IN THE GRAND COURT OF THE CAYMAN ISLAND

CAUSE NO: 256 OF 2005

IN THE MATTER OF THE COMPANIES LAW (2004) REVISION

AND

IN THE MATTER OF INDIES SUITES LIMITED ("The Company")

HEARD: July 29, 2005

Appearances: **Mr. Alberga Q.C., instructed by Mr. Waide DaCosta for the Company Brac Construction Limited, the sole shareholder of the Company**

Mr. Alan Turner for the Joint Provisional Liquidator of the Company

RULING

STANDING TO PETITION

1. This is the hearing of the petition for the winding up of the Company. A point of objection has been taken in limine by Mr. Alberga Q.C. on behalf of Brac Construction Limited, which is the sole shareholder of the Company, that the petitioners have no locus standi to bring this petition because they do not come within the classes of persons granted standing by the Companies Law. Sections 94, 95 and 96 of the Companies Law are in issue and, in particular, section 96 which defines the classes of persons who may petition to wind up.

2. The petitioners obtained an order from Justice Henderson on 7th June, 2005, appointing Mr. Christopher Johnson as provisional liquidator on the basis that they are owed a debt by the Company; citing the ground in the petition that it was

just and equitable to so order. If Mr. Alberga is right, that order of the 7th June must be set aside and Mr. Johnson's appointment discharged.

3. In the circumstances of the case, the only class within which the petitioners could claim or do claim to come is that of "creditors", but, says Mr. Alberga, they do not qualify because they are merely prospective or contingent creditors and that class of creditor is not included in the Law. Section 96 reads:

> **"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 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.**

4. A petition to wind up may only be presented if the requirements of Section 94 are also met:

> **"A Company may be wound up by the Court if -**
>
> **(a) the Company has passed a special resolution requiring the Company to be wound up by the Court;**

(b) the Company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the Company is unable to pay its debts; or

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

5. Here the petitioners rely on paragraphs (c) and (d) above to ground their petition, although the petition actually cites only the "just and equitable" ground. They say, for the purpose of paragraph (c), that they are creditors because the Company owes them a contractual debt for a liquidated amount of money or an amount which can readily be quantified and ascertained, and in respect of which, they may and ought to be allowed to prove in the liquidation. That they are thus to be regarded not as contingent or prospective but as actual creditors.

6. Their claim arose in this way: The petitioners are two of some 500 persons who had purchased time share entitlements in the Indies Suites Resort, which was owned and operated by the Company. Each time share unit was purchased for a fixed sum of money and entitled the unit holder to the use of the Indies Suites apartments and other amenities for a specified period – usually for one week each year – for 99 years.

7. The property, whiled owned by the Company, was provided to a proprietary club which was also formed and owned by the Company; to be operated as club premises. The time share entitlements were sold as memberships in the club. In

addition to the one-time membership fee paid as a stipulated sum, members were required to pay annual maintenance dues.

8. A further 175 members have given notice and have joined the petitioners in support of the petition, and are also represented by Mr. Turner. I am told that over the last 10 years or so, members have paid some 5-6 million dollars in membership fees and the petitioners and those in support, claim debts for repayment of significant portions of those amounts.

9. The Rules of the Club provide, importantly for present purposes, that in the event of destruction of the club premises, the Company will be obliged to repair or restore the property and such works must commence within two years. The Company is further obliged by the Rules to keep the property fully insured for those purposes.

10. The property was severely damaged by the hurricane of last September. It appears, however, not to have been insured in keeping with the Rules and, instead of restoration, the property has been sold. This is said to have happened without the petitioners' or other members' knowledge or consent.

11. The petitioners, not surprisingly, allege that their contract with the Company, expressed in the form of the Rules of the Club has been breached, and that they are immediately entitled to damages by way of the return of their membership fees. If the fees are not to be entirely repaid, at least as pro rated by reference respectively to the amount of time each has already enjoyed the benefit of membership, as against the number of years of the 99-year membership terms left to run.

12. It seems no claim is to be otherwise made for general damages in respect of the loss of the benefit of use of the premises or for annual fees and dues; although such claims may as yet only be unarticulated. In other words say the petitioners, they have a pecuniary claim for a debt within the meaning of section 94(c) of the Companies Law which, for reasons they say are apparent from the evidence; the Company is unable to pay and thus they are constituted as creditors for the purposes of Section 96.

13. It is accepted by Mr. Turner that unless they come properly within the class of "creditors" under the Law, they have no standing as persons entitled to petition to wind up; although he did raise an argument which he did not press - that even if they are only contingent creditors, they are entitled to petition.

14. In support of his in limine objection, Mr. Alberga embarked upon a brief excursion into the history of the English Companies and Insolvencies Acts and our Companies Law, which clearly shows that while the words "contingent or prospective creditor" have ever since 1907 been included in the English Legislation in order to broaden the categories of creditors who may petition; those words were never included in the local Law as is apparent from the wording of section 96 above.

15. The additional words were first expressed in section 28 of the Companies Act of 1907 in England in this way:

> **"In determining whether a company is unable to pay its debts within the meaning of section eighty of the Companies Act 1862, the Court shall take into account**

the contingent and prospective liabilities of the company and any contingent or prospective creditors shall be a creditor entitled to present a petition for winding up the company under section eighty-two of that Act [the equivalent of the local section 94]: Provided that the court shall not give a hearing to a petition for winding up the company by such a creditor, until such security for costs has been given as the court thinks reasonable, and until a prima facie case for winding up has been established to the satisfaction of the court."

16. The local Companies Law is based upon the 1862 English Companies Act which contained, prior to that amendment by section 28 of the 1907 Companies Act, the identical wording to section 96 of the local Law.

17. The fact that the absence of the wording would operate in the context of the local Law as it stands, to exclude prospective and contingent creditors, must be regarded as settled beyond dispute having regard to the pronouncements of **Jessel M.R. in *Pen-Y-Van Colliery Company* [1877].** It is a case upon which Mr. Alberga strongly relied.

18. There Jessel M.R. held that a claim against a company for unliquidated damages on account of alleged fraudulent misrepresentation, did not constitute the claimant a creditor, so as to entitle him to petition either for a winding up order or a supervision order: before he could so petition he had to make himself a creditor by changing his claim for damages into a judgment. Until that was done he could

not petition as a creditor under the Act. However, the full context of the dicision in that case must be understood. Reflecting further upon the particular circumstances of the claim in that case, the Master of the Rolls said this:

> **"Now the claim which the Company brings forward is not a claim of debt, as I understand the meaning of it. It is a claim of a very singular kind. It is hardly possible to state it much more shortly than it is stated in the petition itself. [His Lordship then described the allegations in the petition in respect of alleged fraudulent misrepresentation stated above and continued]: what possible claim there can be against anybody upon these statements I cannot understand. It is quite sufficient to say that the respondents dispute the allegations above [(that is, the allegations of fraudulent misrepresentation)]."**

19. So while that case must be regarded as settled authority for the propositions for which it still stands after a hundred and twenty odd years, it must also be noted for the present purposes, that **Jessel M.R.** regarded the claim for the debt sought to be advanced in it as being of "a very singular kind". Precisely because of the speculative, prospective or contingent nature of the allegations of fraud, it was decided in that case that the claimants were not properly constituted creditors within the meaning of the Act as it was then framed and so had no standing to petition to wind up the Pen-Y-Van company. **Jessel M.R.'s** parting advice was

that they needed to change their claim into a debt - a liquidated sum - and in order so to do they needed to first obtain a judgment; their allegations being so steadfastly denied by the directors of that company.

20. What may not be attributed to the pronouncements of **Jessel M.R.**, is a proposition that in all circumstances where the claim is for a contract or tortious debt which is yet to be transformed into a judgment debt, the claimant remains only a prospective or contingent creditor and so unqualified to petition.

21. In this case the claims may not in my view be described as being merely speculative, prospective or contingent.

22. They are described as debts arising from breach of contract by the deliberate decision of those responsible for the Company not to restore the property, but to sell it instead. A claim may have arisen as well from the probable likely earlier breach in having failed adequately to insure the property.

23. As the result of these breaches, the petitioners (joined in by some 175 other claimants) say that the Company is immediately liable to repay at least their membership fees as appropriately pro rated having regard to the number of years left in their entitlement. Those are pecuniary amounts, which, if not already quantified, can be readily quantified and ascertained and so represent liquidated damages. The contract having been breached and the innocent parties having elected to treat the contract as at an end - the subject-matter having been sold - there is I accept, substituted an obligation on the part of the defaulter to pay money compensation to the innocent party for the loss sustained by him in consequence of the non-performance of the contract in the future. For this

proposition, Mr. Turner cited ***Photo Production Ltd. V Securicor Transport Ltd*** **1988 A.C. 827** cited in **Chitty on Contracts para. 25-046 28th Ed.**

24. Here, far from being disputed, the evidence points to the members' claims having been acknowledged by the Company, subject only to the settlement of amounts. A sum of $885,000 has been recorded in these proceedings as having been set aside to meet the claims. And, moreover, far from defences being raised against the claims, efforts have been made to negotiate settlements. In this context, I pause to note also, that where the dispute is only as to the amount which may be owing, the petition will usually be granted: ***Palmer's Company Law*** **Vol. 3 para 15.214** citing inter alia ***Re Steel Wing Company Limited*** **[1921]1 Ch. 349.**

25. Against the present factual background, it is hardly surprising that no readily identifiable defence has been asserted on behalf of the Company and when asked by me what such a defence might be, Mr. Alberga, being as it is his custom to be, cautious before venturing; responded that there could possibly be a defence of frustration having regard to the massive damage caused by Act of God to the property.

26. As such issues which may be raised in defence do not arise for my decision now, I think I need only note in order to deal with the present point; that frustration would of course provide no defence in these circumstances if it is proven (as appears to be the case) that the Company was contractually bound to make provisions by way of insurance and to restore the property if it was destroyed: ***Joseph Constantine S.S. Line Ltd. v Imperial Smelting Corp. Ltd.*** **[1942] A.C. 154, 163** and **Chitty on Contract 28th Ed. Para. 24-003.**

27. For the foregoing reasons, while I accept Mr. Alberga's argument that mere prospective or contingent creditors have no standing to petition to wind up a company under Cayman Law as it is presently framed; I conclude that the petitioners have shown for the purposes of their standing to petition, that they have claims for money within the meaning of the Law for which they might prove in a liquidation and that they are properly constituted creditors for those purposes.

28. While it is rendered moot by that finding, Mr. Turner did raise the counter-argument that Mr. Alberga had no standing to challenge the petition acting as he was, not on behalf of the Company itself, but on behalf of the sole shareholder/contributory – Brac Construction Limited. Mr. Turner's argument was simply that only the Company itself, Indies Suites Limited - as respondent to the petition, had the right to appear in opposition. He pointed out that the Board of a Company has residuary powers for those purposes, notwithstanding the appointment of the Provisional Liquidator. He cited ***Re Union Accident Co. Ltd.*** **[1972] 1 W.L.R. 640** which is authority for the proposition that where a provisional liquidator is appointed the Company, through its board of directors, retains residuary power to oppose a petition to wind it up. That case was however not followed by this Court in ***Banco Economico S.A. v Allied Leasing and Finance Corporation*** **[1998] CILR 102** where it was held, applying ***Re Emmadart Ltd.*** **[1979] Ch. 540** that the board of directors of a company in provisional liquidation has no power to act to oppose the winding up without an affirmative resolution of the shareholders in general meeting.

29. It was, in any event, accepted by Mr. Turner that a contributory could petition to wind up. And that a creditor, as a person having a financial interest in a Company could not only petition, but also appear to oppose a petition. That being so, I was unable, as a matter of logic, to accept the argument that a shareholder, who could petition, could not oppose. As shown above, it is the affirmative resolution of the shareholders who are the contributories that gives the Board its authority to oppose.

30. While it remains unclear in this case whether the contributory or only the creditors will have the real financial interest in the liquidation (that is, whether the Company is insolvent or solvent) the contributory at this stage has a prima facie interest and so must have standing to be heard.

UPON THE HEARING OF THE PETITION

31. Having been informed of the foregoing decision as to locus standi, Mr. Alberga confirms for the record that he and Mr. DaCosta are now instructed by Brac Construction Limited, to oppose the petition itself. The petitioners having been found to have standing, he does so primarily on the basis that the requirements of section 94 (c) of the Companies Law have not been met. Section 94 (c) provides that a company may be wound up if it is unable to pay its debts.

32. Mr. Turner has however, confirmed that the petitioners also rely upon the just and equitable ground in section 94 (d) and so I am obliged to consider the petition from the point of view of both provisions of the Law.

33. For the purposes of section 94 (c), section 95 defines the circumstances under which a company may be regarded as being unable to pay its debts in these terms:

"A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

(b) execution of other process is issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts.

34. Of those three alternative sets of circumstances, it is the case, as Mr. Alberga said, that the circumstances most often relied upon by creditors before this Court are those described in paragraph (a) viz: where a creditor has served the statutory

demand for payment and payment of the debt is not paid or otherwise settled within 21 days.

35. No statutory demand has been served here by the petitioning creditors, or by those joining in support of the petition. They explain the reason for that omission as being the urgency of the situation arising from the conduct of the directors and shareholders of the Company. In this regard they point to the following factors:

(i) the conduct of the director, Mr. Foster, in having assured the time-share owners at a meeting last year after the hurricane, that the property would be restored despite the hurricane damage and in keeping with the contract. They assert that this happened even while he was, unknown to them, negotiating to sell the property;

(ii) the subsequent sale of the property arguably at a significant under value;

(iii) the divestment of the sale proceeds from the Company to Brac Development Limited ostensibly in satisfaction of a wholly undocumented earlier loan from Brac Development Limited to the Company;

(iv) the divestment of the proceeds of the insurance coverage from the Company to Brac Development Limited on the same ostensible basis;

(v) the retention of the sum of US$885,000 not by the Company but by the law firm of Myers and Alberga to the order of Brac Development Limited, although it has been said that the sum is held and is to be used for no other purpose but to repay the time-share owners.

(vi) the allocation of the same sum on the stated basis (per Mr. Ronald Foster, the shareholder of Brac Development Limited) that it represents the entire

interest of the time-share owners at 20% of the total time-share value of the property, even though the combined value of all the time-share owners' claims is said to amount to a great deal more, in the order of millions of dollars.

36. These factors are raised not only in the evidence of the petitioners themselves, but also by the provisional liquidator's preliminary report filed with this Court on 26th July, 2005. There the provisional liquidator goes on to raise his own concerns about the destruction of much of the Company's records by those in charge of the Company and the lack of co-operation he has experienced with his enquiries into the general affairs of the Company.

37. The provisional liquidator has been able to compile a report only because he has had access to records from the Company's bankers, the Company's insurers and from its property appraisers. Such records as were made available by the management of the Company were wholly inadequate for the purposes.

38. Among the several areas of concern listed by the provisional liquidator at pages 30 - 31 of his report (some of which are mentioned above at items (i) to (vi)); the provisional liquidator also cites the Company's own contention that "the facility was never able to operate on a profitable basis and incurred significant operating losses on a yearly basis which were subsidized by the owner".

39. This – a contention not accepted by the provisional liquidator for being unsubstantiated by the financial statements which are available – is nonetheless some evidence coming from those opposing the petition of the Company's insolvency and therefore of its inability to pay its debts.

40. At all events, a comparison by the provisional liquidator of the financial position of the Company between the 31st May, 1999 balance sheet and the date of his appointment, shows a loss over that period of $4,856,637. This is largely represented by the fact that its only tangible asset, the resort premises, has been sold for much less than the book value and the proceeds of sale as well as the insurance proceeds, divested to Brac Development Limited.

41. The only "asset" which the provisional liquidator records is the sum of $885,000 United States Dollars, but that is not held in the name of the Company itself and so can only be regarded as a receivable due from Brac Development Limited or from Mr. Foster as the person who controls Brac Development Limited.

THE GROUNDS OF THE PETITION

42. The first question to be resolved, given all those circumstances and the absence of a statutory demand for repayment of the petitioners' debts, must therefore be in the words of section 95 paragraph (c). – (Paragraphs (a) and (b) not being relied upon by the petitioners) – **"...has it been proved to the satisfaction of the court that the Company is unable to pay its debts?"**

43. Before proceeding further to examine that question as a matter of law and fact, it is important that I should note, that the grounds set out in section 95 are alternative grounds for winding up.

44. As to section 95 (c), it is a condition precedent of the exercise of the Court's jurisdiction that the Company shall have been "proved to be unable to pay its debts" – ***Re Capital Annuities Limited*** **[1978]3 All.E.R. 704 per Slade J at 713.** It also follows that if, as a matter of the separate objective assessment of the state

of affairs of the Company, it is to be concluded that the Company is unable to pay its debts as they fall due, the petition may be granted, even if, as here, the petitioners have served no statutory demand and have not given the 21 days notice required by section 95 (a).

45. This alternative recourse under section 95 (c) must therefore be seen as recognising that creditors may be presented with circumstances so urgent in nature as to render the 21-day notice period otiose or so as to render futile any basis for thinking that a statutory demand for repayment will be duly considered and honoured by the Company. Urgency of that kind, would also preclude as a prerequisite, recourse to the Courts by way of a separate action for a judgment upon which to ground the claim, which is the further alternative ground under section 95 (b).

46. I conclude that that sort of urgency attended the circumstances here under, which the petitioners, and those who support the petition, were required to respond. I find that they had every good reason to conclude that the Company had been placed in the position where it would most probably be unable to pay its debts owed to them. And these are debts which, for reasons earlier explained, I find are not merely prospective or contingent, but actual debts capable of being proven in a liquidation.

47. Moreover I find that this is not a case, where – to adopt the cautionary words of **Slade J** in ***Re Capital Annuities Ltd.*** (above) at p.718 d-e – "the evidence merely shows that the company has for the time being insufficient liquid assets to pay all its presently owing debts, whether or not payment of such debts has been

demanded". Here the evidence available to the provisional liquidator and to the petitioners shows that the assets of the Company have apparently been deliberately stripped away for the purpose of what the provisional liquidator describes as "making significant preferential payments from property sale and insurance recovery proceeds to a related-party company". Thus it is fairly apprehended that the state of affairs is not merely temporary or passing.

BONA FIDE DISPUTE OR DEFENCE

48. Mr. Alberga further submitted that before it can be open to me to find that the Company is unable to pay its debts in the sense contemplated by section 95 (c); I am obliged to bear in mind that the Company has raised a bona fide defence to the petitioners' claims. It is the defence earlier only adumbrated during the in limine arguments, which now upon the hearing of the petition, Mr. Alberga seeks to raise in earnest. It is that the time-share agreement(s) was or were frustrated by the event of the hurricane of last September having destroyed the resort property. That, in light of that defence, which can only be resolved by Court action, it cannot be concluded at this stage that the petitioners are owed actual and absolute debts, but only prospective or contingent debts and so the requirements of section 95 (c) of the Law are not satisfied.

49. For the proposition of law as to the effect of a bona fide defence rendering a claim moot, Mr. Alberga cited ***Palmers Company Law*** **Vol. 3 2001 Ed. para 15.121** where it is written:

> **"As to inability to pay debts, proof by a creditor that his particular debt has not been paid within a reasonable**

time is prima facie evidence that the company is insolvent, provided that the company has no bona fide basis on which to dispute the debt in question (citing *Re Globe New Patent Iron and Steel Co.* [1875] L.L. 20 Ea. 337 and other cases).

....It is an abuse of process to present a winding up petition against a solvent company as a means of putting pressure on it to pay money which is bona fide disputed, instead of applying for summary judgment under RSC Order 14...."

50. The defence of frustration is said to arise here as a proposition of law by analogy with a lease, and on the basis which was incontrovertibly declared by the House of Lords in the case cited by Mr. Alberga; viz: that a contract comprised in a lease of land can, in exceptional and rare circumstances, be frustrated: ***National Carriers Ltd. v Panalpina (Northern) Ltd.*** **[1981]2 WLR 45.**

51. Having so presented the framework for the company's defence, Mr. Alberga did however, in his usual frank and helpful manner, acknowledge that it is for this court hearing the petition to decide whether a bona fide defence to the claim exists. This, is only consistent with the passage cited from **Palmers** above that the petition may be granted "provided the company has no bona fide basis on which to dispute the debt(s) in question". Further, as is also stated at ***Palmers*** **(op cit) para. 15.214:**

> **"to fall within the general principle the dispute must be bona fide both in a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial and reasonable grounds. "Substantial" means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company to 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."**

52. So what then is to be made of the defence which has been raised? It was already dealt with if only in an anticipatory manner, when considering Mr. Alberga's in limine objection above. In that earlier context it was also necessary to consider whether the claims may have been rendered moot by such a possible defence, but then rejected. Having heard Mr. Alberga's fuller submissions here in opposition to the petition, I do not accept that it can objectively constitute a bona fide dispute.

53. As pointed out earlier in the ruling on the point in limine, it may not lie in the mouths of those directing the affairs of the company to say that the agreements

have been frustrated if only because in order so to do, they must invite the Court to ignore their express contractual obligations to have properly insured the property and to have restored it for the continued benefit of the members, including the petitioners. And that is even if, as a matter of principle, they could properly cite the events of last September as an event of frustration which the law could recognise. I do not objectively think it is open to them to do so – far from having been destroyed, the premises were sold to St. Mathews University Facilities Limited who no doubt will restore it to be used as teaching or housing facilities.

54. As Mr. Turner submitted, dicta from the House of Lords in the ***Panalpina*** case (above) underscore the nature of the difficulty in the path of this defence: **(at page 63 f-g per Lord Simon:**

> **"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."**

55. No doubt the words in parenthesis in that passage reflect their Lordships' recognition of the principle enunciated in the earlier decision of their House in ***Joseph Constantine S.S. Line Ltd. v Imperial Smelting Corp. Ltd.*** (above) which the Report of the ***Panalpina*** case shows, was cited to their Lordships in the arguments. Although obvious, it is just as well to reflect upon the sort of rare and exceptional circumstances which their Lordship would regard as capable of frustrating a lease.

56. So even if the analogy here between the time-share agreements and a lease is apposite, the requirements for the applicability of the doctrine of frustration are, in my view, clearly not present.

57. Finally, as to whether there is shown to be a bona fide defence or dispute, I am obliged to note the provisions of the local ***Contracts Law*** **(1996 Revision) Sections 4 and 5.** They show that even in the event of the defence of frustration being properly raised, they would likely operate, in the circumstances of this case, to create a statutory debt in favour of the petitioners:

> **"4. Where a contract governed by the law of the Islands has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance thereof, this Part shall have effect in relation thereto.**
>
> **5. All sums paid or payable to any party in pursuance of the contract before the time when**

the parties were so discharged (in this Part referred as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just so to do, having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any of the sums so paid or payable, not being an amount in excess of the expenses so incurred."

58. Accordingly, in any event, there would be pecuniary debts for which the petitioners could claim. The only remaining question would be whether they should be able to claim in the context of winding up the Company, or otherwise by action through the Courts.

"JUST AND EQUITABLE"

59. Mr. Alberga also argued that it could hardly be just and equitable to wind up the Company where the petitioners are unable, for having failed to present a statutory demand or otherwise, to show that the Company is unable to pay its debts.

60. Given the difficult circumstances described above which confronted the petitioners when they sought to preserve their rights, which have only been compounded since then and which continue to attend their efforts to discover the true position, I consider the case for winding up to be self-evident.

61. As a matter only of further explanation of my reasons for holding that the just and equitable ground is also established, I also regard the case as one where the essential substratum of the Company is gone – its only tangible asset, the Resort and adjoining properties – having been sold away by those who controlled it. Such circumstances have been a basis for the making of an order for winding up ever since the pronouncements of Lord Cairns in ***Re Suburban Hotel Co.*** **[1867] 2 Ch. App. 737.**

> **"...proof of impossibility of carrying on the contemplated business would justify a winding-up order, even in the absence of insolvency."**

And it is clear from the definitive judgments of the House of Lords in ***Ebrahimi v Westbourne Galleries Ltd.*** **[1973] 3 All. E.R. 360** that it is wrong to attempt to create categories or headings under which cases must be brought if the "just and equitable" clause in the Companies Acts is to apply (per **Lord Wilberforce at 374-375).**

62. That being so, it would be wrong in an otherwise proper case such as I find this to be, to refuse an order because, as Mr. Alberga also suggests, the cases do not show any instances before where creditors, as distinct from shareholders or contributories, have successfully petitioned on this ground.

63. For all the foregoing reasons, I grant the petition and confirm the appointment of Mr. Johnson as official liquidator.

64. In deference to repeated expressions of concern from Mr. Alberga that the available resources not be consumed by the costs of the liquidation, I record the Court's advice to the liquidator that every effort be made to conserve resources, to minimise expenses and to attempt as quickly as possible to resolve the claims of creditors.

Hon. Anthony Smellie
Chief Justice
August 5, 2005

GRAND COURT CAYMAN ISLANDS