court will hold that the April resolutions were invalid, so that the Petitioner remained a creditor after the 17th April 2008.

100. For that reason, I do not think it would be right to strike out any part of the Petition. This Court will, however, record in its order that, on the proper construction of the Articles and the CEM, the Company had a power to suspend the payment of redemption proceeds after the Redemption Date but before payment of those proceeds. This declaration is one of law and will say nothing about whether the power was, as a matter of fact, properly or validly exercised.

101. In order to enable the issues raised by the Petition to be efficiently and expeditiously tried, the Petitioner may wish to apply to make further amendments to the draft amended Petition to reflect the legal holdings in this judgment, and so as to make it clear that the Petitioner cannot claim to be a creditor, unless and until the suspension is lifted or the exercise of the suspension is vitiated by order of the Court or in some other way.

102. In these circumstances, it would be inappropriate for this Court to grant permission to amend the Petition in the form of the present draft. That said, I would indicate that:-

(1) The question of amendment should be dealt with as soon as possible by the Grand Court; and

(2) Permission should be granted for an amendment to be made to plead the 'just and equitable' ground in much the form of the existing draft, but excluding the allegation that the Petitioner is an existing creditor, save on the basis that the exercise of the suspension power was invalidly exercised.

103. The parties made submissions on whether these proceedings should be made public, bearing in mind that the Company contended that confidence could be lost if the possibility of a petition were known to investors and potential investors. It appears that the Petitioner does not now seek to advertise the Petition, which will now proceed primarily as a contributories' 'just and equitable' petition.

104. In my judgment, however, it would be inappropriate for us to make any direction preventing publication of this Judgment. There would be no such order if the claim had been brought in an ordinary writ action, and no such direction is appropriate in this Petition.

Vos, J.A.

I too have read in draft the Judgment of Vos, J.A. and agree with the decision and reasons therefor.

Forte, P. (Acting).

I have read in draft the Judgment of Vos, J.A. and agree with the decision and reasons therefor.

Mottley, J.A.