

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**CIVIL APPEAL NO. 16 OF 2006**  
[GRAND COURT CAUSE NO. 830 OF 2003]

**IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)**

**AND IN THE MATTER OF PARMALAT CAPITAL FINANCE LIMITED**  
**(In Liquidation) ("the Company")**

**BETWEEN:**

- (1) Parmalat Capital Finance Limited
- (2) Parmalat Finance Corporation BV
- (3) Olex SA
- (4) Parmalat Netherlands BV
- (5) Parmalat Soparfi SA
- (6) Parmalat SpA ("Old Parmalat")
- (7) Parmalat SpA ("New Parmalat")
- (8) Parmalat Participacoes do Brasil Ltda

**Appellants**

**AND:**

- (1) Food Holdings Ltd (In Liquidation)
- (2) Dairy Holdings Ltd (In Liquidation)

**Respondents**

**Before:**

- The Right Hon. E. Zacca, President
- The Hon. I. Forte, Justice of Appeal
- The Hon. E. Mottley, Justice of Appeal

Heard: August 1, 2, 3 & 11<sup>th</sup> 2006      Delivered: 5<sup>th</sup> December 2006

Appearances: Gabriel Moss Q.C. instructed by Andrea Dunsby of Turner & Roulstone for the Appellants, Michael Crystal Q.C. instructed by Sandie Corbett of Walkers for the Respondents, and Charles Quin Q.C. of Quin and Hampson for Bank of America.

**REASONS FOR JUDGMENT**

**MOTTLEY, J.A.**



1. On 29 December 2003, Food Holding Limited ("Food") and Dairy Holdings Limited ("Dairy"), who alleged that they were creditors of Parmalat Capital Finance Limited ("PCFL"), presented a petition to the Grand Court seeking to wind up PCFL under the provisions of the Companies Law (2004 Revision) ("the Law"). On that day, Henderson J. appointed James Cleaver and Gordon MacRae as Joint Provisional Liquidators ("JPL's").

The petition was based on debts which total at least \$516,000,000.00 United States currency ("the Petition Debts") due by PCFL to Food & Dairy. These debts arose under Put Agreements dated respectively 17 December 1999 between PCFL and Food and 22 June 2001 between PCFL and Dairy. The debt due to Food was US\$270,266,199.52, while that due to Dairy was US\$245,999,252.12. Mr. Cleaver and Mr. MacRae had previously on 24 December 2003 been appointed Joint Official Liquidators of Food and Dairy. The provisional appointment in respect of Food & Dairy was made permanent by the court on 1 April 2005.

2. The petition to wind up came on for hearing in the Grand Court in a trial that lasted over 4 days. It was opposed by PCFL together with Parmalat Finance Corporation BV, Olex SA, Parmalat Netherlands BV, Parmalat Soparifi SA, Parmalat SpA (Old Parmalat), Parmalat SpA (New Parmalat) and Parmalat Participacoes do Brasil Ltda ("the Other Companies). On 12 May 2006, Henderson J ordered that PCFL be wound up by the court subject to the provisions of the Law. The judge further ordered that Mr. James Cleaver and Mr. Gordon MacRae be appointed jointly and severally Joint Official Liquidators ("JOLs") of PCFL. The JOLs were "authorized to do any acts or things" considered by the JOLs to be necessary or desirable in connection with the liquidation of PCFL and winding up of its affairs. The Order contains other terms but it is not necessary for the purpose of this appeal to set them out in greater detail.

3. In this appeal the Order of Henderson, J is challenged by PCFL and the other companies on the ground that Food and Dairy had no standing to petition for the winding up or to apply for the appointment of official liquidators. In addition, or in the alternative PCFL and the companies state that the alleged debts due to Food and Dairy are disputed on substantial grounds and, as such, the judge erred in appointing the JOLs. Finally, and without prejudice to their contention that the winding order ought not to have been made, PCFL and the other companies took issue with the identity of the JOLs appointed by the Court.

### **BACKGROUND**

4. PCFL and the other companies were part of the Parmalet Group ("the Group"), a multinational food group with its operations centered in Italy. At the end of 2003, the Italian operations folded amidst allegations of criminal conduct on the part of the management of the Group. The Italian government appointed Dr. Enrico Bondi, known as an independent turn around expert to manage the Group and certain of its subsidiaries. The Italian Courts subsequently confirmed Dr. Bondi's appointment. PCFL, which was managed and controlled in Malta from around March 2002, was used to raise finance for the Group.
5. Food and Dairy are companies incorporated in 1999 in the Cayman Islands on instructions from Bank of America to be used as special purpose vehicles for the sole purpose of raising money by issuing loan notes ("the Notes") to institutions in the United States. Food and Dairy each issued Notes of US\$150 Million on 17 and 22 December respectively. This money was to be used by Food and Dairy to purchase shares in Parmalat Administracao SA (Parmalat Admin), a Brazilian company within the Parmalat Group. Food and Dairy acquired 18.18% of the share capital in Parmalat Admin. Around the time that Food and Dairy issued their Notes, PCFL entered into Put Agreements with Food and Dairy. The Food Put Agreement is dated 17 December 1999 while that with Dairy is dated 22 June 2001. PCFL agreed to buy the shares in Parmalat Admin if the Put events as described in

the Agreement occurred, or if Food and Dairy still owned their shares in Parmalat Admin at a specified date in November 2003 for an "option price" which was to be calculated. On issuing their notes, Food and Dairy, by way of security Trust Agreements, assigned all rights and interest under the Put Agreements which they had signed with PCFL to a security Trustee, Wells Fargo Minnesota N.A. (Wells Fargo), for the benefit of the Note holders. A notice of the assignment to the security trustee was served on PCFL by Food and Dairy.

6. In Clause 2.1 of the Put Agreements between PCFL and Food the terms of the Put Events are set out. If Food held its shares in Parmalat Admin on 20 November 2003, PCFL was automatically required to pay Food the Option Price by 12 December 2003. This Option Price was stated as US\$150,000,000 together with certain other amounts. In relation to the Put Agreement between PCFL and Dairy, PCFL would be automatically required to purchase Dairy's shares in Parmalat Admin if Dairy still held the shares on 25 November 2003. PCFL was required to pay Dairy the Option Price, which was stated as US\$172,252,068 together with certain other amounts, by 17 December 2003.
7. In December 2003, the Parmalat Group collapsed. As a result PCFL was unable to meet its obligations to Food & Dairy under the Put Agreements. The Base Option Price which PCFL was obligated but failed to pay Food was US\$270,266,199.52. The Base Option Price which PCFL was required but failed to pay Dairy was US\$245,999,252.10. It was failure of PCFL to pay these debts which led Food and Dairy to petition the Court for the order to wind up PCFL.
8. In February 2004, an application was made by PCFL and the other companies to discharge the JPLs and to replace them with Dr. Bondi and/or Mr. Russell Smith. This application was dismissed in March 2004 by Henderson J. In that application, PCFL and other creditors supported the making of the winding up order against PCFL. This was stated in the second affidavit of Mariela Belmontes dated 26 February 2004.

9. Dr. Bondi proposed a restructuring Plan for the Group which was approved in July 2004 by the Italian Government. In March 2005, a final revised document entitled "Proposal of Composition With Creditors" was prepared by Dr. Bondi. This Composition was subsequently approved in Italy by the court in Parma in October 2005. The result of this restructuring led to a new entity called Parmalat SpA ("New Parmalat"), of which Dr. Bondi is the Chief Executive Officer, being established. New Parmalat is now listed on the Milan Stock Exchange.
10. In November of 2005, the JPLs on behalf of PCFL instituted proceedings in the United States of America, in North Carolina against Bank of America and in Chicago, Illinois, against Grant Thornton. These proceedings ("the US Proceedings") were considered by Henderson J as the most significant asset of PCFL, which all parties to these proceedings agreed is hopelessly insolvent.
11. In December 2005, PCFL and the other companies applied to the Grand Court for an order to dismiss the petition filed by Food and Dairy which sought to wind up PCFL. The application was made on the ground that Food and Dairy were not creditors of PCFL within the meaning of s. 96 of the Law. The application also sought to replace the JOLs with liquidators suggested by Dr. Bondi. By the time of the hearing before Henderson J, Dr. Bondi had recommended other persons to be appointed as JOLs.
12. On the hearing of the petition, Henderson J ordered that Messrs Cleaver and MacRae be appointed as JOLs of PCFL. In addition, the judge held that the company was hopelessly insolvent and its affairs required investigation in the Cayman Islands. It is against this decision that the appellants have appealed to the Court.

## THE APPEAL

### GROUND 1

13. In the first ground of appeal, the appellants alleged that Food and Dairy have no 'technical standing' or 'standing in substance' to petition the Court for winding up or to apply to the Court for the appointment of Joint Official Liquidators. The appellants submit that the jurisdiction of the Grand Court to wind up a company falls within the ambit of the provisions of the Law. Mr. Moss QC for the appellants submitted that the burden of proof is on Food and Dairy as petitioner to demonstrate on the balance of probability that they are creditors. Counsel further submitted that even though Food and Dairy may have 'technical standing' in order to obtain an order to wind up the PCFL, Food and Dairy had to show that they had 'substantial standing'. Counsel further submitted that, in order to establish 'substantial standing', Food and Dairy had to show that they had a proper interest in the relief which they were seeking. The petitioners had to show that they were creditors. If they failed to do so they would not have *locus standi*. Mr. Moss relied on the Privy Council case from Cayman Island, **Deloitte & Touche AG v. Johnson et al [1999] 1 WLR 1605** in particular a passage at p. 1611 (letters D-H) which is set out below.
14. It is the contention of PCFL and the other appellants that Food and Dairy had assigned the right to receive the sums due by PCFL to Food and Dairy under the Put Agreements to Wells Fargo as security trustee. Consequently, counsel contended that Food and Dairy no longer had any interest in the Petition Debt and, as such, could not qualify as creditors within the provision of s. 96 of the Law.
15. Mr. Moss stated that although the word "creditor" in s. 96 was not defined in the Law, nonetheless, the plain meaning of "creditor" in the context of the Cayman legislation means a "person entitled to payment of a liquidated debt presently due". As earlier stated, it was the view of the appellants that the issue of who is a creditor under s. 96 of the Law involved a two fold process of proving what counsel referred to as 'technical standing' and 'substantial standing'. He contended that, in relation to the issue of 'technical standing', the

critical question is whether Food and Dairy are parties entitled to payment of the Petition Debt. The appellants contended that Food and Dairy are not creditors under s. 96 of the Law and they do not even have technical standing. This submission is grounded on the allegation that Food and Dairy have no right to receive the proceeds of the Petition Debt. At any rate, it was alleged they certainly did not have the beneficial interest in the Petition Debt, this having been assigned to the security trustees. In any event, the appellants stated that even if Food and Dairy were to receive payment of the Petition Debt they would have to hold it in trust for Wells Fargo, the security trustee.

16. The appellants further submitted that, even if it may be said that Food and Dairy had 'technical standing', it certainly could not be said that they had any substantial standing. This proposition is based on the submission that Food and Dairy had no interest in winding up of PCFL since they would receive nothing from it. It was contended that in order to have substantial standing, Food and Dairy would have to show that they were entitled to participate in the ultimate distribution of the assets of PCFL. Counsel asserted that Food and Dairy could not do this as they had assigned their beneficial interest to receive the money under the Put Agreement to Wells Fargo for the benefit of the Note holders, and it was unlikely that any proceeds would remain which would revert to Food and Dairy.
17. Counsel for the appellants pointed out that, under the Law of New York, which governed the Security Agreements under which the beneficial interest had been transferred to Wells Fargo three propositions had been agreed to by the expert witnesses on New York law. These propositions which were accepted, by Henderson J showed that, under the laws of New York, the right to receive payments from PCFL had been transferred to the security trustee by Food and Dairy. In these circumstances, any payment received by the security trustee would have to be deposited by it in the collection accounts. Money in the collection accounts would then be applied in accordance with priorities which were set out in the Security Agreement with any surplus reverting to Food and Dairy.

18. Counsel relied heavily on the statement by Henderson J in his judgment to the effect that it was entirely unlikely that there would be a surplus after the security trustee had paid out the money which was paid in to collection accounts by the security trustee. It was his contention that Food and Dairy would not in reality have any real or substantial interest in the prospective liquidation of PCFL.
19. The appellants submitted that, as the assets subject to the security including the Put Agreement belonged to the security trustee as holder of the security, they were to be administered by the security trustee on behalf of the beneficiaries, the holders of the Notes. It was said that the result of this assignment was that the JOLs of Food and Dairy had no right to administer the options under the Put Agreements; for this proposition counsel relied on **Buchler v. Talbot [2004] AC 298**.
20. Counsel stated that the purpose behind the Security Agreement was to provide protection to the holders of the Notes in the event of default by Food and Dairy. He said that Food and Dairy were now purporting to exercise rights which they had in fact transferred to Wells Fargo. It was argued that in these circumstances Food and Dairy were not creditors and therefore had no standing to petition the Court for an Order to wind up PCFL. The petition ought therefore to be dismissed. If this submission is correct, then Dairy and Food had no standing to apply for the appointment of Mr. Cleaver and Mr. MacRae as JOLs. Consequently, if any winding order is to be made, the independent persons put forward by the appellants ought to be appointed as JOLs.
21. Mr. Michael Crystal, QC submitted that the argument of the appellants regarding the need for a creditor to have 'technical standing' and 'substantial standing' should be rejected on the grounds that it reflects a misunderstanding of the case of **Deloitte and Touche AG v. Johnson et al** referred to above. Counsel contended that, while it is accepted by all parties that PCFL is insolvent, nonetheless PCFL does not dispute that the Petition Debt is owed albeit to the Security Trustee under the assignments.

22. Counsel agreed with the conclusion reached by Henderson J that Food and Dairy retained the legal title to the Petition Debts. In such circumstances Food and Dairy would have been entitled to any residue in the collection accounts after all priorities had been met. Indeed the judge pointed out that “legal title without the beneficial interest is nonetheless sufficient to establish standing to request a winding up”.
23. In order to present a petition to wind up a company, the petitioner must demonstrate by evidence that the petitioner has locus standi. To do this, the petitioner is obligated to show that the petitioner is a creditor within s. 96 of the Law. Without such locus standi, the petition is bound to fail even if the evidence shows that the company is insolvent. In **Mann v. Goldstein [1968] 1 W.L.R. 1091**, Ungood -Thomas J said at p. 1095:
- “To enable the Companies Court to make the winding-up order itself, not only must the petitioner have been shown to be entitled to present the petition, but one of the grounds specified in section 222 of the Companies Act must be established: and the only such ground relied on in the petition and before me was that the company is unable to pay its debts. This requirement is additional to the pre-condition of presenting the petition, that the petitioner must be a creditor, and is not alternative to it.”
24. As stated earlier, Mr. Moss had argued that, in deciding whether Food and Dairy were creditors under the Law, the court had to approach it on the basis of ‘technical standing’ and ‘substantial standing’. In order to be satisfied that Food and Dairy had ‘technical standing’ to present a petition under s. 96, the court had to be satisfied that they were “persons entitled to payment of a liquidation debt presently due”. If the Court was so satisfied, it was then necessary to decide whether Food and Dairy had ‘substantial standing’. In ascertaining whether ‘substantial standing’ existed, the issue for the court was whether Food and Dairy had any right to participate in the ultimate distribution of the assets of PCFL by the liquidator. For this proposition Mr. Moss relied entirely on **Deloitte and Touche AG v**

**Johnson et al.** In the opinion of the court, this is a complete misunderstanding of what was said by Lord Millet in his judgment.

25. In Deloitte's case, a company called Omni Securities Ltd. which was incorporated in Cayman Islands was placed in voluntary liquidation in November 1991. The respondents in the appeal were appointed joint liquidators of the company. In March of 1995, an action was instituted in the Grand Court against a number of defendants alleging negligence in the audit of the company's financial statements for the years 1988 and 1989. The appellants were the company's auditors who had signed off the audit report for the company's financial statements for 1990. Shortly after the service of the Writ on the appellants, it applied by Originating Summons for an Order removing the respondents as liquidators of the company on the ground of their conflict of interest. In the alternative the appellants sought to restrain the respondent from continuing the proceeding against it. The respondents issued a Summons to strike out the Originating Summons on the grounds that the appellants had no locus standi or any real interest in applying for the relief sought in the Originating Summons. It is not necessary to consider the manner in which it was alleged that the conflict of interest arose.

26. In delivering the judgment of the Judicial Committee of the Privy Council, Lord Millett said at p. 1611:

"In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the Court. The first occurs when the Court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will

act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint..... It is therefore incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.”

27. Lord Millett went on to point out that:

“Where the court is asked to exercise a statutory power therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he “has an interest in making the application or may be affected by the outcome”. It means that he has a legitimate interest *in the relief sought*. Thus even though the statute does not limit the category of persons who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not a creditor. See **In re Corbenstoke Ltd. (No. 2) 1990 B.C. LC 60.**”

28. In the opinion of the court, Lord Millett identified “two different kinds of cases” which must be distinguished. His Lordship clearly treated the situation of the persons who may apply to the Court as falling within two different categories which are distinguishable from each other. In the first situation, his Lordship deals with the case where the statute itself confers on a particular person the right to invoke the power of the court. A case such as this exists under the provision of s. 96 of the Law. S. 96 provides:

“any application to the Court for a winding up of a company shall be presented by the company, or any one or more than one creditor or contributory of the company or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all creditors and all the contributories of the company in

the same manner as if it had been made upon a joint petition of a creditor and a contributory.”

An examination of s. 96 demonstrates that a petition to wind up a company may only be presented by the company itself, a creditor or a contributory of the company. The court has no jurisdiction to entertain a petition presented by any person who is not mentioned in s. 96 of the Law.

29. The provisions of s. 96 must be distinguished from the provisions of s. 106(1) (now s. 107(1)) which was the relevant section under which the appellants sought to invoke the jurisdiction of this Court to remove the liquidators in Deloitte’s case. S. 107(1) provides:

“Any official liquidator may resign or be removed by the court on due cause being shown: and any vacancy in the office of an official liquidator appointed by the court shall be filled by the court.”

An examination of this section shows that it does not provide that the application to the court must be made by any particular person or group. In other words, the section does not contain any restrictions as to who may apply. This is an example of the second case referred to by Lord Millett. Any person may apply. However, in such a case Lord Millett says that “it is therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction”. Clearly this section gives the court jurisdiction to remove a liquidator on due cause being shown. However, in order to invoke the jurisdiction under this section, the person making the application must show that he is a proper person. To decide whether that person has power to invoke such jurisdiction it will be necessary for the court to have regard to the nature of the relief that is being sought. In **Deloitte’s** case Lord Millet stated that the plaintiff did not lack jurisdiction to invoke s. 106(1). However, in order to decide whether the plaintiff could apply to have the official liquidators removed as liquidators, the court had to ask itself whether the applicant had a legitimate interest in the relief being sought. In order to establish that such interest existed the plaintiff had to show that it was “entitled to

participate in the ultimate distribution of the company's assets". Without such interest the plaintiff could not be said to have any legitimate interest in having the liquidator removed.

30. In support of his proposition of the category of 'substantial standing', Mr. Moss relied on that passage of Lord Millett's judgment where, having acknowledged that the company is insolvent and that the liquidation was continuing under the supervision of the Court, Lord Millett went on to state at p. 1611:

"The only person who could have any legitimate interest of their own in having the liquidator removed from office as liquidator are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors."

Counsel relied on this statement as support for his proposition that a creditor means a person entitled to participate in the ultimate distribution of the company's assets. But this proposition ignores what Lord Millett had said earlier when he identified the question engaging the attention of the Court. At page 1608 Lord Millett said:

"The question on the appeal, therefore, is whether the plaintiff which is neither a creditor nor contributory, has any locus standi to invoke the statutory jurisdiction of the court to remove the liquidators as liquidators of the company."

His Lordship made it abundantly clear the issue of who is, or is not, a creditor was not an issue in **Deloitte's** case.

31. In our view Deloitte's case did not decide the issue for which the appellants contend on this appeal. That case has nothing to do with who is a creditor or who may petition. It simply decides that where the statute does not in any way limit the persons who may apply to the court for the exercise of a power given to it by statute, the person making the application must show that the court has power to make the order sought and that the person applying is the proper person to invoke the court's jurisdiction. In order for an appellants to show that he is the proper person in the context of an application to remove liquidators under s. 106(1) (now 107(4)) of the Law, that person must show that he is "entitled to participate in ultimate distribution of the company's assets".

32. The attack on the lack of standing by Food and Dairy was also based on the fact that Food and Dairy had transferred their right to receive payment from PCFL under the Put Agreements to the security trustees. Mr. Moss submitted that, in these circumstances, Food and Dairy “did not have and would never have any real or substantial financial interest” in the liquidation of PCFL. For this he relied on the statement by Henderson J. that “it is entirely unlikely” that there would be any surplus remaining after the security trustees had paid out any money received by it, in accordance with the given priorities. Counsel contended that the assets which were subject to the security including the payment under the Put Agreements belonged to the security trustees and are to be administered by the security trustee on behalf of the beneficiaries, the holders of the Notes. In these circumstances, he argued that Food and Dairy had no beneficial interest in the alleged debt. For this proposition he relied on **Buckler v. Talbot [2004] AC 298** where Lord Millett said at paragraph 51:

“Bankruptcy and companies liquidation are concerned with the realization and distribution of the insolvent’s free assets among the unsecured creditors. They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amount secured by them only the equity of redemption remains the property of the charger and falls within the scope of the charger’s bankruptcy or winding up. As James L J observed in **In re Regent’s Canal Ironworks Co. (1877) 3 Ch. D 411, 427** charge holders are creditors “to whom the [charged] property [belongs]....with a specific right to the property for the purpose of paying their debts”. Such a creditor is a person who “is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company but to his own property” per James L J in **In re David Lloyd & Co. (1877) 6CL D. 339, 344.**”

33. Counsel did not appear to place much emphasis on that portion of the judgment of Lord Millett where he said:

“Asset subject to a charge belongs to the charge holder to the extent of the amount secured by them *only the equity of redemption remains the property of the charger and falls within the scope of the bankruptcy or winding up.*” (emphasis ours)

The charge holders interest in the charged property is not absolute but is limited to the extent of the amount secured. The interest of the charger in the property is not extinguished and remains if only limited to the equity of redemption.

34. Henderson J., in dealing with the effect of the security documents which he characterized as being complex, identified the following elements of those documents:

- “1) Under New York law, the right to receive payment from PCFL was transferred to the security trustees by Food and Dairy;
- 2) upon receiving such payment, the security trustees were to deposit the money into the “collection accounts”;
- 3) money in the collection accounts had to be supplied in accordance with certain priorities set out in the security agreement after which any remaining surplus had to be paid to Food and Dairy;
- 4) Legal title to the debts owned by PCFL remained at all times in Food and Dairy (this point was conceded during argument);
- 5) the security documentation expressly retained with Food and Dairy the right to demand payment from PCFL of the debts.”

35. The appellants did not challenge this assessment of the relevant element of the security documents by Henderson J. Food and Dairy did exercise their demand for payment from PCFL. However, according to this assessment, the legal title to the debts remained owned by Food and Dairy. Food and Dairy were entitled to receive any surplus after all payment from the “collection accounts” had been made by the security trustees. No challenge is

made to the right of the security trustee to make payments out of the "collection accounts". However once these payments are made, security trustees are obligated to pay any surplus to Food and Dairy.

36. In his judgment Henderson J concluded that the "legal title without the beneficial interest is none the less sufficient to establish standing to request a winding up". For this proposition he relied on a statement by Chadwick J in **Bell Group Finance (Ply) Ltd. (in liq.) v. Bell Group (UK) Holding Ltd. [1996] BCC 505:**

"If the debenture is valid, the effect of Crystallization was that debts, wherever situate, acquired by BGF after 1 February 1990 became the subject of an assignment in equity by way of fixed charge to Westpac as security for the secured liabilities under the debenture. Prima facie, however, the legal title to the debts remained in BFG."

Applying this reasoning which the Court accepted is correct, this court is satisfied that even though Food and Dairy had transferred the beneficial interest to the security trustees, they none the less retained the legal title to the debts. For this reason also, this Court concluded that Food and Dairy would have standing as creditors which would entitle them to present the petition to wind up PCFL. In the opinion of this Court, it is the right to receive the payment of any surplus and not the actual payment which gives Food and Dairy sufficient interest to accord them standing as creditors and entitled them to present this petition. Consequently, the contention of the appellants that Food and Dairy had no locus standi to present the petition to wind up PCFL is rejected by the Court.

## GROUND 2

37. In their second ground of appeal, the appellants allege that the trial judge erred in law in holding that the respondents were creditors within the meaning of s. 96 of the Law as the petition debts were bona fide disputed on substantial grounds. If the judge had concluded that there was in fact a bona fide dispute on substantial grounds it would mean that the applicants would have failed to establish that they were creditors and therefore did not have

any locus standi to present the petition for winding up. In those circumstances the court would be obligated to have dismissed the petition.

38. This submission of the appellants is grounded upon the proceedings instituted on December 2005 by the JOLs then JPLs in the United States against Grant Thornton International (the auditors of PCFL) and others in Illinois for negligent misrepresentation, aiding and abetting breach of fiduciary duty, accounting malpractice and negligence. As against the Bank of America and others in North Carolina the claim is for breach of fiduciary duty, civil conspiracy and unjust enrichment. (These proceedings will be referred to collectively as the US Proceedings.) Both companies allege that PCFL “never received any value in exchange for the Put Agreements”. The appellants submit that a review of the US Proceedings will show that the JOLs are alleging that the petition debts arose from a breach of fiduciary duty and/or a misfeasance by corrupt insiders of PCFL, and that Food & Dairy had knowledge through their then controller Bank of America. The appellants further submit that the effect of this was to render the Put Agreement transactions void and/or voidable and/or unenforceable by the JOLs. Mr. Moss contended that if the JOLs did not believe the facts alleged in the US proceedings they could not properly plead them. He indicated that when PCFL entered into the Put Agreements and undertook a substantial liability it did so at a time when it was insolvent and got nothing in return.

39. He suggested that on the basis of the facts pleaded in the US Proceedings by the JOLs there can be no doubt that entering into the transactions including the Put Agreements amounted to a breach of fiduciary duty on the part of Bank of America and the corrupt insiders of PCFL who, as the JOLs allege, were in “control of and orchestrating the acts of Food, Dairy and PCFL”. In these circumstances, counsel argued, there was a serious issue to be tried as to whether or not Food and Dairy claims are valid and enforceable, based as they are, on fraudulent transactions as pleaded by the JOLs on behalf of PCFL.

40. Counsel complained that the judge erred when he viewed the submissions of the appellants that the petition debt was being disputed on substantial grounds with an air of skepticism. In rejecting these submissions, Henderson J. held:

“On February 3, 2006 the opposing parties gave notice for the first time that they considered the petition debts to be disputed on substantial grounds. These proceedings were commenced in December 2003. No mention of the dispute on substantial grounds was made during an extended hearing in February 2004. When the existence of a bona fide dispute on substantial grounds is alleged for the first time over two years after the court is asked to wind up a company, as has occurred here, the court will naturally bring a degree of skepticism to its examination of the issue.

Those opposing parties have not chosen to adduce evidence from which I might infer that the petition debts are unenforceable. Their assertion is based upon isolated passages in two complaints (i.e. statement of claim) filed by the JPLs in the U.S. litigation.”

The judge continued:

“Each of the complaints is a long and complex document. Overall they seek to portray PCFL as an innocent victim, utilized by others as a vehicle for fraud. No clear basis can be found in either complaint for inferring that PCFL should have attributed to it any knowledge of the fraudulent activity. In any event that is a question of fact, proof of which would require much more evidence than I have before me. Moreover the assertion that PCFL received no value for entering into the put agreement may not succeed at trial in the U.S. It is in this situation that I am asked to leave Food and Dairy to their ordinary remedies and dismiss their application as an abuse of process.”

41. Henderson J concluded that he was “not prepared to dismiss the petition on the basis of an alleged dispute on substantial grounds advanced for the first time more than two years after the filing of the petition and supported by assertions made in the US pleadings”. Mr. Crystal

supported the conclusion of the judge and pointed out that this issue was raised for the first time in a letter by Turner and Roulstone on 3 February 2006 which stated that:

“on the basis of [the Petitioners] pleading against Bank of America in the US the alleged debts are based on fraudulent transaction and in particular constituted breaches of fiduciary duty by those controlling the company of which breaches (or the facts constituting them) the Controllers of [the Petitioners] had knowledge or notice.”

Mr. Crystal further submitted that the US Proceedings did not in fact challenge the Put Agreement or the debt arising under them. Those proceedings, he stated, represent the only assets of substance of PCFL, as Henderson J observed.

42. Mr. Crystal, QC submitted that the approach adopted by the judge was correct, when he rejected the assertions made by the appellants as there was no evidence to support them. He pointed out that the validity and existence of the debts is a matter of New York Law for which there ought to be evidence of the law of New York. Unfortunately there was none. Further, Mr. Crystal submitted that the true nature of the complaint being made by the appellants in this regard was one of inconsistency between the allegations made in the US Proceedings and the petition debts. He asserted that there was no inconsistency in as much as the assertions by the appellants were vague and based on a misreading of the Complaints in the US Proceedings. He pointed out that nowhere in the Complaint in the US Proceedings did the JOLs or PCFL assert that the Put Agreements or the debt arising there from are, like the petition debts, unenforceable. Further, PCFL does not assert that the JOLs fraudulently induced PCFL to enter the Put Agreement. The fraud alleged in the US Proceedings is that of the Bank of America. In addition, Mr. Crystal also contended that the Complaints in the US Proceedings do not allege that PCFL was defrauded. A further reason given by Mr. Crystal for supporting the judgment of Henderson J is the fact that, in the US Proceedings, there is no allegation that the Put Agreements can or should be “avoided, set aside or rescinded” by PCFL so that it would have no obligation to pay the amount due under the Put Agreements. Mr. Crystal pointed out that, rather than seeking to “avoid, set

aside or rescind” the Put Agreements, PCFL is claiming damages against the Bank of America which claim is predicated on the existence and validity of the obligations to pay the sums due under the Put Agreements.

43. This Court has examined carefully the submissions of Mr. Crystal and considers that they should be adopted. The Complaints in the US Proceedings do not in our opinion cast any doubt on the fact that PCFL is indebted to Food and Dairy under the terms of the Put Agreements. The claims for damages in the US Proceedings are in fact predicated on the existence of the Put Agreements. Consequently, this court concludes that there is no bona fide dispute on a substantial ground that the Petition Debts are due from by PCFL to Food and Dairy. The submissions of the appellants on this aspect are rejected.
44. The appellants, on their second ground, further submitted that where the petition debt is bona fide disputed on substantial grounds, the “alleged creditor” is not in fact “a creditor” who is entitled to present a petition to wind up the company. They submitted that if the petition debt is in fact bona fide disputed on substantial grounds the petition ought to be dismissed as an abuse of process. It was their contention that the Court had no discretion to make the winding up order. For the reasons set out below this submission was rejected.
45. As stated earlier, it was contended by Counsel for the appellants that the issues raised in the US Proceedings meant that the petition debt was *bona fide* disputed on substantial and therefore that the petition should be dismissed. He relied on **Re Great Britain Mutual Life Assurance Society (1880) 16 Ch. D 246**, where at p. 253 Lord Jessel M.R. said:

“The company have disputed the claim. I have not a word to say at present with regard to the *bona fides* of the dispute. I will assume that the directors, advised by their solicitor, thought it proper to dispute the claim. But the claim was disputed upon the grounds of fraudulent misrepresentation of the state of the health of the assured. Of course the obligation of proof is upon the company.....They must bring forward a *prima facie* case which satisfies the

Court that there is something which ought to be tried, either before the Court itself or in an action, or by some other proceedings.”

46. There are a number of cases dealing with the issue of a petition debt which is *bona fide* disputed on substantial grounds. In **Mann v. Goldstein [1968] 1 W.L.R 1091**, Ungood - Thomas J. said at p. 1098:

“For my part, I would prefer to rest the jurisdiction directly on the comparatively simple proposition that a creditor’s petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purposes of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court: and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of process of the court.”

47. The issue of a disputed debt in a petition to wind up a company also engaged the attention of the court in **In re Lympe Investment Ltd. [1972] 1 W.L.R. 523**. In delivering his judgment Megarry J. said at p. 527:

“It therefore seems to me that this petition must fail. A real dispute, turning to a substantial extent on disputed questions of fact which require viva voce evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with modern practice to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seem to stem from **In re London & Paris Banking Corporation (1974) L.R. 19 Eq. 444**.....Further, **Mann v. Goldstein {1968} 1 W.L.R. 1091** cited with approval in the New Zealand Court of Appeal in **Bateman Television Ltd. v. Coleridge Finance Co. Ltd. [1969] N.Z.L.R. 794**,

provides authority for saying that when a petition is based on a debt which is disputed on substantial ground, the petitioner is not a "creditor" within section 224(1) of the Act of 1948 who has locus standi requisite for the presentation of the petition, even if the company is in fact insolvent."

48. The final authority to which reference is made is **Stonegate Securities Ltd. v. Gregory** 1980 Ch. 576. Buckley LJ in adopting that portion of the judgment of Ungood-Thomas J in **Mann v Goldstein** [1968] 1 WLR 1091 referred to above, said at p. 580:

"I gratefully adopt the whole of that statement, although I think it could equally well have ended at the reference to want of locus standi. In my opinion a petition founded on a debt which is disputed in good faith and on substantial ground is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224(1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings."

49. These authorities all show that in order to petition for the winding of a company, a person must show that he had locus standi as a creditor within s. 96 of the Law. He must show that a debt is due to him by the Company. If, however, the debt, upon which the petition is based, is disputed by the company in good faith and on substantial ground, this would indicate that the petitioner does not have locus standi as a creditor and the presentation of the petition would be an abuse of process of the court. The onus is on the company, if it disputes the bona fides of the debt, to show that it does so on substantial grounds. A dispute which is based on insubstantial grounds would not suffice.

50. Mr. Moss submitted that, as the debt is disputed in good faith on substantial grounds, the court had no discretion to make a winding-up order because the presentation of the petition is an abuse of process and in these circumstances must dismiss the petition. For this

proposition he relied on a statement by Nourse LJ in **Re Bayoil SA [1998] BCC 988** where the Lord Justice said at page 990 :

“The question is whether the judge was right to hold that his discretion was at large or whether its exercise was governed by authority which requires the petition, except in special circumstances, either to be dismissed out-right or to be stayed until after the cross claim had been determined. In order to answer that question, it is necessary to refer first to the practice of the Companies Court to dismiss a petition where the petition debt is disputed in good faith and on substantial grounds. That practice, it appears, has been established since the end of the last century. It was explained by Buckley LJ in **Stonegate Securities Ltd. v. Gregory [1980] Ch. 576 at p580C** where, having adopted a passage in the judgment of Ungood-Thomas J in **Mann v. Goldstein [1968] 1 WLR 1091 at p. 1098**, he said:

‘In my opinion a petition founded on a debt which is disputed in good faith and on substantial ground is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of Section 224(1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding-up proceedings.’

So the dismissal of the petition in such a case is not, at any rate initially, a matter for the discretion of the court, it is founded on the petitioner’s inability to establish the locus standi to present a petition under what is now Section 124(1) of the Insolvency Act 1986. The case of an undisputed debt with a genuine and serious cross claim is different, in that the dismissal or staying of the petition can only be a matter for the discretion, of the court, albeit that its exercise may have been narrowed by authority. By way of short hand I will refer to the two categories of cases as disputed debt and cross claim cases respectively.”

Counsel said that since the petition debt was bona fide disputed on substantial grounds this meant that there was no creditor with an undisputed debt who was willing to apply to be substituted as a petitioning creditor. In these circumstances, the petition to wind up should have been dismissed.

51. Mr. Crystal on the other hand submitted that the Court had jurisdiction to make a winding-up order on a winding-up petition in circumstances where the petition is disputed. He relied on the following cases: **In re Russian and English Bank [1932] 1 Ch. 663; Brinds Limited & Others v. Offshore Oil NL & Others [1986] BCC 98, 916 (PC), Bateman Television Ltd. v. Coleridge Finance Co. Ltd. [1971] N.Z. LR 929; Alipour v. Ary [1997] 1 WLR 534.**

52. In **Brinds Limited & Ors v Offshore Oil N.L. & Ors [1986] BCC 916 (PC)** Lord Brightman in rendering the judgment of the Judicial Committee of the Privy Council adopted the earlier reasoning of the Judicial Committee in **Bateman Television Ltd. v. Coleridge Finance Co. Ltd. [1971] NZLR 929**. Lord Brightman said:

“It is a matter for the discretion of the judge whether a winding-up order should be made on a disputed debt, and it is also a matter of discretion whether he decides the substantive question of debt or no debt. Their Lordships agree with the observations of Gibbs J. in **Re Q.B.S. Pty, Ltd. [1967] QD. R. 218**, at p. 225:

‘It seems to me that in every case it becomes necessary for the court to exercise its discretion as to how far it will allow the question whether or not the dispute is *bona fide* to be explored. In some cases it may be very easy to decide this question on the petition and affidavits in reply. In other cases however it may be difficult to determine whether or not the dispute is bona fide without determining the merits of the dispute itself. In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such

cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard.”

The same line of reasoning was adopted by this Board in an appeal from New Zealand, **Bateman Television Ltd. v. Coleridge Finance Co. Ltd.** [1971] N.Z.L.R 929 at p. 932:

“...the general rule is, no doubt, that no order will be made on a petition founded on such debts. But each case must depend upon its’ own circumstances and it is a question for the discretion of the Judge; a discretion to be exercised judicially, which is not open to review unless it is shown to be exercised on some wrong principle, or that the Judge relied on some fact irrelevant for the purpose, or omitted consideration of a relevant fact or finally that he was wholly wrong. As their Lordships have already pointed out, the disputed questions of indebtedness were fully investigated in a lengthy hearing before the learned Judge with oral and documentary evidence and he held that both the appellants companies were insolvent. Their Lordships add the very important fact that from start to finish neither side ever suggested to Macarthur J. that the petitions should be dismissed or even stayed on the ground of disputed debts pending the bringing of appropriate proceedings at law to determine these matters.”

53. In **Alipour v Ary and Another** [1997] 1 WLR 534, Peter Gibson LJ made it abundantly clear “that it is only a rule of practice, not one of law, of the Companies Court to refuse to determine a dispute on the creditors” petition (p. 541). After reviewing the cases of **In re Russian and English Bank** [1932] Ch 663 and in **Re Claybridge Shipping Co. S.A.** [1981] Com. L.R. 107 the Lord Justice concluded at p. 546:

“The position as we see it, in the light of the authorities as affected by the current procedures of the Companies Court, is this. (1) A creditor’s petition based on a disputed debt will normally be dismissed. (2) It will not be dismissed if the petitioning creditor has a good arguable case that he is creditor and the effect of dismissal would deprive the petition of a remedy or

otherwise injustice would result or for some other sufficient reason the petition should proceed.”

This court accepts this as representing the practice which should be adopted in the Cayman Islands.

54. Based on these authorities it is clear that the court does in fact have a discretion which is to be exercised judicially. In our view, Nourse L.J in **Re Bayoil SA** (above) was merely reiterating the rule of practice, that where there is a bona fide dispute on substantial ground by a company as to the petition debt, the court will dismiss the petition on the ground that the evidence before the court did not disclose that the petition was a creditor. Mr. Moss by his submission sought to elevate the rule of practice into a rule of Law. For the reasons given above the Court cannot acceded to this submission. While the US Proceedings allege fraud against Bank of America, no fraud is alleged in so far as the Put Agreements are concerned. We earlier rejected the submission that the petition debts due from PCFL to Food and Dairy are disputed on substantial grounds.

### **GROUND 3**

55. The third ground of the appeal deals with the identity of the JOLs appointed by the Court. The appellants states, without prejudice to their contention that no winding up order ought to have been made, that Parmalat SpA, the Old Parmalat and Parmalat Participacoes do Brasil Ltda, as shareholders, would have been able to place PCFL into voluntary liquidations and choose liquidators who would not have any conflict of interest. The appellants contend that Messrs Cleaver and MacRae have a conflict of interest by reason of the fact that they are also the liquidators of Food and Dairy.
56. The complaint under this ground is four fold:-
- i) that the judge erred in law in giving priority to the interest of creditors as a whole;

- ii) the appointment of Messrs Cleaver & MacRae as JOLs of PCFL could give rise to a conflict of interest;
- iii) in appointing Messrs Cleaver and MacRae, the judge failed to properly consider and/or to give appropriate weight to the conduct of the JOLs whereas JPLs sold a senior secured Note in the sum of US\$30 million issued by PCFL to Food and Dairy to an unnamed third party for \$4,350,000;
- iv) that in concluding that these matters did not constitute a clear and cogent reason for appointing suitable alternative individuals as JOLs of PCFL the judge also erred.

57. On the first issue, the appellants are critical of the judge for failing to give appropriate weight to views of the appellants, who together constitute 78% of the creditors of PCFL and consequently, it is asserted, have the greatest interest in any liquidation of PCFL. They contend that the judge gave too much weight to the views of creditors who did not appear before the court and to the view of Bank of America which did appear but, because of the pending US Proceedings, has a conflict of interest. Criticism is also made of the judge for affording less weight to the view of appellants because they could be regarded as connected to the former management of PCFL. Counsel submitted that Henderson J erred in law because he failed to apply numerous dicta in reported cases to the effect that, in insolvency matters, the wishes of the majority of creditors on matters such as the selection of JOLs should prevail unless there are compelling reasons to depart from this rule. He contended that no such reasons existed in this case.

58. Henderson J pointed out that the proposal that Messrs Cleaver and MacRae, the joint provisional liquidators, continue in office as JOLs was supported by:

- (i) Teachers Insurance and Annuity Association of America ("Teachers"), a creditor holding US\$86 million face value of 6.625% Guaranteed Notes due 2008 issued by the Company;

- (ii) Cerberus Partners LP (“Cerberus”), a creditor holding US\$30 million 8.80% Senior Notes due 2014 issued by the Company;
- (iii) HSBC Private Bank (Suisse) SA, a creditor (acting on behalf of clients) in the sum of US\$3,075,000;
- (iv) Bear, Stearns & Co Inc., a creditor in the sum of US\$28,474,689;
- (v) Bank of America Securities LLC, a creditor in the sum of US\$10 million;
- (vi) Blue Ridge Investments LLC, a creditor in the sum of US\$40 million; and
- (vii) Bank of America NA, a creditor in the sum of US\$258 million.

He indicated that, of the opposing parties, only Cargill Financial Markets PLC, a creditor of PCFL in the amount of US\$52,362,000 is entirely independent of Parmalat Group. He accepted that the appellants represent about 78% of the total debt owed to PCFL. The judge expressed the view that compliance with the wishes of the majority of creditors is not automatic. He indicated that their views would be taken into consideration along with other relevant factors. He concluded that, in the absence of clear and cogent reasons for doing otherwise, Messrs Cleaver and MacRae, who have been the joint provisional liquidators for 2½ years, should continue as JOLs. The judge adverted to the fact that Dr. Bondi and the accounting firm retained by him in Italy have not been able to establish a working relationship with Messrs Cleaver and MacRae. Indeed Dr. Bondi stated that he would not co-operate with Messrs Cleaver & MacRae if they were appointed JOLs and would not be providing any funding for them to conduct the liquidation. It appeared that Dr. Bondi would only fund the liquidation if his nominees, Messrs Stenger and Varga, were appointed.

59. Mr. Crystal submitted that the weight to be given to the views of creditors on any matter concerning winding up proceedings is a matter for the assessment of the evidence of the judge at trial. Unless there is an error of principle or law, the Court of Appeal ought not to interfere with that assessment. This Court agrees with Henderson J that it is not automatic for a judge to adopt the wishes of the majority of the creditors. In arriving at this

conclusion, this Court adopts the statement by Brightman J, as he then was, in **In re Southard & Co. Ltd. [1979] 1 W.L.R. 546 at p. 552:**

“The petition is presented and supported only by creditors who belong to the same group of companies as the company in liquidation. Their wishes do not carry with me a weight commensurate with the size of the alleged indebtedness. The company is a subsidiary of the petitioning creditor. The petitioning creditor is prima facie morally responsible for the insolvency and large indebtedness of the company, unless and until the contrary is shown. The supporting creditor is a member of the same group. The insolvency of the company and its considerable indebtedness could be the result of mismanagement or lack of control by its parent company, which is the petitioning creditor. Certainly, in the absence of evidence to the contrary, I must assume that the petitioning creditor had it in its power to control the activities of the company which is now bankrupt. I therefore take the view that the size of the indebtedness of the company to the petitioning creditor and the supporting creditor, all of which have operated under the same aegis, ought not to carry decisive weight.”

60. The court also took into account **Re Lowestoft Traffic Services Co. Ltd. [1986] 2 BCC 98, 945 at p. 98. 948** where Hoffmann J, as he then was, said:

“In addition, it is, I think proper to discount the opposition of those opposing creditors who are closely associated with the management of the company, particularly when, as is this case, it is said that the main reason why there should be an order for compulsory winding up is the necessity for an independent investigation into their management.”

61. In view of the state of the evidence, Henderson J was correct in giving less weight to the views of the majority of the appellants having regard to their connection with Parmalat

Group and in particular the mismanagement of PCFL. This Court has concluded that the appellants have not shown that there was an error of principle or of law in the assessment of the evidence.

62. Issue was also taken with the fact that Messrs Cleaver and MacRae have entered into a note transaction without seeking the court's or creditors' approval. A note in the sum of US\$30 million issued to PCFL by Food was sold by Messrs Cleaver and MacRae as JOLs of Food to an unnamed third party for US\$4,350,000. Of the sale price, the sum of US\$2,298,542.17 was paid (a) to satisfy liabilities to Food and Dairy, (b) to remunerate Messrs Cleaver and MacRae as JOLs of Food and Dairy and (c) to satisfy liabilities of professionals retained by Messrs Cleaver and MacRae in the liquidation of Food and Dairy. In short, the complaint is that beneficiaries of the realisation of this asset of PCFL were the debtors to PCFL under the note. It was submitted on behalf of the appellants that no sufficient explanation was given for this transaction or why the JOLs did not seek the approval of the majority of creditors or of the court. It was suggested to Henderson J that this transaction should be investigated by independent liquidators. The appellants contend that it will be impossible for Messrs Cleaver and MacRae, as JOLs of PCFL and JOLs for Food and Dairy to properly adjudicate on the debts claimed by Food and Dairy, especially having regard to the support of the JOLs of the claims of Food and Dairy in these proceedings.

63. In dealing with this issue Henderson J stated:

“I asked during argument how this obvious conflict of interest has been managed. Mr. Crystal, QC said that he gave detailed and considered advice to the JPLs on the subject. They concluded it was in the best interest of the general body of creditors to proceed with the note purchase and acted on the advice. I consider that an adequate response to the situation in which the JPLs found themselves. There is no need for an investigation on the issue of conflict of interest by Messrs Cleaver & MacRae in the capacity of JOLs of PCFL and of Food and Dairy.”

64. It was recognized by the judge that the appointment of JOLs as liquidators of PCFL, being already JOLs of Food and Dairy would require Messrs Cleaver and MacRae to put in place some mechanism to prevent a conflict of interest when adjudicating the claim of Food and Dairy. We accept that in so concluding Henderson J was following the accepted positions where there is a possibility of a conflict of interest arising out of the performance of their duty as JOLs of two different entities which are in liquidation. We accept and adopt as being correct, two statements by Hoffman J as he then was in **Re Arrows Ltd. [1992] BCC 121** and **Re Maxwell Communications Corp. PLC [1992] BCC 372**.

65. In **Re Arrows Ltd.** it was accepted that a conflict of interest could arise by the appointment of the same firm as receiver of another company. Hoffman J. said at p. 123:

“It is by no means uncommon in the case of insolvency of a substantial group of companies for cross-claims and conflicts of interest to arise between companies within the group. That does not usually deflect the court from appointing a single firm of insolvency practitioners in the first instance to deal with the whole insolvency of the group, leaving the question of potential conflict of interests to be dealt with if and when it arises. In my view, that would be the proper course to adopt in this case.”

66. In **Re Maxwell Communications Corp. PLC**, again dealing with a potential conflict of interest, Hoffman J, after rejecting the request to appoint an additional administration, said at p. 375:

“There are other ways of dealing with a potential conflict of interest. One of them is to leave the matter to be dealt with if and when it arises. It seems to me that any provision which I make to deal with it today could equally be made at some future date....If such a conflict should surface there should be no difficulty for the administration, if they find themselves faced with any difficulty in the matter, in securing the appointment of the necessary independent person by the Court.....”

67. While it is recognized that the possibility exists that a conflict of interest could possible arise when Messrs Cleaver and MacRae in their capacity as JOLs of PCFL are adjudicating the claims made by Food and Dairy in respect of the amounts due to the Food and Dairy, any potential conflict of interest could be dealt with if and when it arises. But, as shown above, this in itself does not disqualify them from being appointed JOLs of PCFL.

68. The final point raised under this ground was the all encompassing submission that the judge erred in law in concluding that the issues raised under this ground did not constitute clear and cogent reasons for appointing suitable alternative individuals as the JOLs of PCFL. No useful purpose will be served by embarking on a wholesale review of the evidence at this stage. It will suffice to state that for the reason given above the Court is satisfied that there was no error of principle or of law which would necessitate the intervention of this Court.

69. The Court agrees with the view that PCFL is hopelessly insolvent and in the circumstances the facts surrounding its downfall require investigation. The Court is mindful of what was said by Lord Hoffman in *In Re Pantmaenog Timber Co. Ltd.*, at para 64 of the judgment:

“But I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the insolvent estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company’s failure and conduct of those concerned in its’ management is another.”

From the nature of the allegations being made in the US Proceedings it would seem that the Company’s failure and the conduct of those in charge of PCFL, ought to be investigated. Henderson J in our view was correct when he decided that the circumstances surrounding the downfall of PCFL required investigation by the JOL.

It was for these reasons that the Court dismissed the appeal and ordered the appellants to pay the costs of the respondents (certified fit for two Counsel). The appellants were also ordered to pay the costs of The Bank of America.

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Mottley, J.A.



Zacca P.

I have had the advantage of reading in draft the judgment of Mottley J.A. I am in full agreement with his conclusions and reasons.

I wish briefly to add a few words in relation to the issue as to whether the petitioners were creditors entitled to petition the Court for a winding up order.

Mr. Moss Q.C. submitted that Food and Dairy were not creditors and were not entitled to petition the Court to wind up the Company. He relied on the fact that although the Company was indebted to the petitioners by virtue of the Put Agreements, both petitioners had assigned their debts to Securities Trustees and were therefore no longer creditors.

Also the petitioners had no technical standing and since the petitioners would only be entitled to any surplus which would either be minimal or non-existent, they had no standing of substance. For them to be creditors they must have both "technical standing" and "standing in substance".

For these propositions, Mr. Moss QC relied on the cases of **Deloitte and Touché A.G. v. Johnson et al [1999] I.W.R.R.1605** and **Three Rivers [1996] C.A. 292. District Council and Others v Governor of the Bank of England [1996] C.A. 292**. In my view, the issue

in **Deloitte's** case was not who is or who was not a creditor. In that case, the plaintiff was neither a creditor nor a contributor.

In that case Lord Millett distinguished the case where the Court had to examine the statute to see whether it identified the category of persons who may make the application; in the second case a more general issue was involved, that is to say, the position of a person who was not a creditor or contributory. In **Deloitte's** case Lord Millett, on page 1608, said:

“The question on the appeal therefore is whether the plaintiff which is neither a creditor nor a contributory has any *locus standi* to invoke the jurisdiction of the Court to remove the liquidators of the Company”.

I agree that **Deloitte's** case did not decide the issue for which the appellants are contending in this appeal. For this and the other reasons of Mottley J.A. I am of the view that Food and Dairy are creditors and therefore entitled to make the application for a winding up order.

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Zacca, P.



**Forte J.A.**

On the 11<sup>th</sup> August 2006, having heard the arguments of Counsel, we dismissed the appeal and affirmed the Orders of Henderson J in the Court below. We promised then to put our reasons in writing and now do so.

I have read in draft the judgment of Motley J.A. I agree with the reasons stated therein.

However, I wish to add a few words of my own in relation to the issue as to whether the respondents are in fact creditors of the company to the extent that they are qualified to petition the court for its winding up. I will not rehearse the facts that give rise to this issue here in full, except where they are relevant to the principles I propose to address.

Section 96 of the *Companies Law* provides a convenient point of departure. It states:

*“Any application to the Court for the winding up of a company shall be by petition which may be presented by the company, or by any one or more than one creditor or contributory of the company, or by all or any one of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.”*

The section clearly empowers a creditor of the company to petition for the winding up of the company and stipulates that all other creditors and contributories shall also benefit from any order made on the petition.

The appellants, however, contended that Food and Dairy were not creditors and consequently were not entitled to petition for the winding up of the company. Mr. Moss, QC, submitted that:

- (1) Although it was accepted that the Company was indebted to the petitioners by virtue of Put Agreements entered into between the company and the petitioners separately, both petitioners had since assigned their debts to Securities Trustees and therefore were no longer creditors.
- (2) As a result of (1) above, the petitioners would only be entitled to any surplus which would remain in respect to the debts assigned which would be in the circumstances, at the highest, minimal and at the lowest non-existent and consequently the petitioners were not substantial creditors.

Mr. Moss Q.C. maintained that, to determine whether a petitioner qualified as a creditor under *Section 96 of the Companies Law*, one had to look, firstly, to see if the petitioner were technically a creditor *and* thereafter whether he was a substantive creditor. He argued that the petitioners did not satisfy both categories and consequently did not qualify as creditors so as to petition the court for the winding up of the company. In support of the proposition that the respondents were not, technically, creditors, he relied on the case of **Three Rivers District Council And Others v Governor And Company of the Bank of England (1996) C.A. 292** in which the majority, (Waite and Peter Gibson LJ), held that:

*“... an equitable assignee of a chose in action, as the person in reality entitled to the chose, was entitled to sue the defendant on that chose in his own name, but save in special circumstances, the assignor should be joined as a party so that he might be bound and the debtor protected; that the assignor would not be allowed to maintain an action on the chose unless the assignee was joined as a party to the claim; and that accordingly the judge had exercised his discretion properly in refusing to allow the depositors to proceed with the action with BCCI joined as non-claiming plaintiffs.”*

Interestingly, Straughton LJ, in his minority judgment, opined:

*“the assignor still has a cause of action at law; and the assignee has a cause of action in equity. Where the assignee is a party to an action, and expressly declines to make a claim, I can see no reason why the assignor should not claim his legal right.”*

The *ratio decidendi* of the case seems to have fallen from the lips of Peter Gibson LJ.

Waite LJ agreed (p. 304). Gibson LJ. said (p 307):

*“For my part, I regard it as sufficient to look at the position as established by the authorities since 1873. In doing so, it is important to distinguish between what is a requirement of substantive law and what is merely a procedural requirement. It is, in my judgment, elementary that where, as here, there is an agreement to assign a legal chose, in equity, the assignee becomes the owner and controller of the legal chose. He is entitled to sue for the recovery of the chose, but as a matter of practice he will normally be required by the court to join the assignor either as a plaintiff or if he refuses to give his consent to this, as a defendant. All this seems to me to be in conformity with section 49 of the Act of 1981. An assignor,*

*if the assignment is known, will not be allowed to sue in his own name for himself. He may sue as a trustee for the assignee if the assignee so wishes, but in that event he should reveal his representative capacity (RSC Order 6 r 3 (1) (a)), and if he attempts to recover for himself, even if, for example, only part of the debt has been assigned, he will be required to join the assignee."*

In coming to his conclusion, Gibson LJ relied on the following passage from Viscount Cave LC in the case of **Performing Right Society v London Theatre of Varieties Ltd. (1924)**

**A.C. 1 at p. 14:**

*"That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action: Daniell's Chancery Practice 7<sup>th</sup> ed. Vol. 1 pg 172. If this were not so, a defendant after defeating the claim of an equitable claimant, might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied."*

Gibson LJ also relied on dicta of Lord Sumner in the same case, quoting from a passage at p.29:

*"The latter is essentially a matter of practice and the established practice might not be disturbed, or at any rate very sparingly."*

Then in reference to Lord Sumner's statement he said:

*"He held that there was no justification for departing from the general rule that the assignor should be joined so that he might be bound saying at pg.32 'it is the right of the respondents that they should be protected.'"*

As is obvious from the cited dicta from the **Performing Rights case** (supra), that case dealt with an action brought by the assignee. That the principle relates to an action brought by an assignor, is made clear in the following reference by Gibson LJ, to **Walter and Sullivan Ltd. v J. Murphy and Sons Ltd. (1955) 2 Q.B. 584**, which he described as a rare example

of a case where an assignor sought to recover a debt without joining the equitable assignee of part of that debt. He referred to the judgment of Parker LJ at p.588:

*“Normally, of course, it is the assignee who, if necessary, seeks to recover the debt, and in a case where, as here, section 136 of the Law of Property Act 1925 does not apply, he would have to join the assignor to bind him at law. In the present case, however, it is the assignor who is seeking to recover, and in his own right, and it is strongly urged that he is entitled to do so without joining the assignee. We think that is an impossible contention. The whole object of the notice to the debtor is to protect the assignee. After the receipt of the notice the debtor pays the assignor at his peril.”*

The significance of this judgment is the requirement, in practice, that if an assignee or assignor of a debt wishes to sue for its recovery, then either has to join the other in such an action. It is not a matter of substantive law, but a procedural requirement for the protection of each, as the case may be, and also of the defendant. Gibson LJ recognized this in the *Three Rivers case* (supra) when at p. 309 he stated:

*“These cases therefore confirm the existence of a rule of practice that an equitable assignee, while able to sue in his own name and to obtain an interlocutory injunction, will not be able to obtain a perpetual injunction or damages without joining the assignor save in special circumstances, the reasons given being practical, for the protection of the debtor and to avoid multiplicity of suits. But an action commenced without the assignor as a party is not a nullity and the non observance of the rule can be cured by the appropriate joinder at any stage.”*

It follows from the cited dicta from *Three Rivers*, that in the present case, both Food and Dairy could bring an action for the recovery of the debt from the company so long as the Securities Trustees were joined as a party to any such action.

*Three Rivers*, however, deals with actions for the debt in the Courts and the necessity in practice, in those circumstances, for the joinder of the assignor as a party where an action is brought for the recovery of the debt by the assignee. To my mind, this principle of practice is not applicable to the petition for the winding up of a company by either assignor or

assignee, both of whom, in my opinion, would qualify as creditors for that purpose. The *Three Rivers case* demonstrates that either could bring an action against the company, so long as the other was joined as a party.

In this case, it is common knowledge that the debt had been assigned to the Securities Trustees, who themselves could petition for the winding up. The basis for adding the other party, (assignor or assignee), is to protect each, and the defendant also, as the case may be, and to avoid multiplicity of actions. That would not arise in a winding up petition, the assignor, as in this case, retaining legal title to the debt and being entitled to sue the company, so long as it joins the assignees in the action. Significantly, the company was aware of the assignment of the debt to the Securities Trustees by Food and Dairy, a fact that was not in dispute. Both Food and Dairy, on the one hand and the Securities Trustees on the other, would have a legitimate interest in the winding up of the company. In any event, the Securities Trustees, to the extent that they are entitled, will benefit from the distribution of the assets, such as they are. In my judgment, the assignors, Food and Dairy, being holders of the legal title to the debt, are qualified as creditors under *section 96 of the Companies Law*.

Mr. Moss Q.C., however, contended that a petitioner must not merely be a creditor in the technical sense but must be so substantially. For the reasons already stated, I find no merit in the submission that the petitioners are not technically creditors.

I therefore turn now to his second contention, that the petitioners are not substantial creditors because in the circumstances they could recover only a minimal sum, if any at all, as a result of the winding up.

Before addressing this, however, I should state that I have great difficulty accepting the appellants' projection of 'two limbs', as it were, in the definition of a "creditor". I am of the view that if the company is indebted to a person to any extent at all then he is a creditor and entitled to petition for the winding up of the company, taking into consideration that he

would have to show the company's inability to pay the debt unless, of course, he petitions on other grounds. If the appellants' submissions on this point were accepted, that would make it possible for a company without any assets to be protected from the granting of a creditor's petition for its winding up. This cannot be so as the purpose of liquidation is not merely to give creditors and contributories the opportunity to recover their debts, or a portion thereof, but also to make it possible for the investigation of the company.

Common sense dictates that a company whose assets are nil should be wound up. However, the fact that a company without assets can be the subject of a winding up order, on the basis of a petition by a creditor, is supported by the case of *In re Pantmaenog Timber Ltd. (2004) A.C. 158*, in which it was held:

*“that a liquidator's functions in relation to a company which has been wound up were not limited to the recovery and distribution of the company's assets but extended to the investigation of the causes of the company's failure, and the conduct of those concerned in its management, in the wider public interest of the appropriate action being taken against those engaged in commercially culpable conduct...”*

The following statement by Lord Millet in his speech in the House of Lords in the *Pantmaenog case (supra –Pg. 177)* speaks to this:

*“But I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the insolvent estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Further more, such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company.”*

In my view, once a person establishes that he is a creditor, no matter what the possibilities of recovery of the debt are, that person, by virtue of *section 96* is entitled to petition for the winding up of the company, provided that all the other conditions are met.

Mr. Moss Q.C., however sought support for the contrary in the case of **Deloitte and Touche AG v Johnson (1999) 1 WLR 1605**.

In that case a company incorporated in the Cayman Islands was placed in voluntary liquidation, which was subsequently ordered to continue subject to the supervision of the Grand Court of these Islands. The joint liquidators caused the company to institute proceedings for negligence in relation to the audit of the company's financial statements. By originating summons, the plaintiff, which was not a creditor or contributory to the company but one of the defendants to the company's action, applied under *section 106 (1) of the Companies Law (1995 revised)* for an order removing the liquidators, or alternatively, restraining them from continuing the conduct of the proceedings against the plaintiff, on the ground that the liquidators had a conflict of interest. The liquidators applied for the plaintiff's originating summons to be struck out on the ground that the plaintiff had no *locus standi* to make the application or real interest in seeking such relief. The judge dismissed the liquidators' summons, but the Court of Appeal of the Cayman Islands allowed the liquidators' appeal and struck out the plaintiff's originating summons (see head note to the report of the case).

The plaintiff appealed to the Judicial Committee of Her Majesty's Privy Council. In coming to his conclusion, when delivering the opinion of the Board, Lord Millet had this to say:

*"The company is insolvent. The liquidation is continuing under the supervision of the Court. The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say, the creditors."*

The learned Law Lord then went on to conclude that:

*"The plaintiff is not merely a stranger to the liquidation, its interest are adverse to the liquidation and the interest of the creditors."*

The Board concluded, per Lord Millet, that the plaintiff had no legitimate interest in the identity of the liquidators and *“is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office holders.”*

Against that background, I now turn to examine the passages from Lord Millet’s opinion upon which Mr. Moss, QC, (for the appellants), sought support for his contention that in the circumstances of the instant case, where the court is asked to exercise its statutory power under *section 96 of the Companies Law*, the petitioner must show that he/she is not only technically a creditor but also substantially so.

It is necessary to refer to the passages relied on to understand the gravamen of the appellants’ contention. Lord Millet states at p.1611 of the **Deloitte case (supra)**:

*“In their Lordships’ opinion two different kinds of case must be distinguished when considering the question of a party’s standing to make an application to the court. The first occur when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes, (as in the present case), of other parties as well. It is therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.”*

This passage clearly speaks to two different situations; the first, to circumstances where the statute names the category of person who may make the application, and the second, to circumstances where the statute is silent in that regard. In the first, as it is in the instant case, there is no necessity for the court to examine whether the applicant is a proper person to

invoke the jurisdiction of the court once he comes within the stipulated category of persons in the statute. It is in the second circumstances, where the statute is silent as to the category of persons who may invoke the jurisdiction of the court, that it becomes necessary for the court to examine whether the applicant is a proper person to do so.

The following paragraph taken from the judgment of Lord Millet, and upon which the appellants rely, relates in my view to the second set of circumstances to which he had already referred. He continued at pg.1611:

*“Where the Court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he ‘has an interest in making the application or may be affected by its outcome’. It means that he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see **In re Corbenslotee Ltd. (No. 2) (1990) BCLC 60...**”.*

This latter passage puts it beyond doubt that Lord Millet was, in the words expressed therein, addressing his mind to circumstances where the statute does not limit the category of person who can invoke the court’s jurisdiction to exercise the statutory power given to the court in the particular section of the Law, as is done in *section 96 of the Companies Law*. In those circumstances which Lord Millet was addressing, the court has to decide not only whether the applicant is a person qualified to make the application but also if the applicant is a proper person to invoke the jurisdiction of the court.

In cases such as the present case the statute gives the court the jurisdiction to exercise its power on the application of a specific category of person e.g. a creditor. There would therefore be no necessity, having determined that the applicant is a creditor, for the court to further determine “that he has a legitimate interest in the relief sought” because the statute,

by endowing a creditor with the right to petition for the winding up, indicates that such a person does have a legitimate interest in the winding up of the company. This is also evident in the Board's conclusion (supra) in which Lord Millet stated that the only person who could have any legitimate interest of their own in having liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors.

These passages relied on by Mr. Moss Q.C. are therefore, in my judgment, unhelpful to the appellants' case as the opinions expressed therein by the Board are clearly the result of an examination of the case before their Lordships, which related to the exercise of a statutory power in circumstances where there are no limitations on the category of person entitled to invoke the court's jurisdiction. As has been seen, those circumstances called for different considerations, which are not necessary in the present case.

Having come to the conclusion that the respondents in this appeal are, indeed, creditors, then, in my judgment, this ground must also fail. It is for the reasons I have heretofore set down that I agreed that the appeal be dismissed and the orders made.

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Forte, J.A.

