



**GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 6 OF 2022 (IKJ)

IN THE MATTER OF SECTION 131 OF THE COMPANIES ACT (2021 REVISION) (AS AMENDED)

AND IN THE MATTER OF COMPANIES WINDING UP RULES (2018), ORDER 15 (AS REVISED)

AND IN THE MATTER OF ASIA MOMENTUM FUND (SPC) LTD. (IN VOLUNTARY LIQUIDATION)

IN CHAMBERS

Appearances: Mr. Adam Crane and Ms Nicosia Lawson, Baker and Partners
(Cayman) Limited for the Petitioner

Mr. Alan Turner and Ms Heather Turner, Circumference Legal,
for the Joint Voluntary Liquidators (“JVLs”)

Before: The Hon. Justice Kawaley

Heard: 28 January 2022

Date of Decision: 28 January 2022

**Draft Reasons
Circulated:** 28 March 2022

Reasons Delivered: 6 April 2022

HEADNOTE

Creditor’s petition presented by beneficial owner of sole investor in company-application to place the liquidation of a company in voluntary liquidation under Court supervision-effect of redemption in full by registered shareholder on petitioner’s standing as a creditor-whether requirements for supervision order

REASONS FOR DECISION

Introductory

1. The Petition herein was presented on January 10, 2022. The Petitioner was incorporated in 2011 to make investments on behalf of a sovereign wealth fund. Its liquidators were, the Petition alleged, appointed to investigate a significant global fraud. The Company was said to be one of the entities with which the Petitioner has placed investments before the Fraud was discovered. The Petition was verified by the First Affidavit of Helen Janes, who on August 11, 2021 was appointed (by written resolutions of the sole member, a publicly owned company) together with Angela Barkhouse and Carl Jackson as liquidators of the Petitioner. Ms Janes is attached to Hyperion Risk Solutions Limited in the British Virgin Islands. Ms Barkhouse is attached to Quantuma (Cayman) Limited in Grand Cayman, and Mr Jackson is attached to Quantuma Advisory Limited in Southampton, U.K.

2. The filing was prompted by two notices published by the Company in the Cayman Islands Gazette. The first on October 25, 2021 was summarised at paragraph 10 of the Petition as stating as follows:
 - “(a) *the Company was placed into voluntary liquidation on 13 September 2021 (the Commencement Date) pursuant to a special resolution passed by the sole shareholder of the Company passed on 16 September 2021;*

 - (b) *Alan Turner and Andrew Johnson of Circumference FS (Cayman) Ltd., 4th Floor, Century Yard, Cricket Square, George Town, Grand Cayman KY1-1209, Cayman Islands have been appointed joint voluntary liquidators of the Company (the JVLs); and*

 - (c) *creditors of the Company are to prove their debts or claims to the JVLs on or before 26 November 2021 to establish any title they may have under the Companies Act, or otherwise be excluded from the benefit of any distribution or from objecting to the distribution.”*

3. A further notice was published in the Gazette on December 20, 2021 announcing that the Final General Meeting would take place on January 14, 2022. On January 11, 2022, the Petitioner filed its Summons for Directions seeking directions in relation to confidentiality (to protect asset recovery efforts), service and also an Order that “*pursuant to section 151 (3) of the Companies Act the dissolution of the Company is deferred until further Order of the Court.*” This relief was granted by Order dated January 13, 2022. The Petition was heard on January 28, 2022.
4. The Petitioner asserted the standing of a contingent creditor, with claims relating to diverted funds and excessive fees. The JVLs appeared through counsel who adopted a neutral position while seeking to illumine the jurisdictional questions the Court had to resolve to properly adjudicate the application. Having heard counsel I was satisfied that the Petitioner’s case for placing the Company’s liquidation under this Court’s supervision had been made out and I granted the Supervision Order sought and appointed Ms Angela Barkhouse and Mr George Kimberley Leck of Quantuma as JOLs of the Company.
5. These are the reasons for that January 28, 2022 decision.

Legal findings: the jurisdiction to make the Supervision Order

6. The statutory jurisdiction invoked by the present Petition is found in section 131 of the Companies Act which provides as follows:
 - “131. *When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that —*
 - (a) *the company is or is likely to become insolvent; or*
 - (b) *the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.”*

7. In the Petitioner’s Skeleton Argument, the following arguments were set out as to how this jurisdiction operated in practice:

“44. *A creditor (including a contingent and prospective creditor) has standing the [sic] present a petition to wind up a company or seek a supervision order under section 131 of the Companies Act (Companies Act, section 94(1)(b) [AB/Tab 3]; Companies Act, section 139(1) [AB/Tab 6]; Re Exten Investment Fund and Others (FSD 96 of 2017 (IMJ), Unreported, 23 June 2017) at paragraphs 62-64 (Exten) [AB/Tab 10]; Adamas Heracles Multi Strategy Fund and Adamas Asian Origin Fund SPC (FSD No 133 of 2021 (IKJ) and 140 of 2021 (IKJ), Unreported, 23 July 2021) (Adamas Heracles) at paragraph 12 [AB/Tab 7].*

45. *The standing bar is not a high one (Adamas Heracles at paragraph 22 [AB/Tab 7]). Justice Mangatal held in Exten at paragraph 65 [AB/Tab 10] that:*

In my judgment, it is not necessary for either section 151(3) or 131(b) for the Petitioner’s claim to have reached the level of being a provable claim or for the Petitioner to have submitted a claim as a contingent creditor under section 139(1) of the Companies Law. In any event, it is clearly not fatal that no such claim had yet been made. This is because the investigations are still to be carried out and completed.”

8. These submissions were relevant to the standing of the Petitioner and applied with equal force to each of the two jurisdictional limbs of section 131. Limb (a) (“*the company is or is likely to become insolvent*”) requires little elaboration. As far as limb (b) is concerned (“*the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company*”), the Petitioner relied upon my following observations in *Re Adamas Asia Strategic Opportunity Fund Limited (In Voluntary Liquidation)*, FSD 72 of 2019 (IKJ), Unreported, 23 July 2019):

“80. *Effectiveness in the present context takes into account not simply an immediate need to deploy investigative powers, but the appointment of official liquidators who are manifestly more independent than voluntary liquidators because they cannot be removed by the shareholders eligible to vote in general meeting. Liquidators who will be free without more to engage the full panoply of statutory powers should they see fit to do so. Liquidators who will also, if necessary, be able to seek recognition and assistance overseas...*

81. *When this Court winds-up a company on the grounds that its affairs need to be investigated, it is usually on the basis that a sufficient case has been made out to justify appointing official liquidators who will carry out preliminary enquiries rather than unquestioningly immediately deploying statutory powers based on the concerns which have supported the winding-up order. In any event, the main reason why supervision is required in this case is that official liquidators expressly empowered by this Court to investigate the public policy and commercial concerns of the Petitioners will lend a credibility-based efficacy to the liquidation that voluntary liquidators will not. It seems obvious that their official status will make it easier for them to obtain information voluntarily from persons who might be inclined to decline to assist the JVLs on the basis that they lack of formal powers to demand cooperation.”*

9. Those observations must now be read in light of the more authoritative pronouncements of the Cayman Islands Court of Appeal in a consolidated hearing of an appeal from my own quoted judgment and a judgment by McMillan J concerning a related company: *In the Matter of section 131 of the Companies Law (2018 Revision) and In the Matter of Asia Private Credit Fund (in Voluntary Liquidation) and In the Matter of section 131 of the Companies Law (2018 Revision) and In the Matter of Adamas Asia Strategic Opportunity Fund Limited*, Civil Appeals Nos. 17 and 27 of 2019 (Consolidated), Judgment dated November 8, 2019 (unreported). Sir Richard Field cogently explained the ambit of this jurisdiction (under section 131(b) of Companies Act) and how it should be exercised at the Grand Court level as follows:

“90. *The jurisdictional thresholds captured by the words ‘effective’, ‘economic’ and ‘expeditious’ are open textured and of broad meaning as both McMillan J and Kawaley J observed. They overlap but at their core they connote separate concepts. The words ‘facilitate’ and ‘more’ are also open textured and of broad application. Mr Cogley QC for both appellants submitted that the effect of the words “will facilitate a more ...” was that the court had to be satisfied that upon the making of a supervision order, there and then, there would be an immediate concrete benefit for the contributories and/or the creditors not conferred by the voluntary liquidation presently on foot. It was not enough that one or other of the prescribed circumstances might or could occur. In my judgment, if a supervised liquidation is more suitable than a voluntary liquidation on the facts because it has the immediate potential for achieving a more thorough investigation, it will be more effective from the outset than the current voluntary liquidation which lacks such potential. And depending on the*

facts, for instance where an investigation is called for, it may well be that the appointment of official liquidators who cannot be dismissed by resolution in a general meeting in place of voluntary liquidators who can be so dismissed will immediately result in a more effective liquidation, particularly where the manager of a fund has appointed its own choice of voluntary liquidators in defiance of the choice of the stakeholder or stakeholders in the liquidation.

91. *In deciding whether the threshold has been met the court will make a judgment resulting from an evaluative process in which the words of para. (b) are considered in light of the evidence before it. This process is akin to but not the same as the exercise of a discretion properly so called. Although not truly the result of an exercise of discretion, since the court's decision is an exercise of judgment based on an evaluation of a number of different factors, it will be a decision that an appellate court ought to be slow to overturn unless the judge has misconstrued s. 131 or the decision falls outside the generous ambit within which a reasonable disagreement is possible.*
92. *If Kawaley, J. was meaning to say in paragraph [45] that after the Court had formed the view that one or all of the jurisdictional requirements of s. 131 (b) had been established, the Court still had a residual discretion, albeit a narrow one, whether to make a supervision order, I disagree with him. As I have said, the process of deciding whether any of those requirements has been established is an evaluative one, but once that process has been completed there is no room for the operation of a residual discretion in respect of the jurisdictional thresholds.*
93. *Contrary to the view of Kawaley J, I also think that, given the evaluative nature of a decision on a s.131 application, the better view is that the Court has to be satisfied on the material before it that one or more of the jurisdictional thresholds has been met rather than reaching a conclusion on the balance of probabilities i.e. applying the civil standard of proof. In my judgment, the evaluation is akin to that which the Court must undertake when deciding to give leave for the issue and service of a writ out of the jurisdiction as provided for in Ord 11 r.4 (3): "No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order". [Italics supplied]*
94. *As noted above, Kawaley J expressed the view in paragraph [85] that in addition to its narrow duty to provide independent oversight designed to vindicate the statutory rights of all parties interested in a liquidation, the Court had a broader duty to uphold the integrity of the Cayman Islands' commercial law framework. This view echoes that of McMillan J*

expressed in paragraph 32 of his judgment, that where a contributory has suffered a very significant loss of its original investment, “it is particularly important ... in order to maintain the reputation and standing of this jurisdiction that supervision should be ordered.”

95. *I hesitate to differ from these views in what may appear to be a quibble, but in my opinion, the Court’s sole duty is to decide, bearing in mind the full width of paragraph (b) including the words “in the interests of the contributories”, whether one or more of the jurisdictional requirements of s. 131 (b) has been established and to order accordingly. In other words, the standing of the Cayman Islands as an international financial centre is indirectly one of the objectives of s. 131 (b) and that objective is achieved by the Court evaluating the criteria in that provision in light of the evidence put before it.”*

10. These principles were not, perhaps unsurprisingly, in dispute as the Court of Appeal’s decision is binding on this Court. The JVLs limited their submissions to an exploration of the applicable standing principles, with Mr Turner very skilfully taking his submissions to the brink of adversarial territory without actually breaching his clients’ professed neutrality. The question which was raised was whether or not the Petitioner qualified as a “creditor” for standing purposes under section 131. This question, it was rightly submitted in the JVLs’ Skeleton Argument, went to the Court’s jurisdiction to make the Order sought:

“13. *The Petitioner asks this Court to exercise a statutory power, namely to make a supervision order pursuant to the terms of section 131 of the Companies Act. Pursuant to s131, the parties who may bring such an application, by petition, are a voluntary liquidator, contributory or creditor. In Deloitte & Touche v Johnson [1999 CILR 297] (a privy council decision) at p304, Lord Millett opined: two different kinds of case must be distinguished when considering the question of a party’s standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by statute to make it.”*

11. I accepted that it was fundamental to the jurisdiction to grant a Supervision Order that the Petitioner should establish its posited standing as a contingent creditor. At the heart of the JVLs’ submissions

was the proposition that the Petitioner as a mere beneficial owner of shares in the Company could not itself assert a claim against the Company. Reliance was placed firstly on Article 21 of the Company's Articles:

“The Company shall not be bound by or compelled to recognise in any way (even when notified) any equitable, future or partial interest in any Share, or (except only as provided by the Articles or the Statute) any other rights in respect of any Share other than an absolute right to the entirety thereof in the registered holder.”

12. This contractual rule does not appear to have statutory force although section 38 of the Companies Act does provide:

“38. The subscribers of the memorandum of association of any company shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned, and every other person who has agreed to become a member of a company and whose name is entered on the register of members, shall be deemed to be a member of the company.”

13. This rule appeared to me to be only relevant to the question of standing to assert a claim as a member of a company. *Svanstrom and Nine others v Jonasson* [1997 CILR 192] (CICA), which Mr Turner relied upon, concerned the right of a beneficial owner to assert a derivative claim on behalf of the company. In *Hannoun v R Limited and Banque Syz Company Limited* [2009 CILR 124], Henderson J made the following findings in relation to the standing to petition as a contributory:

“The petitioner did not have locus standi to petition... It would be an unwelcome expansion of the law if a beneficiary of a bare trust, whose existence was unknown to the directors of the company, could seek the dissolution of that company, in which he only had an indirect interest, without regard to the wishes of the other creditors or contributories. Standing for contributories to bring a winding-up petition was limited to those registered on the company's books.” [Emphasis added]

14. Potentially more pertinent to the present standing question was *In the Matter of Lancelot Investors Fund Limited (in official liquidation); KBC Investments Limited v Varga (as official liquidator of the company)* [2015(1) CILR 328] (CICA). In this case Martin JA opined (at pages 336-337):

“There is no doubt that in ordinary circumstances the rights attaching to shares may only be pursued by the registered shareholder...The principle is also the foundation of the rule that only a registered shareholder may bring proceedings to vindicate shareholder rights: see, for example, *Schultz v Reynolds* and *Svantstrom v Jonasson*, both decisions of this court holding that a mere beneficial owner of shares could not maintain a derivative action on behalf of a company, and *Hannoun v R Ltd*, in which the Grand Court held that a beneficiary under a bare trust of shares could not petition for a winding up on the just and equitable ground....” [Emphasis added]

15. However two observations arise from the passages the JVLs’ counsel relied upon. Firstly, Martin JA left open the possibility that extraordinary circumstances might justify a departure from the general rule that share rights and proceedings to vindicate share rights can only be brought by the registered shareholder. Secondly, the examples cited for the application of this principle are all cases where share rights (or shareholder status) were unambiguously being relied upon by the party found to lack standing. The latter point also applies to another case relied upon by the JVLs’ counsel, *In the Matter of BAF Latam Credit Fund* (16 March 2021, Unreported) (Parker J), where the contributory’s lack of standing to petition to wind-up the company was cured by substituting the registered shareholder for the beneficial owner of the relevant shares. However, it was submitted that the Petitioner’s lack of standing could only be cured by the substitution of Julius Baer, the registered shareholder which was a wholly redeemed shareholder, not a redemption creditor.

16. Mr Crane for the Petitioner in reply relied most significantly on the *ratio* of the *Lancelot* case, which in fact concerned the right of the beneficial owner to appeal against the rejection by a liquidator of a proof of debt. In the Petitioner’s Supplementary Skeleton argument it was argued:

“26. *In Re Lancelot Investors Fund, Ltd (in Official Liquidation) (Unreported, CICA 27/2013, 27 April 2015) (Lancelot), the Cayman Islands Court of Appeal (CICA) dismissed an appeal by KBC Investments Limited (KBC) arising from the rejection of a proof of debt by the joint official liquidators*

of Lancelot Investors Fund, Ltd and dismissal of an appeal by the Grand Court. However, in dismissing KBC's appeal, the CICA made certain findings in respect of the standing of KBC which are instructive in these proceedings.

27. *KBC was the beneficial owner of shares of Lancelot Investors Fund, Ltd which were registered in the name of Fortis Bank (Cayman) Ltd (Fortis) and held by Fortis as custodian for KBC. Fortis filed a proof of debt in the liquidation proceedings which was rejected by the official liquidator. KBC issued a summons seeking to appeal the disallowance of the proof of debt submitted by Fortis. Quin J dismissed KBC's appeal on a number of grounds, including that KBC had no locus standi.*
28. *Although the CICA dismissed KBC's appeal, it was held that KBC had standing as a beneficial shareholder for the following reasons:*
 - a. *When Lancelot Investors Fund, Ltd went into liquidation, all claims against the company became provable in the winding-up. Various claims would rank for dividend, and by virtue of Order 18, rule 9(1) of the Companies Winding Up Rules 2008 (same as the current version of the CWR), the right to receive a dividend is assignable. Fortis had a right to receive a dividend as regards its claim to the proceeds of redemption which was freely assignable. The assignee could be any party, including one that does not have any status in relation to the company.*
 - b. *KBC did not benefit from an express assignment of Fortis' right to receive any dividend. However, KBC relied on the terms of the custodian agreement with Fortis as establishing a relationship of a bare trustee and beneficiary; and consequently, KBC was an equitable assignee and was able to maintain a claim to the redemption proceeds in that capacity. The CICA accepted the relationship between KBC and Fortis as one of a bare trustee and beneficiary. And once the company went into liquidation and Fortis' capacity changed to that of a proving creditor, 'there was no obstacle to KBC maintaining a claim as equitable assignee, even while the custodian agreement continued'. The CICA found that an equitable assignee may sue in his own name....*
32. *SRC BVI's relationship with Julius Baer is therefore one of a bare trustee and beneficiary; and SRC BVI should be considered to be an equitable assignee of any claims that Julius Baer may have had or may have against the Company."*

17. Mr Crane referred to the first three sentences in the following passage in Martin JA’s judgment in oral argument:

“22. *I accept that the relationship between Fortis and KBC during the currency of the custodian agreement was that of bare trustee and beneficiary. The terms of the agreement make clear that Fortis was a mere nominee, with no interest of its own in the assets it held and no decision-making powers. However, as long as Fortis’s rights in respect of the company were in its capacity as shareholder, the company was not obliged to recognize the trust relationship between Fortis and KBC, and KBC could not have maintained an action as equitable assignee. Once Fortis’s relevant capacity changed to that of proving creditor, however, there was no obstacle to KBC maintaining a claim as equitable assignee, even while the custodian agreement continued...An equitable assignee may sue in his own name, although it is necessary that the assignor be joined in the proceedings prior to judgment so as to be bound by the result...*”

18. Implicit in this analysis is the well accepted legal assumption that where a share redemption has occurred and the former shareholder is seeking to recover the redemption proceeds, the capacity in which it pursues that claim (through the proof of debt process if the company is in liquidation) is that of a creditor rather than a member, despite the fact that the claim derives from its former status as a member or shareholder. In asserting such a claim the general principle that a company is only entitled to deal with the registered shareholder simply does not come into play. That principle is specifically limited to the relationship between a member and the company and that relationship (subject to the articles of association in the relevant case) comes to an end when redemption occurs. Subject to the terms of the relevant nominee agreement, the starting assumption will usually be that it is a matter for the beneficial owner rather than the nominee to decide whether or not it wishes to pursue any redemption claims personally if the nominee agreement has not in any event already been terminated.
19. I did not find *In the Matter of Exten Investment Fund (IVL)*, FSD 96 of 2017 (IMJ) to be of assistance in relation to the narrow standing point which arises in the present case, although I am guided by it in accepting the broader principle that a contingent creditor (as well as an actual creditor) qualifies as a petitioner under section 131. The Petitioner’s counsel more aptly relied upon

my own recent decision in *Re Adamas Heracles Multi Strategy Fund*, FSD 133 of 2021 (IKJ) in relation to a winding-up application. Although that application was not opposed, I recorded the following findings:

- “12. *The Companies Act (2021 Revision) section 94(1) (b) confers standing to petition on ‘any creditor or creditors (including any contingent or prospective creditor or creditors)’. A qualifying creditor clearly has standing to seek to influence the Court’s decision on the identity of the JOLs to be appointed on the winding-up of a company.*
13. *In my judgment the requisite standing requirement clearly has been made out in both evidential and legal terms. AOF is a contingent and/or prospective creditor of Heracles since having given notice to terminate its custodian agreement with HSBC it will in the foreseeable future acquire the rights of a redemption creditor now legally held by its nominee.”*

20. In *Adamas Heracles*, the registered shareholder’s status as a creditor was not in doubt and I found that the beneficial owner was a contingent creditor because it would “*in the foreseeable future*” acquire the rights held by its nominee as a redemption creditor. Although the reasoning was somewhat thin, the fundamental conclusion was that the prospect of the beneficial owner/ petitioner acquiring whatever rights the registered shareholder possessed by virtue of its status as a nominee conferred on the petitioner the standing of contingent creditor. The contingency in that instance was not whether or not potential claims against the respondent company would succeed; rather it was whether or not (or rather precisely when) the beneficial owner would acquire the legal rights held by its nominee in relation to its redemption claim, having given notice to terminate the nomineehip contract. My analysis (but not the result) might well have been somewhat different had I been able to consider the Court of Appeal’s decision in *Lancelot*.
21. I accordingly find based primarily on *Re Lancelot Investors Fund, Ltd (in Official Liquidation)* (Unreported), CICA 27/2013, 27 April 2015, that the general legal principles on the standing of a beneficial owner to seek relief as a creditor against a company which is in liquidation may be summarised as follows:

- (a) where shareholder rights have been extinguished because redemption has taken place but the nominee shareholder has not been paid, the nominee shareholder has the right to prove as a redemption creditor in the liquidation even if the nominee agreement still subsists;
 - (b) the beneficial owner has standing to prove as equitable assignee of the nominee's (legal) redemption claim;
 - (c) where a shareholder's rights have been extinguished because redemption has taken place and the nominee shareholder has been purportedly fully paid, the nominee shareholder has the right to prove as a contingent creditor in the liquidation for any alleged shortfall or any other sums considered to be due and the beneficial owner also has standing to prove as equitable assignee of the nominee's contingent claim;
 - (d) where the beneficial owner has the right to prove in a company's liquidation as equitable assignee of its nominee, it also has the standing to petition as an actual or contingent creditor, as the case may be, either to wind-up or obtain a supervision order. It matters not whether or not the nominee agreement is still in effect or has been terminated.
22. How these general principles fall to be applied in practice will be subject to the exigencies of the peculiar factual circumstances of each case. However, in many cases (because of the standardization of articles of association and nominee agreements) the legal terrain may often be broadly the same.

Findings: the Petitioner's standing as a contingent creditor of the Company

23. There was no dispute that whoever could advance the claims relied upon by the Petitioner, that party would be a contingent creditor. The question was whether the Petitioner had standing to rely upon the contingent claims for the purposes of the Petition. The main factual issues which arose for determination were:

- (a) had the nominee agreement in relation to the Petitioner’s beneficial shareholding interest in the Company been terminated or lapsed; and/or
- (b) if the nominee agreement still subsisted, did its terms deprive the Petitioner of standing to petition as a creditor under section 131 in respect of the relevant post-redemption claims as equitable assignee of the registered shareholder?

24. At first blush it appeared to me that since it was common ground that all of the shares indirectly held by the Petitioner in the Company had been redeemed before the voluntary liquidation began, the nominee agreement had lapsed or terminated. However the last redemptions had only taken place in March and April 2021 and the somewhat broad terms of the relevant contractual arrangements did not make it crystal clear that the agreement was entirely at an end. Nonetheless it was clear from the terms of the Client Agreement that:

- (a) the relevant services provided by the nominee did not extend beyond operating a custodian account and managing “*Client Securities*”;
- (b) the nominee was empowered to “*exercise any rights attaching to or derived from... Client Securities*”;
- (c) paragraph 15.2(p) provided:

“Without prejudice to Clause 9, either the Bank or the Client may close the Custodian Account at any time by giving reasonable written notice to the other party. Upon termination of the Custodian Account, the Bank shall, subject to the release and discharge of any security created by the Client over any of such

Client Securities in favour of, deliver directly to the Client all Client Securities then in the Custodian Account forthwith upon the Client satisfying all amounts due and payable to the Bank under or in connection therewith...”;

- (d) the nominee had no express or implied right to commence legal proceedings in relation to any “*Client Securities*” without express authority from the beneficial owner;
- (e) the nominee retained no express or implied ownership right over any claims which might arise in relation to “*Client Securities*” which were no longer being administered in a custodian account under the relevant contract.

25. The Articles only expressly provide that post-redemption a redeemed member’s sole rights are *qua* creditor in respect of the redemption proceeds. By necessary implication it is also in my judgment obviously agreed that any other claims the former member wishes to assert, whether by proof of debt or otherwise, can only be asserted as a creditor because once redemption has occurred the former member loses its standing as a member. This underlying standard contractual framework was acknowledged in passing by the Cayman Islands Court of Appeal in *In the Matter of Lancelot Investors Fund Limited (in official liquidation); KBC Investments Limited v Varga (as official liquidator of the company)* [2015(1) CILR 328] Martin JA (at paragraph 19), dealing with a situation where redemption had not yet occurred, noted that the relevant article “*does not have the effect of removing the shareholder’s right to participate...in the company’s affairs...at any time until actual redemption occurs*”. In the present case it is common ground that redemption has actually occurred. Paragraph 13.10 of the Company’s Articles expressly provides:

“13.10 Participating Shares shall be treated as having been redeemed with effect from the relevant Dealing Date Irrespective of whether or not a Member has been removed from the Register of Members or the Redemption Price has been determined or remitted. Accordingly, on and from the relevant Dealing Date, Members in their capacity as such will not be entitled to or capable of exercising any rights arising under these articles with respect to Participating Shares being redeemed...save the right to receive the Redemption Price and any dividend which has been declared...Such Members will be treated as creditors of the Company with respect to the Redemption Price and will rank accordingly in the priority of the Company’s creditors.” [Emphasis added]

26. In my judgment it was clear that the factual position could be viewed in either of the following main ways:

- (a) the nominee agreement came to an end in relation to the shares held by the nominee for the benefit of the Petitioner when redemption occurred under the implied terms of the contract. The legal right to assert any claims against the company derived from the shares (including proving in the Company's liquidation) reverted to the Petitioner when redemption occurred; **or**
- (b) the nominee retained the legal ownership of all rights of action against the Company derived from the shares, but the Petitioner was entitled to terminate the nominee agreement upon reasonable notice with the result that any such legal rights would revert to the Petitioner. The Petitioner accordingly had the standing as equitable assignee of the former registered shareholder's legal rights to exercise all rights as a creditor against the Company, despite the fact that such rights were derived from the shares. Because even if the contractual obligation to return all such rights to the beneficial owner under the nominee agreement had not been triggered by a valid termination notice, in equity the nominee had an obligation to return such rights which were at all times held on trust for the Petitioner.
27. Irrespective of whether case (a) or (b) in the preceding paragraph applied, the Petitioner had standing to petition as a creditor because, post-redemption, no question of the legal relationship between the registered shareholder and the Company arose as a live issue. The legal rule that prohibits a company from taking cognizance of anyone other than the registered shareholder and generally impedes a beneficial owner from asserting shareholder rights against a company is simply not engaged beyond the scope of the shareholder/company relationship.

Summary

28. For these reasons on January 28, 2022 I found that the Petitioner had standing to obtain a Supervision Order under section 131 of the Companies Act and ordered that, *inter alia*:

- “1. *The liquidation of the Company be continued under the supervision of the Court.*
2. *Angela Barkhouse and George Kimberley Leck of Quantuma (Cayman) Limited t/a Quantuma of Suite N404, Flagship Building, 142 Seafarers Way George Town, Grand Cayman, Cayman Islands be appointed as joint official liquidators of the Company (the **JOLs**).*”

THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT