IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 of 2020 (CRJ)

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)

AND IN THE MATTER OF ADENIUM ENERGY CAPITAL, LTD. (IN OFFICIAL LIQUIDATION)

Appearances:	**Mr. Brett Basdeo and Ms. Annalisa Shibli of Walkers on behalf of the Joint Official Liquidators**
	Mr. Robert Levy QC instructed by Mr. Christopher Harlowe and Mr. Laurence Aiolfi of Mourant
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Heard:	**8th April 2021**
Draft Judgment:	**15th September 2021**
Further Submissions:	**4th January 2022, 1st February 2022**

HEADNOTE

The Companies Act (2020 Revision), section 97 (1), test to be applied, whether leave required to continue proceedings against company in liquidation.

JUDGMENT

1. Adenium Energy Capital, Ltd. (in Official Liquidation) (the "Company"), is registered in the Cayman Islands as an exempt company limited by shares. In August 2019, the Grand Court granted leave for the enforcement of an Arbitral Award made in Dubai on the 8th March 2019, (the "Arbitral Award"). The Arbitral Award was made against the Company in favour of Bareeq Capital in the amount of some US $2.25 million together with interest and costs. Judgment was entered by the Court in terms of the Arbitral Award.

2. By petition presented on the 25th March 2020, Bareeq Capital sought the winding up of the Company following its non-payment of the said Arbitral Award, (the "Petition"). By Winding Up Order made on the 27th July 2020, Mr. Christopher Kennedy and Mr. Alexander Lawson were appointed as Joint Official Liquidators ("JOLs") of the Company. By virtue of s.100 (2) of the ***Companies Act*** (2020 Revision), (the "***Companies Act***") the winding up of a company by the Court is deemed to commence at the time of the presentation of the Petition for winding up ("the Commencement Date").

3. There are three Summonses before the Court.

4. The first is a Summons dated 15th October 2020, (the "October Summons"). By the October Summons the JOLs seek declaratory orders that three transfers of the Company's property to KSB Capital (Offshore) SAL ("KSB") which were made after the Commencement Date are void pursuant to s.99 of the ***Companies Act*** and for consequential rectification and declaratory orders, damages and costs.

5. The three transfers are shares held in three entities as follows:

    i. 1000 Class A Shares in Yasmeen Solar Jordan Limited (Yasmeen) on or around the 26th May 2020 or 2nd June 2020.
    ii. 330 Class A Shares and 63,350 Class B Shares in Adenium Solar Jordan Limited ("ASJ") on or around the 2nd June 2020.
    iii. 1,000 shares Class B Shares in Zeini Limited ("Zeini") on or around the 15th June 2020.

6. The first two entities Yasmeen and ASJ are exempted companies incorporated in the Cayman Islands. Zeini is a company incorporated in the British Virgin Islands.

7. The second Summons is dated 20th November 2020 (the "November Summons"). By this Summons KSB seeks to be added as a Respondent to the October Summons and for declarations that the three transfers were not dispositions of the Company's property pursuant to s.99 of the ***Companies Act*** and are not void by virtue of that provision. Alternatively, an order is sought that the dispositions of property by way of these transfers shall not be void by virtue of the said provision. The costs of the application are sought to be paid out of the assets of the Company as an expense of the liquidation.

8. The third Summons is dated 15th January 2021 and is filed by KSB, (the "January Summons"). It seeks in summary the following:

    i. That the JOLs' Summons of 15th October 20020 be entirely struck out on the ground that it is frivolous and/or vexatious and/or is otherwise an abuse of the process of the Court.

    ii. Alternatively that KSB is granted leave retrospectively pursuant to s.97 (1) of the ***Companies Act*** to commence and proceed with the November Summons.

    iii. Costs

9. The JOLs take the preliminary point that leave is required by KSB in respect of both the November and January Summonses and that leave ought not to be granted in the circumstances of this case. KSB argues that it ought to have been joined by the JOLs to the October Summons and that its actions are defensive in nature. Alternatively, KSB says that it ought to be granted leave as a matter of course as it is a secured creditor seeking to enforce proprietary rights obtained by way of a Debenture Agreement dated 30th May 2019.

THE EVIDENCE

10. The October Summons filed on behalf of the JOLs is supported by the Third Affidavit of Mr. Kennedy[1]. He attests that the books and records of the Company include certain resolutions made on the 26th May 2020, (the "May Resolution") and the 2nd June 2020, (the "June Resolution"). By the May Resolution, the Company purported to transfer the shares held in the above named three entities to KSB for a cash consideration of $1.00.[2]

11. By the June Resolution, the Company purported to cancel and replace the May Resolution. The June Resolution described the Company as a borrower, (the "Borrower") from four creditors under certain facility agreements dated 9th March 2017, 18th October 2017, 22nd and 26th February 2018, 1st March 2018 and 24th September 2018. The June Resolution further states that as a condition for the funding, the four creditors and the Company entered into and executed a Debenture Agreement dated 30th May 2019, (the "Debenture"). The amount outstanding as at 19th November 2019 was approximately US$6 million.[3]

12. KSB is described in each of the May Resolution and the June Resolution as a company owned by affiliates of the creditors. Transfers of shares held by the Company in the three entities were made on the said 19th November 2019 in partial enforcement of the rights under the Debenture. The value of the shares transferred was approximately US$5.1 million. This left a loan balance of approximately US$1.7 million. The three questioned transfers to include shares in ASJ of an agreed asset value of US$1.5 million were transferred in respect of this outstanding amount.

13. Mr. Kennedy states his belief that as these transfers were effected after the date of the filing of the Petition without Court approval, they are automatically void pursuant to s.99 of the ***Companies Act.***

14. On the 24th September 2020, the JOLs issued a cease and desist notice to the registered offices of ASJ, Yasmeen and Zeini with respect to the transfers. The responses to this notice included

[1] Dated 15th October 2020
[2] Exhibit CK-3, page 1, paragraph 2
[3] US $6,699,833.95

that the Registers of Members of ASJ, Yasmeen and Zeini Limited are not maintained by the registered offices but by the entities themselves.

15. A similar letter was sent to KSB on the 2nd October 2020. The letter stated in part:-

> *"…However, based on information provided to us by the Company's directors, we understand the Debenture was entered into to provide fixed and floating security over all of the Company's assets, estimated at approximately US$58,887,000 as of 31 December 2018, for certain loan facilities provided to the Company totaling US$6,483,924.42 (the "**Loan Facilities**").*
>
> *With respect to the 2019 securities, the value attributed to these assets was substantially lower in some cases than the value that was attributed to them in the Company's previous financial year, with no disclosure of the method of valuation used, and which were transferred without reference to outstanding debts owed to the Company's creditors. In the circumstances, we believe these transfers were therefore invalid, pursuant to section 145 of the Companies Law of the Cayman Islands (the "**Companies Law**"), such that the Company maintains a proprietary interest in the 2019 Securities. Accordingly, any further dealings with the 2019 Securities, or any realisation thereof, should immediately cease.*
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> *With respect to the 2020 Securities, the impropriety of these transfers is clear. … Nevertheless, pursuant to section 99 of the Companies Law, any disposition of the Companies property after 25 March 2020 (the date on which the winding up of the Company was deemed to commence) without the approval of the Grand Court is automatically void, i.e. null and of no effect. Accordingly, the 2020 Securities remain the property of the Company and the recipients of such property, or any realisation thereof, would be considered constructive trustees of such property for the benefit of the Company.*
>
> *Overall, the transfers of both the 2019 Securities and the 2020 Securities appear to have been effected in breach of the several laws of the Cayman Islands and we believe would likely be declared fraudulent by the Grand Court. Pending the Grand Court's determination of the same, any party subsequently found to have knowingly assisted with illegitimate or unlawful actions or conduct may also be subject to civil and /or criminal liability. As a potential unlawful recipient of the Company's assets, you are hereby on notice of actions that may require your assistance or may otherwise be taken against you."*

16. KSB's response included the suggestion that the JOLs await substantive responses from the Lenders and a denial of the matters outlined in the letter.

17. The JOLs have filed two additional Affidavits. The First Affidavit of Ms. Annalisa Peccarino[4] provides evidence of service of the October Summons and supporting Affidavit on the three

[4] Dated 18th November 2020

entities and on KSB on or about the 16th October 2020. The First Affidavit of Ms. Benicha Tyndale[5] in part produces two legal advices provided to the Company on the 2nd October 2019 and 29th May 2020.

18. The November Summons is supported by the First Affirmation of Mr. Wassef Sawaf dated 30th November 2020. He attests that he is duly authorised to make the Affirmation on behalf of KSB. In summary he states therein that the Company was provided by certain creditors[6] with loan facilities amounting to US$6 million towards its ongoing operational expenditure. He exhibits requests from two of the lenders dated 1st and 5th May 2019 for a charge over the assets of the Company as security.[7] In response to these requests, the Company which was then in default of its obligations under the facility agreements entered into the Debenture[8] with the Lenders. He states that the Debenture was executed as a deed and that it granted a fixed and floating charge over all of the Company's property including the shares which were subsequently transferred. Thereafter a further US$6 million was advanced to the Company.

19. Mr. Sawaf further states that in October 2019, the creditors sought to enforce the Debenture when the Company failed to repay amounts under the loan facility agreements. He describes KSB as a company owned by affiliates of the creditors and states that the creditors enforced the Debenture by requiring the Company to transfer certain shares to KSB.

20. Transfers were made on two occasions, the first of which took place in 2019. The value of the shares then transferred was later found to be only US$5.1 million which was less than the amount owed to the creditors. As a result of this shortfall, the amount owed under the facility agreements was approximately US$1.7 million as at 31st May 2020. In response to a second enforcement notice from the creditors, on 26th May 2020, the Company's Board approved the transfer of further shares in the three entities named above. The ascribed value of the ASJ shares is US$1.5 million. The shares in Zeini and Yasmeen are said to be management shares which have no ascertainable value. Both entities are investment vehicles for other investors. The shares in these entities were transferred to KSB to facilitate the continuation of management by the same management team.

[5] Dated 17th March 2021
[6] Infinity World Investments S.A. Viscom investments Limited, Maymouna Holding SAL and Wassef Sawaf, (the "Lenders")
[7] Exhibit WS-1 pages 90 -91
[8] Exhibit WS- 1 page 50

21. Mr. Sawaf also asserts that as the Debenture was entered into prior to the Commencement Date, the shares were not the property of the Company as at that date and that alternatively s.99 does not apply to the transfer of property effected pursuant to the enforcement of a valid security interest. He says that even if the Court were to find that the 2020 transfers are void pursuant to s.99, the shares would remain subject to the security interest arising under the Debenture.

22. As to the financial issues raised by the JOLs, Mr. Sawaf states that the reference to the Company having assets of some $58 million, refers to the position as at December 2018 and is outdated information. The Company's financial position as at December 2019 was significantly worse having regard to the Company's liabilities and the deteriorating financial position as a result of market turbulence in the renewable energy sector.

THE DEBENTURE

23. The Debenture is stated to be governed by English Law. It is signed between Viscom Investments Limited, Infinity World Investments SA, Maymouna Holding SAL and Wassef Sawaf as Lenders and the Company as Borrower. It is expressed by way of background to be a deed by which the Borrower provides security to the Lenders in respect of the loan facilities extended. There is a covenant by the Borrower to pay to the Lenders on demand the Secured Liabilities, (as defined therein), when they become due.

24. By Clause 3.1, the Company charges to the Lenders by way of a first fixed charge a number of items. These include investments which are defined as: "*All certificates, shares, stocks, debentures, bonds or other securities or investments (whether or not marketable) from time to time legally or beneficially owned by or on behalf of the Borrower.*"

25. Clause 3.3 provides for a floating charge on all the Borrower's undertakings, property, assets and rights not otherwise effectively charged or assigned.

26. By Clause 3.5 the charge becomes fixed in a number of circumstances including that a resolution or "order is made for the winding-up, dissolution, administration or re-organisation of the Borrower". The charge may also become fixed by written notice of the Lenders acting jointly.

27. The Secured Assets are defined as all the assets, property and undertaking of the Borrower which are or expressed to be subject of the security created by the Debenture.

28. By Clause 12.1, the security becomes enforceable if an event of default occurs under any of the loan facility agreements.

29. Clause 13.4 provides:

> *"13.4.* ***Redemption of prior Security***
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> *(a) At any time after the security constituted by this deed has become enforceable, the Lenders may:*
>
> *(i) redeem any prior Security over any Secured Asset;*
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> *(ii) procure the transfer of that Security to itself; and*
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> *(iii) settle and pass the accounts of the holder of any prior Security (and any accounts so settled and passed shall, in the absence of any manifest error, be conclusive and binding on the Borrow).*
>
> *(b) The Borrower shall pay to the Lenders immediately on demand all principal, interest, costs, charges, and expenses of, and incidental to, any such redemption or transfer, and such amounts shall be secured by this deed as part of the Secured Liabilities."*

30. By Clause 19.1, the Borrower agrees to take any action required to facilitate the realisation of the security and by Clause 22.1, the Lenders may assign or transfer all their rights under the Debenture.

THE COMPANIES ACT

31. Section 97 of the ***Companies Act*** provides for a moratorium on the institution of proceedings against companies in liquidation subject to the leave of the Court. It states:

> *" (1) When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.*

(2) When a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void."

32. Section 99 of the ***Companies Act*** provides that:

> *"When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void."*

33. Section 142 of the ***Companies Act*** preserves the position of secured creditors. It states:

> *"Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce that person's security without the leave of the Court and without reference to the liquidator."*

34. The Companies Winding Up Rules, O.17 r.1 ("CWR") provides that a creditor who has security over the assets of a company is entitled to enforce his security without the leave of the Court and without reference to the liquidator. By CWR O.19 r.4, an application for an order validating the transfer of any shares in a company in liquidation may be made by its liquidator or by the transferor or transferee of the shares.

THE APPLICABLE PRINCIPLES

35. The JOLs rely on three cases in particular. The first, ***Tianrui (International) Holding Company Ltd. v. China Shanshui Cement Group Ltd.***[9], sets out the nature of a validation application. In that case the Cayman Islands Court of Appeal ("CICA") considered an appeal against a validation order made by the Grand Court in respect of certain transfers of shares held by Tianrui (International) Holding Company Ltd. ("Tianrui") in China Shanshui Cement Group Limited to the Hong Kong Securities Clearing Company Nominees Limited. Tianrui contended that the Grand Court had failed to identify the correct approach to validation which was applicable to s.99 of the ***Companies Act***.

[9] 2020 1 CILR 417

36. The CICA noted that the purpose of s.99 is to preserve the status quo once a petition has been presented. Thus any transactions thereafter will be avoided if a winding up order is made unless the court exercises its discretion to validate such transactions. The Court stated:

> *"The avoidance effect of s.99 enabled the liquidator to unwind any transactions which might have taken place during this period and return the assets and circumstances of the company and its contributors to those which were in place at the time the winding up commenced."*[10]

37. The Court also noted the importance of validation during the "twilight period" particularly with respect to trading companies which may be enabled to continue to operate in the ordinary course of business prior to a winding up application being heard. It was emphasized that the power to make a validation order ought not to be exercised in such a way that it undermines the essential purpose of s.99. The Court by reference to case law identified a number of relevant principles. These may be summarised as follows:

i. Section 99 applies to all companies whether solvent or insolvent irrespective of the nature of the grounds for winding up.

ii. A court in every case must satisfy itself that an order which is being made under s.99 of the ***Companies Act*** is made in furtherance of the objective not to undermine or frustrate the maintenance of the status quo.

iii. The court's assessment as to whether or not the proposed validation would undermine or frustrate the maintenance of the status quo will vary according to the circumstance of the company and the nature of the transaction in respect of which validation is sought i.e. whether it is one which is in the ordinary course of the company's business.

38. Section 97 of the Companies Act was considered in the case of ***BDO Cayman Ltd. v. Ardent Harmony Fund Inc. (In Official Liquidation)***[11]. Counsel on behalf of the JOLs places significant reliance on this judgment and drew the Court's attention to the exposition of the rationale for requiring that leave be obtained. In that case, Ramsey Hale J. stated:

[10] Ibid, paragraph 15
[11] Grand Court, FSD 74 of 2020 (MRH) unreported 19th November 2020

"The rationale for requiring leave to bring proceedings is succinctly set out in Vagrand v Fielding a decision of the Full Court of the Federal Court of Australia on which BDO relied in this application, where the Court said this:

"The reason for imposing a requirement of leave, in the case of litigation against companies in liquidation, was explained a century ago by Manning J, of the New South Wales Supreme Court, in Thompson v Mulgoa Irrigation Co Ltd. (1893) 4 BC (NSW) 33:

"All that s.140 means is that a company in liquidation is not to be harassed and its assets wasted by unnecessary litigation, and the leave of the Court is therefore required as a safeguard. Before any action can be brought or continued against a company, the court must investigate the intended litigation."[12]

39. The discretion of the court under the section is to be exercised with a view to doing what is right and fair according to the circumstances of each case. The threshold question which a court must first consider before granting leave was stated to be whether the applicant has a claim which is worth entertaining or put another way, that there is a genuine arguable claim. In considering this question, and satisfying itself that there is such a claim a court is not required to investigate the merits of the dispute.

40. The learned Judge referred to the case of ***Gardner v. Lemma Europe Insurance***[13] and the observation of Patten LJ therein that leave is unlikely to be granted where the issue in the action could conveniently be dealt with in the liquidation. The applicable principles governing s.97 extracted from the case law were identified as follows:

"(1) The applicant for leave must first establish an arguable case to be litigated;

(2) If it establishes an arguable case, the Court then has to consider whether it would be fair, in the context of the liquidation as a whole, for the JOLs to have to deal with the burden of that litigation. The Court's discretion is wide and unfettered - there is no presumption in favour of or against giving leave - and each case turns on its own facts;

(3) In deciding what would be fair, the Court can give s.97 leave subject to conditions

[12] Ibid, paragraph 13
[13] 2016 EWCA Civ. 484

subject to a consideration of what would be fair, in the context of the liquidation as a whole."[14]

41. The factual circumstances in the case before the Grand Court included two BDO entities seeking leave to commence proceedings against the defendant company to restrain it from continuing proceedings which it had commenced in New York against one of the two entities. The argument was that the seeking of the restraint was essentially a defensive measure.

42. The Court noted that one of the BDO entities was not a party to the New York proceedings, was not appealing a judgment in favour of the liquidators, was not seeking security for costs, was not a defendant in proceedings brought by the company, neither was it bringing a counter claim against the company nor seeking costs against the company.[15] The Court concluded that the entity had initiated proceedings against the company by which it sought adverse orders against it and required leave. In respect of that entity the Court found that it did not have an arguable case noting that the case turned on a question of New York Law. The Court concluded that it would not be right or fair to burden the liquidation estate by lifting the statutory stay against proceedings.

43. Counsel on behalf of the JOLs also drew the Court's attention to the case of ***In the matter of Abraaj Investment Management Limited (In Official Liquidation)***[16]. In that case, the applicant sought leave by way of two summonses to commence proceedings against a company in liquidation in order to seek disclosure of certain financial information. This in circumstances where the applicant asserted that the liquidators' confidentiality review of certain materials, which was undertaken in order to protect to third party rights, prevented it from having full access to information. The first summons sought leave to commence proceedings outside of the winding up of the company. The second summons sought orders and directions within the winding up.

44. In applying the relevant legal principles, McMillan J. stated that while demonstration of an arguable case to be litigated may be the beginning of the matter, it is far from being the end of

[14]Grand Court, FSD 74 of 2020 (MRH) unreported 19th November 2020, paragraph 24
[15] Ibid, paragraph 25
[16] Grand Court - Unreported FSD 111 of 2018 (RMJ) 25th February 2021

it. The learned Judge highlighted the need when considering an application for leave for consideration to be given to fairness in the context of the liquidation as a whole. It was stated:-

> *"In Ogilvie-Grant and Anor v. Est (1983) I ACLC 742 McPherson J states at page 744 that the purpose of such a restriction is that, without the relevant restriction, a company in liquidation would be subjected to a multiplicity of actions "which would be both expensive and time consuming as well as in some cases unnecessary."*
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> *In addition, this Court notes with approval the salutary observation of Patten LJ in In the matter of Lemma Europe Insurance Company Limited (in liquidation) [2006] EWCA Civ. 484 at paragraph 2:*
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> > *"The imposition of an automatic stay is designed to avoid the unnecessary expenditure of assets otherwise available for distribution amongst creditors and to support the replacement of a creditor's right to establish a claim by judgment in an action with a right to lodge a proof of debt. This process is inherently less expensive and carries with it a right of access to the Companies Court in the event that the proof is rejected: see Rule 4.83 of the IR 1986. Consistently with this, leave to commence proceedings will only be granted by the court when it is right and fair to do so in all the circumstances and is unlikely to be granted where the issue in the action could be dealt with as conveniently in the liquidation as in other proceedings: see Re Exchange Securities & Commodities Limited [1983] BCLC 186 at 196."*
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> *These propositions provide strong reinforcement for the learned dicta of Smellie CJ in the AHAB case, adopting an observation by Pumfrey J, that fairness in this context is fairness in the context of the liquidation as a whole. In particular, where do the interests of the creditors as a whole lie and what is the capacity of the liquidators to deal with the burden of the proposed litigation?*
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> *In practical terms these are questions which will almost necessarily answer themselves in examining the factual circumstances of a winding up."*[17]

45. The learned Judge found the submission of the liquidator to be persuasive, that the starting premise is that generally proceedings should not be permitted against a company in liquidation and that "*proper consideration needs to be given to the interest of the creditors as a whole and the capacity of the liquidators to deal with the burden of proposed litigation*."[18] Having considered what would be fair to the liquidation as a whole, the learned Judge concluded that leave should not be granted to commence proceedings even though the case of the applicant

[17] Ibid, paragraphs 36 -39
[18] Ibid, paragraph 77

was "arguable and sufficiently solidly founded"[19]. This was against the factual background which included that the company was deeply insolvent, the nature of the contractual arrangements which had been in place, the risk of a multiplicity of actions as well as the fact that avenues for obtaining disclosure in the liquidation were available by means of s.110 and s.114 of the ***Companies Act***.

46. Counsel for KSB points to the distinction between the factual circumstances of the cases of ***BDO Cayman Ltd. v. Ardent Harmony Fund Inc*** *and* ***In the matter of Abraaj Investment Management Limited*** on the one hand and the present case on the other. It is argued that the existence of the facility agreements and of the Debenture which was entered into as a result of those long existing facility agreements provides a distinctly different set of circumstances for the consideration of this Court. ***BDO Cayman Ltd. v. Ardent Harmony Fund Inc.*** is said to have been a hostile action against the company as distinct from the instant case in which the Applicant is seeking to assert a proprietary interest.

47. The cases cited by Counsel on behalf of KSB include ***In Re Wanzer Limited.***[20] In that case, the landlord of premises leased to a company in liquidation, brought proceedings to sequester the stock, furniture and effects of the company as security towards the payment of its rent. The English Court was satisfied that the action of the landlord was a proceeding under the provision in Scottish Law which prohibited proceedings against a company in liquidation without the leave of the Court. The Court said that while the liquidator was entitled to the order sought as to the prohibition, that was not the end of the matter because "it would still be open to the landlord to apply to the Court for leave to proceed under the 87th section."

48. The Court having concluded that the landlord was a secured creditor and was entitled to the security given to him for his rent gave the landlord leave to proceed on condition of payment of the costs of the matter.

49. Reliance was also placed on the case of ***Thomas Evan Cook v. Mortgage Debenture Ltd***[21], with respect to the nature of the application of KSB which is said to be essentially defensive in nature.

[19] Ibid, paragraph 89
[20] 1891 1 Ch 305
[21] 2016 EWCA Civ. 103

50. In that case the English Court of Appeal considered the construction of the moratorium provision in respect of proceedings against an insolvent company as set out in paragraph 43 (6) of Schedule B 1 to the Insolvency Act 1986. The Court said that there was no distinction in the approach to the moratorium, between proceedings in respect of a compulsory liquidation and proceedings on an administration.

51. In referring to the nature of the moratorium, the Court stated:

> *"The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it in In re Atlantic Computer Systems plc [1992] Ch 505 at 528, the moratorium provides "a breathing space". Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so."*[22]

52. Counsel highlighted the following statement of the Court:

> *"It follows, as a matter of basic fairness, that defendants to proceedings where the claimant is a company in administration should be able to defend themselves without restriction. This causes no difficulty in taking steps such as serving a defence or witness statements or participating in a trial. However, an issue could be said to arise where defence takes the form of an active step against the claimant company. It is established that essentially defensive steps are not within the statutory moratorium."*[23]

53. The Court in the case of ***Thomas Evan Cook v. Mortgage Debenture Ltd*** referred to the case of ***Humber and Co v. John Griffiths Cycle Co.***[24], in which the House of Lord stated that "…when once an action by the company itself has been proceeded with, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their part."

54. The Court drew the distinction between offensive and defensive proceedings in the following way:

> *"The distinction between legal proceedings against a company and essentially defensive steps is illustrated by the approach taken by the courts to the application of moratorium provisions to counterclaims. If a counterclaim is pleaded solely to raise a defence by way*

[22] Ibid, paragraph 13
[23] Ibid, paragraph 17
[24] 1901 85 LT 141

of set off, it is a defensive measure and no permission of the court is required. If, on the other hand, the counterclaim seeks a net payment from the claimant to the defendant, it does constitute a legal proceeding against the company for which the permission of the court is required. See Langley Constructions (Brixham) Ltd v Wells [1969] 1 WLR 503 (CA).''[25]

55. The Court drew a contrast between circumstances whereby a summons would bring the company in liquidation into proceedings where adverse orders could be made against it with the circumstances in that case.

"In my view, the position in the Eastern Holdings case is clearly distinguishable from the circumstances of the present case. By the interpleader summons, the applicant was, as Mr. Clegg for the respondent submits, seeking to bring the company in liquidation into proceedings in which it was not a party and in which orders adverse to its interests could be made. It was essentially no different from the commencement of proceedings by one of the possible beneficial owners against the company in liquidation seeking appropriate declaratory relief. Such proceedings would clearly fall within the terms of the statuary moratorium.

By contrast, in the present case, MDL is not only a party to the proceedings but is the claimant. By making his application to be joined, Mr. Cook was not seeking any relief against the company but was seeking to be heard on an issue which affected his firm's interests in possible proceedings that might be brought by a third party, Nationwide. While not a defensive proceeding, in the strict sense of a step taken to defend himself against a claim brought by the company in administration, the application has none of the character of legal proceedings against the company.''[26]

56. In ***Buchler v. Talbot***[27], the issue before the Court concerned the rights of a debenture holder arising from a floating charge over the assets of a company which had been placed into voluntary liquidation, specifically as to where the liquidation costs and expenses ranked in relation to the claims of the debenture holder.

57. The House of Lords held that the relevant section of the ***Companies Act*** did not authorise payments to the liquidators out of the assets which were subject to the floating charge. The Court further held that a debenture holder has a proprietary interest in the debenture holder's fund. This was to be treated as a separate fund which would bear its own costs of administration.

[25] Ibid, paragraph 24
[26] Ibid, paragraphs 29 and 30
[27] 2004 2 A.C. 298

Assets subject to a floating charge are not required to bear the costs of winding up and receivership.

58. In ***Scotia Bank (Cayman Islands) Limited v. Treasure Island Resort (Cayman) Limited***[28], the Grand Court considered the applicability of s.98 and s.156 of the ***Companies Law*** (2004 Revision) in circumstances where a debenture and charge holder sought to dispose of assets of a defendant company. The sections provided:

> *"98. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."*
>
> *"156. Where any company is being wound up by the Court or subject to the supervision of the Court all disposition of the property, effects and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void"*

59. Having been notified of the presentation of a winding up petition, the receiver in regard to the rights of the debenture holder, applied for a declaration as to whether the assets of the company (a hotel) could be sold. There was also a statutory charge under the ***Registered Land Law*** (2004 Revision) over the property.

60. The Court identified the primary issue as being:

> *"Whether a sale or other disposition of a company's property, to be effected during its winding up but in exercise of rights and powers vested by a debenture or charge obtained prior to the company being put into winding up, is contemplated by s.156 of the Law."*[29]

61. The Court stated that the principle gleaned from a number of judicial pronouncements is that provided that the receiver was expressly authorised by the debenture holder or chargee, any disposition of assets executed would be valid even though the debtor company was in liquidation:

[28] 2004-2005 CILR 423
[29] Ibid paragraph 10

> *"24 In Sowman v. David Samuel Trust Ltd. (9), a case very much on point here, it was held that a receiver could execute a contract to sell a freehold property comprised in his debenture notwithstanding the making of a winding-up order. The winding up did not affect the power of the receiver to hold and dispose of the company's property, including the power to use the company's name for those purposes, although the winding up had deprived the receiver of the power to bind the company personally by acting as its agent. Goulding, J. ([1978] 1 W.L.R. at 30) explained that the disposition by way of debenture was binding on the company and those claiming through it (such as unsecured creditors) as well in liquidation as before liquidation, except of course where the debenture is otherwise susceptible of being set aside under some other provision of the Companies Act."*

62. The Court explained the principle of secured assets as assets falling outside the scope of the liquidation estate, in the following way:

> *"30 The principle that secured assets do not fall within the scope of a liquidation estate is even more generally explained in the following applicable terms by Lord Millett ([2004] 2 A.C. 298, at paras. 51–52):*
>
> *"Bankruptcy and companies liquidation are concerned with the realisation and distribution of the insolvent's free assets among the unsecured creditors. They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the chargor and falls within the scope of the chargor's bankruptcy or winding up. As James L.J. observed in In re Regent's Canal Ironworks Co (1877) [sic.] 3 Ch. D. 411, 427 charge holders are creditors 'to whom the [charged] property [belongs] . . . with a specific right to the property for the purpose of paying their debts.' Such a creditor is a person who 'is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property' per James L.J. in In re David Lloyd & Co (1877) 6 Ch. D. 339, 344.*
>
> *The 1883 and 1888 Acts [the early English Acts under which those Victorian cases were decided and which were primogenitors to the Companies Law] were concerned with the distribution of 'the assets of any company being wound up.' They were not concerned with assets to the extent to which they belonged to secured creditors, and accordingly did not affect assets over which the company had given a charge whether fixed or floating. Preferential creditors were thus given priority over other unsecured creditors in the distribution of the company's free assets, but like them were postponed to the expenses of the winding up and had no right to be paid out of any charged assets."*

THE ARGUMENTS IN RESPECT OF LEAVE

PROCESS

63. The JOLs ask that each of KSB's November Summons and January Summons be set aside and that their application for retrospective leave be refused. Counsel on their behalf submits that the conduct of KSB is an abuse of process and that its position is that of an unnecessarily adversarial third party who 'purports to be a former secured creditor'. It is said that had KSB obtained leave as was required it could have then brought a validation application which might not necessarily have been opposed by the JOLs. Instead the position is that no validation application has been made in accordance with s.99 of the ***Companies Act.*** A third party ought not to be seeking to intervene or be joined in the liquidation proceedings and that any proceedings to be brought by a third party should be brought under a separate cause number.

64. As to standing, it is submitted that KSB is a recipient of the transfer of securities, it is neither a transferee nor a creditor of the Company and that it does not fall within the list of qualified persons permitted to make an application under CWR O. 19 r.4. It is a separate company which is said to be an affiliate, or is made up of the affiliates of the creditors. Counsel said that although the application is filed by KSB, the submissions are really being made on behalf of the creditors and that if the secured creditors are using KSB as an agent or recipient for these proceedings this is not explained in the evidence.

65. While there is some resonance to some aspects of this argument, the question as to KSB's status does not appear to be a particularly strong one. It is noted that Mr. Sawaf exhibits letters dated 2nd October 2019 and 21st January 2020 on behalf of the four lenders requesting the transfer of shares to KSB, a "company collectively affiliated with the secured creditors." Share transfers are exhibited dated 19th November 2019 but there are also transfers dated 26th May 2020, 27th May 2020 and 2nd June 2020. These latter purport to transfer shares to the "transferee KSB."

DEFENSIVE POSITION

66. It is argued by Counsel on behalf of the JOLs that KSB's position is not a defensive one. It is a challenge to the JOL's October Summons which requires leave. Counsel noted that the initial application which had been contemplated by KSB was an application for validation and said that "the defensive step would have been to seek validation of the Directors' actions in the context of s.99 and its requirements."

67. Counsel submitted that instead of doing this, KSB has brought applications which are adversarial to the Company which should have been brought by way of originating process. By the November Summons and the January Summons filed, declaratory orders, strike out, and adverse cost orders are all sought against the Company. KSB should be dismissed from continuing in the liquidation proceedings. It would not be right or fair for it to do so. Counsel submitted further that the effort appears to be to have the Court make a declaration as to the validity of the Debenture and the circumstances surrounding it.

68. Counsel for KSB's argument is a two-fold one. Leave is not required as both the November Summons and the January Summons filed by KSB are essentially defensive in nature. If leave is required it ought to be granted as a matter of course given the status of KSB as the transferee of shares transferred by virtue of the Debenture. Counsel's primary submission is that by virtue of s.142 of the ***Companies Act***, the secured creditors were entitled to enforce their security without reference to the JOLs or to the Court.

69. Counsel drew the Court's attention to an extract from *Tolley's Insolvency Law* in which the authors say:

> "*The secured creditor so described because in addition to the (personal) claim which he has against the company for payment of his debt, he may also take possession of some property belonging to the company for the purposes of selling it and recovering the money owed to him from the proceeds of sale.*
>
> *The supreme advantage for the secured creditor is the recovery of the debt outside the liquidation process at least to the extent of the value of the company's property which constitutes the security. For any balance owing the creditor will claim as an ordinary*

> *creditor... The effect on the company's assets is clear. They are reduced to the extent that they are applied, by sale or otherwise, in payment of the debts which they secure"*[30]

70. Counsel also referred to an extract from *McPherson & Keay, The Law of Company Liquidation*[31], which states that:

> "*Liquidators must naturally satisfy themselves in the onset as to the validity of any security interest, the creditors assert that they hold. Like bankruptcy, liquidation does not interfere with the security rights of a secured creditor and so a secured creditor may realise otherwise deal with the security. However, if a secured creditor needs, for some reason, to take proceedings against the company in relation to the security, it is necessary first to obtain the leave of the court under s.130(2). The Rules do provide some procedures for those secured creditors who may want to claim in the liquidation. In general terms they follow the provisions found in earlier bankruptcy legislation. The effect of the bankruptcy legislation as far as secured creditors was concerned was succinctly expressed by Sir George Jessel MR in Moor v Anglo-Italian Bank."*

71. Counsel said that while he is not aware that the JOLs have actually satisfied themselves as to the validity of the Debenture, there is no challenge to it so it is assumed that it is accepted as effective according to its terms.

72. Counsel submitted that in the absence of challenge to the Debenture, which there is not in this case, the clear position is that the creditors are secured creditors. Detailed submissions were made on the factual background in support of the argument. Counsel submitted that the loan agreements between the creditors and the Company which led to the Debenture were entered into between March 2017 and September 2018. Infinity World Investments SA lent some US$6 million, Maymouna Holding SAL lent US$1.5 million, Viscom Investments Ltd. lent US$1 million and Mr. Sawaf lent US$500,000.00. By May 2019 the Company was in default of its obligations which led the entities to request additional security. Counsel submits that the Debenture is a valid security document which serves to secure the rights of the creditors and that given the factual circumstances, in light of the authoritative pronouncements in texts, the statute and the common law including cases decided by the Grand Court, the secured creditors are outside the liquidation process and may act in reliance on their security without regard to the winding up.

[30] Paragraph L5323
[31] 4th Edition paragraph 12-032

73. The further submission is that the JOLs were aware of the Debenture before the filing of the October Summons. This is said to be evident from the Third Affidavit of Mr. Kennedy. Despite that awareness, the October Summons did not reference the fact that the transfers took place by way of enforcement of security and it was not served on KSB which was the transferee. The argument is that both of these should have been done and that the JOLs fell into error in not doing so and in attempting to proceed by way of an *ex-parte* summons. Had those errors not been made, leave would not now be required. Counsel said that had the JOLs acted in the way they should have, KSB would have been properly joined "as an obvious necessary and proper party," and that:

> "*It is surprising and virtually an abuse of process that the JOLs should have considered it appropriate to seek declaratory relief without joining the interested parties. This would have allowed for the court to have the benefit of arguments on the real and actual issues."*

74. The argument is that having not been served and having an interest in the outcome of the October Summons, the November Summons is no more than a defensive response. The terms of the November Summons are the opposite of that sought by the JOLs, that is to say the November Summons is for a declaration that the transfers are not void. Counsel said that in this way, the November Summons is analogous to a counter claim.

75. Counsel referred to an extract from ***Zamir and Woolf's, The Declaratory Judgment***[32] in which the Authors state that "the general rule is that it is desirable that all persons who appear to have a real interest in objecting to the grant of a declaration claimed in legal proceedings should be made defendants." The case cited in support is ***London Passenger Transport Board v Moscrop***[33] in which it was stated that***:***

> *"The persons really interested were not before the court. It is true that in their absence they were not strictly bound by the declaration but the Courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the Court in their absence, and that except in very special circumstances, all persons interested should be made parties whether by representation orders or otherwise before a declaration by its terms affecting their rights is made."*

[32] 4th Edition Paras 6-01 to 6-03
[33] 1942 QC 332

76. The authors say that this is a sensible approach as it avoids the danger of having to bring fresh proceedings and ensures that there is someone before the court who would be able to properly contest the issue. By reference to ***Aldrich v. Attorney General***[34], the authors note the application of the principle whereby a court would be reluctant to grant a declaration without a trial unless it would be contrary to the interests of justice to do so. This is followed by the following statement:

> *"So as to ensure that all relevant parties can participate, the court will generally look with favour upon the joinder of all parties whose legal or equitable interests may be affected by the grant of a declaration even if they are not immediately involved in the act or transaction in issue. Prima facie, however, a claimant is entitled to choose against whom he wishes to proceed and is not required to join anyone against his will."*

77. With respect to the arguments as to non-service and non-inclusion of KSB as a respondent, I record my view that the criticism of the actions of the JOLs appears to be unduly harsh and unwarranted. The Affidavit of Ms. Peccarino provides evidence of service of notice of the application on the Lender companies. These entities said Counsel for the JOLs are the proper respondents to the October Summons and they were each notified of it. The evidence is that notice was also given to KSB. KSB acknowledged the notice and indicated that it would bring its own validation application which it has not done.

78. It is noted that Counsel for KSB throughout his arguments stressed that the Debenture is unchallenged and only in reply to oral arguments appeared to accept that there was some challenge. However, Counsel was critical of what he termed challenge by correspondence rather than direct challenge. From the material provided and the submissions made by the JOLs, it is plain that they have questions as to the validity of the Debenture, the status of KSB and the creditors, the transfers and the entirety of the surrounding circumstances. It is also plain that their inquiry is in the early stages where such questions remain unanswered.

79. I accept in part the submissions of Counsel for the JOLs on this aspect. In effect, KSB is by its application and arguments seeking to establish the validity of the Debenture and the status of the Lenders as secured creditors. It is only upon doing so that one could get to the stage of a

[34] 1968 P. 281, 285

determination as to whether as creditors they fall outside the liquidation or not. The fact of the asserted existence of a Debenture is not one which prevents question and inquiry. Indeed, the JOLs who act in the best interests of all creditors have a positive duty to inquire into all the circumstances.

80. It is evident that the questioned transfers took place after the Commencement Date and in my view the onus is on the creditors who purport to be secured creditors to respond to the questions of the JOLs as to the legitimacy of the basis for the transfers. One would have expected engagement with the process to the extent of demonstrating that they are in fact secured creditors and provision of any and all supporting documents. It appears that the JOLs have sought answers by way of their letters and detailed responses have not been forthcoming.

81. In considering whether the steps taken by KSB are purely defensive in nature, I bear in mind Counsel's argument that the November Summons is akin to a counter claim, being the obverse of that sought by the October Summons. I do think however that there is a distinction between an argument that the JOL's application ought not to be granted and seeking declarations which are wider in scope so as to establish the validity of documents and loan arrangements. This is a particularly active step. Additionally, the November Summons seeks that the costs of KSB's application be paid out of the assets of the Company as an expense of the liquidation. The January Summons seeks in part that:

> *"… The Joint Official Liquidator's Summons of 15th October 20020 be struck out on the ground that it is frivolous or vexatious and/or it is otherwise an abuse of the process of the Court."*

82. In my view, KSB has gone beyond a defensive response in circumstances where it seeks costs orders and orders of the nature outlined above against the Company. I conclude that leave is required.

83. There is no dispute that leave can be granted retrospectively.[35] I turn to consider the question whether leave ought to be granted applying the principles outlined above.

[35] See McPherson para 7.81

ARGUABLE CASE

84. In respect of factual matters, Counsel for the JOLs submitted that the JOL's October Summons cannot be characterised as frivolous or vexatious raising as it does serious questions such that this aspect of the January Summons of KSB is bound to fail.

85. Secondly it is submitted by Counsel for the JOLs that leave should not be granted to KSB as it does not have an arguable case as to the validity of the Debenture. This is said to be dubious arising as it does in a factual matrix which gives rise to the need for investigation. It was secured on assets of US$58 million which was 10 times the loan facilities provided. This is in circumstances where a secured creditor would have a duty to account for any surplus amount said to have been received which is in excess of the amount borrowed.

86. Counsel referred to the time line as beginning with the 6th May 2019 when certain enforcement orders were made in favour of Bareeq Capital. The enforcement procedure commenced on 25th August 2019. The Company filed a summons to set aside the enforcement order on the 9th September 2019. October 2019 was a pivotal month and was also the month in which the Company sought and obtained legal advice which identified the risks if dispositions were made without reserving funds to make the Arbitral Award payment. The transfers were approved on the 9th November 2019.

87. Counsel points to the inconsistencies between the Company's financial position, as stated in the October 2019 legal advice provided to the Company, an internal document which the JOLs identified, and that stated in the evidence of Mr. Sawaf. There are also inconsistencies in the values of the shares in two of the subsidiaries (ASJ and Zeini) as stated in Mr. Sawaf's First Affirmation, and the values stated in the October 2019 legal advice to the Company. Counsel identified these as follows. At paragraph 28 of the First Affirmation, Mr. Sawaf states:

> "*The total value ascribed to the 2020 Transfers by the company was US$1,500,000. I set out the breakdown of the value of the shares as follows:*
>
> "*The ASJL (Adenium Solar Jordan Limited) shares were determined as having a value of US$1,500,000."*

88. In contrast on page 2 of the advice it is stated:

> *"The proceeds from the sale will be paid into the bank account in the name of AEC. On Adenium Solar's behalf, AEC will distribute the proceeds from the sale to Adenium Solar's shareholders. As one of the holders of Adenium Solar's participating shares, AEC will be entitled to retain US $2-3 million out of the proceeds."*

89. With respect to Zeini, Mr. Wasaf stated that "*The Zeini shares have no ascertainable value*".

90. With respect to Zeini, the advice, stated:

> "*However, AEC will receive a carried interest payment amounting to around US$5 million from the transaction."*

91. Counsel said that around May and June 2020 the transfers were effected by the specific actions of the Company's directors by way of resolutions. This was not a unilateral enforcement action. These actions were taken between the presentation of the Petition and the winding up in the context of an Arbitral Award which was due for payment and which was not paid. The transfers of these securities each took place after the Commencement Date and were not validated by order of the Court. The Company had received the advice of two sets of attorneys that the transfers would be void unless approved by the Court.

92. Counsel submits further that the investigation of the JOLs has identified that assets valued at US$59 million were dissipated on the purported basis of enforcement of security despite an outstanding Arbitral Award. In summary the matters requiring investigation are said to include that there is enforcement of the security after the winding up, the transfers took place despite the risks as outlined in legal advice which the Company had received, the values were agreed by the Company's directors among themselves and there are questions as to whether the values of the shares were considered and or determined to match the security granted. There are also unanswered questions as to the circumstances behind the grant of security whether the loans in respect of which the security was granted were actually paid to the Company following default and the accuracy of the valuations ascribed to the shares transferred. Counsel said that the JOLs sought answers by the letters sent and no answers were received.

93. Counsel's main point is that had the application been brought by the creditors as it ought to have been, the evidential burden would have fallen on those creditors to provide evidence.

94. Counsel for KSB submitted that KSB has a good and arguable case and that it would be right and fair to all parties for leave to be granted. Counsel said that the approach of challenging matters by way correspondence rather than directly is an attempt to avoid challenging the resolutions and transfers directly and to short circuit the process by seeking an *ex-parte* declaration.

95. It was submitted that the language of the application by the JOLs is that one does not have to be concerned with s.142 which is not correct. Section 142 cannot be effective if the debenture holder or security holder cannot rely on it to make an application.

96. It was further submitted that the reference to the Company's legitimate assets fails to take account of the debts owed and the security provided, and that the allegation of dissipation of assets is unsupported by evidence.

97. Counsel submitted that KSB should not have to make a separate application as it should have been included as a respondent from the start, it should now be joined and the JOLs be required to plead a case against it. It is argued that no case has been set out against KSB and that :-

> *"There is nothing in these documents which could lead the Court properly advised on evidence to conclude that there is any valid or worthy challenge to:*
>
> *i. The existence of a debenture;*
> *ii. The enforceability of a debenture; or*
> *iii. The transactions which have taken place pursuant to the debenture."*

98. It is submitted that the transactions, having regard to the detailed history going back to March 2017 when the first financing and loan contract was entered into in May 2019 when the Debenture was granted, have all the hallmarks of a valid and genuine enforcement of security by secured creditors and thus they fall outside of the insolvency.

99. Counsel stated that any issue as to the valuations ascribed to the shares does not go to the validity of the enforcement but would be an issue to be resolved separately and notes the following:

i. The JOLs do not challenge the grant or effectiveness of the Debenture.
ii. They do not assert that the transactions were not by way of enforcement of the Debenture.
iii. The transfers themselves are not challenged.

100. In respect of the argument of the JOLs that the conduct of KSB is an abuse of process in light of the October legal advice referred to, it is submitted that the document does not undermine KSB's case. The proposed dispositions which were being considered therein were the sales of assets and not the transactions which actually took place in respect of share transfers. Counsel said that the advice notes that the security granted in May 2019 may operate as an impediment to a successful challenge of the repayment of the shareholder loans and identifies the six month limitation period for bringing a voidable preference claim.

FAIRNESS IN THE CONTEXT OF THE LIQUIDATION

101. Counsel for the JOLs argues that the relief sought by KSB can be obtained within the liquidation. In response to criticism from KSB that the JOLs October Summons did not mention the Debenture when they were aware of it, Counsel submitted that reference to the Debenture is unnecessary because the JOLs' October Summons is simply seeking a declaration. Should the relief sought by the JOLs' be granted, it would simply maintain the status quo and would not prevent an action pursuant to s.99 of the ***Companies Act*** at any time in the future. The application of the JOLs is doing no more than asking the Court to say that the transfers were invalid as a matter of the strict application of the ***Companies Act***. There is no prejudice suffered or can be suffered by a secured creditor as a result.

102. Counsel submitted that:

> "*A secured creditor can make a subsequent application at any time, and we agree it can be retrospective, although it shouldn't be, for validation to enforce their*

> *security. It simply shouldn't be on the company's dime. It should be in separate proceedings, not within these liquidation proceedings.*
>
> *In fact a secured creditor should have no concerns at all, ..the actions of the Court's appointed officers, in securing the assets of the company, the JOLs are bound to recognize the rights of secured creditors over all other creditors and they would be looking after legitimate secured creditor's interests."*

103. Counsel also submitted that:

> *"A true secured creditor should take no issue with the JOLs' Summons and their effort to maintain the status quo as it could rest assured that any proprietary right enjoyed against the securities will lie outside of the liquidation and would therefore be protected by the JOLs. Instead KSB's own submissions make the case for the JOLs that further investigation is necessary and leave should therefore be refused."*

104. On the implications of a grant of leave, Counsel submitted that this would stymie the efforts of the JOLs to secure the legitimate assets of the Company and would be premature and an unnecessary burden on the liquidation estate. Counsel asked the Court to consider whether it would be fair in the context of the liquidation as a whole, for the JOLs to have to deal with the burden of the proposed litigation.

105. Counsel for KSB submitted in response that it is wrong to say that the JOLs are simply seeking a declaration and that in doing this they are ignoring s.142 of the ***Companies Act***. It is not correct that the status quo would be maintained. The reason that secured creditors, debenture holders, and mortgagors are able to enforce their security is that one is not now dealing with the company's assets. The declaration sought does prejudice KSB because it affects the assets it now holds.

106. Counsel said that it was accepted that it would not prevent KSB commencing an action at any time in the future for validation but that KSB should not have to make such an application for the reasons previously outlined.

DISCUSSION

107. I am not at this stage inquiring into the merits of the matter. There appears to be, by the asserted fact of the existence of the Debenture and the surrounding documents, material such as to suggest that the status of the Lenders is that of secured creditors. If that is the case, they may act outside of the liquidation estate and enforce their security. I accept the submissions of KSB that there is an arguable case or serious question to be tried on this aspect. In respect of the aspect of the January Summons seeking the strike out of the JOLs' October Summons on the basis that it is frivolous or vexatious, and/or is an abuse of the process of the Court, in light of the questions raised by the JOLs, as set out in paragraphs 91 and 92 above, and all the factual circumstances of this case, that aspect of the January Summons does not appear to raise a serious question to be tried.

108. The question is whether leave should be granted in respect of the first aspect referenced.

109. Counsel for KSB drew the Court's attention to an excerpt from ***McPherson's Law of Company Liquidation:***

> *"It has been said that where what the claimant is claiming from the company is in reality no more that his or her own property, leave to proceed will be granted as a matter of course. The underlying principle is that the company should not, merely because of the fact that it is in liquidation, be permitted to withhold the claimant's property and accordingly the court will permit proceedings to be taken by a landlord to re-enter for breach of covenant, and by a mortgagee, debenture – holder or lienee, for the enforcement of the security held by the claimant."*[36]

110. The authors do go on to say that the practice of granting leave has been viewed with disfavor on occasions because it is "difficult to reconcile it with the policy of avoiding expensive litigation" and they identify circumstances where a secured creditor has been refused leave including:

i. Where the applicant for leave is offered everything to which he is entitled without needing to bring an action.

[36] 4th Edition para 7-079

ii. Where the applicant for leave could obtain identical protection of its position within the winding up.

111. It is said also that the determination of an application for leave by the courts has usually been in two principal categories being one in which the determining factor is the nature of the claim and the second category in which it is the balance of convenience and the demands of justice.

112. I have considered whether this matter can be conveniently dealt with in the liquidation process as urged by the JOLs. The JOLs are officers of the Court, have particular duties and responsibilities and will no doubt respect the rights of any secured creditor once any questions are resolved. I accept that there is some merit to the argument that matters are at an early stage of the liquidation and the application of KSB may be pre-mature pending further inquiry of the JOLs. However I consider that it is an important factor that KSB is seeking to assert proprietary rights in respect of property which it considers has been lawfully transferred to it. I note that underlying the argument of the JOLs is a recognition of the possible nature and effect of any declaration which may be made as a result of the October Summons. The important consideration being that even if a declaration is made as sought it is not likely to impact negatively any equitable interests which are actually held. Put another way, the response of KSB is disproportionate to the possible outcome of the October Summons. While I accept the strength of this argument which is reflected in part in the conclusions reached as to the non-defensive nature of the application sought to be made by KSB, it is nevertheless the case that KSB is seeking to protect rights which it says that it has.

113. The referenced text (***McPherson***) identifies a circumstance in which a liquidator casts doubt on the validity of security as being one in which leave ought to be granted.

> *"It has been held that where a receiver acts pursuant to a charge over the company's assets he or she is entitled to initiate proceedings against the company to recover the charged assets as of right, on the basis that a secured creditor is permitted to exercise the rights held in relation to security despite the fact that its debtor company has entered liquidation. However, as Professor Riz Mokal points out, a secured creditor could only obtain leave if it could not obtain identical protection of its position within in the winding up. For instance, in the leading case of Re David Lloyd & Co, Mokal points out that the liquidators were casting*

> *doubts over the validity of the charge of the secured creditor and this precipitated the application for leave."*[37]

114. In the referenced case of ***Re David Lloyd & Co***.[38] the Court said this:

> *"And as the liquidators in the present case do not offer to put the mortgagee in the same position in which he would be when he obtains a judgment in his action, but suggest that there are questions which may prevent his having the right upon which he insists, and to enforce which he brought the action, I am of opinion that these questions will be much better tried in the action, and that there is no ground for refusing the mortgagee leave to proceed with his action."*

115. It is evident from the material exhibited to the affidavits and the submissions made that the JOLs at the very least question the authenticity of the Debenture arrangements which led to the transfers. In my view to deny leave in circumstances where the nature of the claim is as to the asserted rights of KSB and /or the lender creditors, would be unfair.

116. I would grant leave to KSB to proceed with its application for declarations as to the transfers of shares.

COSTS

117. The authorities cited suggest that there is a discretion to impose conditions on any grant of leave.

118. Following release of the draft judgment, Counsel for KSB sought and was granted leave to make submissions on the issue of costs as to whether the discretion of the Court can and ought properly to be exercised such as to deny KSB its costs in respect of the instant matter and or to impose a condition as to the payment of costs going forward. I reconsidered the matter[39] in light of the relevant authorities and the correct applicable test.

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[37] Paragraph 7-078

[38] 1877 6 Ch. D. 339

[39] Mid-Town Acquisition L.P. v. Essar Global Fund Limited [2017] 2 CILR 776, In the Matter of Shanda Games Limited [2017] 2 CILR Note 3, In the matter of L and B [2013] UKSC 8,Vringo Infrastructure Inc. [2015] EWHC 214,Stewart v. Engel Case No. QBC MI 2000/0032/A3.

119. Under this heading, I have considered the submissions of the JOLs with respect to the burden to be placed on the Company and on other creditors by the grant of leave. The liquidation estate and thus the other creditors may have to bear the cost of any such proceeding. This is essentially being embarked upon in the liquidation estate, by those seeking to protect their own interests, who say that they are outside of the liquidation estate. This in circumstances where those seeking to protect their own interests had and continue to have the option to respond substantively to the queries of the JOLs and to engage in that less costly process and or to bring their own separate validation application, neither of which they have chosen to do. I also note that implicit in Counsel for KSB's acceptance that a negative response would not prevent KSB from commencing an action for validation at any time in the future, is the recognition of the range of options open to KSB.

120. In summary, on the first issue, Counsel on behalf of KSB argues that having regard to the applicable guiding principles on the circumstances in which a successful defendant may be denied his costs, there is no basis to deny KSB its costs in this matter. Counsel on behalf of the JOLs argues in reply that KSB is not in the position of an entirely successful defendant. Counsel submits that an adverse cost order is appropriate where KSB has been unsuccessful in respect of two out of three applications. Counsel points also to three factors, the manner in which KSB responded to requests for information from the JOLs, that it failed to produce supporting documents and the costly route that it has chosen where less costly routes are available to it.

121. As to the second issue, Counsel on behalf of KSB submits that to grant leave to KSB subject to a condition as to costs would be draconian and unfairly prejudicial. In reply Counsel on behalf of the JOLs refers to s.97 of the Companies Act and submits that there is a broad unfettered jurisdiction as to the terms and conditions on the grant of leave to bring proceedings against a company in liquidation.

THE LEGISLATION

122. Section 24 of the ***Judicature Act (2021 Revision)*** provides a power to order costs in the discretion of the Court. It is *inter alia* in the following terms:-

"*24.* (1) *Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in-*

(a) the Court of Appeal; and

(b) the Grand Court,

shall be in the discretion of the relevant court.

(2) *Without prejudice to any general power to make rules of court, such rules may provide for regulating matters relating to the costs of civil proceedings referred to in subsection (1), including, in particular —*

(a) the entitlement to costs;

(b) the taxation of costs;

(c) the powers of taxing officers;

(d) the powers of judges to review decisions of taxing officers; and

(e) the powers of the court, as defined in section 24A(4), to make protective costs orders in judicial review proceedings and constitutional proceedings

(3) *The court shall have full power to determine by whom and to what extent the costs are to be paid.*

(4) *In any criminal or civil proceedings, the court may disallow or (as the case may be) order the attorney-at-law or foreign lawyer concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with the rules of court.*"

123. The Grand Court Rules O.62 r.4 provides, *inter alia*:

"(1) *This rule shall have effect unless otherwise provided by any Law.*

...

(2) *The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by the successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*

(5) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*

(6) *The amount of the costs which a successful party shall be entitled to recover from any other party is –*

...

(c) the fixed costs prescribed in rule 7;

(d) the amount assessed by the Judge in accordance with rule 8;
(e) the amount allowed after taxation on the standard basis; or
(f) the amount allowed after taxation on the indemnity basis.

(7) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings;
(g) interest on costs (at the prescribed rate for Cayman Islands dollars) from or until a certain date, including a date before judgment;..."

124. Counsel for KSB has also drawn the Courts attention to s.51 (1) of the United Kingdom ***Senior Courts Act 1981*** which empowers the English High Court with a similar discretion in respect of costs.

ISSUE 1 – COSTS OF PROCEEDINGS

125. Counsel on behalf of KSB submits that the successful party is usually entitled to costs unless there has been some form of misconduct and the circumstances are exceptional. It is submitted that in the case of ***In Re Wanzer Limited***[40] while costs were awarded against the landlord, he had been found to have been entirely in the wrong. He had commenced proceedings against a company in liquidation without the leave of the court. Additionally the costs which were awarded were limited to the costs of those proceedings.

126. Counsel on behalf of KSB has drawn the Court's attention to a number of cases which are said to be illustrative of the principle that a wholly successful defendant should not be deprived of his costs except in exceptional circumstances.

[40] [1891] 1 Ch. 305,

127. In ***Cooper v. Whittingham***[41], the plaintiffs sought to enforce copyright with respect to certain publications. The English Court held that:-

> *"Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the Court has no discretion to refuse him costs."*

128. The Court gave examples of misconduct which may be considered as possibly taking different forms and occurring at different stages. The Court stated:-

> *" As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs —the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it."*

129. In ***Ritter v. Godfrey***[42], the English Court of Appeal noted that the discretion as to costs is not an absolute one but is limited in scope. The matter concerned the conduct of a successful defendant. He had written a letter to the plaintiff in response to the plaintiff's accusations of medical negligence. He had denied the allegations but in such a manner as was said to be callous in nature and in a tone of levity. Though successful at trial he was denied his costs. On appeal the decision as to costs was reversed. Atkin L.J. reviewed a number of cases in which a trial judge exercised a discretion to deprive a successful defendant of his costs. The issue was as to the circumstances and or the conduct with respect to which this could properly be done. The learned judge, identified three guiding principles as follows:-

> *"In exercising his discretion over costs a judge should be guided by the following principles. In the case of a wholly successful defendant the judge must give him his costs unless there is evidence (1) that the defendant brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit*

[41] [1880]15 Ch. D. 501
[42] [1920] 2 KB 47

calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

130. The reference to the defendant bringing about the litigation was stated to mean where a defendant induced a plaintiff to believe that he had a good cause of action against the defendant. Alternatively where a defendant's conduct was such as to induce the plaintiff to believe that he has a good cause of action.

131. The second principle includes conduct in the course of the litigation which is improper in that it is calculated to defeat or delay justice. The third relates to where the facts complained of disclose a wrong to the public meaning some criminal or quasi-criminal conduct.

132. One of the cases reviewed by the Court was that of ***Sutcliffe v. Smith***[43] in which the following statement was made by Fry L.J.:-

"Whenever a defendant had by his misstatements made under circumstances which imposed an obligation upon him to be truthful and careful in what he said, brought litigation on himself, and rendered the action reasonable, there would be 'good cause' to deprive him of costs."

133. The case of ***Ritter v. Godfrey*** was followed in the case of ***Bevington v. Perks and the Bell Assurance Society (Third Party)***[44].

134. In the case of ***Ottway v. Jones***[45], the English Appellate Court declined to interfere with the judge's discretion in not granting costs to the successful defendant. The Court referred to the special provisions in the rent acts together with the circumstances of the case which included that the defendant had not absolutely succeeded. The Master of the Rolls stated:-

"I said earlier that to make the defendant (who in the end succeeds in the sense that no relief is ordered against him) pay the costs of the plaintiff (who fails in the

[43] 2 Times L. R, 881
[44] [1925] 2 K.B. 229
[45] [1955] 1 W.L. R. 706

sense that no relief is obtained at his suit) requires a strong and exceptional case. But I cannot think that in a rent case such an award of costs must necessarily be in excess either of the powers of the county court judge or of a proper exercise of his judicial discretion."

135. Counsel for KSB also relies on the case of ***Knight v. Clifton***[46] . In that case the issue related to whether the third defendant had observed an injunction in respect of hindering or obstructing the free use of a right of way. The defendant was found not guiltily of contempt but was ordered to pay the plaintiff's costs. The issue on appeal was whether the trial judge had misdirected himself in law and in principle with respect to the costs order. Russell L.J. stated:-

"To say of the third defendant that he should not get his costs because he acted rashly, or steered rather close to the wind, is one thing; as has been often said a successful defendant has no right to his costs. But to order him to pay the costs incurred by the plaintiffs in launching a motion to commit which in the event proved unjustified is quite another matter."

136. Sachs L.J. noted that there is difficulty in precisely defining the circumstances which constitute a strong or exceptional case such that a successful defendant should be deprived of his costs. It may ultimately depend on the weight to be given to the relevant facts. The learned Judge stated:-

"It is, of course, impossible as well as undesirable to attempt to define what constitutes a strong or exceptional case, but to my mind it can include occasional rare cases in which the conduct of the defendant has brought about the proceeding or in which his conduct causes its continuance or in which he escapes the normal consequences of his blameworthy conduct by reason of some unexpected matter which he knew but which the plaintiff could not know. After giving every weight both to the fact that the defendant has succeeded after being brought to court by a plaintiff who has not secured any relief and to the settled practice of the courts in ordinary cases, it may yet be that in justice the former should bear the costs. Moreover, in assessing whether the material before the court entitles it to make an exceptional order it is necessary to recognise that the approach needed nowadays is one in which decisions made in the days when judges were influenced either by

[46] [1971] Ch. 700

> *the jurisdiction decisions or by other fettering decisions that preceded Campbell v. Pollak may prove at best to be of modest assistance, even if not misleading. In practice the borderline between cases where a court may order that a wholly successful defendant is not to be paid any costs and those where it may order him to pay the plaintiff's costs may prove difficult to define - if indeed it exists. It may well simply depend on a question of the degree of weight to be given to the relevant facts."*

137. Counsel on behalf of the JOLs submits in reply that KSB's reliance on the cases of ***Knight v. Clifton*** and ***Ottway v. Jones*** is misplaced. This is on the basis that KSB has been unsuccessful save for the grant of leave. It thus cannot claim to be a "wholly successful defendant."

138. With respect to the factual circumstances leading up to the filed applications by KSB, Counsel, notes that the evidence from correspondence produced is that the former director of the Company had been made aware from at least May 29, 2020[47] of the effect of s.99 of the ***Companies Act*** on the transfers made. KSB therefore had the opportunity to seek validation of the transfers before the JOLs issued the November summons. Counsel for the JOLs also states that it remains unclear whether KSB is acting on behalf of all of the secured creditors or simply as a transferee with the legal or beneficial interest in the funds transferred.

139. In my view the arguments of Counsel on behalf of the JOLs are persuasive. KSB cannot claim to be a wholly successful defendant and in any event as noted above, there are questions as to its conduct and as to the route by which it has sought to proceed. I am satisfied on the general cost principles espoused in the cases cited and in exercising the discretion on the grant of leave that KSB should bear the costs of these proceedings.

ISSUE 2 – CONDITIONS ON THE GRANT OF LEAVE – PRE-EMPTIVE COSTS

140. Counsel on behalf of KSB submits that while there is discretion to award pre-emptive costs, there is no basis to do so in this particular case. Counsel submits that the jurisdiction to do so is confined to a distinct group of cases such as those detailed in the case of ***McDonald and***

[47] Exhibit BT -1 to the First Affidavit of B. Tyndale

others v. Horn and others*[48]*. These include where costs are awarded from a fund in representative actions or matters of an analogous nature.

141. In ***McDonald v. Horn***, members of a pension scheme brought an action against their employers, the trustees of the pension fund and others in respect of the administration of the scheme. The issue was whether a pre-emptive costs order can be made against a pension fund. Hoffman L.J. stated:-

> *"In cases like Ritter v. Godfrey [1920] 2 K.B. 47 the Court of Appeal has laid down more detailed principles limiting the circumstances in which a successful party can be deprived of his costs or ordered to pay the costs of the other party. Ord. 62, r. 3(3) is a formidable obstacle to any pre-emptive cost order as between adverse parties in ordinary litigation. It is difficult to imagine a case falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision. So in Wallersteiner v. Moir (No. 2) [1975] Q.B. 373, 403 Buckley L.J. rejected an application for an order protecting the plaintiff, Mr. Moir, from being ordered to pay the costs of the defendant, Dr. Wallersteiner, irrespective of the outcome of the case: "I have never known a court to make any order as to costs fettering a later exercise of the court's discretion in respect of costs to be incurred after the date of the order. I cannot think of any circumstances in which such an order would be justified."*

142. The learned Judge noted that on the other hand, Order 62, r.3(3) and the relevant principles is not an obstacle to preemptive orders as between parties in the same interest as to how they should as between them bear the burden of costs.

143. Counsel for KSB also refers to the case of ***R. v. Lord Chancellor, ex parte Child Poverty Action Group; R. v. Director of Public Prosecutions, ex parte Bull and another***[49] as being one example of exceptional circumstances justifying the making of a pre-emptive costs order. In that case a pre-emptive order for costs was sought by the applicants on the basis that the matters being brought were matters in the public interest.

[48] [1995] 1 ALL ER 961.
[49] [1988] 2 All ER 755

144. The Court said that the general rule that costs follow the event "promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim". For this to be departed from there should be exceptional circumstances. This is so even in cases involving public interest challenges.

145. Both Counsel made submissions with respect to the case of ***In the matter of SphinX Group of Companies***[50]**.** In that case the liquidators of the companies made applications including for an order to appoint representatives on behalf of certain parties who had interests in common and for a pre-emptive costs order. The Grand Court accepted that there is jurisdiction to make a pre-emptive order for costs and stated this in the following terms:-

> *"42 In seeking to adopt the In re Buckton (5) approach to the practice in liquidation cases, Kekewich, J.'s prefatory remarks as to the need to apply judicial discretion in the quest for uniformity of practice remain apposite. Nonetheless, as was said by Browne-Wilkinson, V.-C. in Re Westdock Realisations Ltd. (20), it is now clear that the court, in the context of liquidation proceedings, can make pre-emptive orders as to the ultimate incidence of costs in the proceedings."*

146. In deciding whether or not to make the costs order sought, the Court was guided by the principles on the equitable discretion as to costs in trust cases as set out in the case of ***In re Buckton***[51]. That case identified three categories of circumstances in which a pre-emptive costs order may be appropriate:

> *"38 The three categories of circumstances identified in In re Buckton (5) as requiring the court's exercise of discretion as to pre-emptive costs are described by Kekewich, J. as follows ([1907] 2 Ch. at 414–415):*
>
> *"In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate . . .*
>
> *There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the*

[50] [2010 (2) CILR 13
[51] 1907 2 Ch. 406

> *proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.*
>
> *There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation . . . Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."*

147. The Court concluded that the circumstances in the case before it, where the questions to be determined related to the administration of the estate for the interests of the beneficiaries, that this was analogous to the first category in ***Re Buckton***. In ordering costs to be pre-emptively paid from the liquidation estate the Court held:-

> *"An order for pre-emptive costs would only rarely be made in liquidations—special circumstances would be required to displace the ordinary principle that costs follow the event. In particular, the court would be unlikely to make an order for pre-emptive costs in the context of hostile litigation in which the applicant could not be said to be representing a group of interested parties or the estate as a whole and where the judge was not likely ultimately to award costs to the applicant. On the facts, however, all of the parties regarded the resolution of the issues here as being for the benefit of the liquidation as a whole—and not just of the respective parties. The court would therefore order the costs to be pre-emptively paid from the liquidation estate, albeit capped as to the amount chargeable, based on maximum hourly rates."*

148. In reply Counsel on behalf of the JOLs submits that the issue in the instant case has to be considered in the circumstances of this particular case meaning in the light of a liquidation rather than in respect of the general areas referenced in the cases cited on behalf of KSB. Counsel for the JOLs submits that the discretion on the grant of leave is unfettered for the

reasons set out by the Grand Court in the cases of ***BDO Cayman Ltd v. Ardent Harmony Fund Inc. (In Official Liquidation)***[52] and ***AHAB v. Saad***[53]**.** Counsel has drawn the Court's attention to the statement of the Court in the latter case:-

> *"72 Consideration must be given to what conditions may be imposed upon the lifting of the stay to mitigate that burden in determining whether the stay should be lifted. The conditions which may appropriately be placed upon the lifting of the stay will also be determined according to the circumstances: see In re Euro Bank Corp. (12), in which this court exercised its discretion leading to the imposition of strict conditions to preserve the priority of claims of lawful depositors with the bank over any fine imposed in favour of the Crown in its prosecution against the bank, which was allowed to proceed despite the bank being in liquidation."*

149. Counsel for the JOLs also submits in reply that the imposition of conditions is by its very nature pre-emptory and that pre-emptory costs in the context of a liquidation is not novel or exceptional. It is also argued that these proceedings are distinguishable from the circumstances in the case of ***In Re Sphinx*** in that while they do not fall within the first category mentioned in ***Re Buckton***, they do fall within the third category as KSB is effectively adverse to all other shareholders.

150. While there is some force to the arguments of Counsel on behalf of the JOLs as to the categorisation of the instant matter, for the reasons set out above on the grant of leave, it must also be bourne in mind that KSB is seeking to enforce a right which it says that it has. The issues raised as to whether KSB was responsive in providing information to the JOLs and the process and route by which it is seeking to do so are relevant factors but they ought not to over shadow this point. Counsel on behalf of KSB drew the Court's attention to the case of ***Hunt v Aziz***[54]. The Court in that case referred to the many unexpected events which can occur during the progress of a matter which may make pre-emptive costs orders undesirable. Having considered all the circumstances, the submissions made and the authorities cited, I accept the submissions of Counsel on behalf of KSB on this second costs issue and conclude that a pre-emptive costs order should not be made.

[52] Grand Court Unreported 19th November 2020
[53] [2010] 1 CILR 553
[54] [2012] W.L. R. 317

151. I am grateful to Counsel for their helpful detailed submissions, extensive authorities and for their patience.

Dated this the 26th day of April 2022

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court