IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CIVIL APPEAL NO. M7 OF 1996

BEFORE: **THE RT. HON. EDWARD ZACCA P.C., O.J.** **PRESIDENT**
THE RT. HON. TELFORD GEORGES P.C., J.A..
THE HON. JUSTICE IRA ROWE J.A.

BETWEEN: **DELOITTE AND TOUCHE A.G.** **RESPONDENT**

AND: **CHRISTOPHER D. JOHNSON**
JOHN DINAN **APPELLANTS**

Appearances:
Mr. Ian Hunter, Q.C. and Mr. Alan Turner for the Appellants
Mr. Geoffrey Vos, Q.C. and Mr. Alden McLaughlin for the Repsondents

JANUARY 13, 14, 15, 16, 17 and APRIL 3, 1997

ZACCA, PRESIDENT:

By an Originating Summons, the Respondent sought an Order removing the Appellants as joint liquidator of Omni Securities Limited and in the alternative, an Order restrainng the Appellants from continuing the conduct of the action against the Plaintiff and others in the Grand Court of the Cayman Islands in Cause No. 104/1995.

In answer, the Appellants, by summons, sought an Order dismissing the Respondent's Originating Summons on the ground that they had no locus

standi. Smellie, J., sitting in the Grand Court, held that the Respondent had locus standi and in the alternative that the Court had an inherent jurisdiction to restrain the liquidators from continuing to conduct the action against the Respondent in Cause 104 of 1995.

This appeal is from the Judgment of Smellie, J. Several grounds of appeal were filed and a Respondent's notice was also before the Court. The question for the Court was whether the Respondent had locus standi to apply to the Grand Court for the removal of the Appellants as liquidators.

The Appellants are the joint liquidators of Omni Securities Limited ["OSEC"]. OSEC is a Cayman Island exempt Company, incorporated and registered on December 22, 1986. OSEC is a wholly owned subsidiary of Omni Holding A.G. ["OHAG"] a Company incorporated in Switzerland. OSEC was placed in voluntary liquidation by OHAG. The voluntary liquidation was ordered to continue, subject to the jurisdiction of the Grand Court. The original liquidators were Mr. Christopher D. Johnson and Mr. Kenneth V. Shanahan of Coopers and Lybrand of Grand Cayman. Mr. John M. Dinan of Coopers and Lybrand replaced Mr. Shanahan as joint liquidator by Order of the Grand Court on March 15, 1994.

A Writ of Summons [Cause 104/1995] was filed by OSEC on March 17, 1995, against several defendants, including the Respondent. The claim is in respect of the auditing of OSEC for the years 1988 and 1989.

It is alleged that there was negligence in the auditing by the Respondent and there is a likely claim that certain aspects of the auditing was deceitful.

OHAG is also in liquidation and the liquidators are Coopers and Lybrand of Basel, Switzerland.

There are large claims against OSEC from creditors including claims from OHAG and OBET, both OMNI group Companies. Other claims have been made by Banks. The liquidators have also filed an action against the former Directors of OSEC claiming damages in excess of CHF 200 million.

The financial statements of which OSEC complains, relate to the Financial Years 1988 and 1989. At that time, OSEC was audited by Deloitte Haskins and Sells, a Cayman Firm. However, much of the audit work was done on their behalf by the Zurich practice of Deloitte, known as Deloitte Haskins and Sells A.G. [Switzerland].

The Respondent allege that the U.K. practice of Deloitte, known as Deloitte Haskins and Sells [U.K.] was involved in the affairs of the Omni Group and if there was mis-auditing of OSEC's accounts by the Deloitte Cayman practice, this was attributable to the failure of Deloittes U.K. practice to provide the Zurich practice with adequate information.

In 1989, there was a worldwide merger between Deloitte Haskins and Sells and Touche Ross. Internationally, the Deloitte Haskins and Sells practices and Touche Ross practices merged with effect from January 1990. However, in

London, the U.K. practice of Deloitte Haskins and Sells [U.K.] did not merge with Touche Ross, but with Coopers and Lybrand in the U.K.

The Respondent allege that the Appellants in bringing their action against the Respondent are acting under a serious conflict of interest and in breach of their professional rules in continuing as liquidators of OSEC. The Respondents allege that Coopers and Lybrand, U.K., advised the Omni Group of Companies and acted as auditor for some 83 U.K. Omni Companies and some non-U.K. Omni Companies and that Coopers and Lybrand had a professional relationship with Securities and the Omni Group. Another allegation is that the financial statements of OSEC for the Financial Year 1989 were signed of by the Deloitte Cayman practice in March 1990 which was some 2 - 3 months after the date of the U.K. merger. The alleged evidence of conflict was provided in the Affidavits of Mr. Houghton and Mr. Wilson on behalf of the Respondent. It was agreed before Smellie, J., that this Affidavit evidence was to be taken as correct for the purposes of the application.

It is unnecessary, therefore, to consider the allegations of conflict in any great detail. The Appellants submit that regardless of any conflict of interest, the Respondent has no locus standi to make the application to remove the liquidators. It is argued that the Respondent is but a potential debtor in the liquidation. In any event, it is submitted by the Appellants that such conflict of interest as being alleged is insufficient to move the inherent jurisdiction of the Court.

THE ISSUE OF LOCUS STANDI

The winding up of Companies and the appointment and removal of liquidators are governed by the Companies Law [1995] Revision. The relevant sections are :

Section 106[1] deals with the case of an official liquidator and provides :

> "Any official liquidator may resign or be removed by the Court on due cause shown; and any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court".

Section 143 deals with the case of a voluntary liquidator and provides :

> " If from any cause whatsoever there is no liquidator acting in the case of a voluntary winding up, the Court may, on the application of a contributory, appoint a liquidator or liquidators; and the Court may on due cause shown remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding up. "

Section 152[2] provides for the removal of a liquidator in the case of a voluntary winding up subject to the supervision of the Court :

> " The Court may from time to time remove any liquidator so appointed and fill any vacancy occasioned by such removal or by death or resignation"

The Companies Law [1995 Revision] is modelled on the Companies Act 1862.

The relevant sections of the 1862 Act are as follows :

Section 93 :

" Any official liquidator may resign or be removed by the Court on due cause shown. "

Section 106[1] of the Cayman Companies Law is similar to this section.

Section 141 :

" If from any cause whatever there is no liquidator acting in the case of a voluntary winding up, the Court may on the application of a contributory, appoint a liquidator or liquidators. The Court may also, on due cause shown, remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding up. "

Section 143 of the Cayman Companies Law is similar to this section.

Section 150 :

" Where any order is made by the Court for a winding up, subject to the supervision of the Court: The Court may from time to time remove any liquidators so appointed by the Court and fill up any vacancy occasioned by such removal or by death or resignation.

The Companies Act 1948 followed and this was repealed and replaced by the Insolvency Act 1986.

The relevant provisions of the Companies Act 1948 are as follows :

Section 242[1]

" A liquidator appointed by the Court may resign, or, on cause shown, be removed by the Court. "

Section 304[2] [Voluntary liquidation]

"The Court may, on cause shown, remove a liquidator and appoint another liquidator. "

Section 314[3] [Voluntary liquidation subject to the supervision of the Court]

" The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal or by death or resignation. "

The Insolvency Act 1986 did away with liquidations subject to the supervision of the Court. The relevant provisions relating to the removal of official and voluntary liquidators are as follows :

Section 171[1] :

" This section applies with respect to the removal from office and vacation of office of the liquidator of a company which is being wound up voluntarily. "

Section 171[2] :

" Subject to the next subsection, the liquidator may be removed from office only by an order of the Court or -

[a] in the case of a member's voluntary winding up, by a general meeting of the

Company, summoned specifically for that purpose ;

[b] in the case of a creditor's voluntary winding up, by a general meeting of the company's creditors summoned specially for that purpose in accordance with the rules. "

Section 171[3] :

" Where the liquidator was appointed by the Court under Section 108 in Chapter V, a meeting such as is mentioned in subsection [2] above shall be summoned for the purpose of replacing him only if he thinks fit or the Court so directs or the meeting is requested, in accordance with the rules :-

[a] in the case of a member's voluntary winding up, by members representing not less than one-half of the total voting rights of all the members having at the date of the request, a right to vote at the meeting, or ;

[b] in the case of a creditor's voluntary winding up, by not less than one-half, in value, of the company's creditors.

Section 171[4] :

" A liquidator shall vacate office if he ceases to be a person who is qualified to act as an insolvency practitioner in relation to the company.

Section 171[5] :

" A liquidator may, in the prescribed circumstances, resign his office by giving notice of his resignation to the Registrar of Companies.

Section 108[1] :

> " If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator. "
>
> *Section 108[2] :*
>
> " The Court may, on cause shown, remove a liquidator and appoint another. "

Mr. Hunter submits that the current legislation in England is to the effect that in a solvent liquidation, it is the shareholders who have a real interest in removing a liquidator and in an insolvent liquidation, it is the creditors who have a real interest in doing so. He also submitted that, prima facie, only persons with a financial interest in the distribution of the assets of the company may apply to the Court to remove the liquidator. The liquidator may also apply. He argued that the only persons who have a financial interest in liquidation are the creditors of an insolvent company and the shareholders and creditors of a solvent company. The Respondent having no such interest cannot have locus standi.

Mr. Vos for the Respondent submitted that s. 106[1] of the Companies Law [1995 Revision] does not impose any limitation as the section is silent as to who may apply to remove a liquidator. He argued that the categories of persons who may apply are not closed and that the correct test is whether in all the circumstances, the applicant was *"a proper person"* to apply.

It was conceded at the trial and before this Court that s. 106 of the Law is the section which requires construction in deciding whether the Respondent has

locus standi. Although s. 106 comes under that part of the Law dealing with compulsory winding up, section 153 of the Law provides that :

> " Any order made by the Court for a winding up, subject to the supervision of the Court, shall for all purposes [including the staging of actions, suits and other proceedings] be deemed to be an order of the Court for winding up the company by the Court, and shall confer on the Court authority to make calls or to enforce calls made by the liquidators and to exercise all other powers which it might have exercised if an order had been made for winding up the company by the Court. "

It is conceded that there are three stages to be considered in construing s. 106 of the Law :-

> [1] The question of whether a particular person has locus standi to apply to remove the liquidator ;
>
> [2] The question of what amounts to ***"due cause shown"*** to enable the Court to exercise its power to remove the liquidator ;
>
> [3] The exercise of the Court's discretion to remove the liquidator on the facts.

This Court is concerned with whether the Respondent has locus standi. In arriving at a decision, it is necessary to consider the many cases to which this Court has been referred to by the Appellants and the Respondent.

In Re *BRITISH NATION LIFE ASSURANCE ASSOCIATION* [1872] LR 14 Eq. 492 was a case in which a contributory of the Association made an application to the Court to remove liquidators.

The British Nation Life Assurance Association was amalgamated and absorbed into the European Life Assurance Society. The two companies maintained their separate corporate identity. The Society was wound up on the grounds of insolvency. Subsequently, at a meeting of the shareholders of the Association, it was resolved to wind up the Association. There was one dissenting shareholder. The application to remove the liquidator was made by the dissenting shareholder of the Association, although it appears that he was the voice of the Society, who being a debtor of the Association, could not make the application. In the event, the Court refused to remove the liquidators, having considered the wishes of the majority of the contributories.

Mr. Hunter submits that this case shows that a debtor cannot apply to remove a liquidator. Mr. Vos, however, submits that this case did not consider the question of locus standi but held that a single dissentient shareholder could show cause for the removal of liquidators but as a matter of dissention, the application was refused.

In Re *THE NORWICH PROVIDENT INSURANCE SOCIETY* [1879] 28 WR 272, the Court held that it was settled practice that before any person interested as a contributory can apply to the Court to remove a liquidator, he must pay his calls. The applicant disputed that he was a contributory, refused

to pay the calls and was willing to pay the amount of the call to the liquidator. His offer to pay the call into Court was unacceptable. The Court upheld the preliminary objection that the applicant had no locus standi and dismissed the application.

Mr. Hunter submitted that this case clearly shows that even a potential contributory had no locus standi to apply for the removal of a liquidator. He argued that the position of the Respondent who was a potential debtor cannot be in a better position that a potential contributory.

However, in ***WEBB'S SOUTH EXTENDED SILVER MINING COMPANY LIMITED*** [1896] 6 BCPC 47, an application was made by two contributors for the removal of the liquidator. The contributors had not fully paid up the amount outstanding on their shares. The Court adjourned the matter and stated that the applications could proceed if the contributories paid the money into Court, failing which the application is dismissed. One of the contributories had not been placed in the schedule of contributories as owing any money.

This case reinforces the principle in the Norwich Provident case, that a contributory who had not paid up his call would not have locus standi to apply for the removal of a liquidator.

In Re ***TAVISTOCK IRON WORKS COMPANY*** [1871] 24 TLR 605 was a case in which an application was made by Creditors to remove the existing liquidatior. Lord Romilly stated that the wishes of the majority of creditors would be considered.

In Re *OXFORD BUILDING AND INVESTMENT COMPANY* [1883] 49 LT 495 concerned an application by creditors, bondholders and shareholders to remove a liquidator. The Court held that the liquidator had a right to be present and to be heard.

In Re *ADAM EYTON LIMITED EX PARTE CHARLESWORTH* [1887] 36 Ch. D. 229 concerned the removal of a liquidator on the application by a creditor. The Court of Appeal held that on an application for his removal the liquidator had a right to be heard and if necessary, to appeal against his removal. It was also held that if the Court was satisfied that it is for the general advantage of those interested in the assets of the company that a liquidator should be removed, it has power to remove him, and appoint a new one.

In Re *NEW DE KAAP LIMITED* [1908] 1 Ch. 589 concerned the question of whether liquidators of a new company known as New de Kaap [1906] Ltd. had locus standi to apply for the removal of the liquidator of another company by the name of New de Kaap Ltd. New de Kaap Limited, was wound up voluntarily and a Mr. Hutton appointed liquidator. The New de Kaap [1906] Ltd. was incorporated with the object of taking over the assets and liabilities of New de Kaap Limited. It was also agreed that all the assets of the old company should be purchased by the new company. Subsequently, an Order was made by the Court that the new company should be wound up. One Mr. Ogle, the liquidator of the new company, took out a summons in the winding-up of the old company against Hutton as its liquidators, asking that Hutton should be

ordered to transfer to or cause to be vested in Ogle, certain shares of a third company, forming part of the assets of the old company and that Hutton should be removed as liquidator and that Ogle should be appointed liquidator in his place. It was argued that the applicant was neither a creditor nor a contributory of the company and had no locus standi.

On behalf of the applicant, it was argued that as the liquidator of the new company, the purchaser of the assets of the old company, he was the person most interested in seeing that the winding-up of the old company was efficiently carried out.

Neville, J. had to decide whether the applicant had locus standi to apply. He considered sections 138 and 141 of the Act of 1862 and Section 25 of the Act of 1900. At page 591, Neville J. stated :

> " The only question which I have to decide here is whether the applicant has any locus standi under the Companies Acts, 1862 and 1900. The sections I have to consider are ss. 138 and 141 of the Act of 1862 and s. 25 of the Act of 1900. Sect. 25 of the Act of 1900 provides that "in a voluntary winding-up an application under section 138 of the Companies Act 1862, may be made by any creditor of the company". I do not think that the applicant can be said to be a creditor within the meaning of that section, and I am therefore remitted to the Act of 1862, and have to consider the question who can apply to the Court for an order under s. 141 of that Act. The first part of that section provides that "if from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the Court may, on the application of a

contributory, appoint a liquidator or liquidators". This is not a case where there is no liquidator, but is a case in which it is sought to appoint a liquidator in the place of an existing liquidator. The second part of the section is as follows: "The Court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up". That part of the section does not say who may apply for the removal of a liquidator and the appointment of another in his place, but, having regard to the wording of the former part of the section, there would, if the section stood alone, be a difficulty in saying that the latter part of the section left it open for any person who was not a contributory to apply for the removal of a liquidator.

" But s. 138 of the Act of 1862 provides that in a voluntary winding-up "the liquidator or any contributory may apply to the Court ..... to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court". So that in a voluntary winding-up all applications to the Court are made under s. 138, and the fact that the operation of the section has been enlarged by s. 25 of the Act of 1900 may enable a creditor to apply for the removal of a liquidator. But the liquidator of the new company, who is the applicant in the present case, is not a creditor of the company whose liquidator he seeks to have removed, and therefore the preliminary objection that he has no locus standi to make the application must prevail, and the summons must be dismissed with costs. "

Neville, J., concluded that the applicant was not a creditor of the company, whose liquidator he sought to have removed and therefore he had no locus standi to apply.

The appellants relied on this case to submit that it is only a creditor or contributory who can apply to the Court to remove a liquidator, as they are the only persons who can have any real or proper interest in the distribution of the assets of the company in liquidation.

For the Respondent, it was submitted that Neville, J's. reasoning was based upon the demonstrably false proposition that all applications in a voluntary winding-up were made under Section 138 of the Companies Act 1862. It was argued that the decision conflicts with Warner J's decision in ***RE A.J. ADAMS*** who expressly held that the wording of Section 138 of the Act of 1862 which was equivalent to S. 140 of the Cayman Companies Law was not apt to cover an application to remove or appoint a liquidiator under the equivalent to section 143 of the Cayman Companies Law. It was argued that Smellie, J. was correct not to follow New de Kaap Limited .

Mr. Vos also submitted that the decision in New de Kaap was wrong and that Section 138 of the 1862 Act did not limit who could apply.

In ***RE CORBENSTOKE LTD.*** [No. 2] [1989] 5 B.C.C. 767 concerned an application by Gabraphone Transducers Ltd. pursuant to Section 172[2] of the Insolvency Act, 1986 for the removal of the liquidator of Corbenstoke Ltd. The applicant was a shareholder of Corbenstoke Ltd. The Company was however

insolvent. Harman, J. held that the applicant had no locus standi as a contributory to make the application.

Harman, J. at page 768 stated :

> " The applicant makes its application as a member, being the registered shareholder for 49 out of 100 issued shares. Since it is undoubted on all the figures at the moment that this company is insolvent, as one would expect for a company which has been wound up by the court on a petition for a compulsory liquidation, I am of opinion that the applicant has no locus standi as a contributory to make this application. I make that ruling upon the analogy with the proposition laid down by Sir George Jessel M.R. over 100 years ago in connection with contributories' petitions.
>
> Sir George held that a contributory could not present a petition unless he alleged that there would be a surplus for contributories after payment of all creditors. He asserted that that was the rule, because, he said, with that common sense for which that great judge is noted, were it not so, the contributory could get nothing as contributory and could have no real interest in presenting a petition and the court should not be troubled with petitions presented by persons not having any real interest. In the same way, in my judgment, an application to the court under sec. 172 of the Act of 1986 for the removal of a liquidator can only properly be made by a person having an interest in the outcome of the liquidation. If the company be insolvent, the only persons with an interest must be creditors for the dividends which may be paid upon their debts in the liquidation and cannot be a contributory who, by definition, will receive nothing. I therefore hold that the applicant's status as contributory, a 49 per cent shareholder, is

> irrelevant to this matter and I reject any reliance upon it. "

Mr. Hunter submitted that it was clear that in insolvency matters only those who had a positive financial interest can apply to the Court and that when a Company is insolvent, it is only the creditors who can apply. It may be the contributories when the Company is solvent.

Mr. Vos submitted that the question decided by Harman J. was not material to the outcome of the case and that his decision was therefore obiter.

While conceding that Harman, J's decision to the effect that the contributory in that case could not apply, qua contributory, to remove the liquidator was correct. The contributory had no interest and could not be ***"a proper person"***. Mr. Voss also submitted that it was correct to state that only persons with an interest in the affairs of the Company or in the outcome of the application to remove a liquidator, may apply. He, however, submitted that there is no reason why only creditors with a financial interest in the proceeds of the liquidation should be able to apply.

In relying on his submissions that only a person with a financial interest in the Company can apply to remove a liquidator, Mr. Hunter referred to V 7[3] of Halsbury's Laws of England, published in 1996.

Paragraph 2376 states in part :

> " An application to the Court to remove a liquidator must be made by a person with an interest in the outcome of the liquidation. Hence in an insolvent liquidation, a

> contributory will not have locus standi to apply. "

The case cited in support of this proposition is ***RE CORBENSTOKE LTD.,*** supra.

Paragraph 2743 is concerned with the removal of a liquidator by the Court in the case of a voluntary winding-up and states :-

> " The Court may, on cause shown, remove a liquidator and appoint another. The application may only be made by a contributory, a liquidator or a creditor. "

The case cited in support of this proposition is ***RE NEW de KAAP LIMITED,*** supra.

Paragraph 2740 concerns the appointment of a liquidator by the Court and states :-

> " The Court may appoint a liquidator if, from any cause whatever, there is no liquidator acting. The application may be made only by a contributory, a liquidator or a creditor."

> For this proposition, Footnote 2 refers to Re New de Kaap Ltd. [1908] 1 Ch. 589. In ***RE A.J. ADAMS {BUILDING} LTD. ; RE AUTOMATED EXTENDED WARRANTIES LIMITED*** [1991] BCLC 359, [1991] B.C.C. 62, it was held that a former liquidator had locus standi to apply under the Insolvency Act,

> [1986] s. 108 but not under s. 112 [see paragraph 2771 post]. "

Mr. Hunter submitted that Halsbury's Laws of England is of an authoritative status and is of persuasive value. Volume 7[3] was not available to the trial Court.

The passages quoted from Halsbury's Laws show the predominant position of the creditors in the winding-up of an insolvent Company. In my view these passages deserve serious consideration and should not be swept aside as ***"bald statements of principle"***.

I now turn to consider the cases cited by the Respondent in support of their contention that the ***"proper person test"*** is the test to be applied by the Court.

In *RE A.J. ADAMS [BUILDERS] LTD.* [1991] BCLC 359, Mr. Papi who was a member of the Insolvency Practitioners Association had his practising certificate and authorization suspended by the Association. At the time of his suspension, he was acting as liquidator in a considerable number of liquidations, some 125. Some of those were creditors' voluntary liquidations and some were members' voluntary liquidations. Mr. Papi made an application for an order that Mr. Salman Saud be appointed as liquidator of A.J. Adams [Builders] Ltd. and the other 125 of the Companies. The normal procedure for filling a vacancy was by a contributory convening a general meeting of each Company and a creditor convening a general meeting of each Company.

Warner, J. concluded that Mr. Papi, at the time of his application was not a liquidator and was not entitled, qua liquidator to apply. However, he turned to consider the provisions of s. 108 of the 1986 Act.

Warner, J. at page 364 stated :

> " I therefore think that where a liquidator ceases to be a person who is qualified to act as an insolvency practitioner in relation to a company, he vacates office ipso facto, automatically and does not continue in office until he complies with his obligations under r. 4.135 or r 4.138.
>
> However, that is not the end of the matter because Mr. Curry QC put forward an alternative argument to this effect. Section 108(1) of the 1986 Act does not say who may make the application to the court under that section. That is left to the court to decide, and the court may entertain an application under that section by anyone whom the court considers proper. Those who may make the application are not confined to the persons specified in s 112.
>
> I have, after some hesitation, come to the conclusion that that alternative contention of Mr. Curry QC is right. I think it is reinforced by this consideration. Subsection (1) of s 112 enables an application to be made to the court -
>
> > 'to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court'.

> An application under s 108[1] is not very aptly described as an application for the determination of a question arising in the winding up of a company when that is contrasted with the exercise of powers. It is more properly described as an application for the exercise of a power. But it is not a power which is invoked because the court might exercise it if the company were being wound up by the court. It is a power expressly conferred on the court in the case of voluntary liquidations by s 108. In that respect, s 108 stands on its own.
>
> I therefore conclude that the court does have power to accede to Mr. Papi's application. If the test be whether the court considers a former liquidator in Mr. Papi's position to be a proper person to make that application, it seems to me that the test is satisfied. It is interesting to observe that in a letter from the Insolvency Service of the Department of Trade and Industry dated 14 May to Mr. Papi's solicitors that course was suggested in anticipation of the disciplinary proceedings against Mr. Papi resulting in his suspension. It seems to me plain that a responsible insolvency practitioner in Mr. Papi's position is taking a proper course when he brings the difficulties resulting from his suspension before the court for solution rather than leaving it to the contributories and creditors of the various companies of which he has been liquidator to resolve those difficulties at their own expense. "

Mr. Vos submitted that Warner, J., made no distinction between the appointment or removal of a liquidator under s. 108 of the Insolvency Act 1986.

He supported the *"proper person"* test and submitted that s. 112 of the Act did not limit the persons who might apply.

Mr. Hunter submitted that the Adams' case was an unusual case and that if the Court had not acceded to Mr. Papi's application, time consuming and expensive meetings of contributories and creditors of a large number of companies, would have to be held. He argued that this case was of limited application and that the *"proper person"* test applied only to s. 108[1] of the 1986 Act and did not apply to s. 108[2].

In any event, only creditors, contributors and the incumbent liquidator should be recognized by the Court in an application for removal of the liquidator.

In Re ***INTERCONTINENTAL PROPERTIES PTY. LTD.*** [in liqi] 1977 2 ACLR 488 was an Australian case. The Company was wound up on the petition of the Attorney General, as Minister administering the Companies Act 1961. A summons was filed on behalf of the Attorney General and the Corporate Affairs Commission. It sought orders for the appointment of a receiver and in the alternative, the removal of the liquidiator and the appointment of another liquidator in his place.

The liquidator conceded the right of the Attorney General to make the application. Needham, J. at page 492 said :-

> " Any right of the C.A.C. to interfere in the winding up decisions was denied, although

> the liquidator conceded the right of the Attorney General to bring before the Court any aspect of the winding up which concerned the administration of justice.
>
> The question of whether C.A.C. is entitled to bring these proceedings is academic in view of the concession by the liquidator as to the status of the Attorney General - a concession which I would regard as correctly made. "

There appears to be some doubt as to whether the C.A.C. could apply for the removal of the liquidator, although s. 278[2] of the Companies Act 1961 gives a right to the C.A.C. or the Companies' Auditors Board to report to the Court any matter which in its opinion is a misfeasance, neglect or omission on the part of the liquidator.

In Re ***BRIDGEND GOLDSMITHS LTD.*** [1995] 2 BCLC 208 concerned the case of an insolvency practitioner who had been disqualified. An application was made by the Secretary of State for Trade and Industry, to appoint a Mr. Gary Stones to replace the liquidator. It was the Secretary of State who had withdrawn the authorization of the insolvency practitioner and he thereupon ceased to so act.

Blackburne, J., in his judgment referred to Re ***A.J. ADAMS [BUILDERS] LTD.*** supra.

At page 209, Blackburne, J. said :-

> " I am satisfied that s. 108[1] of the 1986 Act empowers me to make these appointments in relation to the four Companies in creditors'

> voluntary liquidation since, in the case of each of the companies, there is by reason of the withdrawal of Mr. Evans' authorization, no liquidator acting. I am also satisfied that the Secretary of State is a proper person to make the application. In the circumstances, I propose to make the order which the Secretary of States seeks appointing Mr. Stones as liquidator in relation to each of the four Companies. "

A number of cases were cited by Mr. Hunter in support of his submissions that in an insolvent Company, the only persons who had a financial interest in the winding-up were the creditors.

Re ***MARSEILLES EXTENSION RAILWAY AND LAND COMPANY*** [1867] L.R. 4 Eq. 692; Re ***SIR JOHN MOORE GOLD MINING COMPANY*** [1879] 12 Ch. D. 325; Re ***TAVISTOCK IRON WORKS COMPANY*** [1871] 24 TLR 605; Re ***RUBBER AND PRODUCE INVESTMENT TRUST*** [1915] 1 Ch. D. 382; Re ***KARAMELLI AND BARNETT LIMITED*** [1917] 1 Ch. D. 206.

Mr. Vos submitted that these cases relate to ***"due cause shown"*** and was not relevant in considering whether the applicant had locus standi.

On a review of the cases, Mr. Hunter submitted that in the case of an insolvent Company, the only persons with a real or proper interest in the removal of a liquidator are the creditors. In the case of a solvent Company, both the creditors and contributories will have locus standi. A liquidator can only apply for his removal. Mr. Hunter concedes the position in the three cases relied on by Mr. Vos.

In his submissions, Mr. Vos contended that the Respondent has locus standi and that the *"proper person"* test is applicable. He argued that the Respondent is a proper person because the Respondent is a defendant in Cause 104; it was the Auditor of Securities; the claim against the Respondent in Cayman is not likely to be different from the allegations in Zurich; there is a convincing body of evidence supporitng the proposition that Rey was dependent, in important respects, on Coopers and Lybrand, so that it is that firm in the U.K. rather than the Respondent that is likely to be shown to be liable to recompense the creditors of OHAG and Securities for Rey's defaults. Mr. Vos further submitted that even if it was said that the interest of creditors will be considered in an application for the removal of a liquidator, this should not prevent another proper person, who is affected by the affairs of the Company or the conduct of the liquidator, from bringing the conflict to the attention of the Court.

He further submitted that the liquidators should not be permitted to continue to act with a serious and irreconcilable conflict of interest, simply because no creditor is interested in removing the liquidator.

It is necessary to refer to parts of the judgment of Smellie, J. in order to discover his reasoning in coming to his conclusions.

At page 5 :-

> " These allegations of conflict of interests and the assumed evidence tendered in support, were of pivotal importance to the outcome of this application. "

At page 8 :-

> " Against that background it became clear that any characterization ofD&T merely as debtors or potential debtors would be an obvious oversimplification of the issues. And indeed D&T, through their counsel, expressly disavowed any argument that they are proper persons to bring this application because they are to be characterized as debtors or potential debtors.
>
> It is plain, that as the former auditors of Securities and of the vast and complex Omni Group, D&T have an important interest in the manner of the conduct of the liquidation, not only of Securities but of the Group worldwide, because they now face claims against their competence and perhaps even their integrity. This is not to be confused with a positive financial interest in the outcome of the liquidation. They are neither creditors nor shareholders and therefore can have no such interest. And it must, moreover, be recognized, that to the extent they may properly be characterized as potential debtors because they are being sued, their ultimate objective must be seen to be, as far as possible, to avoid having to contribute to the assets of the liquidation. "

At page 14 :

> " Of the long line of cases examined in the arguments, a number dealt with the factual issue of what is the measure of due cause to remove a liquidator.
>
> In those the true standing of the applicants bringing the application was either acknowledged or assumed, they being almost invariably creditors or contributories, and the

> issues instead centered around the measure of due cause; that is whether due cause was shown.
>
> A smaller number of the English cases dealt directly with the question of locus standi.
>
> As to the former category, those dealing with the measure of due cause, some did, on first examination seem to lend support to Mr. Hunter's submission that only those having a positive financial interest in the outcome of the liquidation may apply. Indeed some of the dicta seem to assume that premise. But at best, on closer consideration, those pronouncements are to be regarded as obiter and I found them to be unpersuasive. "

In a reference to a passage cited in Re ***ADAM EYTON, LIMITED EX PARTE CHARLESWORTH*** [1887] 36 Ch. D. 229, Smellie, J. said at page 16 :-

> " And while I accept that the words emphasized are perhaps the fons et origo of the now established principle that in deciding whether due cause is shown the Court must consider, and perhaps primarily consider, what is in the best interest of those having a positive financial interest in the outcome, that statement of principle is by no means intended to be and may not be taken to be definitive of who may apply to show due cause.
>
> As typically such persons are likely, in the case of a solvent liquidation to be the creditors and contributories, and in the case of an insolvent liquidation, to be the creditors only, it is hardly surprising that the vast majority of applications to remove liquidators for cause shown are made by persons from among one or the other of those two categories.

> But even amongst the reported cases cited, exceptions to that trend were found and as the analysis of the principles unfolded, the exceptions denied the existence of any rule which would limit the categories only to those having a positive financial interest. "

At page 18 :-

> " For these reasons I feel obliged also not to regard the following bald statement of principle from the footnote #3 of Halsbury's Laws 4th Edition Volume 7(2) paragraph 1614 as defining the categories of proper persons who may apply: 'Under the Companies Act 1948 S. 242(1) (repealed [(now replaced by the 1986 Insolvency Act S. 108)] the liquiidator could be removed by the court on cause shown on the application of a creditor or contributory'".

In a reference to Re *A. J. ADAMS [BUILDERS] LTD.* supra, Smellie, J. said at page 21 :-

> " The first is that in that case Warner J was in actuality dealing with an application to appoint his replacement, not to remove, the liquidator.
>
> I make that observation, only to note that there can be no basis in principle for differentiating between locus standi to bring the one but not the other type of application. In any event, Warner J. properly, in my view, made no such distinction as between those two powers vested by section 108 of the 1986 Act, which are both exercisable by reference to due cause shown.
>
> The other observation is that the facts of that case presented very special circumstances,

> circumstances which may well have justified a robust interpretation of the Act as a matter of judicial policy. A massive drain on their assets would have resulted to the more than 120 companies in liquidation which the applicant ex-liquidator had in his charge, in the event the other more expensive procedural statutory measures had to be invoked to appoint his replacement. In that regard I simply note that it is precisely because of such unforeseen exceptional circumstances why the Law itself prescribes no categorization of persons who may properly apply and why it would be inadvisable to impose such a fetter upon the courts' discretion to determine whether a particular applicant is a proper person to apply. "

In a reference to Re ***CORBENSTOKE LTD.*** supra, and in particular to an observation by Harman, J. with respect to a pronouncement by Jessel, M.R. [in Re ***RICA GOLD WASHING CO.*** [1879] 11 Ch. D. 36], Smellie, J. said at page 28 :

> " It will immediately be apparent from the facts of the case that the words emphasized must be regarded as obiter dictum to the extent they would seem to categorically define who may be a proper person to apply to remove a liquidator. By the analogous reference to the dictum of Jessel M.R., Justice Harman was here dealing only with the issue of the locus standi of an applicant contributory/creditor seeking to remove a liquidator in the context of an insolvency. It seems to me therefore that to the extent it was argued that Justice Harman's dictum is properly to be applied authoritatively to require any person applying first to show a positive financial interest, that argument would be unjustified. "

At page 29 :-

" I concluded that in deciding whether there is locus standi to bring an application to remove a liquidator the Court should be able to consider whether in all the circumstances the applicant is a proper person to do so (per Warner J in Re A J Adams supra). In deciding that question I concluded, the proper approach must be the same which was first and, I believe, most aptly formulated by Sir Robert Malins V.C. in one of the very earliest cases decided under the 1862 Act: In re Marseilles Extension Railway and Land Company (1867) Law Rep. 4 Eq 692 and later applied by him in : Re British Nation Life Assurance Association [1872] L.R. (Equity) 492 in the following words, incorporating a reference to his earlier judgment in re Marseilles:

> ' The Court may take all the circumstances into consideration, and if it finds that it is, upon the whole, desirable that a liquidator should be removed, it may remove him. I do not feel much doubt that (this) is the true construction, and that I have the power to remove these gentlemen'. I then likened the case to that of the power of the Commissioner over assignees in bankruptcy. My opinion is still that I have the power, and that it is due cause shown if it appears to the Court upon the whole, desirable that the removal should take place; or in other words, that the winding-up is likely to go on more advantageously upon the removal of the liquidators appointed than it would by their retention. I am therefore of opinion that I have the power. ' "

Both of these cases dealt with stage 2 of the application, i.e. the issue of due cause shown and the discretion of the Judge.

In my opinion the learned trial Judge did not pay sufficient regard to the cases of New de Kaap Limited and Corbenstoke Ltd. and the passages quoted from Halsbury's Laws of England. In analyzing the judgment of Smellie, J., it appears that he had some difficulty in arriving at his conclusions. The majority of the cases cited along with the passages from Halsbury's Laws of England lends support to the appellants' contention that in the winding-up of an insolvent Company, it is the creditors who have an interest in the disbritution of the assets.

The learned trial Judge himself indicated that the facts of the case in Re ***A. J. ADDAMS [BUILDERS] LIMITED*** presented very special circumstances.

It is conceded that the Respondent is neither a creditor nor a contributory. It is also conceded that debtors cannot apply to have the liquidator removed. The Respondent is in the position of a defendant being sued by the liquidators and who may be liable in damages. Is not the Respondent in the position of a potential Debtor as suggested by Mr. Hunter.?

The cases relied on by Mr. Voss [in Re ***ADAMS [BUILDERS] LTD;*** Re ***INTERNATIONAL PROPERTIES LTD.*** Re ***BRIDGEND GOLDSMITHS LTD.***] to support the *"proper person test"*, are cases of exceptional and peculiar circumstances.

It is not enough to ask whether the applicant is a proper person. He must show what interest he has in the distribution of the assets of the Company.

In my view, the cases cited do not support the findings of Smellie, J. that the Respondent need not show a financial interest in the outcome of the liquidation. The fact that other persons may be liable cannot give the Respondent the locus standi for an application to remove a liquidator. The Respondent must show a financial interest in the outcome of the liquidation. No such financial interest has been shown by the Respondent and in my view, the interest claimed by the Respondent, does not fall within the criteria required to establish locus standi for the removal of a liquidator. Although in the three cases cited, supra, the applicant had locus standi, the categories of persons ought not to be enlarged.

Creditors may therefore apply and if the Court wishes, it may seek the view of other creditors to have their wishes known and considered.

I accept therefore, the sumissions of Mr. Hunter that liquidators, creditors and contributories may apply for the removal of liquidators, the creditors and contributories being persons who may have a financial interest in the distribution of the assets of the Company. As already observed, the Court has granted locus standi in the three cases cited above. Mr. Hunter concedes that in those cases the Court was correct.

Another issue raised in this appeal is whether the Court has an inherent jurisdiction to restrain the appellant from pursuing Cause 104. Mr. Vos

submitted that even if the Respondent had no locus standi to apply for the removal of the liquidators, nevertheless they may invoke the inherent jurisdiction of the Court to restrain the appellants from prosecuting Cause 104.

Smellie, J., held that although the Respondent had no financial interest in the liquidation, the Court had jurisdiction to restrain the appellants from prosecuting Cause 104. The Respondent had an interest in the litigation and could complain about the conflict of interest and the allegation that the appellants were acting in an improper and unconscionable manner.

Liquidators are Officers of the Court and the duties of a liquidator are set out in paragraph 2329 V7[3] of Halsbury's Laws of England and states :-

> " As an Officer of the Court, the liquidator in a winding up by the Court must maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. It is his duty to the whole body of creditors, the whole body of shareholders, and to the Court to make himself thoroughly acquainted with the Company's affairs, and to suppress or conceal nothing coming to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court; and it is for the Judge to see that he does his duty in this respect. "

Mr. Hunter submitted that the duty of the appellants to act impartially and without conflict of interest is owed to the creditors in the case of an insolvent Company. There is no duty, he stated, owed to a debtor or a potential debtor.

Mr. Vos relied on the dictum of Lord Brandon in ***SOUTH CAROLINA INSURANCE COMPANY*** [1987] 1 AC 24 for the proposition that a party may apply for an injunction where :

> [a] one party to an action can show that anoher party has either invaded or threatens to invate a legal or equitable right of the owner for the enforcement of which the latter is amenable to the jurisdiction of the Court; and
>
> [b] where one party to an action has behaved or threatens to behave in a manner which is unconscionable.

It was held by Smellie, J., that the Court had power to act to restrain unconscionable conduct on the part of a liquidator, despite the fact that a creditor in an insolvent Company did not apply. However, he declined to find that the appellants had invaded or threatened to invade a legal or equitable right of the Respondent. On the appeal, Mr. Vos asked the Court to find that an action brought by the appellants who were acting under a conflict of interest, invaded a legal or equitable right of the Respondent.

In my view, Smellie, J. was correct in declining to make such a finding. Mr. Vos further submited that there was prima facie evidence of unconscionable conduct on the part of the appellants because of their conflict of interest and their breaches of the ethical quidelines of the accounting profession and that Smellie, J. was correct in holding that the inherent jurisdiction of the Court could be invoked.

The appellants owed a duty in Cause 104 to the creditors and to the Court. It is only the creditors who have a financial interest in the liquidation and the liquidators. The creditors, if they are not satisfied with the way in which the liquidators are conducting the litigation, they may apply to the Court to have the liquidators removed. It is conceded that no creditor has come forward to complain about the conduct of the appellants.

In my view, the alleged conflict of interest and the fact that the Respondent complain that Coopers and Lybrand, U.K., are liable and not being sued, is insufficient to warrant a finding that the appellants are acting unconsionable. If Coopers and Lybrand are liable, they could be joined as a third party by the Respondent.

In any event, the Respondent has no locus standi to apply for the inherent jurisdiction of the Court to be invoked. The facts of the case do not support the finding of Smellie, J. for the Court's inherent jurisdiction to be invoked.

I would, therefore, allow the Appeal with costs to the appellants to be agreed or taxed.

Georges, J.A.

The appellants, Mr. Christopher D. Johnson and Mr. John Dinan are the liquidators of Omni Securities Ltd. (OSEC), a company which is being voluntarily liquidated under the supervision of the Court. On March 17, 1995 they filed an action, Cause No. 104 of 1995, against a number of defendants among them Deloitte and Touche, a Cayman firm of accountants, Deloitte Haskins &

...cont'd

Sells, also a Cayman firm of accountants, Deloitte & Touche A.G. (DTAG), a Swiss firm of accountants; and Deloitte Touche International., an international firm of accountants. The writ was generally endorsed and in substance claimed damages against all the defendants or someone or more of them for breach of contract and/or negligence and/or negligent misstatement in their agreement to audit and prepare and submit an audit report for OSEC's financial years ending 31 December, 1988 and 31 December, 1989.

In response to this writ, the eighth defendant, Deloitte & Touche A.G. (DTAG) filed an originating summons against Mr. Johnson and Mr. Dinan and the firm to which they belonged, Cooper and Lybrand (CL), seeking declarations that Messrs Johnson and Dinan were in a situation of a conflict of interest in acting as liquidators of OSEC and in particular in causing it to commence the action referred to above. They also sought an order removing them as joint liquidators of OSEC or alternatively an order restraining them from continuing the conduct of that action.

Thereupon, the liquidators took out a summons asking that the originating summons be struck out on the ground that DTAG had no *locus standi* to file it. The liquidators' summons to strike out was dismissed by Smellie J. and against this dismissal they have appealed.

The background to this litigation is the collapse of the network known as the Omni Group of companies owned by Mr. Rey. The parent company was a Swiss company, Omni Holding A.G.(OHAG). OSEC, a wholly owned Cayman subsidiary of OHAG, went into voluntary liquidation and on 1 November 1991 Mr. Johnson and Mr. Shanahan, both of CL were appointed

liquidators. On 17 March, 1992 Mr. Shanahan resigned and was replaced by Mr. Dinan.

The audit firms of Deloitte Haskins & Sells (DHS) world-wide had in the main been retained as auditors for companies of the Omni Group. DHS (Switzerland) were the auditors of OHAG and DHS (Cayman) were the auditors of OSEC. During the 1980's, Mr. Rey operated principally from London and DHS (U.K.) audited OMNI enterprises there and also advised Mr. Rey on his personal financial affairs and income tax. Two DHS partners, Mr. Malcolm and Mr. Ridley, were particularly involved in that aspect of affairs.

In July 1989 the international accounting organisations of Touche Ross International and DHS decided to merge to form the firm of Deloitte Touche (DT). DHS (U.K.), however, decided not to join that merger. Instead, as of 1 January, 1990 DHS (U.K) merged with Cooper and Lybrand in the United Kingdom to become Cooper Lybrand Deloitte (CLD) and eventually, from 1992 onwards, simply Coopers & Lybrand (CL). Messrs. Ridley and Malcolm, who as partners in DHS (U.K.), audited the books of some of the Omni group companies in the United Kingdom and elsewhere and advised Mr. Rey in his personal affairs, were now partners in CL, the firm of accountants in which Mr. Johnson and Mr. Dinan, the liquidators of OSEC were also partners.

It is in those circumstances that the conflict of interest alleged by DHS is said to arise. In his affidavit in support of the originating summons Mr. David Wilson, a chartered accountant and managing partner of DT, deposes to facts which, in his view, establish a clear conflict of interest on the part of the liquidators. Mr. Wilson was attached to DT in Zurich and was responsible for

overseeing the audit of OSEC for the year ending 31 December, 1990 and also audit partner responsible for the audit of the parent company OHAG.

He states that because of Mr. Rey's frequent presence in London and his use of DHS (U.K.) as his advisers that firm had access to information which was not always passed on to DHS (Switzerland). He points out that in draft proceedings filed by CL against DT (Switzerland) it is suggested that DT (Switzerland) should have had a global perspective of the Omni Group and should, therefore, have exposed alleged financial misdealings within that Group. The same type of allegation would no doubt in time be developed in cause 104 of 95. Any such allegation would involve liability on the part of DHS (U.K.) now CL which had failed to keep DHS (Switzerland) fully informed.

The second affidavit in support of the originating summons was sworn by Mr. Anthony Houghton, a partner in DT since 1976. He examined the provisions of the Guide to Professional Ethics of the Institute of Chartered Accountants in England and Wales which should govern the professional conduct of Messrs. Johnson and Dinan who are both members of the Institute. In his opinion, in accepting the appointment as liquidators of OSEC, Messrs. Johnson and Dinan had breached the principle of objectivity. They had also breached Practice Statements setting out criteria for assessing the propriety of accepting any appointment as liquidator or continuing to hold the appointment when developments in the course of the administration reveal that there may be difficulties in maintaining the principle of objectivity.

It was common ground that the liquidators' application to strike out the originating summons should be decided only on the assumption that the material set out in the affidavits in support of that summons be taken as established. Despite this, there was considerable argument as to what these affidavits did establish. This argument sprang from differences of view as to the inferences which could reasonably be drawn from the facts stated.

On a review of the material I conclude that the liquidators may be faced with a potential conflict of interest as they pursue claims against DTAG. A situation could well develop in which DTAG could contend that any negligence on their part was to some extent due to the negligence of DHS (U.K.) in failing to keep them sufficiently informed as to the global state of the Omni Group. DHS (U.K.) is now, of course, CL.

It was submitted that the Deloitte partners involved in the merged practice may have retained responsibility, to the exclusion of the merged practice itself, for matters relating to pre-merger clients and audited financial statements. There is nothing on the record to show that this was the arrangement, and, if it was, it would be a matter which could easily have been established by the liquidators as partners in the merged firm. In any event, if the merged firm is brought in as third parties the record will show CL on opposite sides of the litigation, the Cayman firm on the one side and the United Kingdom firm on the other. An inference could reasonably be drawn in such circumstances that the objectivity of the Cayman firm in carrying on the liquidation may be compromised.

There is no material on which it can be reasonably concluded that the liquidators in filing action 104 of 95 have in any way been motivated by conflict of interest. It was, in effect, not disputed that a completely independent liquidator may have decided, after competent advice, that action 104 of 1995 should be filed against DTAG alone without any consideration being given to the possibility that CL might be brought in as a third party. Once the possibility has been raised, however, it is reasonable to infer that the liquidators should be conscious of the risk of embarrassment.

It is against this background that the issue for decision - whether or not DTAG has the locus standi to file the originating summons - must be considered.

It seems clear that the provisions enacted for the winding up of companies under the Cayman Companies Law 1995 Revision (The Law) are directed to ensure that the process of winding up should assure the greatest benefit to the contributories if the company is solvent and to creditors if the company is insolvent. Those two groups are identified as the groups concerned with the conduct of the winding up.

Thus where an order for a winding up has been made, section 102 of the Law provides that "any creditor or contributory" may apply by motion to stay the proceedings. In all matters relating to the winding up section 104 of the Law provides that the Court may, as to all matters relating to the winding up, have regard to the wishes of "the creditors or contributories". These wishes may be determined by holding meetings at which regard shall be had as regards creditors to the value of debts due to each and as regards contributories to the votes to which they would be entitled under

the regulations of the company.

When a winding up begins as a voluntary winding up, as in this case, and subsequently becomes a winding up under supervision of the Court, the winding up shall be deemed to be the winding up of the company by the court for the purpose of giving jurisdiction to the Court over suits and actions - section 150 of the Law.

Section 151 of the Law provides that in deciding on the method of winding up - wholly by the Court or merely subject to its jurisdiction - the court may have regard to the wishes of contributories and creditors to be ascertained in the manner set out in section 104 of the Law.

Other sections of the Law recognize the special position of creditors and contributories in the conduct of the voluntary winding up. Section 140 reads -

> "140. **Liquidators or contributories in voluntary winding up may apply to court** Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court to determine any question arising in the matter of such winding up, or to exercise, in respect of the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or may make such other decree on such application as the Court thinks just."

Both sides agree that the section which is directly applicable to the circumstances of this case is section 106(1) of the Law. It reads -

> "Any official liquidator may resign or be removed by the Court on due cause shown; and any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court."

The section does not specify by whom the application may be made and can clearly be interpreted to mean that the Court can exercise its discretion in any way it thinks fit in deciding whether an applicant has the standing to apply.

A review of the cases establishes that the process of resolving an application for the removal of a liquidator raises three stages -

(1) does the applicant have the *locus standi* to apply?

(2) has due cause been shown? and

(3) if such cause has been shown should the Court exercise its discretion and remove the liquidator?

The issues as to whether or not due cause has been shown and whether the discretion should be exercised are far more frequently canvassed than the issue of standing. That issue is often uncontroversial, the application being usually made by a creditor or contributory.

In *Re Marseilles Extension Railway and Land Company* (1867) 4 L.R. Eq. 492, the company was being wound up voluntarily under the supervision of the Court. A meeting of the creditors was held in the Chambers of the Vice-Chancellor and several of them objected to the continuation in office of the liquidators principally because they had been appointed by the shareholders. They wanted an independent person. It was contended that that did not constitute "due cause".

At p. 694 Sir R. Malins V.C. stated -

> "On the one side it is contended that "due cause must be something amounting to misconduct or personal unfitness; on the other hand it is contended that .....the Court may take all the circumstances into consideration and if it finds that it is upon the whole, desirable that a liquidator should be removed, it may remove him."

He then went on to consider whether or not he should exercise the power. He considered that the fact that a substantial number of the creditors wished the liquidators removed would constitute due cause but he could not conclude that this was so in this case.

The issue of standing did not arise.

In *In re Tavistock Iron Works Company* (1871) 24 LT NS. 605, certain creditors applied to remove a liquidator who wished to pursue an action which had been instituted with the sanction of the Court.

Lord Romilly held that though no unfitness had been shown nor misconduct imputed due cause had been shown. On an examination of the facts he concluded that not one creditor had dissented from the application to remove and he granted the order for removal.

The applicant here was a creditor and there was no need to consider standing.

The issue of standing also did not arise in *In re British Nation Life Assurance Association* (1872)

L.R. 14 Eq. 492. The applicant was a shareholder in the Association which was being voluntarily wound up. The Association had some time previously absorbed another insurance company, the European Life Assurance Society. The Society had become insolvent and provisional liquidators had been appointed on a petition for its winding up. Later the Association passed a special resolution for voluntary winding up and liquidators were appointed other than the liquidators appointed under the compulsory order for the winding up of the Society. The applicant sought to have the liquidator appointed by the Association removed and replaced by the liquidators appointed by the Court to wind up the Society on the ground that it would be more convenient to have one set of liquidators wind up both companies. The applicant was not supported by any other contributory of the Association.

Vice-Chancellor Malins reiterated the view he had expressed in the Marseilles case (supra). He refused the application on the ground that though it would usually be more convenient to have one liquidator for amalgamated companies, the applicant had no support among the shareholders of the Association which was clearly solvent.

The case of *In re Sir John Moore Gold Mining Company* (1879) 12 Ch. D. 325 was one in which again no issue of standing arose. The issue was whether due cause had been shown. Sir George Jessel M.R. was not altogether prepared to accept the broad view expressed by Malins V.C. in the *British Nation* case (supra). He did hold, however, that the liquidators' insistence on pressing an action of which all the shareholders disapproved justified the exercise of the discretion to remove for "due cause shown".

The issue of standing directly arose in *In re Norwich Provident Insurance Society* (1879) 49 W.R., 187. Bacon V.C. held that a contributory who had not paid a call could not apply to have a liquidator removed. He stated at p. 187 -

> "...the point before me must be decided upon what I take to be the settled practice of the court. Before any person interested as a contributory can approach the Court to ask for any kind of relief, he must do that which is incumbent upon him in his character as contributory, namely pay his calls."

The case is not, however, particularly helpful in this matter. A settled rule in a narrow area was applied.

The issue of *locus standi* did not arise in *In re Adam Eyton Limited Ex parte Charlesworth* (1877) 36 Ch. D. 229. The issue discussed was "due cause". Cotton L.J. formulated the principle in terms closer to that of Malins V.C. in the *Marseilles* case (supra) than to those of Sir George Jessel M.R. in *Sir John Moore* (supra). He stated at pp. 303-4 -

> "....in my opinion, and I believe the rest of the Court agrees with me if the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person shall be made liquidator, then the Court has power to remove the present liquidator, and of course to appoint some other person."

Bowen L.J. at p. 306 stated -

> "If anybody understands Sir George Jessel language in that case [*Sir John Moore* (supra)] to mean that [unfitness in the liquidator ought to be shown before he is removed] I think that this Court ought to lay down that such an apprehension of his meaning is incorrect, and that is not the sole ground under the statute for which a liquidator can be removed."

The case of *In re New de Kaap Limited* [1908] 1 Ch. 589 dealt with the issue of *locus standi*. The New de Kaap Ltd (the old company) by special resolution was voluntarily wound up and an arrangement concluded under which its liquidator, Mr. Hutton, would consent to the formation of a new company, the New de Kaap (1906) Limited (the new company). An agreement was reached by which the new company would take over the assets of the old company under a reconstruction agreement. Among the terms of the agreement every member of the old company would on making claims, be entitled to a certain number of shares of 5/- each in the new company with 4/6 credited as paid up. Shortly after, an order was made that the new company be wound up and a Mr. Ogle was appointed liquidator. Mr. Ogle, the liquidator of the new company, took out a summons against Mr. Hutton, then liquidator of the old company asking that he be removed as liquidator of the old company and that he, Mr. Ogle, be appointed liquidator in his place.

A preliminary objection was taken to the summons. It was contended that Mr. Ogle had no standing to make the application.

The pertinent legislation was sections 138 and 141 of the Companies Act 1862 as amended by section 25 of the Act of 1900. The language of these sections are largely reproduced in the Law save that the amendment made by section 25 does not appear in the Law. Section 140 of the Law is in its terms an adapted reproduction of section 138 of the 1862 Act. Section 143 of the Law reproduces section 141 of that Act.

Neville J. noted that the second sentence of section 141 of The Act did not say who may apply for the removal of a liquidator and the appointment of another in his place, but, having regard to the wording of the former part of the section, there would, if the section stood alone, be a difficulty in saying that the latter part of the section left it open for any person who was not a contributory to apply for the removal of a liquidator. He held also that Mr. Ogle was not a creditor of the old company. Since he was neither a creditor nor a contributory he had no locus to apply and his summons was dismissed with costs. Mr. Hunter relied heavily on this case. He submitted that it supported the principle of that only persons who have a real interest in the property of the company in liquidation have the locus to apply. Mr. Vos criticised the reasoning of Neville J as being based on a false proposition. Smellie J declined to be persuaded by the decision principally on the ground that section 106 of the Law [like section 141 of the 1862 Act] was entirely unfettered as to who may apply. I shall revert to these positions when undertaking an overall consideration of the cases.

In re Charterland Goldfields Limited (1909) 26 T.L.R. 132 and *In re Amalgamated Properties of Rhodesia Limited* (1914) 30 T.L.R. 405 require little discussion. In both cases the application for removal of the liquidator in companies which were being voluntarily wound up had been made by shareholders. No issue of *locus standi* arose. In each case the question for resolution was whether due cause had been shown and whether the discretion to remove should be exercised. The interpretation given to the phrase "due cause shown" in *Sir John Moore* (supra) was applied.

Although the issue of *locus standi* arose in the case of *Re Intercontinental Properties Pty Ltd in liq* [1977] 2 ACLR 488, it was not discussed because the liquidator whose removal was sought

conceded the status of the Attorney-General to make the application. The petition for the winding up of the company had been filed by the Attorney-General as Minister administering the Companies Act. The ground for the application was the existence of circumstances which were said to cast doubts on his complete independence and impartiality. The Attorney-General had in effect directed him to sue the Bank of New South Wales for a large sum said to be due to the estate. He did not think he should do so. He had taken advice from senior counsel who had advised that the claim could not be maintained. He had an account at the Bank of New South Wales but maintained that that fact in no way affected his position. While the judge stressed the need for a liquidator to be objective and to avoid situations of potential conflict, he did not remove the liquidator. The Attorney-General offered to indemnify him with respect to any costs he might incur in an action against the bank and on the basis of the offer, the judge ordered him to proceed with the action.

Re Keypak Homecare [1987] 3 BCC 558 was entirely concerned with a discussion of the concept of "due cause shown". Millett J examined the case of *Re Adam Eyton Ltd.* (supra) and stated at p. 564 -

> "There were special circumstances in that case but I do not read the general principle laid down by the Court of Appeal as being limited to cases in which special circumstances can be shown. On the contrary, the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him either personally or in his conduct of the particular litigation."

The applicant was a trade creditor under the Insolvency Act 1986. There could be no question that

he had *locus standi*.

The clearest pronouncement on the issue of *locus standi*, albeit obiter, appears in the judgment of Harman J in *Re Corbenstoke Ltd. No. 2* [1989] 5 BCC 767.

The applicant for the removal of the liquidator in that case was a company which according to the affidavit in support held 49 out of the 100 issued shares of the company which was being wound up by the court. The company was insolvent. Harman J stated at p. 768 -

> "I am of the opinion that the applicant has no locus standi as a contributory to make this application. I make that ruling upon the analogy with the proposition laid down by Sir George Jessel MR over 100 years ago in connection with contributories' petition.
>
> Sir George held that a contributory could not present a petition unless he alleged that there would be a surplus for contributories after payment of all creditors. He asserted that was the rule, because, he said, with that common sense for which that great judge was noted, were it not so, the contributory could get nothing as a contributory, and could have no real interest in presenting the petition and the court should not be troubled with petitions by persons not having any real interest. In the same way, in my judgment, an application to the court under sec. 172 of the Act of 1986 for the removal of a liquidator can only properly be made by a person having an interest in the outcome of the liquidation. If the company be insolvent, the only person having an interest in the outcome must be creditors for the dividends which may be paid upon their debts in liquidation."

The statement was, however, plainly obiter since the company could also establish that it was a creditor and the application proceeded on that basis.

Re A.J. Adams (Builders) Ltd. [1991] BCC 62 also dealt with the issue of standing. The applicant, Mr. Papi, was an insolvency practitioner who had been liquidator of the company A. J. Adams

(Builders) Ltd. His practising certificate had been suspended by the Disciplinary Committee of the Association of which he was a member. He could no longer act as a liquidator of that company or of some 129 other companies of which he had been liquidator. He applied for an order that Mr Saud, a licensed member of the Association, be appointed liquidator in his stead of all the companies of which he had been liquidator.

It was, of course, possible to call meetings of the creditors of each company and have liquidators appointed to replace Mr. Papi but that would have been costly both in terms of time and money.

Section 108 of the 1986 Act under which the application was made reads -

> "(1) If from any cause whatever there is no liquidator acting, the court may appoint a liquidator .
> (2) The court may, on cause shown, remove a liquidator and appoint another."

Also pertinent was section 112 of the Act which reads -

> "(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court."

Warner J stated at p. 364 -

> ".....Mr. Curry Q.C. put forward an alternative argument to this effect. Section 108 (1) of the 1986 Act does not say who may make the application to the court under the section. That is left to the court to decide, and the court may entertain an application under that section by anyone whom the court considers proper. Those who may

> make the application are not confined to the persons specified in s.112.
> I have, after some hesitation, come to the conclusion that the alternative contention by Mr. Curry Q.C. is right."

Thereafter he cites, in part, section 112 set out above and continues -

> "An application under s. 108 is not very aptly described as an application for the determination of a question arising in the winding up of a company when that is contrasted with the exercise of powers. It is more properly described as an application for the exercise of a power. But it is not a power which is invoked because the court might exercise it if the company were being wound up by the court. It is a power expressly conferred on the court in the case of voluntary liquidations by s. 108. In that respect s. 108 stands on its own."

He concluded that the Court did have power to accede to Mr. Papi's application.

> "If the test be whether the court considers a former liquidator in Mr. Papi's position to be a proper person to make that application it seems to me that the test is satisfied."

Mr. Vos urges acceptance of this as the test applicable in this case and contends that on that test DT would plainly qualify.

In *Re Arrows Ltd.* [1992] BCC 121, the application to discharge provisional liquidation was made by the company itself. The petitioning creditor was represented at the hearing. The standing of the company to appear was not raised. The facts were complicated but it was clear that a single liquidator might be confronted with situations of conflict of interest as the competing interest of interlocking companies developed in the course of the litigation. Hoffman J refused the application to discharge leaving it to the liquidators to apply to the court for directions as conflicts developed.

In *Bridgend Goldsmiths Ltd. and others* [1995] 2 BCLC 208, the application to remove the liquidator was filed by the Secretary for Trade and Industry. The liquidator had ceased to be qualified to act as an insolvency practitioner, his authorisation so to do having been withdrawn by the Secretary. Blackburne J was satisfied that s. 108 (1) of the 1986 Act [s. 106 of the CCL] empowered him to make the appointment. No issue of removal arose because on the loss of his authorisation to act as an insolvency practitioner the liquidator had ceased to be liquidator. Blackburne J was also satisfied that the Secretary of State was a proper person to make the application applying the interpretation placed on s. 108 by Warner J in *A. J. Adams (Builders) Ltd.* (supra).

In *In re Sankey Furniture Ltd.* [1995] 2 BCLC 594 two applications were being considered. Mr. Betts, a partner in the firm of Grant Thornton, was ill. He wished to retire and pass on to Mr. Harding, who was replacing him, appointments as liquidator of several companies which he held while at Grant Thornton. Mr. Harding, formerly a partner in Pannell Kerr Foster, having moved to Grant Thornton wished to pass over to other partners at that firm the conduct of liquidators which he was conducting as liquidator while at that firm.

Chadwick J stated at p. 603 -

> "I am satisfied that I should follow the approach adopted by Harman J in *Re Parkdawn Ltd.* and by Warner J in *Re Adams (Builders) Ltd.* and recognise that where the applicant liquidator and trustee is unable, through ill health or some other cause, to continue in office - so that an application for leave to resign could not be refused - the appointment in his place of a member or employee of the same firm- who is himself an authorised insolvency practitioner and whose

> suitability for appointment is unimpeachable - is so obviously in the interest of creditors in each individual liquidation or bankruptcy that meetings creditors and contributories will serve no useful purpose. Accordingly, I should not put the creditors and contributories to inconvenience and expense by insisting that the applicant follows the procedure for resignation prescribed by the 1986 Act and under the 1986 rules."

No issue of standing arose in this case because Mr. Bett and Mr. Harding were still liquidators and applied in that capacity for the requisite orders. It is, however, interesting to note that the existence of standing could not of itself have provided a basis for the grant of the orders. A procedure existed under the rules by way of summoning a meeting of creditors which would have achieved the purpose sought by the grant of the orders. In the interest of convenience the Court acceded to the application and short-circuited the prescribed statutory procedure.

Although the cases were exhaustively reviewed, the essential difference of approach to the question of *locus standi* lies in the view taken by Neville J in *New de Kaap Limited* (supra) in which counsel appeared on both sides and there was argument and that taken by Warner J in *Re A.J. Adams (Builders) Ltd.* (supra) in which counsel appeared only for the applicant. *New de Kaap Limited* (supra) does not appear to have been cited to Warner J in *Re A. J. Adams (Builders) Ltd. (supra).* Our attention has not been drawn to any disapproving references or academic criticism of *Re New de Kaap Limited* (supra) and it is cited in the latest edition of Halsbury's Laws of England Vol 7 (3) para 2743 in support of the second of the propositions set out below -

> "Removal of liquidator by the court. The court may, on cause shown remove a liquidator and appoint another. The application may only be made by a contributory, liquidator or a creditor."

The Australian text book McPherson on the Law of Company Liquidation, O'Donavan 3rd Ed. at p.227 states -

> "Who may apply The Companies Act 1981 provides that a liquidator may, on cause shown, be removed by the court. There is no indication of who may apply for his removal, but a creditor or contributory would certainly have the necessary locus standi as also has the liquidator himself."

Re New de Kaap Limited has been criticised on the ground that section 141 of the Act of 1862 which vested in the court the power to remove the liquidator did not specify by whom the application could be made. Neville J introduced a limitation by referring to section 138 of that Act as amended by section 25 of the Act of 1900. In the result he formulated no principle which could guide the exercise of the discretion granted in broad terms by the section. He concluded that the applicant was neither a creditor nor a contributory and had no standing.

In my view, the discretion granted by the section (section 106 of the Law) should be exercised against the background of the broad scheme of the legislation. A company is not to be put into liquidation except on its own petition or the petition of persons potentially entitled to share in its assets on dissolution - the contributories or the creditors - section 95. Section 97 empowers the company, a creditor or contributory to seek an injunction to restrain the making of a winding up order. Section 102 empowers a creditor or a contributory to move for a stay of the winding up order. Section 104 empowers the Court in all matters relating to the winding up to have regards to the wishes of the creditors or contributories. In ascertaining these wishes, regard must be had to the value of the debt or the number of votes conferred by the contributory's holding.

The legislation seeks to ensure that the assets of the company which is being wound up are dealt with in such a manner that those entitled to any portion of them on distribution are consulted and do as well as can be expected in the circumstances.

Understandably, there is concern with the need to preserve flexibility so that the court's hands are not unduly fettered. If, however, such restrictions as are imposed take fully into account the groups intended to benefit under the general scheme of the Act, these restrictions should place no obstacle in the path of ensuring that justice be done.

On the other hand, a very broad formulation of the test for determining who may apply may well tempt the optimistic to seek intervention. In the final analysis, the intervention may fail, in that the court may refuse to exercise its discretion as sought. The process of completing the winding up would, however, have been delayed to the disadvantage of those entitled to a share of the proceeds on distribution.

In *In re Corbenstoke No. 2* (supra), Harman J at p. 768 did formulate such a test. He held that -

> "in my judgment an application to the court under sec. 172 of the Act of 1986 for the removal of the liquidator can only be properly made by a person having an interest in the outcome of the liquidation."

Although he did not specify a financial interest, this was plainly in his mind since he went on to add -

> "If the company be insolvent, the only persons with an interest must

> be creditors for the dividends which may be paid upon their debts in the liquidation and cannot be a contributory who by definition will receive nothing."

In considering the issue of standing, it must also be borne in mind that it is the first stage of a three stage process as has been mentioned - the second being the determination of due cause and the third the determination as to whether the discretion should or should not be exercised.

Most of the cases reviewed dealt with the issue of due cause. The attempt to confine the content of "due cause" to some notion of unfitness on the part of the liquidator has been firmly rejected.

Millett J in *Keypack Homecare Ltd.* (supra) stated at p. 564 -

> "the words of the statute are wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him either personally or in his conduct of a particular liquidation."

The applicant who sets in motion proceedings to activate the exercise of such a wide discretion should clearly himself or herself be a person who will be affected by the outcome of the liquidation in which the removal of the liquidator is sought.

The test of being a "proper person" suggested by counsel in *A. J. Adams (Builders) Ltd.* (supra) and accepted as right, Warner J, 'after some hesitation', suggests no criteria and appears to leave the matter entirely to the court.

In two recent cases, applications were entertained from persons who could not be said to have had any financial stake in the outcome of the liquidation. In *A. J. Adams (Builders) Ltd.* (supra), a liquidator, whose licence had been suspended for 6 months, was allowed to apply for the appointment of an associate who worked with him to replace him in some 129 liquidations in which he was engaged. In *Re Bridgend Goldsmiths Ltd* (supra), the Secretary of State for Trade and Industry applied for the removal as liquidator of four companies and as supervisor of 20 voluntary liquidations.

In the course of his judgment, Warner J stated at p. 364 -

> "If the test be whether the court considers a former liquidator in Mr. Papi's position to be a proper person to make that application, it seems to me that that test is satisfied. It is interesting to observe that in a letter from the Insolvency Service of the Department of Trade and Industry dated 14 May to Mr. Papi's solicitors, that course was suggested in anticipation of the disciplinary proceedings against Mr. Papi resulting in his suspension. It seems to me plain that a responsible insolvency practitioner in Mr. Papi's position is taking a proper course when he brings the difficulties resulting in his suspension before the court for solution rather than leaving it to the contributories and creditors of the various companies of which he has been liquidator to resolve those difficulties at their own expense."

The applicant in these cases would not have been affected by the outcome of the liquidation in terms of sharing in its proceeds. They were, however, in the one case, that of Mr. Papi, deeply involved in the administration of the liquidations which would have come to a halt on his enforced removal. In the other case, the Secretary of State was the competent authority under the Insolvency Act. Unless some action was taken to get the liquidation back on course those entitled to a share

would be prejudiced.

It could, therefore, be stated that under section 106, an applicant must have an interest in the liquidation either as someone who had a financial interest in the outcome or as someone involved in the smooth and orderly processing of the winding up and applying to overcome administrative difficulties arising in the process of the winding up.

On the test as I have formulated it, DT does not qualify as a proper applicant. In no circumstances would they be entitled to a share in the assets realised in the liquidation. OSEC is insolvent and they have no claim as auditors. They are potential debtors. Additionally, they are to be taken as having established that the liquidators as partners in CL have acted in breach of the professional rules and guidelines by which they are governed in accepting the appointment as liquidators of OSEC and in continuing to act as liquidators after this breach of the rules and the guidelines have been pointed out to them.

Accepting that circumstances may arise in which that infringement of the principle of objectivity may cause embarrassment, the facts assumed to be established do not support an inference that the creditors, the only group with a financial interest in the liquidation, are likely to suffer as a consequence. Nothing in the supporting affidavits suggest the CL's lack of objectivity may lead to their favouring one creditor as against another.

It is the case that DT may be faced, if the suit is successful, with an award against them of a huge

sum in damages and a possible tarnishing of their reputation as professionals. The first of these possibilities will be entirely to the benefit of the creditors and build up the assets which they are to share. The second in no way affects the outcome of the liquidation.

The cases indicate that it is not unknown for liquidators to face conflicts of interest in the conduct of liquidations, particularly where a complex web of interlocked companies is being wound up and the liquidator is appointed for two or more subsidiaries, each with claims against the other. Convenience may well dictate that the liquidator remain in office and apply for the guidance of the court in a situation of sharp and serious conflict. This can be done if DT seeks to bring in CL (U.K.) as third parties.

I would accordingly conclude that DT does not have the locus standi to apply for the removal of the liquidators under section 106 of the CCL.

The conclusion which I have reached regarding DT's standing under section 106 of the Law to bring an application for the removal of the liquidator is not the end of the matter. The application was not made in the liquidation proceedings but in a separate originating summons. Among the remedies claimed alternatively was -

> ".....an order restraining the First and Second Defendants from continuing the conduct of the action against the plaintiff and others in the Grand Court of the Cayman Islands in Cause no. 104 of 1995."

On behalf of DT it is submitted and not challenged that the liquidators are officers of the Court.

Accordingly, in their conduct of the liquidation, it is submitted that the Court has power to supervise their actions and restrain them from acting in circumstances in which the liquidators appear not to be acting impartially. For the liquidators, it is contended that if DT does not have standing under s. 106 of the Law, they cannot circumvent the carefully constructed scheme of winding up set out by the Act by seeking to invoke the inherent jurisdiction of the court to control their officers by injunction. In effect the argument is that once it is ruled that there is no standing under section 106, that is an end of the matter.

I do not think that this is the case. The jurisdiction of the court to grant injunctions is determined by criteria separate and distinct from the jurisdiction under the Law. A recent authoritative statement is to be found in the judgment of the House of Lords in *South Carolina Insurance Co.* v *Assurantie Maatshappij "De Zeven Provincien" N.V.* [1987] 1 A.C. 24. All the Lords concurred in the conclusions and the reasoning underlying these conclusions in the speech of Lord Brandon. He stated at p.40 -

> "The effect of these authorities, so far as material to the present case is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when a party has either invaded, or threatens to invade a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved or threatens to behave, in a manner which is unconscionable."

Smellie J concluded that though DT had an interest in the liquidation it was not a positive financial interest and consequently he saw no need to make a finding as to whether that strictly gave them a legal or equitable interest which would qualify them under situation (1) where there is an invasion

or a threatened invasion of a legal or equitable right.

Mr. Vos filed a respondent's notice of his intention to contend that Smellie J should have found that the liquidators had invaded DT's legal and equitable rights by bringing Cause 104 of 1995 when affected by conflicts of interest.

It is important in determining the issue of conflict of interest to identify clearly the persons to whom the fiduciary duty is owned. A passage from the Australian text book. McPherson, on the Law of Company Liquidation, 3rd Edition O'Donovan at pp. 214 - 215 was acknowledged as accurately summarising the law on this issue. It reads -

> "**(1) Fiduciary duties**
>
> From the practical point of view it does not seem to matter much whether the liquidator is treated as a trustee in the strict sense or simply as an agent, for in either capacity he occupies a fiduciary position in relation to the company, its creditors and contributories. This imposes upon him certain obligations identical with those resting upon trustees, agents, and directors, one of which is that he is bound to act honestly and to exercise his powers bona fide for the purpose for which they are conferred and not for any private or collateral purpose. In addition, two further duties of major importance follow from his fiduciary relationship: these are (a) that he must not allow his private interest to come into conflict with his duty, and (b) that in discharging his duties he must at all times act with complete impartiality as between the various persons interested in the property and liabilities of the company."

The entities to whom the duty is owed are the company, its creditors and contributories. The liquidator owes no duty to debtors or potential debtors from whom compensation is being sought for

damages allegedly done to the company by their negligence or malfeasance. The liquidator owes a duty to the company, its creditors and contributories to pursue such a claim with all due diligence and in so doing cannot be said in any way to be invading the legal and equitable rights of the defendant in such an action.

Assuming that the liquidators, in accepting the appointment and continuing to hold and exercise the functions of the office, were acting in breach of professional guidelines that could not create legal and equitable rights in the defendant.

The alternative basis for granting an injunction is that set out in situation 2 - where a party to an action has behaved or has threatened to behave in a manner which is unconscionable. There would appear to be one basis for the accusation of unconscionable conduct. It would arise in this way. Accepting that the liquidators, by reason of the breach of the principle of objectivity, have decided to refrain from investigations which would reveal that a case could be made against CL (U.K.) and have sued DT alone, it is asserted that they have acted unconscionably. This, in my view, is a non-sequitur. If facts can be alleged which would indicate a prima facie case against DT it could not be unconscionable to sue them. Situations frequently arise where a plaintiff is in a position in which he could sue more than one person for damages in respect of a wrong suffered. The rules of civil procedure prescribe steps which the person sued is able to take to bring in as a party to the action all persons who can be fixed with the responsibility to contribute to the satisfaction of any damages which the court may order should be paid. Whatever may be the sympathies of the plaintiff, the defendant would in no way be hindered in pursuing a claim for indemnity or contribution against the

third party.

I am satisfied that assuming the facts set out in the affidavits of Mr. Wilson and Mr. Houghton be true, they do not establish either of the situations described by Lord Brandon cited above as giving rise to the power of the court to grant an injunction.

Accordingly, that basis for the application also fails.

In addition to the concrete remedies of removal of the liquidators and enjoining them from continuing the action, the respondent claimed two declarations. The first was a declaration that the First and Second Defendants, as partners in the Third defendant, was in a conflict of interest in acting as joint liquidators of OSEC. The second declaration was that the first and second defendants, as joint liquidators of OSEC and as partners in the third defendant, were in a conflict situation in commencing and prosecuting cause no. 104 of 1995.

In the light of the refusal to accede to the requests for removal and an injunction, it is unnecessary to discuss these claims.

The appeal is accordingly allowed with costs.

ROWE, J. A. (Ag.).

This appeal is taken from a judgment of Smellie, J. dated August 23, 1996, sitting in the Grand Court of the Cayman Islands. In that judgment the learned judge held that the Respondents had locus standi to present an Originating Summons to remove the liquidators of Omni Securities Ltd., or alternatively , the Court had inherent jurisdiction to restrain the liquidators from continuing to conduct the action against the Respondents and others in Cause 104 of 1995.

The Appellants, who are the liquidators of Omni Securities Ltd., filed 19 separate grounds of appeal and the Respondent filed a Respondents' Notice. As argued before us, there was no specific mention of the numbered grounds of appeal but the presentation of the appellant covered them all.

This case is said to be one of first impressions and to have great importance in insolvency practice not only for the Cayman Islands. In a very general way the appeal is concerned with who may agitate the Court for the removal of a liquidator of an insolvent company having regard to the appropriate current legislation and the relevant decided cases in this field of law.

Omni Securities Ltd. ("OSEC") which was incorporated in the Cayman Islands on December 22, 1986, was placed into creditors' voluntary liquidation in November 1991 and the liquidation was ordered to be continued subject to the supervision of the Court on March 25, 1992. Mr. Christopher D. Johnson and Mr. Kenneth V. Shannahan of Coopers & Lybrand, Chartered Accounts of George Town, Grand Cayman were appointed joint liquidators of OSEC in 1991. Mr. Shannahan resigned as joint liquidator on January 17, 1994 and Mr. John M. Dinan of Coopers and Lybrand, Chartered Accountants of George Town Grand Cayman was appointed joint liquidator of OSEC by the Grand Court on March 15, 1994.

OSEC was a member of a very large group of companies, (numbering over 420) with the parent company being Omni Holdings AG, ("OHAG"), a Swiss corporation. This group of companies was controlled by a "shadow director" Werner Rey, who is being sought by the Swiss authorities, in extradition proceedings from The Bahamas, to face charges in Switzerland of fraudulent conduct in the management of the group of companies. OHAG, together with its many subsidiaries and affiliate companies worldwide, is also in liquidation and the liquidators are Coopers & Lybrand, Basel, Switzerland and Dr. Eugene Isler, a Swiss lawyer.

The liquidators of OSEC commenced Cause 104 of 1995 in which the Respondent is named as one of several defendants including its predecessor firm, the partners in those firms and D&T and DRT International, the international organization of the Respondents' firms world wide. The generally endorsed writ which sounds in contract, negligence, negligent mis-statements and breach of statutory duty is in respect of the financial statements of OSEC for the financial years 1988 and 1989. Although the Statement of Claim has not yet been finalized it is said that the claim is for hundreds of millions of US dollars, it will allege negligent auditing, and there may be an allegation that aspects of the auditing were deceitful, i.e., that the auditors acted in collusion with the management of the company to issue false financial statements. So massive is the claim that the Respondents say the action threatens their very existence.

OSEC has received claims from creditors totaling approximately CHF 886,720, 807.19. Of this amount CHF 468,170,563.67 represents claims from OHAG and OBET, both Omni group companies. The majority of the claims in terms of number have been made by third party banks, e.g..,

Banque Paribus (Suisse) S. A., Citibank (Switzerland), B. S. I. (Zurich), Bassler Kantonalbank ("K. B."), Basellandschaft KB and Banque Cantonale Vaudoise.

The liquidators have also filed an action against the former directors of OSEC claiming damages in excess of CHF200 million.

Smellie J. had before him a number of affidavits. There were affidavits from Mr. David Wilson, the Managing Partner of the Respondent and from Mr. Anthony Raymond Houghton, Chartered Accountant, and a partner of DELOITTE & TOUCHE (UK). Mr. Houghton describes himself as a distinguished Insolvency Practitioner and this has not been disputed. There were affidavits from Mr. Johnson (one of the Appellants) and a further affidavit from Mr. Johnson was introduced and received de bene esse during the hearing of the appeal.

The affidavits disclose that in July 1989 the global organizations of Deloitte Haskins & Sells International announced an intention to effect a worldwide merger between all Deloitte Haskins & Sells and Touche Ross firms. Some national Practices chose to pursue a different course. One such was Deloitte Haskins & Sells (UK) which merged with Coopers & Lybrand, rather than with Touche Ross. Consequently from January 1, 1990, Deloitte Haskins & Sells withdrew from the membership of Deloitte Haskins & Sells International. The case was argued on the basis that within the six or so large international audit firms, partnerships are formed in various countries of the world, each referred to as a "Practice" with its own separate partners and its own separate business. There is, however, an understanding that if the Practice in one country wishes to perform audit work in another country which has a Practice affiliated with its worldwide Practice, it will use its "sister Practice" for that purpose. Additionally, the headquarters organization regulates standards to be maintained by all the members of the world organization.

The Respondents say that the appellants are acting or must be assumed to be acting under serious conflict of interest and in breach of their professional rules in continuing as liquidators of OSEC. In support they refer to the affidavits of Mr. Wilson and Mr. Houghton. Mr. Wilson

identified 5 key facts in paragraph 12 of his affidavit sworn to on March 4, 1996, to be:

(a) The Liquidators (Appellants) are partners of Coopers & Lybrand (C&L.), (Cayman);

(b) C&L. (Cayman) is part of the Coopers & Lybrand international organization that includes Coopers & Lybrand (UK);

(c) OSEC was part of the Omni Group of companies that was controlled by Mr. Werner K. Rey. During the 1980s , a significant part of that Group was based in the UK, as was Mr. Rey;

(d) Coopers & Lybrand (UK) and its predecessor firm, Deloitte Haskins & Sells (UK), audited the majority of the UK Omni Group companies as well as various other OMNI Group companies worldwide such as the Omnicorp International BV sub-group. It also provided accounting advice to the Omni Group and personal financial and tax advice to Mr. Rey; and

(e) Appellants contend that Coopers & Lybrand (UK) and its predecessor firm had key information about the affairs of the Omni Group and Mr. Rey which they did not pass on to Appellants in Switzerland.

Mr. Houghton, on the other hand, concentrated on the rules of the Institute of Certified Accountants ("ICA"), of England and Wales and opined that the Appellants are in breach of the ICA Guidelines and have serious conflicts of interest with regard to their appointment as liquidators and continuing in office as such. At paragraph 46 of his affidavit Mr. Houghton summarized the breaches of the ICA ethical guidelines thus:

(1) C&L (Cayman) and its UK associated firm, Coopers & Lybrand (UK) are members of the same international association. This international association between the firms and the connection between the UK Practice, Securities(OSEC) and the Omni Group as a whole affects C&L (Cayman)'s actual and perceived objectivity. This is in breach of the Fundamental Principle both in the 1991 and 1994 Guide;

(2) It is clear from Mr. Wilson's affidavit that the Omni Group was a complicated network of companies worldwide which were all interlinked. Most were ultimately owned by OHAG which in turn was owned, in effect , by Mr. Rey. Consequently the issue of the Liquidators' objectivity has to be considered in the context of the whole Omni Group and not just the individual companies.

(3) At the time of Mr. Dinan's appointment in 1994, material professional relationship existed due to the audit by Coopers & Lybrand (UK) and its predecessor firm of companies under the same *"common control"* as OSEC which had " *material* " relationships with OSEC. This audit work took place within three years of Mr. Dinan's appointment as joint liquidator. Since OSEC is insolvent, Mr. Dinan should not have accepted appointment;

(4) Mr. Johnson should have been aware of the changes in the Guidelines from 1991 to 1993 as to the meaning of "*under common control*" and therefore his continued objectivity can be called into question;

(5) In 1991 Audit work had been carried on by the UK Pracrtice for companies controlled by OSEC within 3 years of his appointment and this fact must affect its objectivity;

(6) A material professional relationship existed because Coopers & Lybrand and its predecessor firm which gave advice to Mr. Rey personally;

(7) The Respondents are likely to join Coopers & Lybrand (UK) to Cause 104 of 1995 as Third Parties and in that event the litigation would certainly affect the objectivity of the Liquidators and create a continuing conflict of interest.

I have summarized the facts as contended for by the Respondent at some length. Mr., Hunter during the course of the argument sought to point out that certain portions of the affidavit of Mr. Wilson were inaccurate or misleading and that Mr. Houghton as the Managing Partner of the Respondent firm is not an independent expert. In the light of the concession of counsel on both sides both before Smellie J. and before us that this being a strike out summons, the facts as given by the Respondents must be assumed to be true, I can give no weight to these submissions of Mr. Hunter. It was decided in Attorney General of the Duchy of Lancaster v. L. & E. N. W. Railway Co. (1892) 2 Ch. 274, that the summary procedure of striking out can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable. This procedure cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to determine whether the Plaintiff really has a

cause of action. Wenlock v. Moloney, (1965) 1 WLR 1238; (1965) 2 ALL E. R. 871.

The Appellants say that the Respondents have no locus standi to make the application to remove the liquidators because the Respondents are at best potential debtors in the liquidation and further that there is no such conflict of interest as to trigger the inherent jurisdiction of the Court. I shall deal first with the issue of locus standi.

A company incorporated in the Cayman Islands may go into liquidation in a number of ways and for divergent reasons. It may be compulsorily wound up by the Court under the provisions of Section 93 of the Companies Law ("the Law"); voluntarily under Section 131 of the Law and subject to the supervision of the Court under Section 149 thereof. In the instant case OSEC was placed in creditor's voluntary winding-up pursuant to Section 131 of the Law. The original liquidators were appointed by the creditors and when Mr. Shannahan resigned, the Court appointed Mr. Dinan to replace him.

It was conceded that the Companies Law of the Cayman Islands (1995 Revision) is modeled to a large extent on the English Companies Act of 1862 ("the 1862 Act"). Then came the 1948 Companies Act which was repealed and replaced by the Insolvency Act of 1986. Although the Insolvency Act of 1986 has not been adopted into the Cayman Islands the Insolvency Rules have been so adopted. As said above the governing legislation in the Cayman Islands relating to the winding-up of companies , is the Companies Act, (1995 Revision). It will enhance this presentation for me to set out the relevant sections of the four statutes identified herein, especially as counsel on both sides made fullsome references to them.

The 1862 Act.

Section 93.

"Any Official Liquidator may resign or be removed by the Court on due cause shown".

Section 141.

"If from any cause whatever there is no Liquidator acting in the case of a voluntary Winding-up the Court may on the

Application of a Contributory appoint a Liquidator or Liquidators. The Court may also, on due Cause shown remove any Liquidator and appoint another Liquidator to act in the Matter of a Voluntary Winding-up".

Section 150

"Where any Order is made by the Court for a Winding-up subject to the supervision of the Court: The Court may from time to time remove any Liquidators so appointed by the Court and fill up any Vacancy occasioned by such removal or by Death or Resignation".

The 1948 Act:

Section 242(1)

"A liquidator appointed by the court may resign or, on cause shown, be removed by the court".

Section 304(2)

"The court may, on cause shown, remove a liquidator and appoint another liquidator".

Section 314(3)

"The Court may remove any liquidator so appointed by the court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal, or by death or resignation"

Section 304(2) applied to the case of a voluntary liquidation and Section 314(3) to the case of voluntary liquidation subject to the supervision of the Court.

The Insolvency Act, 1986.

This Act did away with liquidations subject to Court supervision. The relevant provisions relating to the removal of official and voluntary liquidators are as follows:

> Section 171 (1). This section applies with respect to the removal from office and vacation of office of the liquidator of a company which is being wound up voluntarily.
>
> Section (171) (2). Subject to the next sub-section, the liquidator may be removed from office only by an order of the court, or -
> (a) In the case of a members' voluntary winding-up by a general meeting of the company summoned specially for that purpose or;
>
> (b) In the case of creditors' voluntary winding-up by a general meeting of the company's creditors summoned specially for that purpose in accordance with the rules.
>
> Section 171(3). Where the liquidator was appointed by the court under section 108 in Chapter 5 a meeting such as is mentioned in sub-section (2) above, shall be summoned for the purpose of replacing him only if he thinks fit or the court so directs or the meeting is requested in accordance with the rule:-
> (a) In the case of a members' voluntary winding-up, by members representing not less than one- half of the total voting rights of all the members having at the date of request a right to vote at the meeting, or
> (b) In the case of a creditors' voluntary winding-up, by not less than one- half in value of the company's creditors.
>
> Section 171(4). A liquidator shall vacate office if he ceases to be a person who is qualified to act as an insolvency practitioner in relation to the company.
>
> Section 171 (5). A liquidator may, in the prescribed circumstances , resign his office by giving notice of his resignation to the Registrar of Companies.

Section 171(5). Where -

(a) In the case of members' voluntary winding-up, a final meeting of the company has been held under section 94 in Chapter III, or

(b) In the case of a creditors' voluntary winding-up, final meetings of the company and of the creditors have been held under Section 106 of Chapter IV,

the liquidator whose report was considered at the meeting or meetings shall vacate office as soon as he has complied with subsection (3) of that section and has given notice to the Registrar of Companies that the meeting or meetings have been held and of the decisions, (if any) of the meeting or meetings.

Section 172(1). This section applies with respect to the removal from office and the vacation of office of the liquidator of a company which is being wound up by the court or a provisional liquidator.

Section 172(2) Subject as follows, the liquidator may be removed from office only by an order of the court or by a general meeting of the company's creditors summoned specially for that purpose in accordance with the rules; and a provisional liquidator may be removed from office only by an order of the Court.

The Companies Act of the Cayman Islands (1995 Revision).

Section 106(1) which deals with official (compulsory) liquidators.

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

Section 143 which deals with voluntary liquidators.

"If for any cause whatever there is no liquidator acting in the case of a voluntary winding-up the Court may, on the

> application of a contributory, appoint a liquidator or liquidators; and the Court may on due cause shown remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding-up".
>
> Section 152(2) deals with a voluntary liquidation subject to the supervision of the Court.
>
> "The Court may from time to time remove any liquidator so appointed and fill any vacancy occasioned by such removal or by death or resignation".

Under the statutory regime of 1862, the Court could remove an official liquidator on due cause shown and in the case of voluntary winding up also remove a liquidator on due cause shown. In the case of a winding-up subject to the supervision of the Court the 1862 Act did not stipulate the conditions on which the liquidator could be removed - vide Section 150. Section 141 of the 1862 Act specifically stated that a contributory could apply to the Court for the appointment of a liquidator in the event of vacancies for all liquidators. The 1948 Act made no meaningful changes in the legislative regime for the removal of liquidators, notwithstanding that the phrase "on due Cause shown" appearing in the 1862 Act, was replaced with the phrase " on cause shown".

Section 152(2) of the Cayman Islands statute is in pari materia with Section 150 of the 1862 Act. In the 1986 Act, there is no provision for the winding-up of a company subject to the supervision of the Court, nor is there any obligation for creditors or shareholders to apply to the Court to remove liquidators as each group can in their separate meetings by appropriate resolutions remove the liquidators. However, Section 108 of the 1986 Act deals in two subsections with the appointment and removal of liquidators respectively. With this latter section I will be much concerned in this judgment.

On the assumed facts, OSEC is hopelessly insolvent. In the winding-up of this company the shareholders (contributories) stand to get nothing and the only persons who can benefit from the winding-up are the creditors of the company. At the outset it must be said that this is not an application to appoint liquidators. It was submitted in argument and both statutory and

case law support the contention that only the shareholders, the creditors or the company itself can apply to the Court to wind up a company. No third party who does not fall into one of the three categories can petition the Court to wind-up a company.

The broad submissions of the appellants and the Respondents can be set side by side. Mr. Hunter submitted that prima facie, only the persons who have a financial interest in the distribution of the assets of the company and, in addition, the liquidator, may apply to the Court for the removal of a liquidator. Mr. Vos, on the other hand, submitted that the test of locus standi is not so circumscribed. He said that Section 106(1) of the Law, does not impose such a limitation, that it would be dangerous and wrong to regard as closed the categories of persons who may apply to remove a liquidator and that the true test is whether in all the circumstances the applicant was "a proper person" to apply.

Section 106 of the Law is that which falls to be construed on this issue of locus standi. Although this section falls in that part of the statute which relates to Official Liquidators, by virtue of Section 153 of the same Law, it is provided , inter alia, that "any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes --- be deemed to be an order of the Court for winding up the company by the Court".

In construing Section 106 there are three stages through which the Court must pass. First there must be a determination whether a particular applicant has locus standi to apply to remove a liquidator; next, what is capable of amounting to "due cause shown" so as to enable the Court to exercise its power to remove the liquidator and,thirdly, the exercise by the Court of its discretion on the facts whether or not to remove the Liquidator. Locus standi is stage one and in relation to the present appeal it is the only stage with which this Court is concerned.

I turn now to look at the decided cases to see whether there has been the settled practice of the Court since 1862 that only persons with a positive financial interest or the liquidator himself, may apply to the Court to remove a liquidator. Although a very large number of cases were cited in argument, only a limited number expressly discussed the question of locus standi to remove liquidators and to those I will first go.

In Re British Nation Life Assurance Association, (1872) LR 14 Eq. 492, an application was made to the Court nominally by a shareholder of the company , but really as the mouthpiece of the European Life Assurance Society, (Society"), for the removal of its liquidators under section 141 of the 1862 Act. British Nation Life Assurance Association ("Association") had amalgamated with and had been absorbed into ("Society") so that after the amalgamation the whole of the business of the Association had been carried on by the Society, but the two companies had retained their separate corporate identities. Society was wound up on the basis of its hopeless insolvency. A resolution was passed to wind up Association against the vote of a single shareholder. Society which was debtor in the liquidation of Association could not, qua debtor, apply for the removal of the liquidators of Association and so it used the shareholder for that purpose. The Court accepted jurisdiction to hear the shareholder but made it clear that it could not exercise its discretion to remove liquidators at the wish of a debtor.

In Re Norwich Provident Insurance Society (1879) 28 WR 272, the court held that it was a settled rule of practice that before any person interested as a contributory can approach the Court for the removal of a liquidator , he must pay his calls. The applicant in that case had denied that he was a contributor, had refused to pay calls and was not willing to pay any money to the liquidators whom he did not trust. His offer to pay the money into Court was rejected and so was his application that he had standing to petition for the removal of the liquidators. Webb's South Extended Silver Mining Company Ltd., (1896) 6 BCPC 47, followed the principle of the Norwich Provident Insurance case although on slightly different facts, the Court came to a different conclusion. In Webbs' case, one of the contributory applicants had not been placed on the list of contributories from whom calls were outstanding and he was ordered to pay into Court what was said by an affidavit to be owed by him, while the other contributory applicant was given the opportunity to pay his call to the liquidator.

Kay, J., held, in Oxford Building and Investment Company, (1883) 49 LT 495, that in order to remove a liquidator who had been appointed in a voluntary winding up that liquidator had to be given notice and was entitled to be heard. Accordingly he had locus standi to ask the Court to reconsider its decision as to his removal. The Court went on to make some important

pronouncements as to the weight to be given to the wishes of creditors in the winding up of an insolvent company.

In Re New De Kaap Limited, (1908) 1 Ch. 589, Neville, J. was required to consider the locus standi of one who was considered a debtor , qua the company, to apply to remove its liquidators. New de Kaap, Limited, went into voluntary liquidation and Mr. Hutton ("Hutton") was appointed liquidator. By that same resolution, the liquidator was authorized to consent to the registration of a new company to be called "New de Kaap (1906) Limited". It was also resolved that Hutton should enter into a specific agreement with the new company when formed. The new company was duly incorporated. The old company and Hutton as its liquidator entered into an agreement with the new company whereby all the assets of the old company (subject to debentures and other encumbrances) should be purchased by the new company and as part of the consideration the new company should undertake and pay the debts and liabilities of the old company and provide an indemnity to the old company and its liquidator. There were other aspects of the consideration which are not material. Some of the shares of the new company were allotted according to the agreement.

An order for the winding up of the new company was made. Mr. Ogle was appointed liquidator of the new company and he applied to the Court, inter alia, for the removal of Mr. Hutton as the liquidator of the old company and for his own appointment as its liquidator. A preliminary objection to Mr. Ogle's application was taken on the ground that he was neither a creditor nor a contributory of the old company and therefore had no locus standi to apply for the removal of Mr. Hutton as liquidator. On behalf of the applicant it was submitted that he was in the position of a creditor and even if he were not, his special relationship to the old company should give him status. It was submitted further that as the liquidator of the new company, the purchaser of the assets of the old company, he was the person most interested in seeing that the winding up of the old company was effectually carried out.

Neville J. held that the liquidator of the new company could not be said to be a creditor of the old company. He looked at sections 138 and 141 of the 1862 Act as amended by section 25 of the Act of 1900, which introduced the category of "creditors" who could apply to the Court to appoint liquidators and reasoned that:

"The second part of the section is as follows:-

> The Court may also on due cause shown remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up. That part of the section does not say who may apply for the removal of a liquidator and the appointment of another in his place, but, having regard to the wording of the former part of the section, there would, if the section stood alone, be a difficulty in saying that the later part of the section left it open for any person who was not a contributory to apply for the removal of a liquidator".

Neville, J. concluded that as the applicant was not a creditor of the company whose liquidator he sought to have removed, he had no locus standi to apply.

The appellants consider this the seminal case in support of their argument as to locus standi. Creditors and contributories, they submit, are the only persons who can have any real interest in the distribution of the assets of a company in liquidation. This principle they say pervades winding up proceedings as they relate to appointment of liquidators and their removal. The New de Kaap case they submit, is the high point in the series of cases coming all the way from the first reported cases under the 1862 Act. The facts were such that the liquidator of the new company in New de Kaap was arguably the person with the greatest interest in seeing that the old company was effectually wound up but that was not the test for locus standi in such proceedings.

The Respondents argue that Neville, J. proceeded upon the demonstrably false proposition that all applications in a voluntary winding up were made under Section 138 of the 1862 Act. (Mr. Hunter does not support Neville, J. on that statement of the law.) Further that because the provisions of Section 25 of the 1900 Act does not apply to the Cayman Islands, if Neville J. was right, creditors could not apply in the Cayman Islands for the removal of a liquidator, nor could liquidators apply for their own removal and that because section 106 and 143 of the Law on the Cayman Islands are entirely unfettered as to who may apply, Smellie J. was right not to follow New de Kaap. The Court was urged to say that Neville J. was in error in categorizing the liquidator of the new company as a debtor rather than as a creditor and there were other avenues open to this liquidator

through actions for specific performance to obtain redress rather than to apply for the removal of the liquidator.

As an alternate submission, Mr. Vos argued that the decision in New de Kaap was wrong not only because Section 138 of the 1862 Act did not limit who could apply but because if it were right anyone could apply in compulsory liquidations but only a limited category in voluntary liquidations and it would be odd to have different categories able to apply in different types of litigation without a compelling express provision.

The next case which appeared to deal expressly with locus standi comes from Australia. Re Intercontinental Properties Pty Ltd.(in liq.) (1977) 2 ACLR 488. In that case the company was wound up on the petition of the Attorney General as Minister administering the Companies Act, 1961. Needham J. at p. 488. It was conceded by the liquidator that the Attorney General who had filed a summons seeking, inter alia, the removal of the liquidator had standing so to do, and at p. 492 the Judge said,

> "Any right of the CAC to interfere in the winding up decisions was denied, although the liquidator conceded the right of the Attorney-General to bring before the court any aspect of the winding up which concerned the administration of justice".

Although the relevant Australian statute was not cited it seems safe to infer from the fact that the petition for winding up was presented by the Attorney General and the concession by the liquidator , which the Judge approved, that he had locus standi to bring the summons for the appointment of a receiver and also for the removal of the liquidator by virtue of statutory authority.

Re 67 Budd Street Pty. Ltd. & ors.; The Commonwealth of Australia v. O'Reilly, (1984) 2 ACLC, does not seem to take the inquiry any further. In that case the Commonwealth sued as the "person" beneficially entitled to federal income tax and petitioned the Court to hold that the dissolutions of the companies involved should be held to be void and the liquidators removed. The Court held, at p. 198, that the Tax Commissioner was a creditor of each company and therefore had locus standi to bring the action.

Another case of great significance to the appellants is that of Re Corbenstoke Ltd. (No. 2) (1990), BCLC 60. In this case Gabraphone Transducers Ltd. made an application pursuant to section 172(2) of the

Insolvency Act 1986 for the removal of the liquidator of Corbenstoke Ltd. The applicant which owned 49 out of 100 shares of the company made its application in the capacity of a shareholder. The company was found to be insolvent and Harman J. held that he had no jurisdiction, qua shareholder (contributory) to bring the application. At page 768 of the judgment, Harman J. said :

> "The applicant makes its application as a member being the registered shareholder for 49 out of 100 shares issued. Since it is undoubted on the figures at the moment that Corbenstoke is insolvent, as one would expect for a company which has been wound up by the court on a petition for a compulsory liquidation, I am of the opinion that the applicant has no locus standi as a contributory to make this application. I make this ruling upon the analogy with the proposition laid down by Jessel, MR. over a 100 years ago in connection with contributories' petitions".
>
> Jessel MR. held that a contributory could not present a petition unless he alleged that there would be a surplus for contributories after payment of all creditors. He asserted that was the rule, because, he said, with the common sense for which that great judge is noted, were it not so, the contributory would get nothing as contributory and could have no legal interest as contributory in presenting a petition and the court should not be troubled with petitions presented by persons not having any real interest. In the same way, in my judgment, an application to the Court under section 172 of the 1986 Act for the removal of a liquidator can only be properly made by a person having an interest in the outcome of the liquidation. If the company be insolvent, the only persons with an interest must be creditors for the dividends which may be paid upon their debt in the liquidation and cannot be a contributory who by definition will receive nothing. I therefore hold that the applicants' status as contributory, a 49 % shareholder, is irrelevant to this matter and I reject any reliance upon it."

Harman J. was of the clear opinion that the only persons who had capacity to apply to remove a liquidator of an insolvent company was a person who had an interest in the outcome of the liquidation, which interest

he amplified at page 772 of the judgment, to be " for its dividends on its debt". Mr. Vos submitted that the dictum of Harman J. quoted above was not material to the outcome of the case and was obiter. It went too far, said he, as on its face, it would exclude the liquidator as a proper applicant ; and the restriction added an artificial gloss to the words of the statute. He would go so far as to say that the obiter dictum was wrong.

Then came the case of Re A. J. Adams (Builders) Ltd. (1991) BCLC 359. In this case P. who was a member of the Insolvency Practitioners Association had his practising certificate and authorization suspended by that Association for a period of 6 months reducible to 1 month if P. complied with certain conditions. P. who was either liquidator or receiver of a great number of companies, approximately 125, made an application (ex parte) for a compendious order that S. be appointed liquidator of A. J. Adams (Builders) Ltd. and the others of the 125 companies. All the companies involved were in voluntary liquidation. The primary method of filling these vacancies was by a contributory convening a general meeting of each company and a creditor convening a meeting of creditors of each company for the purpose, and would involve great expense and delay.

Warner J. referred to the provisions of sections 108 and 112 of the Insolvency Act of 1986 and concluded that P was not at the time of his application the liquidator of the company and was not entitled, qua liquidator, to apply. At page 364 he disposed of the argument that P. was still a liquidator at the date of his application and turned to the alternative argument. He said:

> "I therefore think that where a liquidator ceases to be a person who is qualified to act as an insolvency practitioner in relation to a company, he vacates office ipso facto, automatically and does not continue in office until he complies with his obligations under 2. 4.13 or r. 4.138.
>
> However, that is not the end of the matter because Mr. Curry put forward an alternative argument to this effect. Section 108(1) of the Act does not say who may make the application to the Court under that section. That is left to the Court to decide, and the Court may entertain an application under that section by anyone whom the Court considers proper. Those

who may make the application are not confined to the persons specified under section 112.

I, after some hesitation, have come to the conclusion that the alternative contention of Mr. Curry is right. I think it is reinforced by this consideration. Subsection (1) of section 112 enables an application to be made to the Court,

> 'to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.'

An application under section 108 is not very aptly described as an application for the determination of a question arising in the winding-up of a company when that is contrasted with the exercise of powers. It is more properly described as an application for the exercise of a power. But it is not a power which is invoked because the Court might exercise it if the company were being wound up by the Court. It is power expressly conferred on the Court in the case of voluntary liquidations by section 108. In that respect section 108 stands on its own.

I therefore conclude that the Court does have power to accede to Mr. Papi's application. If the test be whether the Court considers a former liquidator in Mr. Papi's position to be a proper person to make that application, it seems to me that the test is satisfied. It is interesting to observe that in a letter from the Insolvency Service of the Department of Trade and Industry dated 14 May to Mr. Papi's solicitors, that course was suggested in anticipation of the disciplinary proceedings against Mr. Papi resulting in his suspension. It seems to me plain that a responsible insolvency practitioner in Mr. Papi's position is taking a proper course when he brings the difficulties resulting from his suspension before the Court for solution rather than leaving it to the contributories and

creditors of the various companies of which he has been liquidator to resolve those difficulties at their own expense".

Both counsel submitted that the decision of Warner J. to permit Mr. Papi to make the application for the appointment of a liquidator in his stead was correct and eminently sensible. But there their agreement ended. Mr. Vos submitted that Warner J. quite properly made no distinction between the appointment and removal of a liquidator under section 108 of the Insolvency Act of 1986 and that it would be surprising if any distinction could exist when neither sub-section included limiting words as to who may apply. Whether it be to appoint or to remove a liquidator he argued, it was equally important to be flexible as to who could apply as the situation in either case called for urgent action. Mr. Vos strongly supported the "proper person" test and the reasoning of Warner J.

On the other hand Mr. Hunter submitted that on the unusual facts of the case, the Court made a sensible and practical decision. However, the decision was of limited application and did not in his submission overturn the long established practice of the Court that only the liquidator, contributories and creditors could apply to remove a liquidator. If, said he, the decision of Warner J. should be regarded as of general application, it should be restricted to section 108(1) which dealt with the appointment and not to the removal of liquidators and if it did apply to section 108(2), then the only proper persons recognized by the Court were the liquidator, the contributories and the creditors.

It does not appear that the decision in New de Kaap was referred to during the hearing of the case in Re Adams.

The decision in Re Adams has been mentioned in Re Arrows Ltd., (1992) BCC 121. In this case the application for the removal of the liquidators was made by a company in provisional liquidation. The applicant company, the liquidators, and the petitioning creditor were all represented before Hoffman J. The issue of locus standi of the company was not raised and the issues discussed related to conflicts of interest of the liquidators. In Re Parkdawn Ltd. 15.06.93 (unreported), Harman J. referred to Re Adams with approval. In that case, the application was by a liquidator for his own removal on the ground of ill health and for the

appointment of two persons, who were either partners or former partners of his, to replace him as liquidator. In discussing "cause", Harman J. said,

> "The jurisdiction arises under section 108 (2) of the Insolvency Act 1986 --which gives a completely general power in connection with voluntary winding-ups for the court to remove a liquidator and appoint another".

It does not appear that Harman J. in the passage quoted was speaking of the proper person to apply but rather to the separate question of what can amount to due cause.

Chadwick J. in Re Sankey Furniture Ltd. ex p. Harding, (1995) 2BCLC 594, referred to the decision in Re Adams with approval. He was there dealing with an application by a liquidator for his own removal and for the appointment of another in his place. There were relevant regulations providing for the resignation of a liquidator but this liquidator had not followed that procedure . Chadwick J. said he would follow the approach taken by the Judges in Parkdawn and Adams and recognize that where the liquidator through ill health or for some other cause could not continue in office in circumstances in which the Court could not refuse his application to resign, and it was in the interest of the creditors of each company so to act, he would not put the creditors and contributories to inconvenience and expense to insist upon the procedure for resignation and would make the order sought.

In this case the liquidator clearly had locus standi , qua liquidator, to make the application, subject to the rules. The learned Judge's reference to Parkdawn and Adams seem to suggest that he was concerned with finding a practical solution to a situation in which the applicant fell in the special category of a liquidator or former liquidator.

The other case cited to us which mentions Re Adams, is Re Bullard & Taplin Ltd. (1996) BCC 973. Mr. Rout , a licensed insolvency practitioner was liquidator in 5 members' voluntary liquidations, liquidator in 54 creditors' voluntary liquidations, liquidator in 11 compulsory liquidations, supervisor in 1 company voluntary arrangement, supervisor in 62 individual voluntary arrangements and trustee in bankruptcy in 35 bankruptcies. The firm in which Mr. Rout was a partner was dissolved and most of the assets were taken over by another firm which wished to continue the insolvency practice. Mr. Rout applied to the Court for his

removal from all the offices listed above. There was no problem with the companies in voluntary or compulsory liquidation but the individual and company voluntary arrangements did not have specific provisions for the resignation and replacement of the supervisor. Knott J. stated that his approach was to take , having regard to the evidence, " a practical and sensible step" in the circumstances. It seems that a proper person was before the Court and it was therefore not a question of whether the applicant should be treated as a proper person to apply for the relief sought.

I must now look at a long line of cases which was cited before us by both counsel. Mr. Hunter cited them for the purpose of convincing the Court that at every stage of the winding up of an insolvent company, the only persons who had an interest in the winding up were the creditors and that the Court had consistently so held. Mr. Vos said that as the Court was concerned with and only with locus standi, considerations which would be material as to what could or would amount to due cause to remove a liquidator were not material at "stage one" however material they would be at the two further stages of the inquiry, viz., whether due cause was shown for removal and whether the Court would as a matter of discretion remove the liquidator.

The earliest of these cases dates back to 1867. In Re Marseilles Extension Railway and Land Company , (1867) LR 4 Eq. 692, the voluntary liquidation of a company was being continued under the supervision of the Court. Some of the creditors objected to liquidators who had been appointed by contributories and on an application to the Court for the removal of the liquidators, some of the creditors and contributors challenged the jurisdiction of the court to remove the liquidators. Malins, V.C., held that he had power to remove the liquidators and in doing so the Court must take into consideration all the circumstances to determine whether it was desirable that the liquidator should be removed. He gave some guidance as to the position of creditors on such an exercise when he said:

> "There is no personal objection alleged or proved against the liquidators; but I am satisfied that it is a serious and valid objection to their efficiency as liquidators, that a considerable number of creditors are opposed to their continuance in office; just as in the case of an ordinary trust , it is a serious obstacle to

> the performance of the trust if a large number of the cestuis que trust are dissatisfied with the trustees".

The Court held that it was not bound to follow the wishes of creditors in any given case but it will be observed that the persons who made the application had a financial interest in the outcome of the liquidation.

In Re Tavistock Iron Works Company (1871) 24 TLR 605, although the liquidator had obtained the sanction of the Court to continue certain proceedings with a view to increasing funds available for distribution amongst the creditors of an insolvent company, the creditors who voted at a meeting unanimously decided that the liquidator should be removed and that the action which they considered frivolous should be discontinued. Lord Romilly held that it was solely a creditors question, that they were entitled to decide and that although the liquidator was at all times acting under the direction of the Court, he would allow the creditors to regulate their own interests. He declined to consider whether the further prosecution of the proceedings was a matter which he should judicially consider. The creditors were the only ones who had a financial interest in the liquidation and in that case their wishes prevailed.

Mr. Hunter found strong support from this case and submitted that the creditors in the instant case which are commercial organizations are in the best position to protect their own interests and should be left to do so. It is to be recalled that In Re British Nation Life Assurance Association, supra, it was argued that the court will be disposed to leave it to the shareholders (in the case of a solvent company) to decide who shall conduct the liquidation, that the Court heard the single shareholder (who incidentally had standing) who opposed the liquidators but in the end found in favor of the wishes of the majority of the shareholders.

The oft cited case of In Re Sir John Moore Gold Mining Company, (1879) 12 Ch D 325, discussed what amounts to due cause which discussion gave rise to the faulty notion that the liquidator could only be removed for some personal unfitness. In Re Oxford Building and Investment Company, supra, Kay J. held that the views of creditors and bondholders in the case of an insolvent company took precedence over those of shareholders, as to whether or not to remove a liquidator appointed by the shareholders.

The Court of Appeal in In Re Adam Eyton Ltd. Ex parte Charlesworth (1887) 36 Ch D. 229, took the opportunity to state that due cause for the removal of a liquidator was not limited to unfitness. Cotton L. J. said:

> " --if the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and of course then to appoint some other person in his place", at p. 303-304.

The reference to "all those who are interested in the company being liquidated", would prima facie be limited to the creditors and contributories as they would be the only persons with a financial interest in the winding up of any company.

Shareholders were the applicants for the removal of the liquidator in both In Re Charterland Goldfields (Limited), (1909) 26 TLR 132 and In Re Amalgamated Properties of Rhodesia (Limited), (1914) 30 TLR 405. The winding up in the case of In re Rubber and Product Investment Trust, (1915) 1 Ch. D. 382, began as a contributories liquidation as the company was initially thought to be solvent. When it transpired that the company was insolvent, a dispute arose between certain creditors on the one hand and the liquidator and committee of inspection on the other hand as the latter intended to use the assets to continue misfeasance proceedings contrary to the wishes of those creditors. On an application of the creditors to remove the liquidators etc., it was argued that it was a sufficient cause to remove the liquidator "if his removal is in the interests of those really concerned in the liquidation, i. e. the creditors.", and further that "creditors were entitled to conduct it by their own liquidator, who on their behalf will consider and decide on the advisability of any misfeasance proceedings and conduct any that are deemed advisable". That is similar to the approach of Mr. Hunter in the instant case. The Court acceded to the submission of counsel, holding inter alia, that, " having regard to the fact that the creditors alone are interested, and to the official receiver's report, the creditors are entitled to decide whether the assets are to be expended in misfeasance proceedings".

Neville J., held that in the case of an insolvent company he always paid great attention to the wishes of unsecured creditors and that "the view

of the shareholders who have no pecuniary interest in the assets ought not to be regarded as against the views of the creditors to whom in substance the assets belong" - In re Karamelli & Barnett Limited , (1917) 1 Ch. D. 203 at p. 205.

A trade creditor who was outraged at the complacent and relaxed attitude of the liquidator in the process of the winding up, applied to the Court under Section 108 (2) of the Insolvency Act of 1986 to remove the liquidator. Millet J. reviewed all the cases from 1879 onwards dealing with the meaning of due cause for the removal of a liquidator and after referring to the case of In Re Adam Eyton Ltd., supra, said:

> " --but I do not read the general principle laid down by the Court of Appeal as being limited to cases in which special circumstances can be shown. On the contrary, the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him either personally or in the conduct of the particular liquidation".

The liquidator was removed because his laid back attitude did not lend confidence to the creditors that he would pursue the former directors with sufficient vigor. Smellie J. was much impressed by this robust judicial attitude of Millet J. and concluded that a similar approach should be adopted in determining who had locus standi to apply to the Court for the removal of the liquidator.

Mr. Hunter submitted that there was no academic criticism of the proposition replete in the decided cases that only a person with a financial interest had locus standi to apply to the Court to remove a liquidator. He referred to Vol. 7(3) of Halsbury's Laws of England, covering Corporate Insolvency, which was published in the autumn of 1996 and purports to state the law of England as of August 1, 1996. Paragraph 2376 of Vol. 7(3) states in part

> "An application to the court to remove a liquidator must be made by a person with an interest in the outcome of the liquidation. Hence in an insolvent liquidation, a contributory will not have locus standi to apply".

The case cited in support is Re Corbenstoke, supra.

Paragraph 2743 is concerned with the removal of a liquidator by the Court in the case of a voluntary winding up and states:

> "The Court may, on cause shown, remove a liquidator and appoint another. The application may only be made by a contributory, a liquidator or a creditor"

The principal authority cited for that proposition is Re New de Kaap, supra.

Paragraph 2740 - Appointment of liquidator by the Court.

> "The Court may appoint a liquidator if, from any cause whatever, there is no liquidator acting. The application may be made only by a contributory, a liquidator or a creditor".

And to this proposition, Halsbury's provides the following footnote:

> "Footnote 2.
> Re New de Kaap Ltd. (1908), 1 Ch. 589. In Re A. J. Adams (Building) Ltd., Re Automated Extended Warranties Ltd. (1991) BCLC 359, (1991) BCC 62 it was held that a former liquidator had locus standi to apply under the Insolvency Act 1986 s. 108 but not under s. 112 (see para. 2771 post.)"

McPherson on the Law of Liquidation was the only other academic authority cited. In dealing with Removal of Liquidators, the learned author cited the several examples from the cases where the liquidator has been removed for impropriety, misconduct, unfitness and if the court is satisfied that it is in the best, i.e. the real, substantial and honest interests on the liquidation. Then at page 228-229 the learned author continued:

> "This requirement may be satisfied by proof of some breach of duty or want of efficiency or appearance of partiality or conflict of duty on the part of the liquidator, but it also seems to be enough to show that the winding up can be conducted more cheaply or more effectively by some other person. And since the creditors and contributories themselves are usually the best judges of what is in the interests of the liquidation, the court will take account of their wishes in deciding whether a liquidator should be removed and may direct that meetings be held in order to ascertain their views. But while their wishes are relevant, they are certainly not decisive, for the seriousness

> of removing a liquidator requires that consideration of fairness to him should not be left out of account as might occur if the matter were left simply to the unfettered control of creditors and contributories. Consequently, those who assert that the liquidator should be removed are under a duty to establish at least a prima facie case that this is for the general advantage of the persons interested in the winding up--".

In my view the passages quoted from Halsbury's Laws and from McPherson, highlight the predominant position of the creditors in the winding up of an insolvent company subject only to the Court's duty to protect the reputation of liquidators from those creditors.

I now return to the submissions of the Respondent as to why they say that the Respondent have locus standi to make this application for the removal of the liquidators. The Respondent says that it is a defendant in Cause 104 in the Cayman Court,; it was the auditor of OSEC; it signed OSEC 1990 Accounts and worked on the 1988 and 1989 Accounts; the claim against the Respondent in Cayman is not likely to be different from the allegations in the Zurich action in which the Appellants are alleging that the Respondent is responsible for the Mr. Rey's defaults in creating false profits, false company values and share support schemes; and that there is a convincing body of evidence supporting the proposition that Rey was dependent in important respects on Coopers & Lybrand, so that it is the UK firm rather than the Respondent that is likely to be shown to be liable to recompense the creditors of OHAG and OSEC for Rey's defaults.

The Respondent says further that there are exceptional circumstances as this case arises from a combination of unusually modern circumstances; to wit, the merger of large firms of accounts to form 6 huge firms; the existence of international organizations of affiliated accountants; the Rules of the accountancy profession providing in effect that an accountant has a material professional relationship with a company if an associated firm audits that company or an associated firm audits a subsidiary or a company controlled by that company; the fact that in this merger, one major firm in the international organization went elsewhere thus creating a situation of potential conflict; the fact that this is a massive liquidation with huge debts; most liquidators would not have accepted an appointment in these circumstances; the fact that in this case, a liquidator wishes to continue

acting notwithstanding his own associated firm's close involvement with the affairs of the collapsed group; and the fact that at the moment, no creditor has applied to remove the liquidator.

What really is the position of the Respondent, qua OSEC?. It is conceded that they are neither creditors nor contributories. It is conceded that under no circumstances whatsoever could they benefit from the assets of OSEC which become available for distribution. They are persons affected in the sense that they are persons sued and from whom damages are being claimed by the Appellants. Could a debtor or a potential debtor say: "I may be liable but other debtors are also liable. Go after them first or go after all of us at the same time. If you do not take one of these courses which I dictate, you may not go at all"? I think not.

The dicta from the array of cases cited before us and from which I have quoted in this judgment, do not in my view support the finding of Smellie J. that in deciding whether there is locus standi to bring an application to remove a liquidator under the provisions of Section 106 of the Companies Law of the Cayman Islands, the Court should be able to consider whether in all the circumstances the applicant is a proper person to apply, and that in carrying out this exercise it is not necessary for the applicant to show a positive financial interest in the outcome of the liquidation. In my opinion the decision in Re Adams did not lay down a general principle that any person who could show to the Court that he had some special or unusual interest in the winding up of the company could come to the Court to ask for the appointment of a liquidator or for the removal of a liquidator. In Adams the applicant was a former liquidator who had ceased to be a liquidator because he had temporarily lost his licence to practice as such. In the other case where the Secretary of State had canceled the licence of the Liquidator he made the application himself. In the one case the position of the applicant was assimilated into that of a real liquidator and in the other the position of the Secretary of State was accepted as the government official with ultimate responsibility for the administration of the Insolvency Act. Neither case in my view destroys or expands the long established rule that only persons with a positive financial interest in the outcome of the liquidation has locus standi to apply to interrupt the process of liquidation.

I accept as good law the propositions of Mr. Hunter that apart from the liquidator himself, a former liquidator disqualified by reason of ceasing to be a recognized insolvency practitioner, and the Secretary of State or similar body acting under statutory powers, the only persons that can apply to the Court for the removal of a liquidator are those persons who will participate, or are likely to participate, in the distribution of the assets of the company, i.e., creditors and contributories. The interest claimed by the Respondent does not fall within the categories of persons who have traditionally gained access to the Court to seek to remove liquidators and I can see no reason whatever why this category of persons should be enlarged. Clearly one who is a debtor, however special the circumstances under which he became a debtor, could not be given power to choose the persons to enforce the debt.

I am of the view the words of Section 106 of the Law as it relates to the removal of liquidators ought not to be interpreted in splendid isolation without regard to the long established practice of the Courts in dealing with the removal of liquidators in the liquidation of insolvent companies. The wide, expansive and open-ended interpretation given to this section by Smellie J. could not but lend itself to the flood gates argument so forcibly presented by Mr. Hunter, and would bring great uncertainty into a branch of the law in which in my opinion there has been a settled and sensible practice. Creditors can apply to the Court in the winding up to remove their liquidators and if the Court has any reservations about this it may order meetings of the creditors to consider the matter and to make their wishes known. I conclude therefore, that the Respondent had no locus standi under the statute to apply to the Court to remove these liquidators.

I turn to deal in a summary way with the second issue raised on the appeal. It was argued that even if the Respondent had no locus standi under the Companies Law to apply to remove the liquidators, the Court has an inherent jurisdiction to declare that the liquidators have a conflict of interest and /or to restrain them from prosecuting Cause 104. It was accepted on both sides that the appellants as liquidators were officers of the court . Smellie J. found that the Respondent had no positive financial interest in the liquidation but that it had an interest in the litigation which the liquidators brought against it and it had standing to complain about the manner in which the liquidators, as officers of the Court, were alleged to be acting improperly and unconscionably.

The statement of the law as to the Liquidator's duty as set out in Vol. 7(3) of Hals. Laws is that:

> "As an officer of the Court, the liquidator in a winding-up by the Court must maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. It is his duty to the whole body of creditors, the whole body of shareholders, and to the Court to make himself thoroughly acquainted with the company's affairs and to suppress or conceal nothing coming to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court, and it is for the judge to see that he does his duty in this respect".

The statement of the law in McPherson, supra is to the same effect. If there is any reason to suppose that a liquidator is not or may not be, in the eyes of reasonable persons, impartial he should be removed. - see In Re Budd Street Pty Ltd., supra.

I have already set out the portions of the affidavits filed by the Respondent which raise the conflict of interest issue. The Respondent submits that the kinds of conflict which exist in respect of these Appellants are personal to them and are not the kinds of conflict which can be overlooked by a Court which will act to restrain such conduct. They rely on the dictum of Lord Brandon in South Carolina Insurance Co. (1987) 1 A. C. 24 as authority for the proposition that a party can apply for an injunction where:

(a) one party to an action can show that another party has either invaded or threatens to invade a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the Court, and,

(b) where one party to an action has behaved or threatens to behave in a manner which is unconscionable.

Smellie J. declined to find that there was any evidence to support the first limb of Lord Brandon's formulation, but held that the Court had power to act to restrain unconscionable conduct on the part of a liquidator even if no creditor, in the case of an insolvent company wished to apply. Through his Respondent's Notice, Mr. Vos asked the Court to find that an action

brought by the Appellants who were prima facie acting under a conflict of interest invaded or threatened to invade a legal or equitable right of the Respondent. I do not think that any person has a recognizable right in law or in equity not to be sued. In any case where an action does not state a cause of action cognizable by the Court, the opposing party can have it struck out. If the litigation is vexatious there is a procedure to deal with vexatious litigation and there is no complaint in this case that Cause 104 is vexatious in the ordinary way.

Mr. Vos said there was indeed prima facie evidence of unconscionable conduct on the part of the Appellants because of their conflicts of interest, their breaches of the ethical guidelines of the accounting profession and their inability to carry out their duties objectively and therefore Smellie J. was right to invoke the inherent jurisdiction of the Court to remove the liquidators who are officers of the Court.

I am persuaded that there was no warrant for the resort to the inherent jurisdiction in this case. The Appellants owed a duty in this insolvent litigation to the creditors and to the Court. It is the creditors and the creditors alone who have any financial interest in this liquidation. They are commercial organizations which deal in huge sums of money and one may infer, are advised by competent attorneys. They are the ones to who stand to lose if the Appellants dissipate their assets in frivolous litigation. If any person sued by a liquidator, could apply to the Court for the removal of the liquidator and force the liquidator to defend that application substantively by the production of evidence and the like, this could be wasteful of the company's assets and the time of the court. I am of the opinion that the rule of practice is that the only persons who can apply to the Court to exercise its powers of control over liquidators are the liquidator, the creditors in an insolvent company and both creditors and contributories in a solvent company.

There is nothing of which the Respondent complains which the Court could not correct on the application of creditors for that purpose. Furthermore, if a majority to the creditors, being aware of the conflict and waive the same, the Court would give great consideration to their wishes. As Mr. Vos concedes, no creditor has come forward to complain that the liquidators are acting contrary to the wishes of the creditors and therefore they should be removed. It is indeed a novel situation where a potential

debtor is coming forward to say it is acting partly for the benefit of the creditors in applying for the removal of the liquidators appointed by the creditors or by the Court. The other potential debtor which, prima facie, the Respondent has identified and as to whose potential liability it complains that the Appellants have closed their minds, can be brought into the action at the behest of the Respondent. That option is open and unaffected by this litigation. It would indeed be remarkable if in a case of this nature, the Respondent who had no locus standi under the Companies statutes could gain access to the Court under the guise of invoking its inherent jurisdiction. I do no so hold.

For the reasons given herein, I would allow the appeal with costs to be taxed or agreed.

Rowe, J. A. (Ag.)