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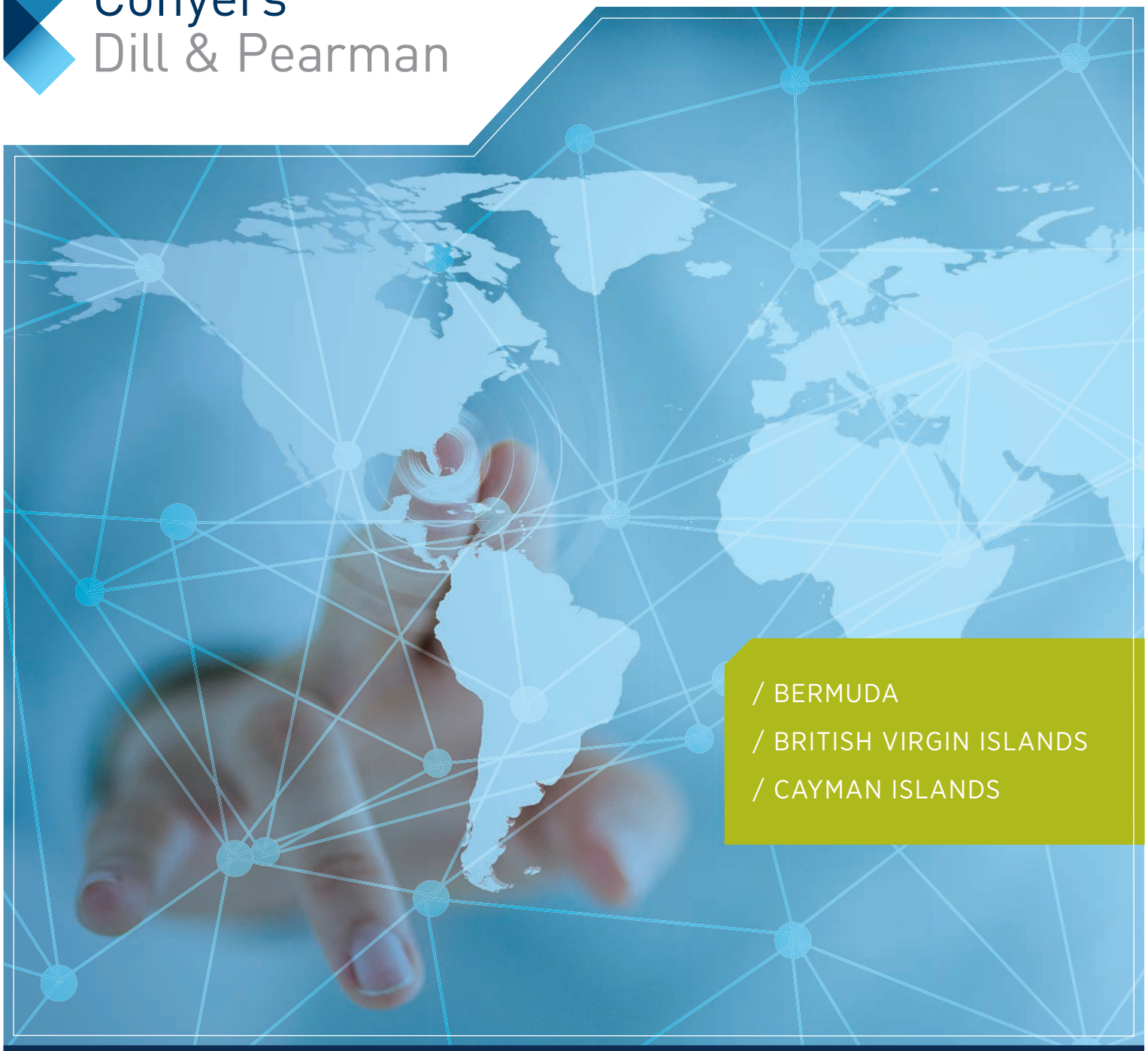

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OFFSHORE CASE DIGEST

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About Conyers Dill & Pearman

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 140 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and trust and private client matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

ABOUT THE DIGEST

The Offshore Case Digest offers readers a high level summary of the major commercial cases decided in Bermuda, the British Virgin Islands and the Cayman Islands between November 2014 and February 2015. Our goal is to provide a useful reference tool for clients and practitioners who are interested in the development of case law in each jurisdiction.

We would welcome any feedback and suggestions from readers on the content. If you would like to obtain further information on any of the cases feel free to contact any of the Conyers Dill & Pearman litigation team.

Bermuda

BERMUDA

PRIVY COUNCIL

CROSS-BORDER INSOLVENCY – WINDING UP – DISCLOSURE SOUGHT BY FOREIGN LIQUIDATORS – JUDICIAL ASSISTANCE – EXCESS OF JURISDICTION – EXTENT OF COMMON LAW WHERE EXISTING STATUTE – STANDING – PUBLIC POLICY – MODIFIED UNIVERSALISM

PricewaterhouseCoopers (Bermuda exempted partnership No. 7420) –v– (1) Saad Investments Company Limited [2014] UKPC 35 (10 November 2014)

Singularis Holdings Limited –v– PricewatershouseCoopers (Bermuda exempted partnership No. 7420) [2014] UKPC 36 (10 November 2014)

In the Singularis case, the Privy Council (Lords Neuberger, Mance, Clarke, Collins and Sumption) delivered an important judgment (1) about the jurisdiction of the Bermuda court to assist foreign liquidators by ordering the production of documents and information by persons in Bermuda and (2) defining the common law powers of assistance to foreign liquidators.

The interplay or conflict between the decisions of the Privy Council and the UK Supreme Court in *Cambridge Gas –v– Navigator* [2007] 1 AC 508, *Rubin –v– Eurofinance [2012]* UKSC 46 and *Al Sabah –v– Grupo Torras* [2005] 2 AC 333 has been a source of great debate and litigation in the world of cross-border insolvency. The Privy Council has now provided clarity to this area of the law.

In summary:

1 The Bermuda court has no general jurisdiction under the *Companies Act, 1981* or at common law to wind up foreign companies that do not conduct business in Bermuda;

2 "Modified Universalism" is part of the common law and there is a common law power to assist foreign liquidators, *inter alia*, by ordering the production of documents and information, but this power has the following limits:

a. Firstly, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It is not available to assist a voluntary winding up that is not conducted by or on behalf of an officer of the courts.

b. Secondly, it is a power of assistance. It exists for the purpose of enabling courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers. It is not available to enable office-holders to do

something which they could not do even under the law by which they were appointed.

c. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions.

d. Fourth, the power is subject to the limitation in In Re African Farms Ltd, in Re HIH Casualty and General Insurance Ltd and Rubin, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda.

PricewaterhouseCoopers ("PwC") is a Bermuda exempted partnership with its registered office in Bermuda. It is a different legal entity to the PricewaterhouseCoopers Bermuda auditing firm. Through its Dubai branch, PwC audited two Cayman companies, Saad Investments Company Limited ("SICL") and Singularis Holdings Ltd. ("Singularis"). PwC did not have any office or other physical presence in Cayman. The Cayman court ordered the compulsory winding up of SICL and Singularis, and Joint Provisional Liquidators ("JPL") were appointed in Cayman in 2009. Production orders were made against PwC as former auditors in Cayman, that were complied with. The Cayman orders did not and could not require PwC to produce its own working papers (merely documents that were the property of SICL and Singularis).

Some three years after the Cayman winding up orders, in 2012 the JPLs obtained an ancillary winding up order in Bermuda against SICL. They subsequently obtained ex-parte orders against PwC (1) under s195 of the *Companies Act, 1981* requiring the production of extensive documentation relating to SICL, including the auditor's working papers and the response to interrogatories and (2) at common law against both SICL and SHL requiring the production of substantially the same extensive documentation and interrogatories. PwC challenged the making of these orders, and was unsuccessful at first instance before Kawaley CJ.

PwC appealed to the Bermuda Court of Appeal and was partially successful. Both sides appealed to the Privy Council in two separate appeals. The question whether the Bermuda Court has power at common law and under Bermuda statute to grant assistance in cross-border insolvencies arose for determination. The position was complicated by the fact that Bermuda has no statutory regime similar to that contained in s426 of the (English) *Insolvency Act, 1985,* expressly permitting assistance to foreign liquidators.

The two decisions of the Privy Council are complex and the law discussed is difficult.

In the SICL decision, the Privy Council held that the statutory company law regime in Bermuda did not enable the Bermuda courts to wind up foreign companies that were not doing business in Bermuda. This judgment overturns Bermuda case-law to the contrary going back some 10 years.

In the Singularis decision, the Privy Council held by a majority (Lords Sumption, Clarke and Collins) that "modified universalism" means that while there is indeed a common law power in Bermuda to assist a foreign liquidator by making document and information production orders, that power is not unlimited. The limits on the power are as set out above. Of particular significance for the present case was the fact that under the Cayman legislation governing their functions, the Cayman liquidators could only obtain production orders in Cayman for documents and records that were the property of the company. An auditor's working papers are not the property of the company and therefore cannot be obtained in Cayman. The common law power in Bermuda cannot be used to extend the powers of the liquidator to enable him to obtain the auditor's working papers.

The minority judgments in Singularis (Lords Neuberger and Mance) held that there was no general common law power in Bermuda to order the production of documents or information in aid of a foreign liquidation.

COURT OF APPEAL

LEAVE TO ENTER JUDGMENT IN ARBITRATION – INDONESIAN LAW – EXCESS OF JURISDICTION – PLEADINGS – OPPORTUNITY TO PRESENT CASE – PUBLIC POLICY

Sampoerna Strategic Holdings Ltd –v– (1) Huawei Tech Investments Co Ltd and *(2) Huawei International Pte Ltd* [2014] Bda LR 108 (19 November 2014)

The issue in this appeal was whether the Supreme Court correctly gave leave to the Respondents to the Appeal to enter judgment against the Appellant in the terms of a Consolidated Final Award dated 27 June 2013 (the "Award") issued by the Singapore International Arbitration Centre ("SIAC"). The Appellant was a Bermudian company named Sampoerna Strategic Holdings Ltd. The Respondents (the Claimants in two arbitrations against the Appellant) were Huawei Tech Investments Co Ltd (a Hong Kong company) and Huawei International Pte Ltd (a Singapore company).

In short, the Arbitral Tribunal had awarded the sums claimed by the Respondents, not on the grounds advanced in the Statements of Claim, which were rejected, but under the provisions of Article 1316 of the Singapore Civil Code, which was not expressly pleaded. The Appellant now contended that: 1. the Award dealt with disputes not contemplated by and not falling within the terms of the submission to arbitration; 2. the Award contained decisions on matters beyond the scope of the submissions to arbitration; 3. the Respondent was unable to present its case; and 4. the enforcement of the Award would be contrary to public policy.

On 9 October 2013 Hellman J gave leave to enter judgment in the terms of the Award. By Summons dated 14 November 2014, the arbitration Respondent applied to set aside the Order of Hellman J, on the grounds stated above. The application was refused by the Chief Justice following a hearing in Chambers. The Court of Appeal dismissed the appeal on each on the grounds:

Ground 1 – Excess of Jurisdiction

Section 42(2) of the *Bermuda International Conciliation* and *Arbitration Act, 1993* (the "Act") provides, *inter alia,* that enforcement of an Award may be refused where the defendant proves –"(d) ...that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; ...". The Court of Appeal held that it was clear beyond doubt that the jurisdictional challenge must fail on the basis that the arbitration agreement was broadly defined to incorporate "All disputes arising out of or in connection with this letter shall be finally settled under the administrative and procedural rules of [SIAC]...".

Ground 2 – The Pleading Point

The Appellant submitted that the Respondents did not, in their Notices to Arbitration, their Consolidated Statement of Claim, or their Consolidated Statement of Reply, plead or even mention Article 1316.

Counsel for the Appellant submitted that under Singapore law "a party is bound by his pleadings and an action is confined to the issues raised therein" and therefore, the Arbitral Tribunal was precluded from granting any relief under Article 1316. However, it was also accepted by the Appellant's Counsel that the Singaporean authorities do not go so far as to hold that an arbitrator's finding can be set aside merely because it was a finding based on a ground not expressly included in the pleadings before him. The Court of Appeal held that in every case where there is no express reference in the pleadings it is necessary to consider about the factual background leading to the failure to plead a particular issue. There is no general rule that, because the matter was not pleaded, the finding must be disregarded or set aside, or that an award cannot be enforced. The Court of Appeal determined it necessary to consider how it came about that the Arbitral Tribunal made its Award under Article 1316 of the Civil Code, a ground which was not expressly pleaded by the Claimants.

3 and 4 – No Opportunity to Present Case, and Public Policy

The Act provides that enforcement of an award may be refused when the defendant proves "that he was not given proper notice of the...proceedings or that he was otherwise unable to present his case" (Section 42(2))(c), or "if it would be contrary to public policy to enforce the award" (Section 42(3)).

The Court of Appeal held, in agreement with the Chief Justice, that it was abundantly clear that the Tribunal rejected the submission. It was reiterated that the Claim raised no new issues of fact, and the Chairman of the Tribunal had considered that no amendment was necessary for the Claim to be based on Article 1316. The issue was first raised by the Respondent's own expert witness and it cannot be said, therefore, that either he or counsel for the arbitration Respondent was unprepared to deal with it. In fact, both parties dealt with it in detail, both at the hearing and in the arbitration Respondent's closing submissions. The Tribunal treated it as an issue in the proceedings that had been fully argued by both parties. If an amendment was necessary and had been applied for, there was no ground on which it could properly be refused.

On the public policy argument the Court of Appeal again agreed with the Chief Justice who had cited judgments from in the Singapore Court of Appeal *(PT Asuransi Jasa Indonesia (Persero) –v– Dexia Bank SA* [2006] SGCA 41) and the Federal Court of Australia (*Castel Electronics Pty Ltd –v– TCL Air Conditioner (Zhongsam) Co Ltd (No 2)* [2012] FCA 1214) which demonstrate the heavy burden that lies upon a party seeking to set aside or to prevent enforcement of an arbitral award on the ground of a breach of natural justice. In the former case, Chan Sek Keong CJ citing English as well as Singaporean

authority, referred to cases where upholding an award would *"shock the conscience"* or be *"clearly injurious to the public good"* or *"violate the forum's most basic notion of morality and justice"*. The Court of Appeal found that the Appellant did not come within a measurable distance of establishing that the present Award satisfied that test and the requirements of public policy demand no less.

SUPREME COURT

WILFUL MISCONDUCT – FURTHER AND BETTER PARTICULARS – AMENDMENT

Kingate Global Fund, Ltd (In Liquidation) (2) Kingate Euro Fund, Ltd –v– PricewaterhouseCoopers (A Firm) [2014] SC (Bda) 83 Com (4 November 2014)

The Plaintiffs were investment companies which acted as "feeder funds" to Bernard L Madoff Investment Securities LLC ("Madoff Securities"), an investment company established and operated by the notorious fraudster Bernard L Madoff. The vast majority of monies raised by the Plaintiffs were transferred to Madoff Securities for investment on the Plaintiffs' behalf. In fact Mr Madoff was running a Ponzi scheme and none of the monies were invested. Upon Mr Madoff's arrest in December 2008 the Plaintiff funds collapsed and were placed in liquidation.

The Defendant was appointed as auditor for the First Plaintiff from 1999 to 2008 and for the Second Plaintiff from 2000 to 2008. The Plaintiffs alleged that, had the Defendant done its job properly, from March 2000 onwards the Plaintiffs would not have invested any monies in Madoff Securities. The amount transferred by the Plaintiffs to Madoff Securities after that date and not recovered is well in excess of US$1 billion.

The Plaintiffs claimed damages to be assessed for breach of contract, negligence, negligent misstatement, and wilful misconduct. The amount claimed is likely to be substantial. On 21 February 2014 the Plaintiffs filed and served a statement of claim that weighed in at 366 pages.

By a summons dated 10 April 2014 the Defendant applied to strike out the statement of claim pursuant to Order 18, Rule 19(1) of the *Rules of the Supreme Court, 1985* ("RSC") on the grounds that in breach of RSC Order 18, Rule 7(1) it was not confined to a statement in summary form of the material facts upon which the Plaintiffs relied; it contained evidence and argument and/or was prolix and would thereby embarrass and/or delay the fair trial of the action; or that it was otherwise an abuse of process. Following a part heard strike out application and further correspondence between the parties, the Plaintiffs served a proposed amended statement of claim, now running to 416 pages, which sought to address various concerns raised by the Court and the Defendant.

At the resumed strike out hearing in October 2014 the Defendant did not pursue the strike out application but instead sought, in respect of each audit year, an order for the further and better particulars. The Court gave consideration to the requests for further particulars and held as follows:

- That a defendant to a claim for wilful misconduct is entitled by reason of RSC Order 18, Rule 12(1) to particulars of (i) the conduct alleged to be wilful (by analogy with the requirement to provide such particulars with respect to an allegation of wilful default) and (ii) the facts relied upon to establish the requisite state of mind. The amount of detail necessary will depend upon the facts of the case. However, the Court accepted that, per Lord Hope in Three Rivers at para 51, the more serious the allegation of misconduct the greater the need for particulars to be given. In this case, the Judge held that the Claimant had to properly articulate in express terms the fact that each of the senior members of the audit team for that audit year knew or was recklessly indifferent.
- The Defendant's knowledge is alleged to include cumulative knowledge derived from past audits. The Judge held that the proposed amended statement of claim should set out the material facts on which the allegation of cumulative knowledge is based.
- Due to the collective nature of the audit process the Defendant's request for details of each act or omission (etc.) of each of the senior members of the audit team was inappropriate. What was material were the breaches of duty, identified in the conclusion to each of the sections dealing with one of the audit years, for which each senior member of the team was, on the Plaintiffs' case, jointly responsible.

The Judge noted that had he ordered additional particulars (beyond those outlined above), they could have run to another 400 pages and he was satisfied that, subject to the further amendments to the proposed amended statement, the Defendant had received adequate notice of the Plaintiffs' case.

SUMMARY JUDGMENT – ORDER 14 OF THE SUPREME COURT RULES – ENTITLEMENT TO DIVIDEND DECLARATION – SECTION 103 OF THE COMPANIES ACT 1981

Nitin T Mehta (2) MFP-2000, LP –v– (1) Viking River Cruises Limited (1) Viking Capital Limited (3) MISA Investments Limited [2014] SC (Bda) 86 Com (29 October 2014)

The Plaintiffs applied for summary judgment against the First Defendant (the "Company") in respect of a claim for payment, *pro rata*, of a dividend which the Company had declared (the "Dividend"). The application was brought pursuant to Order 14 of the *Rules of the Supreme Court, 1985* ("RSC").

The First Plaintiff ("Mr Mehta") and the Second Plaintiff ("MFP") are, and were at all material times, the registered holders of preference shares and ordinary shares in the Company. At all material times the Second Defendant ("Viking Capital") and Third Defendant ("MISA") held not less than 95% of the series A ordinary shares in the Company.

On 4 October 2011, Viking Capital and MISA served a notice on MFP under Section 103(1) of the *Companies Act, 1981* (the "Act") of their intention to acquire MFP's series A ordinary shares in the Company. The notice was dated 29 September 2011. MFP applied to the Court under Section 103(2) of the Act to appraise the value of the shares (the "First Section 103 Application"). The Dividend was declared by the Company on 24 September 2012. That same day, MISA served a notice on the Plaintiffs under Section 103(1) of the Act of its intention to acquire their preference shares in the Company. The notice was dated 20 September 2012. The Plaintiffs had applied to the Court under Section 103(2) of the Act to appraise the value of the shares.

The Plaintiffs submitted that as registered shareholders they are entitled to receive their *pro rata* share of the Dividend, and will remain so entitled irrespective of whether Viking Capital and/or MISA decided to purchase their shares at the price fixed by the Court. The Company disagreed and issued an interpleader summons under RSC Order 17 seeking an order that it should hold the Dividend payable on the Plaintiffs' shares in a specified bank account, to be distributed to the person(s) who are ultimately entitled to them at the conclusion of the appraisal process.

Viking Capital and MISA supported the Company's application for interpleader relief. They contended that if they elected to purchase the Plaintiffs' shares (or rather, on their analysis, unless they elected not to purchase them) at the values fixed by the Court then they will be entitled to the Dividend payable on those shares.

There are no decided cases dealing with entitlement to dividend payments under Section 103. However the parties submitted that cases dealing with contractual and equitable rights to dividend payments provide persuasive analogies. In this regard, it was common ground that service of a notice under Section 103(1) gives rise to a statutory right and obligation on the part of the majority shareholder to buy and the minority shareholder to sell the shares that are the subject of the notice.

The Plaintiffs relied on *Kidner –v– Kidner* [1929] 2 Ch 121, Ch D as authority for the proposition that the person who is entitled to payment of a dividend on a share is the registered shareholder at the date when the dividend was declared. The Defendants submitted that the case of *Black –v– Homersham* (1874) 4 Ex D 24 was of greater assistance offering, by way of analogy, a persuasive approach to the construction of Section 103 whereby the purchaser is entitled to payment of any dividend declared after it gave notice to the minority shareholder under Section 103(1). The Defendants asserted that the right of the purchaser was equivalent to the beneficial ownership of the minority's shares, subject to the vendor's lien.

Additional arguments were outlined by both sides which the Judge considered was illustrative of the competing policy considerations which ultimately tended to cancel each other out. In summary, the Judge noted that the giving of the Section 103(1) notice and registered ownership both provide a rational basis for determining entitlement to a dividend.

The Judge held that the Court should focus on the words of the statute. Section 103(3) confronts the majority shareholders with a choice. They can elect to acquire the shares at the price fixed by the Court or alternatively to cancel the notice given under Section 103(1). Until that choice has been made — and Section 103(3) is predicated on the assumption that it will be made — the majority shareholders' entitlement to the shares is only provisional. If they elect to acquire the shares at the price fixed by the Court then their entitlement becomes definite.

The Judge was satisfied that the legislature did not intend that the majority shareholders should be entitled to any dividend on

the shares declared before they make their election. Entitlement to the dividend may indeed "relate back" but, if so, it relates back in the case of an appraisal to the date of the majority shareholders' election under Section 103(3) and not to the date of the service of the notice. The Judge noted that such an analysis was congruent with all the authorities which were cited and that in none of them was the purchaser entitled to a dividend which had been declared before he had made a definite as opposed to provisional commitment to purchase the shares.

This decision is the subject of an appeal.

WINDING UP – COMPANIES ACT, 1981 – WHETHER COMMITTEE OF INSPECTION CAN BE COMPRISED OF SOLE CREDITOR – DE FACTO COMMITTEE OF INSPECTION

Petroplus Finance 2 Ltd [2014] SC (Bda) 91 Com (7 November 2014)

The Official Receiver/Provisional Liquidator applied by Summons for directions from the Court following the first Meeting of Creditors. One matter of legal principle was drawn to the Court's attention in that only one very significant creditor had voted in favour of the key resolutions to: (1) appoint the Joint Liquidators of the Company; and (2) to appoint a Committee of Inspection comprising only of that substantial creditor.

The difficulty with the second resolution, which was duly passed as an administrative matter, was the doubt surrounding whether or not a committee of inspection under Bermuda law could be constituted by a single creditor. The Chief Justice noted that the position was not made explicit by our legislative scheme, but looking at key statutory provisions, he noted that it was inferred that Parliament envisaged that a committee, consistent with the natural and ordinary meaning of the word 'committee', would consist of more than one creditor.

In the present case the Chief Justice decided to make an Order providing that the Joint Liquidators could deal with the principal creditor as if it was a *de facto* Committee of Inspection (in line with the decision of Hellman J in the related case of Re Petroplus Finance Ltd, Commercial Court, Companies (Winding Up) 2012: 259). However, the Chief Justice emphasised that such an Order was subject to one important *caveat*. While as a practical matter the Joint Liquidators were free to consult with the principal creditor in the same way and in relation to the same sort of matters that a committee of inspection would be consulted on, the position as a matter of strict law was materially different. Where the *Companies Act 1981*, in particular Section 175, specifies certain powers which the liquidators can only exercise with the approval of either the Court or the committee of inspection, the fact that there is a *de facto* committee of inspection cannot clothe that *de facto* committee with authority to empower the liquidators in the same way that a duly constituted committee could. The court held that to direct that this should happen would effectively extend the operation of the statute beyond its intended scope. As a result, the Chief Justice refused to make a direction that the sole significant creditor should be appointed as a sole committee of inspection.

REQUEST FOR EXCHANGE OF INFORMATION – INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE AGREEMENTS) ACT, 2005 – RIGHT TO REVIEW DOCUMENTS IN SUPPORT OF REQUEST

Minister of Finance –v– AD [2014] SC (Bda) 10 Civ (27 January 2015)

It is a fundamental principle of fairness at common law that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it. Thus, at common law any document disclosed to the court on an application for a production order, including a production order made under a Tax Information Exchange Agreement ("TIEA"), must be disclosed to the party or parties to whom the production order is addressed. In reliance on that principle, the Defendant sought an order that the Plaintiff provide copies of all the documents placed before the Court on the making of a production order against the Defendant on 30 December 2014 (the "Production Order"). The Production Order, which was made on the papers without a hearing, was made pursuant to Section 5 of the *International Cooperation (Tax Information Exchange Agreements) Act, 2005* (the "Act").

Section 5(2) of the Act provides in material part that the Supreme Court may make a production order *"if on such an application it is satisfied that conditions of the applicable agreement relating to a request are fulfilled or where the court is satisfied with the Minister's decision to honour a request in the interest of Bermuda…".* In this regard, the requirement that the Court must be *"satisfied with the Minister's decision to honour a request in the interest of Bermuda"* does not mean that the Court is competent to judge the merits of the Minister's decision but rather that the Court must be satisfied that the Minister decided to honour a request in the interest of Bermuda. The Defendant wished to obtain copies of the documents which

were before the Court when the Production Order was made so that it could satisfy itself that the requirements of Section 5 of the Act have been met.

The Plaintiff submitted that the Defendant's common law right to copies of the documents has been abrogated by recent amendments to the Act, which came into force on 8 December 2014. Section 2 of the *International Cooperation (Tax Information Exchange Agreements) Amendment Act,* 2014 (the "Act") amends Section 5 of the principal Act by inserting, *inter alia*, the following subsections:

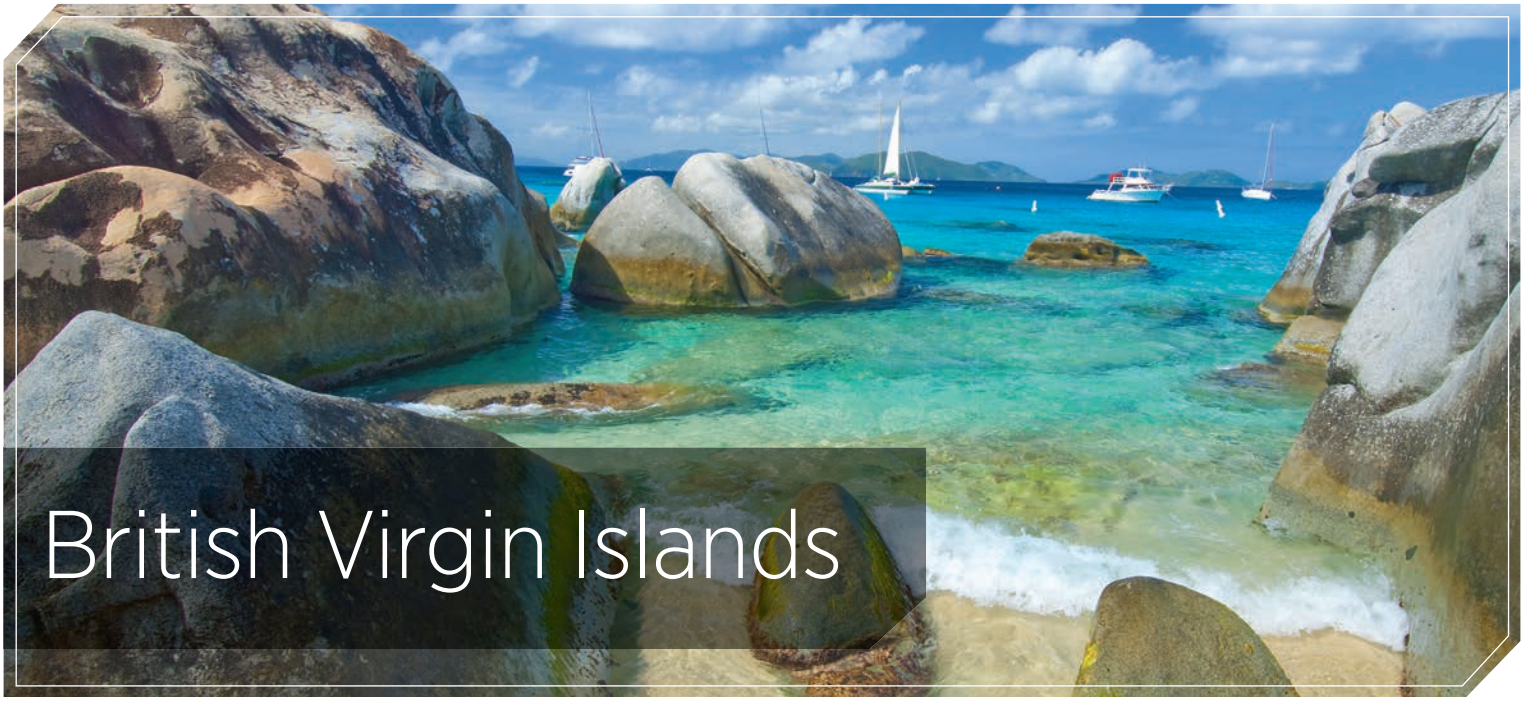
(6A) A person served with a production order under subsection (1) who seeks information from the Minister pertaining to the production order, must first file an application with the court to review the production order.

(6B) Upon the application under subsection (6A) having been filed with the court, the court shall decide whether to grant the person a right of review.

The Plaintiff submitted that the reference to "information" in subsection (6A) includes the documents placed before the Court when the production order is made. The Plaintiff submits that under the legislative scheme, as amended, a party seeking review of a production order must first file an application identifying the grounds of review and the relief sought, i.e. the clarification, variation or discharge of the order. The Court will review the application and decide whether to grant the applicant a right of review.

The Defendant relied on the principle that legislation will only be construed as overriding a fundamental right if it does so expressly or by necessary implication. The Defendant submitted that subsection (6A) of the Act did not remove the fundamental common law right to see the evidence on which the Production Order was based either expressly or by necessary implication. It was submitted that the subsection should be construed as applying only to information pertaining to a Production Order other than that which was before the Court when the production order was made, i.e. any redacted portions of the letter of request.

The Judge held that subsection (6A) did not expressly remove the right of a person who is served with a production order to have sight of the evidence which was before the Court when the production order was made. The Judge therefore ordered that the Plaintiff provide the Defendant with copies of the documents which it sought.



British Virgin Islands

BRITISH VIRGIN ISLANDS

PRIVY COUNCIL

RECTIFICATION OF SHARE REGISTER – SECTION 43 OF THE BVI BUSINESS COMPANIES ACT – NATURE OF THE COURTS JURISDICTION

Nilon Limited and another –v– Royal Westminster Investments S.C and Others [2015] UKPC Privy Council Appeal No 0043 of 2012 (January 2015)

This was an appeal from the Eastern Caribbean Supreme Court of Appeal (sitting in the Territory of the Virgin Islands) and concerned a claim brought for breach of a contract to procure the issue of shares in the first Defendant, Nilon Limited, a BVI company ("Nilon") and rectification of Nilon's share register under Section 43 of the BVI Business Companies Act (the "Act"). The Second Defendant, ("MV"), was the sole registered shareholder in Nilon and resident in England. The Claimants alleged that: (i) MV had orally agreed to enter into a joint venture involving the importation and sale of rice in Nigeria; (ii) they, the Claimant, had funded Nilon; and (iii) they had received dividend payments pursuant to the arrangement between the parties. As a result, they claimed to be the legal and/or beneficial owners in Nilon. MV denied that the Claimants were legally or beneficially entitled to shares in Nilon or indeed that it was intended that they would be. While he accepted that there had been a joint venture agreement, he claimed that the monies paid by the Claimants to Nilon were loans and not paid in exchange for a shareholding interest in Nilon. MV also denied that the sums paid by Nilon to the Claimants were dividends.

The Court at first instance refused permission to serve the Claim out of the jurisdiction and struck out the claim against Nilon holding, *inter alia,* that Section 43 could not be used to determine whether a Defendant was in breach of a contract to procure that a company would issue shares. The Claimant appealed.

Relying on *Re Hoiscrest Ltd* [2001] 1 WLR, the Eastern Caribbean Court of Appeal allowed the appeal on the basis that although the Court could not order rectification where the claimant was not in a position to assert legal title to the shares, Section 43 could be used to decide a dispute as to entitlement prior to a trial on rectification.

The Judicial Committee of the Privy Council's disagreed. In their opinion, the authorities were clear that the summary nature of the rectification jurisdiction was unsuitable for a substantial factual dispute. *Hoiscrest* stood on its own in deciding that it was sufficient for an application to engage the rectification jurisdiction to have a prospective (as opposed to immediate) right against the Company. The overwhelming majority of cases turned on legal title and expressed "no doubt that the legislation was concerned with legal title". *Hoicrest* was (merely) a case

management decision and stood alone in representing a decision where rectification was considered a permissible avenue by which to resolve a dispute concerning beneficial ownership. The JCPC concluded that *Hoicrest* was wrongly decided as a matter of principle and found that rectification proceedings would only be appropriate where an applicant had an existing right to registration by virtue of a valid transfer of legal title and would not be appropriate where the Claim against the Company was based on the conversion of an equitable right to legal title by virtue of an Order for specific performance.

COURT OF APPEAL

CIVIL APPEAL – INTERLOCUTORY APPEAL AGAINST JUDGE'S CASE MANAGEMENT DISCRETION – AMENDMENT TO STATEMENT OF CASE AFTER THE FIRST DATE FIXED FOR THE CASE MANAGEMENT CONFERENCE WITHOUT LEAVE OF THE COURT – WHETHER THE LEARNED JUDGE ERRED IN THE EXERCISE OF THE CASE MANAGEMENT DISCRETION IN REFUSING TO STRIKE OUT AN AMENDED DEFENCE AND COUNTERCLAIM – RULES 20.1 AND 20.2 OF THE CIVIL PROCEDURE, 2000

George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al –v– Joshua Matheson GDAHCVAP 2014/0007

This was an appeal against the decision of the judge of first instance refusing to strike out an amendment to a defence and counterclaim, which had been made without the requisite permission. The Eastern Caribbean Court of Appeal dismissed the Appeal and identified several factors to be considered when deciding whether to exercise its discretion to amend a statement of case. These factors included the justice to the parties, the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute, the adverse effect on other litigants of lost judicial time, the stage reached in the proceedings, whether the other side can be adequately compensated in costs, and whether the amendment will serve any useful purpose. In addition, the Court should continue to be guided by the principle that amendments to a statement of case should be allowed where such amendments are necessary to ensure that the real issues which are in dispute between the parties are determined, provided that such amendments can be made without there being injustice to the other party and that the other party can be compensated in costs.

In relation to the question of the applicable sanction where there has been non–compliance with a rule or order, the Court of Appeal held that while there is a discretion to strike out a statement of case for non-compliance consideration must also be given as to consider whether there are other appropriate remedies available which are more proportionate.

CIVIL APPEAL – INTERLOCUTORY APPEAL – REMOVAL OF LIQUIDATOR – WHETHER MASTER ERRED IN REFUSING APPLICATION TO GIVE DIRECTIONS TO A LIQUIDATOR/REMOVE A LIQUIDATOR – TEST FOR REMOVAL OF LIQUIDATOR – SECTION 10 OF ALIENS LAND HOLDING REGULATION ACT

Brilla Capital Investment Master Fund SPC Limited (a Cayman Islands segregated portfolio company, for and on behalf of Brilla Cap Juluca Segregated Portfolio M, a segregated portfolio thereof) et al –v– John Greenwood (Acting as Liquidator appointed to Leeward Isles Resorts Limited (In Liquidation) by Order dated 4 May 2014 et al Claim No AXAHCVAP2013/0007

This was appeal against the refusal by a master to remove John Greenwood as liquidator of Leeward Isles Resorts Limited. The Court allowed the appeal and held that when deciding whether to exercise its discretion to remove a liquidator, the court must be satisfied that the retention of the liquidator will be adverse to the ongoing liquidation or, conversely, that the removal of the liquidator is in the interests of the liquidation. In making this determination, the court should follow a three-stage process. Firstly, it must determine whether the applicant has the standing to apply for the removal of the liquidator. Secondly, the court has to decide whether due cause has been shown for the removal of the liquidator. Due cause does not necessarily mean that there is misconduct on the part of the liquidator or unfitness for purpose, but rather the court should consider all the circumstances and decide whether, on the whole, the liquidator should be removed. Thirdly, if due cause has been shown, the court should then decide whether to exercise its discretion to remove the liquidator.

In this case, the Court held that the liquidator should be removed for cause. The liquidator had failed to report to the creditors on the progress of the liquidation, failed to comply with the requisite statutory provisions in relation to the sale of property to a foreigner and his overall lack of vigour in dealing with the issues surrounding the liquidation.

INTERLOCUTORY APPEAL – REMOVAL OF LIQUIDATOR – WHETHER MASTER ERRED IN REFUSING APPLICATION TO GIVE DIRECTIONS TO A LIQUIDATOR/REMOVE A LIQUIDATOR – TEST FOR REMOVAL OF LIQUIDATOR – SECTION 10 OF ALIENS LAND HOLDING REGULATION ACT

Mable Phillips (acting through her Attorney Nancy McKenzie Greene) –v– Corrine Clara Claim No GDAHCVAP 2014/0023 (January 2015)

The Appellant had given a power of attorney to the Respondent, Corrine Clara, to manage all of her affairs in Grenada. Prior to that, the Appellant had added the Respondent as a signatory to her bank account in Grenada. The power of attorney in favour of the Respondent was revoked by the Appellant and Nancy McKenzie Greene, the Appellant's step-daughter, was appointed by the Appellant as her attorney (the "Attorney"). The Attorney subsequently instituted proceedings against the Respondent in the name of the Appellant seeking, among other relief, an Order requiring the Respondent to account for sums of money withdrawn from the account.

This appeal concerned, *inter alia*, the refusal by the court of first instance to permit the Appellant to issue a witness summons under Part 33 the *Civil Procedure Rules, 2000* ("CPR 2000"). It should also be noted that the proceedings in the Court below were reaching the pre–trial review stage although no date for trial had been fixed.

The Court allowed the appeal and held, *inter alia*, that in deciding whether to give permission to issue a witness summons, a court should seek to ensure that the application (i) was not being abused; (ii) it was being utilised in good faith for the purpose of obtaining relevant evidence; (iii) it was not a fishing expedition, speculative, oppressive, and did not offend against public interest immunity and like considerations. *(Harrison and another –v– Bloom Camillin (a firm)* (1999) Times, 12 May applied). The Court had found that the Judge in the Court below misdirected herself as to these principles.

COMMERCIAL APPEAL – WINDING UP OF COMPANY – APPOINTMENT OF LIQUIDATORS OF A COMPANY ON JUST AND EQUITABLE GROUNDS – WHETHER COMMON INTENTION OR UNDERSTANDING AMONG SHAREHOLDERS LEADING TO QUASI–PARTNERSHIP WAS FORMED – WHETHER SOLE OR MAIN PURPOSE OF COMPANY FAILED – SECTION 162 OF THE INSOLVENCY ACT, 2003 – SECTION 184I OF THE BVI BUSINESS COMPANIES ACT, 2004

Wang Zhongyong et al -v- Union Zone Management Limited and Jin Xiaoyong et al Claim No BVIHCMAP 2013/0024

This Appeal was against the decision of the court of first instance dismissing an application to appoint liquidators over Union Zone Management Limited (the "Company") on the just and equitable ground under Section 162 of the *Insolvency Act, 2003*. The Appellants were minority shareholders in the first Respondent. The second to fourth Respondents were collectively the majority shareholders of the Company. The second Respondent, Jin Xiaoyong held the shares in the Company for his deceased father Jin Biao. The Appellants alleged that there was (1) a common intention or understanding leading to the existence of a quasi-partnership between Jin Biao and the Appellants, which continued after Jin Xiaoyong joined the management of the Company and its subsidiaries after his father's death, and which they allege was breached when the Appellants were excluded from all aspects of the management of Union Zone and its subsidiaries; and (2) the sole purpose for which the Company was incorporated was to obtain a public listing, and this had failed. On appeal, the Appellants also sought to rely on the Appeal on the allegation that the business of Jangzhou (a subsidiary) was in disarray, a fact not pleaded in their claim.

Dismissing the appeal the Court of Appeal held, *inter alia,*

(i) Applying *In re Fildes Bros. Ltd* [1970] 1 WLR 592 at 593 and *Ebrahimi –v– Westbourne Galleries Ltd and Others* [1973] AC 360 a party is confined to its pleaded facts supporting a just and equitable winding up and it is those matters pleaded facts which are considered by a court.

(ii) While there was a plethora of circumstances to which the equitable considerations may be applied a court must be cautious in applying equitable principles of fairness to commercial transactions or relations. The Court of Appeal stressed that it was not the role of the court to impose its particular concept of what is fair on the parties and their transactions, rather the

concept of fairness must be applied judicially having regard to the particular context which the judge has to address and based on rational principles. (*Ebrahimi* – and *O'Neill and another –v– Phillips and others* [1999] *1 WLR 1092* applied).

(iii) The fact that a company was a small or private company was not, in and of itself, sufficient to engage these equitable considerations and would require something more, for example (i) an association formed or continued on the basis of a personal relationship; (ii) an agreement or understanding that all or some of the shareholders would participate in the conduct of the business; or (iii) restricting the transfer of the members' interest in the company.

(iv) The allegation that the business affairs of a company were in disarray did not of itself lead to a winding up order on the just and equitable ground. While an allegation of frustration of purpose, if proved, would normally be a ground for winding up a company on the just and equitable principle, the facts before the court did not support this conclusion.

(v) There is a principle that permits a court to have regard to the affairs of a subsidiary, when considering whether to regulate the affairs of the parent. However that principle applies only to a directly held subsidiary; *Rackind and others –v– Gross and others* [2005] 1 WLR 3505 applied.

COMMERCIAL COURT

BENEFICIAL OWNERSHIP OF SHARES IN BVI COMPANY – WHETHER SHARES REGISTERED IN NAMES OF SECOND AND THIRD DEFENDANTS HELD BY THEM AS NOMINEES FOR CLAIMANT

Alexander Pleshakov –v– Sky Stream Corporation et al
Claim No BVI HC (Com) No 098 of 2013 (12 November 2014)

The issue before the court of first instance was whether the Claimant held the beneficial ownership of all the issued shares of the first Defendant company, which at all times had been, and remained registered in the names of the second and third Defendants, Mr Linkov and Ms Kazantseva respectively.

Although the case was highly fact-specific, the Court of Appeal found that the most natural explanation for the fact that the original share certificates had been deposited with Mr Pleshakov (although he was not then the legal owner) and left permanently in his custody was that he was beneficially entitled to the shares which they represented. Further, the Court found that an ineffective Deed of Trust was highly persuasive in establishing beneficial ownership. The Court not only made a declaration that Mr Pleshakov was the true owner of the Sky Stream shares but also ordered that its register of members be rectified to delete the names of Mr Linkov and Ms Kazantseva and to substitute the name of Mr Pleshakov.

THIRD PARTY COSTS ORDER – WHETHER POWER TO PERMIT SERVICE OF APPLICATION OUT OF THE JURISDICTION – CPR 7.3(10) CONSIDERED – WHETHER NECESSARY FOR APPLICATION TO BE SERVED OUT IN ANY EVENT

Hornbeam Corporation –v– Halliwell Assests Inc Claim No BVIHC (Com) No 105 of 2014 (December 2014)

In this case, the Defendants successfully resisted applications by the Applicant (a Panamanian company) to continue *ex parte* injunctive relief granted previously by the court and to appoint a provisional liquidator over the Respondent company. Costs followed the event and were awarded against the Applicant. However, the Respondents' case was that this order, as a practical matter would likely be worthless given that the Applicant was merely a shell entity registered overseas.

The Respondents applied for a third party costs order against the ultimate beneficial owner ("the UBO") controller of the Applicant, on the grounds that he was the real beneficiary of the failed proceedings and the real party. This application was based on express powers in the *Eastern Caribbean Supreme Court Civil Procedure Rules* (the "CPR") to make third party costs orders. However, since the UBO, like the Applicant was resident outside the jurisdiction of the BVI court, this necessitated an application for leave to serve the application out of the jurisdiction.

The Commercial Court held that the service out provisions in the CPR contained no specific provision that was applicable to such an application. He went further and remarked that in his view the service out provisions were not designed to deal with applications to render non–parties liable for costs. Accordingly, he refused permission to serve out.

The decision is unfortunate since the net result is that whilst BVI does have power to make costs orders against non-parties, as a consequence of this decision, that power can only be enforced against resident entities, or at least, against entities against whom permission to serve out is not required. An appeal has been heard, but not yet determined.

FOREIGN DEFENDANT APPLYING TO SET ASIDE ORDER FOR ALTERNATIVE SERVICE – CLAIMANT ALLEGING DEFENDANT SUBMITTED TO JURISDICTION – WHETHER DEFENDANT SUBMITTED – WHETHER DEFENDANT ENTITLED TO RELY UPON RESERVATIONS OF RIGHT TO CONTEST JURISDICTION – CPR 7.8A CONSIDERED

JSC VTB Bank –v– Alexander Katunin and Sergey Taruta Claim No BVIHC (Com) No 62 of 2014 (January 2015)

JSC VTB Bank (the "Bank") obtained freezing orders against the Defendants' BVI assets and sought the recognition and enforcement of a money judgment at common law in excess of US$30 million against those assets. The Defendants are not resident in the BVI and the Bank was required to obtain permission to serve the claim on them outside the jurisdiction.

The Bank obtained permission to serve the Claim out of the jurisdiction and later obtained orders for alternative service, without attempting service on any of the Defendants under the Hague Convention. The effect of the alternative service order was that the Bank was permitted to effect service on the first Defendant by serving his companies registered in the BVI.

The first Defendant, a Russian national, sought to challenge the BVI court's grant of the alternative service order and also the jurisdiction of the BVI court to deal with the claim. The Bank successfully contented that he had submitted to the BVI Court's jurisdiction by filing evidence engaging on the merits of the claim in opposition to the Bank's summary judgment application. The first Defendant has appealed both the decisions on alternative service and jurisdiction. The appeals are likely to be heard later this year.

APPLICATION FOR INJUNCTION RESTRAINING FURTHER PROSECUTION OF FOREIGN ARBITRATION – SECTION 3(2)(B) ARBITRATION ACT, 2013 CONSIDERED – WHETHER SECTION 3(2)(B) DISAPPLIED IN CASE OF FOREIGN ARBITRATION BY SECTION 6(3) OF THE ACT

Sonera Holding BV –v– Cukurova Holdings AS Claim No BVIHC (Com) No 119 of 2011 (February 2015)

This case concerned an application by the Applicant, Sonera Holdings BV ("Sonera") for an injunction restraining the Respondent, Çukurova AŞ ("Çukurova") from continuing to prosecute an arbitration commenced by Çukurova under a provision in a draft share purchase agreement ("DSPA") which Sonera claims, but Çukurova denies, became binding between them on 9 May 2005.

The case turned on the interpretation of Section 3(2) of the BVI Arbitration Act 2013 (the "Act") which provided that *"the Court shall not interfere in the arbitration of a dispute, save as expressly provided in the Act"* and thus prevented the court from granting the injunction to restrain Cukurova from continuing to prosecute its arbitration.

Sonera argued that since Section 6(3), dealing with arbitrations outside the BVI, does not specifically provide that Section 3 is to apply to arbitrations conducted outside the BVI then it could not be relied on as a basis for arguing that the court does not have the jurisdiction to grant the injunction sought.

The court rejected this argument. In doing so, the judge examined the structure of the Act and held that sections 1 to 5 were preliminary matters which included definitions, matters of general effect and Section 3 which should properly be be described as policy only. He held that in view of this, it would be difficult to imagine that the legislature envisaged that it was the policy of the BVI to differentiate on the applicability of the Act in a matter such as non-interference in the processes of arbitrations, solely on the basis of where the arbitration has its seat.

The court held that the key to construction is the structure of the Act itself which was intended to provide a complete arbitral code for the British Virgin Islands. The judge found that Section 6(3) does not extend to the preliminary matters contained in Sections 1 to 5 and was intended to do more than stipulate which provisions of the new code were to apply in the case of foreign arbitrations. The court also noted that it would be absurd that the commencement provisions of Section 1(2) or the definitions in Section 2 would have no application in a case involving an arbitration which has a foreign seat. The judge therefore ruled in favour of Çukurova and held that he had no jurisdiction to make the Order sought.

Cayman Islands

CAYMAN

GRAND COURT

INSOLVENT HEDGE FUND COMPANY – PAYMENTS MADE TO INVESTOR FOR REDEMPTION OF SHARES – WHETHER PAYMENTS MADE FROM CAPITAL – WHETHER PAYMENTS RECOVERABLE BY THE LIQUIDATORS FOR BEING FRAUDULENT PREFERENCES

RMF Market Neutral Strategies (Master) Limited –v– DD Growth Premium 2X Fund (In Official Liquidation) (17 November 2014)

In the case before the court, the net asset value ("NAV") of DD Growth Premium 2X Fund (the "Fund") had been struck on the basis of a valuation of certain assets which turned out to be worthless, the NAV had therefore been so overstated that when the assets were realised there was a shortfall resulting in the Fund being unable to pay redemptions in full. Full redemption payments had been made to some redeeming investors, partial payments to others (including the Plaintiff) and no payments at all to others. The Fund was subsequently wound up and liquidators appointed by the court.

The liquidators sought to recover the payments made to investors whose shares had been redeemed on the basis of the overstated NAV, arguing that such payments were unlawful by reason of Section 37(6)(a) of the *Companies Law*, which provides: *"A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business."*

The Chief Justice of the Cayman Islands examined the capital maintenance doctrine as reflected in Section 37(6)(a) and then considered whether the payments made were payments out of capital. He held unequivocally that they were not.

The mainstay of the Chief Justice's reasoning is that save for a *de minimis* amount of US$1/1000 per share, the purchase price of the Fund's shares represented share premium, and the redemption price of the shares represented share premium plus (or minus) the profit (or loss) on the investment of that share premium (in this case into a similarly named master fund).

Section 34(2) of the *Companies Law* provides what share premium can be used for and specifically authorises the use of share premium to be used for *"providing for the premium payable on redemption or purchase of any shares of the company."* (Section 34(2)(f)).

Accordingly, share premium was not to be regarded as having become part of the paid up share capital of the Company for the purposes of the capital maintenance rule as embodied in Section 37(6)(a).

The liquidators had sought to argue that under the 2007 Revision of the *Companies Law* (applicable at the relevant time) section 37(5)(a), no reference was made to "share premium" (unlike the 2011 Amendment Law which added such a reference). Therefore they argued that share premium was, under section 37(5)(b), deemed to be capital for the purposes of Section 37(6)(a). The Chief Justice described this as a *"strained and tortuous construction".*

The Chief Justice expressly rejected an argument that because changes to the wording of section 37(5)(a) were made in 2011 to include the words "share premium" in that provision, a change in the law had been made so that prior to 2011 share premium was to be treated as capital. As the Chief Justice observed, there was no policy change that would justify such a conclusion. The 2011 Amendment served to clarify the existing law and not to alter it.

He held that section 34(2)(f) was to be read without being limited by section 37 and that there were in effect two separate regimes: that provided in section 34 and that provided in section 37. This conclusion was supported by the fact that section 34(2)(c) provided for share premium to be used *"in the manner provided in section 37"* in addition to providing by section 34(2)(f) that it could be used for providing the premium on redemption. Thus, there was no prohibition on using share premium for the purposes of redeeming shares, even if a fund is cash flow insolvent at the time it makes those redemptions.

In the alternative, the Liquidators had argued that the payments were a fraudulent preference contrary to section 168(1) of the *Companies Law* which requires the payments to be have been made *"with a view to giving such creditor a preference over the other creditors".* It has been held previously in the Cayman Islands that this requires the liquidators to prove that the *"dominant intention of the debtor was to prefer the creditor".*

On the evidence, the Chief Justice found that the liquidators had failed to prove such a dominant intention: indeed, on the contrary, he held that the payments were made due to the increasing pressure being exerted by the Plaintiff (including unannounced visits to offices and threats of reporting to authorities) and a desire to cover up or postpone the discovery of the catastrophic losses suffered by the fund.

CIVIL PROCEDURE – GCR O.62, R.4 – INDEMNITY BASIS – COURT'S DISCRETION TO AWARD INDEMNITY COSTS BASED ON CONDUCT OF LOSING PARTY – SEGREGATING COSTS – COSTS AGAINST ADMINISTRATOR OF ESTATE

Hinds (Phillip) –v– Hinds (Clive) and thers (unreported)
(5 December 2014)

This was a ruling that concerned the appropriate form of order to be made on a judgment (which the Plaintiff did not pursue) and also the appropriate order to be made in respect of the costs of the proceedings.

The original proceedings concerned a dispute between members of the Hinds family and a claim by the Plaintiff in relation to seven parcels of land of significant value in the Cayman Islands. The Plaintiff and the Defendants' deceased mother had apparently wished all four of her sons to share the properties concerned equally.

The judgment had concluded that the Plaintiff's claims were both misconceived and barred by limitation. It was also held that the Plaintiff had acquiesced in the matters of which he complained and that it would be unjust and inequitable in the circumstances to permit him to assert the rights which he sought to enforce by his claims.

Notwithstanding the overriding object that the successful party should recover his reasonable costs from the losing party, and the express provision in the GCR that costs should follow the event, the Plaintiff argued that he had succeeded "on major issues" concerning the devolution of assets from his father to his mother as administratrix. He claimed, therefore, that he should be awarded all of his costs against all of the defending parties. In the alternative that he should not be ordered to pay the entire costs of the proceedings because the Defendants had made arguments which were either subsequently abandoned or which were unsuccessful, and which took up a very large portion of the court's time.

Finally, the Plaintiff also argued that because one of the Defendants was also the administrator of his mother's estate, he should have adopted a neutral role in the proceedings, and it was inappropriate for him to take the position he had which was adverse to the Plaintiff, which he did. The Plaintiff contended that in the circumstances the Defendant, as administrator, should not be awarded his costs because they were incurred in breach of his duty as an administrator.

Justice Foster held that the Plaintiff's assertion that he had succeeded on "major issues" was surprising and misconceived: all of his claims had been dismissed entirely. He also found that the Defendants' arguments, which were subsequently amended, were based on a reasonable inference in the circumstances, and that the issue to which the Plaintiff referred as wasting the court's time was actually only one of several significant issues, some of which took up considerably more time. In the circumstances, the judge found it inappropriate to segregate part of the proceedings in respect of costs, and that the exceptions to the usual rule that costs should follow the event should not be applied (as referred to in *Elgindata Ltd. (No.2) [1993] 1 All ER 232).*

In respect of the Plaintiff's arguments as to costs of the Defendant as an administrator, Justice Foster highlighted that the application was not for an indemnity for the administrator's costs out of the estate, but instead simply for his costs as a successful litigant against the losing third party. The Plaintiff's claim was not made in his capacity as beneficiary of his mother's estate, but instead as a beneficiary of his father's estate; it was a proprietary claim to the assets in his mother's estate, which the Plaintiff claimed were absolutely his. In the circumstances, the judge found it coincidental and irrelevant that the Plaintiff was also a beneficiary of his mother's estate, and held that the Defendant, as administrator, should have his costs of successfully defending his mother's estate against the Plaintiff.

Justice Foster then went on to consider whether the costs should be taxed on an indemnity basis, as argued by the Defendants, following the recent decision in *Ahmad Hamad Algosaibi and Brothers Company –v– Saad Investments Company Limited & Ors* [2013] 2 CILR 344. In that decision, the Chief Justice had clarified that GCR O.62, r.4 (order for costs on indemnity basis) provided an exception to the normal rule, and that there must be something in the conduct of the action or the circumstances of the case which takes it out of the norm in a way that justifies an order for indemnity costs.

In the present case, the Plaintiff's claims were wrong in principle, misconceived and barred by limitation. The Plaintiff had been warned of this in advance by his attorney and was also encouraged by the Court to reach a compromise in respect of the proceedings, but refused to do so. He was also found, through cross–examination, not to have been truthful in respect of facts on which his claim was based. Finally, the judge found that the Plaintiff had deliberately delayed the matter by standing by for many years until after his mother's death before commencing proceedings. The judge therefore held that the circumstances of the case were exceptional, and that the court would mark its disapproval of the losing party's conduct by an award of indemnity costs against the Plaintiff.

APPLICATION FOR LEAVE TO AMEND PLEADINGS – APPLICABLE TEST – GCR O.20, R.5

Lemos and Others –v– CIBC Bank and Trust Company (Cayman) Ltd. (unreported) (20 February 2015)

The decision concerns a dispute regarding the Panmar Trust, under which the Plaintiffs are beneficiaries and the Defendant was trustee. The Plaintiffs applied to reamend their pleadings to include an alternative claim for loss from wilful and grossly negligent failure on the part of the Defendant to reinvest in a timely manner the proceeds of the sale of one of the important assets of the trust, a ship.

In the ruling, the Chief Justice briefly considered the recent English cases on applications for leave to amend pleadings. There it had been held that where a proposed amendment would likely result in the postponement of a trial and consequential undue hardship to the other side, that could not be compensated by the usual order for costs, the party seeking leave to amend has a 'heavy onus' to discharge. However, the Chief Justice declined to follow this approach, recognising that those recent English cases represented a much stricter English approach "post–CPR," which has not been adopted by the Cayman courts (see *Bodden –v– Thompson* [2011] (2) CILR 320).

Instead, the Chief Justice applied the more liberal approach found in the Cayman Court of Appeal decision *Swiss Bank and Trust Corp Ltd. –v– Lorgulescu* [1994–95] CILR 149, and confirmed the test for leave to amend to be whether or not injustice or prejudice will result from such leave to being granted. If prejudice (or injustice) will result from allowing the amendment, then leave should not be granted. If not, and the resultant costs can be made good by an order for costs of the amendment in favour of the other side, the amendment would ordinarily be allowed, even shortly before trial.

The Chief Justice found in the present case that: (i) the application had not been made at the 'eleventh hour'; (ii) the alternative claim concerned the same factual matrix as the main proceedings; (iii) the amendment, *prima facie,* was not 'doomed to fail'; (iv) there was no need for further expert evidence; (v) the new claim could be conveniently tried at the same time so as to avoid multiplicity of proceedings; and (vi) any resultant costs of the amendments to the Defendant could be compensated by an order for costs. Therefore, in the circumstances, the amendment was allowed.

APPLICATION FOR SUPERVISION ORDER – BANKS AND TRUST COMPANIES LAW (2013 REVISION), S.18 – BANKRUPTCY LAW (1997 REVISION), S.18 – WHETHER APPOINTMENT OF CONTROLLERS TAKES PRECEDENCE OVER APPOINTMENT OF VOLUNTARY LIQUIDATORS

In the matter of Caledonian Bank Limited (In voluntary liquidation) (unreported) (12 February 2015)

The US Securities and Exchange Commission filed a lawsuit in the US against Caledonian Bank Limited (the "Bank"), alleging fraudulent trading in securities. A temporary restraining order was subsequently issued by the USA Court (NY), restraining US$76 million of the Bank's assets within the US.

In response to concerns regarding the regulatory implications of the SEC allegations and general concerns for the interests of the Bank's depositors, the Cayman Islands Monetary Authority ("CIMA") appointed controllers over the Bank on 10 February 2015 (the "Controllers"). On the same day, after receiving notice of controllership, the shareholders of the Bank voted to put the Bank into voluntary liquidation and appointed joint voluntary liquidators ("JVLs").

The JVLs immediately applied to court for the voluntary liquidation of the Bank to continue under the supervision of the court on the basis of its apparent insolvency (the Bank had assets of US$618 million and liabilities of US$593 million, with shareholder's equity at US$25 million), in addition, the Bank's directors refused to swear a declaration of solvency. The application was opposed by CIMA who countered by seeking the Controllers' appointment to be recognised, with powers vested by the court pursuant to s.18 of the *Bankruptcy Law (1997 Revision*). In the alternative CIMA requested that if the court was not prepared to recognize the Controllers, that they should be appointed as official liquidators instead of the JVLs.

There was no dispute between the parties as to whether the company should be wound up. The main issue was the identity of the liquidators, i.e. the JVLs appointed by the shareholders or the Controllers appointed by CIMA. The Chief Justice had to determine the effect of the appointment of the Controllers notice of which had been provided to the directors and shareholders of the Bank before the resolution to appoint JVLs.

The Chief Justice was called upon to identify and express the true meaning of the *Banks and Trust Companies Law (2013 Revision),* s.18 (the "Law"), which allows CIMA to appoint a person to assume control of the affairs of a company licensed under the Law, who shall have all the powers of a person appointed as a receiver or a manager under the *Bankruptcy Law (1997 Revision),* s.18.

In his Ruling, the Chief Justice applied the decision in *Finsbury Banks and Trust –v– Attorney General* [1996] CILR 349, and interpreted s.18 of the Law to mean that the appointment of controllers by CIMA, vests immediate control of the licensee's affairs in the Controllers. Therefore, the Controllers of the Bank had effectively assumed control of the Bank's affairs prior to the appointment of, and to the exclusion of, the JVLs, the directors and the shareholders, and indeed anyone else who may have claimed control. The practical effect of the resolution to appoint the JVLs was no more than to vest the JVLs with such residual powers as might otherwise remain in the directors themselves notwithstanding the appointment of the Controllers, and therefore the JVLs' petition for a supervision order was refused.

The Chief Justice also made an order for the vesting of the powers under s.18 of the *Bankruptcy Law* in the Controllers, on the basis of submissions made at the hearing. The Chief Justice indicated that, following the submission of their first report to CIMA, the Controllers would be at liberty to petition to be appointed as joint official liquidators ("JOLs") of the Bank. That petition was subsequently made by the Controllers and they were appointed as JOLs on 23 February 2015.

It is noted that the temporary restraining order has since been reduced to US$7 million and the US judge has criticized the SEC for seeking to restrain US$76 million.

COURT OF APPEAL

COMPANIES DIRECTORS – POWERS AND DUTIES – DUTY TO SUPERVISE INVESTMENT COMPANIES WITH REASONABLE SKILL, CARE AND DILIGENCE

Weavering Macro Fixed Income Fund Ltd. –v– Peterson and another (12 February 2015)

The Court of Appeal reversed the decision of Jones J in *Weavering Macro Fixed Income Fund Limited –v– Peterson and Ekstrom* [2011] (2) CILR 203, which had held that the Directors of the Weavering Macro Fixed Income Fund (the "Fund") were liable for wilful neglect or default. The Court of Appeal decision set aside the US$111 million judgment of the lower court, which had been obtained by the Liquidators of the Fund against the Directors.

The Fund collapsed into insolvency when it was discovered that its net asset value ("NAV") comprised fictitious interest rate swaps with the related Weavering Capital Fund based in BVI. These swaps were designed to conceal the fact that the Fund had suffered substantial losses. The allegation against the directors was that they ought to have discovered the identity of the counterparty to the swap contracts, and that if they had done so, then they would have appreciated that the values attributed to those contracts could not be justified with the result that the Fund would have been put into liquidation in November 2008 and subsequent redemption payments to investors in the sum of US$111 million would not have been paid. These payments are now irrecoverable.

Jones J concluded at the end of the trial at which both directors gave evidence that they were in breach of their duty of care and skill in failing to discover who the counterparty was in November 2008 since the name of the counterparty had appeared in a quarterly report which they had both read. The Court of Appeal agreed.

However, the Articles of Association of the Fund provided an exclusion of liability and indemnity against liability except where the Fund could prove that the directors had been guilty of *"wilful neglect or default"*. Jones J had inferred from the evidence that they had indeed been guilty and held them liable. The Court of Appeal disagreed and held that the judge had been wrong to draw such an inference from the facts.

The Court of Appeal re–affirmed that a director could not be guilty of wilful neglect or default unless he either (i) knows that he is committing and intends to commit a breach of his duty or (ii) is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty (applying the test of Romer J in *Re City Equitable Fire Insurance* [1925] Ch.407). This was the same test that Jones J had applied.

Jones J had found that this test had been satisfied on the evidence. He inferred that the directors consciously chose not to read the 2008 report with sufficient care to satisfy themselves that there had been no breach of the investment restrictions, knowing that failure to do so was in breach of his duty. The Court of Appeal held that this inference was improper on the evidence. The Court of Appeal said that the evidence was equally consistent with the directors having a different view from the judge as to what their high-level supervisory duties required of them and equally consistent with negligence or gross negligence which was not enough. The directors' evidence was that they each genuinely believed that they were complying with their high-level duty to supervise, and it was clear and unchallenged in cross-examination.

In those circumstances the judge was wrong to have inferred that they had consciously chosen generally not to perform their duties to the Fund.

Jones J had not considered the second limb of *"recklessly careless"* and, in particular, had left open the question of whether in order to be held liable under this limb it was necessary to prove that the director had appreciated that his conduct might be a breach of duty and had continued regardless of the consequences. The Court of Appeal examined the authorities which had been relied upon by Romer J in *City Equitable* and concluded a director must at least be shown to have suspected that his conduct might constitute a breach of duty in order to be found liable under the second limb. There was no evidence that these directors appreciated that their conduct might be a breach of duty and so they could not be liable for reckless carelessness.

The judgment applies well known principles and authorities relating to the legal test of wilful neglect or default. Jones J had applied the same principles. The significance of the judgment lies in the criticism by the Court of Appeal of the inferences which had been drawn by the Judge, in circumstances where they had delegated all important functions to the Investment Manager, the Administrator and the Auditors. The case re-emphasises that a negligent neglect of duty does not amount to wilful neglect or default.

The conclusion to be reached from the approach of the Court of Appeal is that if liability for negligence and gross negligence are excluded, the prospects of finding liability on the part of directors, Administrators or Auditors of funds are very slim indeed.

SECURITY FOR COSTS – GCR O.23 – COMPANIES WINDING UP RULES – INHERENT JURISDICTION OF THE COURT

In the matter of Dyxnet Holdings Ltd, (23 February 2015)

Section 74 of the *Companies Law* ("Section 74") provides that security for costs may be ordered to be provided by a plaintiff Cayman Islands company where the Court is satisfied that the assets of the plaintiff company will be insufficient to pay the defendant's costs.

This statutory provision only applies to Cayman Islands companies. *The Grand Court Rules* ("GCR") Order 23 provides for security for costs to be provided by a foreign plaintiff. This Rule does not apply to winding up proceedings. Winding up proceedings are governed by the *Companies Winding Up Rules,* 2008 (as amended) ("CWR") which make no provision for security for costs. It was against this background that the Court of Appeal had to consider whether it had inherent jurisdiction to order a foreign company to provide security

for costs in winding up proceedings.

In *Re Freerider Ltd* [2010] (1) CILR 286 ("*Freerider*") Foster J had held that there was no jurisdiction to make an order for security for costs against a non–resident individual in winding up proceedings because any inherent jurisdiction to do so would be inconsistent with the CWR. In *Re Dyxnet Holdings Ltd.* Cresswell J followed that reasoning and applied it to a foreign company. The Court of Appeal has said that he was wrong to do so.

In relation to the existence of an inherent jurisdiction to order security for costs the Court of Appeal relied upon the observations of Lord Scott in the Privy Council appeal in the Cayman Islands case of *Bancredit* [2009] CILR 578 at 582–583:

"It seems to their Lordships clear from the case law dealing with security for costs issues that the court has an inherent jurisdiction to make security for costs orders but that the exercise of that jurisdiction is subject to what has become the settled practice of the court… The Rules of Court did not create or confer the power to do so but, rather, harnessed the power so as to control its exercise."

Lord Scott went on to say at 585:

"The effect, therefore, of statutory provisions such as Section 74, or of Rules of Court such as Order 23 Rule 1, is not to confer a jurisdiction that the courts did not previously have, but, in the case of Section 74 and its statutory predecessors, to exclude impecunious corporate plaintiffs from the established settled practice that security for costs orders could not be based on mere impecuniosity, and, in the case of Order 23 Rule 1, to specify particular circumstances in which the jurisdiction could properly be exercised…"

The Court of Appeal emphasised that although there is nothing in the CWR that empowers the court to order security for costs, neither is there anything in the CWR which would be inconsistent with the exercise of an inherent power to order security for costs against a non–resident limited liability company in proceedings under the CWR. The CWR are effectively silent on the question.

The Court held that because Section 74 applies only to Cayman Islands companies, it would be discriminatory and contrary to Section 16 in Part I ("Bill of Rights Freedom and Responsibilities") of the Cayman Islands Constitution, if the Court were to refuse to order security for costs against a foreign company. The Court rejected the argument that a Cayman Islands company could argue that the section should not be applied at all because it did not also apply equally to both Cayman Islands and foreign companies. In this regard the court said that it would be wrong in principle to refuse to exercise the statutory power under Section 74 unless there were no other means of avoiding discriminatory treatment. There was, however, another means of avoiding discrimination, namely by reliance on the inherent power to order security for costs against a foreign company in the same manner as Section 74 would apply to a Cayman Islands company.

The Court of Appeal also rejected the argument that the repeated failure of either the Grand Court Rules Committee or the Insolvency Rules Committee to deal with security for costs after the decision *Freerider* in the various amendments which were made to both the GCR and the CWR, demonstrated an intention to endorse *Freerider.* The Court would not speculate as to the intention of either Committee in the absence of evidence, nor was it appropriate to speculate that the Insolvency Rules Committee had appreciated the discriminatory effect of the wider ground of Foster J's decision in *Freerider*. The actual decision in that case (which concerned an individual and not a company) could be supported on a narrower ground that Section 74 was irrelevant, GCR Order 23 did not apply and the CWR contained no power to award security for costs.

The current position is that where an individual is the petitioner in winding up proceedings there is no power to award security for costs: the Court of Appeal approving the narrower basis for the decision in *Freerider*. Where the petitioner is a company there is such a power if the court is satisfied that there is reason to believe that the assets of the plaintiff company will be insufficient to meet the costs of the company against whom the petition is brought, either under Section 74 if the petitioner is a Cayman Islands company or under the inherent jurisdiction if it is a foreign company.

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