COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Law Division
2020/COM/com/00038

IN THE MATTER OF *The International Business Companies Act, Chap. 309 of the Statute Laws of The Bahamas*

AND IN THE MATTER of Finethic Limited

AND IN THE MATTER of a Winding-Up Petition filed in relation to the said Finethic Limited and pursuant to section 190 of *The Companies (Winding Up Amendment) Act, 2011*

AND IN THE MATTER of an Order appointing Joint Provisional Liquidators of the said Finethic Limited

AND IN THE MATTER of the applications of Finethic Limited, Paul D. Moss, and Dominion Management Services Ltd.

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Maurice Glinton QC, with Meryl Glinton for the Applicants Tara Archer-Glascow, with Audley Hanna for the Petitioner Raynard Rigby for Joint Provisional Liquidators
Hearing dates:	14, 22, 23 October 2020, 17 November 2020.

Klein, J.

Winding-up Petition – Just and equitable ground—Management gridlock created between brothers as equal shareholders – Ex parte Order appointing joint provisional liquidators (JPLs) — Application to set aside Order appointing JPLs – Alleged defect in affidavit verifying petition — Affidavit sworn in November 2019 and Petition presented in 2020 – Ord. 3, r.3, Companies Liquidation Rules (CLR)—Whether "prima facie case" for making winding up order—Standing of Director of company of record where provisional liquidators appointed—Allegations of improper appointment.

Practice and Procedure—Ex parte application—Whether "exceptional circumstances" justifying ex parte application—S. 199 (2), Companies (Winding up Amendment) Act, 2011—Affidavit in support of appointment of JPLs sworn by counsel of firm representing petitioner—Whether abuse of process— Whether affidavit should be struck out—Hearsay evidence—Whether affidavit containing material that is "scandalous, irrelevant or otherwise oppressive"—RSC Ord. 41, rr. 5(1)(2), r.6

INTRODUCTION AND BACKGROUND

[1] This is an application by Finethic Ltd., an International Business Company ("the company"), Mr. Paul Moss, in his capacity as the sole director of the company, and Dominion Management Services Ltd., as the registered agent of the company ("Dominion"), together the applicants, to

set aside an *ex parte* order made 27 August 2020 by Bowe-Darville J. appointing joint provisional liquidators of the company ("the JPL Order").

[2] The appointments were made pursuant to a winding-up petition presented 21 August 2020 by Mr. Georgio Nembri ("Mr. G. Nembri"), one of two equal shareholders, to wind up the company on just and equitable grounds, claiming management deadlock.

[3] The application raises, among other issues, an important question of practice relating to the swearing of an affidavit verifying a petition, in particular whether an affidavit sworn in advance of the presentation of the petition is sufficient to witness the truth of its contents. It appears that the issue first reared its head in this jurisdiction, albeit in a somewhat different guise, in the Court of Appeal's decision in *In the Matter of China Emperor and ors. v Paulsen* [2008] 5 BHS No. 73, but it was not necessary for the court to decide the point. But it has remained a troublesome point in many jurisdictions, not least because the answer appears to turn on the interpretation of the particular rules in play, and judicial exegesis of such rules has naturally produced different results.

Factual Background

[4] Finethic was incorporated under the International Business Companies Act (the "IBC Act") on 18 February 2004. Its registered agent of record is Dominion Management Services Limited, Dominion House, #60 Montrose Avenue, P.O. Box N-9932, Nassau, Bahamas. The authorized capital of the company is US$5,000, divided into 5,000 shares of US$1.00 each. The registered members of the company are the petitioner, Mr. G. Nembri and his brother Mr. Andrea Nembri ("Mr. A. Nembri"), who each holds 2,500 shares. Since 20 April 2017, the president of the company has been Mr. Paul Moss ("Mr. Moss") and the secretary Ms. Melanie Lightbourne ("Ms. Lightbourne"). As will be revealed presently, the validity of the 2017 appointments of officers as well as the registered office and agent are disputed.

[5] The petition recites that the company has been in gridlock since about 2015, as the members have been unable to reach agreement on any fundamental issue concerning the management and direction of the company. Owing to this paralysis, the then appointed directors (Gina A. Martinez and Fernando A. Gil) tendered their resignations on 12 December 2016 with immediate effect, and the then registered agent (Aleman, Cordero, Galindo & Lee (Bahamas) Ltd.), also by letter dated 12 December 2016, resigned with 90 days' notice. The members were apparently unable agree replacements for these resignations.

[6] By virtue of a written resolution, apparently passed solely by Mr. A. Nembri on 20 April 2017, the current registered agent, registered office and president of record for the company were appointed. The secretary was appointed by a separate Director's Resolution of the same date. The petitioner alleges this was done without consulting him and that he does not consent to these appointments.

[7] On 21 August 2020, Mr. G. Nembri presented a petition to wind up the company in accordance with s. 89 of the *International Business Companies Act* (the "IBC Act") and s. 186(e) of the

Companies (Winding Up Amendment) Act 2011, (the "Act"), on the ground that it was just and equitable to do so "*due to gridlock*". Mr. Anthony Kikivarakis and Ms. Cheryl Simms, both of Kikivarakis & Co., were nominated for appointment as joint provisional liquidators.

[8] On the presentation of the petition, application was also made *ex parte* by summons for the appointment of joint provisional liquidators of the company. The application was supported by an affidavit sworn by David Hanna, an associate in the firm of attorneys of record who act for the petitioner in the winding up (the "Hanna Affidavit"). As indicated, Mr. Anthony Kikivarakis and Ms. Cheryl Simms were appointed joint provisional liquidators ("JPLs") of the company by order dated 27 August 2020.

[9] By Notice of Motion ("the Motion") filed 17 September 2020, the applicants applied for twofold relief: (i) to strike out the petition in the Court's inherent jurisdiction, or, alternatively that it be dismissed as an abuse of process pursuant to s. 191 (1)(a) of the Act, on various grounds; and (ii) for an order pursuant to Ord. 32, r. 6 or in the court's inherent jurisdiction to set aside the *ex parte* JPL Order on various grounds and to strike out the Hanna affidavit. Simultaneously, the applicants filed an *ex parte* summons to set aside the JPL Order, to strike out the Hanna Affidavit and for further proceedings under and by virtue of the JPL Order to be stayed pending the hearing of the substantive applications. The applications were supported by affidavits of Mr. Moss filed on 17 and 28 September 2020, and a third affidavit was filed on 29 October 2020. The JPLs also filed a joint affidavit on 5 October 2020, responding to certain allegations in the Moss affidavit of 17 September.

[10] The petitioner filed a cross-summons on 14 October 2020 to strike out the affidavits of Mr. Moss, on the basis that he lacked the *locus standi* to advance the applications before the court or swear any affidavits in his capacity as director.

[11] The Motion includes some 13 grounds, bifurcated into those directed at the petition ("the petition grounds") and those directed to setting aside the JPL order ("the JPL grounds"). Some of the grounds directed toward the petition are not so easily assimilable and at times appear contradictory, but they are distilled here (in somewhat redacted terms) as follows:

1. The petitioner lacks the requisite standing under the Act to present the Petition.
2. The petitioner is not a creditor nor claims to be a contributory, and cannot make out a *prima facie* case for the appointment of a provisional liquidator in accordance with s. 199(1) and (2) of the Act.
3. "*Whilst the Petitioner is a contributory within the terms of s. 183*" and the petition is based on Ord. 4, r. 1, the petition is not genuine and not presented *bona fide*.
4. The primary ground of the petition, the alleged management gridlock of the company as a result of the two equal members being unable to reach agreement, is not a basis for a winding-up order under s. 186 of the Act.
5. The petition fails to comply with the mandatory requirements of the Act and the CLR, in particular O. 3, and it is outside the powers of the court under s. 186; further, it is presented for an improper purpose and constitutes an abuse of process.

6. Winding up of the company on the just and equitable ground, in the absence of any evidence of fraud, misconduct or oppression, is an insufficient basis in law for a winding-up order.
7. The petition is fatally flawed for lack of specificity and failure to comply with the provision of the Act and Companies Liquidation Rules 2012 ("CLR").
8. The defects in the petition cannot be cured by amendments.
9. There was no evidence of "…*exceptional circumstances which justifies the application being made ex parte*" as required by the CLR (O. 4, 1(2)).
10. There was material non-disclosure of relevant facts and matters before the Judge on the *ex parte* application.
11. That the judge was not properly assisted by counsel with respect to the law on urgent *ex parte* applications, a significant example being that there was no stipulated return date for the *inter partes* hearing of the summons.
12. That the affidavit filed in support of the *ex parte* application for appointment of the JPLs, being sworn by counsel for the firm acting for the petitioner, is an abuse of process and tends to embarrass or prejudice the proceedings.
13. Ground 8-12 were a miscarriage of justice.

[12] It should be apparent that grounds 1-8 are the petition grounds, and the remaining grounds are the JPL order grounds. Curiously, the latter were not interpolated into the *ex parte* summons, which simply recited the grounds for setting aside the JPL order as "… (*inter alia)…a miscarriage of jurisdiction occasioning the making thereof*". The omission of the grounds from the summons became a matter of some contention, and Mr. Hanna vigorously protested that the summons was clearly deficient and lacking any grounds. However, it was clear that the applicants were relying on the grounds stated in the Motion, which was also before the court, including the petition grounds, insofar as they related to whether the legal prerequisites under s. 199(2) for making an application for the appointment of provisional liquidators were met. I therefore did not find any merit in the objections taken to the summons.

Issues

[13] I believe that the principal issues before the court may be fairly summarized as follows:

1. Whether Mr. Moss has standing, having regard to the challenge to his appointment and the subsequent appointment of provisional liquidators, to advance the application and swear affidavits on behalf of the company or its directors and agent and, if not, whether such affidavits should be struck out [petitioner's cross summons].
2. Whether the petitioner has standing to bring the petition as a contributory [Grounds 1-3].
3. Whether the Petitioner satisfied the requirement of a "*prima facie case for making a winding up order*", and the other legal prerequisites at s. 199(2) of the Act to properly invoke the court's jurisdiction to appoint provisional liquidators [Grounds 4-8].

4. Whether the verifying affidavit failed to comply with the provisions of the Act and the CLR (in particular Ord. 3, r.3), so as to render the petition defective [Grounds 4, 7].
5. Whether there were any "*exceptional circumstances*" (as required by Ord. r, 4. 1(2) of the CLR) for hearing the application *ex parte* [Ground 9].
6. Whether there was full and frank disclosure of all relevant facts and matters before the Judge on the *ex parte* application for the JPL appointments [Ground 10, 11].
7. Whether the Hanna affidavit should be struck out as begin sworn by counsel whose firm represents the petitioner and acts in relation to the application before the court [Ground 12].

DISCUSSION AND ANALYSIS

Issue I: Locus standi of applicants and jurisdiction

[14] Logically, I should deal with this matter first, because if I were to determine that Mr. Moss or Dominion has no standing, that would effectively be the end of the application. The petitioner advances the lack of standing claim primarily on what is said to be the impropriety in the appointment of the current officers, but there is naturally also the consideration of the appointment of the JPLs on any authority they might have held.

[15] The circumstances in which the current applicants have been appointed have been adverted to, and are summarized at paragraphs 13-15 of the Petition:

> "13. Upon the resignations set out at paragraphs 10-12 above, the members were unable to agree upon replacements.
> 14. By virtue of a purported written resolution purportedly passed solely by Mr. Andrea Nembri on 20th April 2017….[…] The current registered agent, registered office, President and Secretary of record for the Company were appointed. This is notwithstanding the fact that: (i) pursuant to Article 22 of the Company's Articles of Association more than 50% of the Members are required to convene a meeting; (ii) […] Article 25 of the Company's Articles […] requires a quorum of 51% of the Members; and (iii) pursuant to Articles 36 of the Company's Articles of Association a resolution must be approved by more than 50% of the members.
> 15. The Petitioner was not consulted with respect to, and does not consent to the appointment of the current registered agent, registered office, Director and Secretary."

[16] In answer to the challenge to the appointments, Mr. Moss in his third affidavit produced the Companies Register of Directors, filed with the Companies Registry electronically on 30 November 2017. That records Mr. Paul D. Moss and Ms. Melanie Lightbourne, respectively, as the current President and Secretary of the Company, having been appointed with effect from 20 April 2017. The applicant contends that this is *prima facie* evidence as to his appointment as director of the company. Further, he contends that the petitioner has not put any contrary evidence before the Court, nor sought to challenge his status as a director through any lawful means available to him.

[17] In addition, the applicants rely on the statement of Plowman J. in *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 [1113] to argue that the appointment of a provisional liquidator does not rob a director of certain residual powers, which includes the power to challenge a petition for winding up:

> "The respondent's submission was that the appointment of a provisional liquidator automatically puts an end to the authority of the company's directors to instruct solicitors and counsel to represent it and that the solicitors purporting to act on its behalf were therefore liable to pay the respondents' costs personally. It is of course well settled that on a winding-up the board of directors of a company becomes *functus officio* and its powers are assumed by the liquidator, and my attention was drawn to *Re Mawcon Ltd*., where Pennycuik J stated that in effect the appointment of a provisional liquidator had the same effect. No doubt that is so, but it is common ground that notwithstanding the appointment of a provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding up order is made, to appeal against that order."

[18] Considering the circumstances of this case, it seems to me that while there may be grounds on which the petitioner might properly challenge the status of the company's officers, registered office and agent, the persons and/or entities indicated on the statutorily-required records of the company are *prima facie* the current office holders and/or service providers. In fact, maintaining a registered office and agent are mandatory requirements of an IBC under the IBC Act. Therefore, until a proper application is made to challenge these appointments, the court is constrained to accept that Mr. Moss is a director and therefore entitled to make the application. In fact, the Petitioner tacitly concedes this in the petition, in which it states [4]: "*The President of the Company since the 20th day of April, A.D. 2017 is Paul D. Moss ("Mr. Moss"), although the Petitioner disputes whether the appointment of Mr. Moss was valid*."

[19] As pointed out by the Privy Council in *Archer & Anor. v Registrar General & Anor* (The Bahamas) [2004] UKPC 31, a judicial review appeal relating to the rectification of the register of members of a company, "*Any dispute as to its correctness [the register] is to be resolved by the court, either on a summary application under section 57 or (in a complex case raising factual dispute) in other proceedings*." While that dispute was about the register of members under the s. 57 jurisdiction, the point is that the petitioner could always have approached the court for declaratory or injunctive relief in respect of the company.

Jurisdiction

[20] This is also a convenient point to deal with the court's jurisdiction to set aside the order. The applicants invite the court to exercise its jurisdiction to set aside on three main grounds. The first is paragraph 7 of the JPL Order, which itself provides liberty, *inter alia*, for "*the Director of Record of the Company, and other interested parties*" to apply. Secondly, there is R.S.C. Ord. 32, r. 6, which provides in material part that "*The Court may set aside an Order made ex parte*." In this regard, the applicants cite the well-known authority of *WEA Records v Visions Channel 4 Ltd*. [1983] 1 WLR 721 and the oft-cited passage of Lord Donaldson, MR (at p. 727) where he said, among other things, that:

> "…there is no doubt that the High Court has power to review and to discharge or vary any order which had been made *ex parte*. This jurisdiction is inherent in the provisional nature of any order made *ex parte* and is reflected in R.S.C., Ord. 32, r. 6…".

[21] Finally, there is Ord. 4, rule 5(1)(e), which is said to give a cause of action and Ord. 4, rule 5(3), which prescribes the application procedure for such an application, as follows:

> "5. (1) An order for the appointment of a provisional liquidator may be varied or discharged upon the application of –
>
> […]
>
> (e) the company, acting by its directors.
>
> (3) An application under this rule shall be made by summons, supported by affidavit, and shall be served upon the provisional liquidator and every person who was entitled to be served with the original order in accordance with rule 4(4)."

The Moss affidavits

[22] I should therefore record, as a footnote to this section, that having accepted that Mr. Moss has standing and the court has jurisdiction to entertain an application by him, there is no basis on which I can strike out his affidavits. In fact, it would be counter-intuitive to grant liberty in the order appointing the joint provisional liquidators to the company's "*Director of Record to apply*", but then contend that he has no standing to file an affidavit in relation to any such application. He is the only director "of record".

[23] I think it is fitting also, at this juncture, to say something about the role of the court on an application to set aside an *ex parte* order, either on an application for that purpose, or on the return date for the *inter partes* hearing. Clearly, the court is not acting as an appellate court in respect of the exercise of the judge's discretion in granting the order. Instead, it is only engaging in a review of the exercise of the discretion that the judge herself would have carried out on an *inter partes* hearing, and which may be reviewed by any other judge of coordinate jurisdiction on a full hearing, *ex parte* orders only being provisional in nature. As memorably stated by Bacon, VC in the old authority of *In re London and Manchester Industrial Association* [1975] 1 Ch. 466, in discharging an *ex parte* order appointing provisional liquidators: "*…I must treat it [the ex parte order] as if I made it myself*."

Issue II: Standing of petitioner as contributory

[24] I must confess that I have found the applicants' arguments on this issue a little difficult to follow. This is not least because in one breath the applicants contend that the petitioner lacks the requisite standing to present the petition (Ground 2), but then concedes that the petitioner comes within the definition of a contributory at s. 183 of the Companies Act (*cf*. s. 89 of the IBC Act) (Ground 3).

[25] Several of the statutory provisions relevant to this issue are mentioned below. Section 95 of the *IBC Act* provides that [a similar provision is at 190(1) (c) of the Companies Act]:

> "Any application for the winding up of a company shall be by petition; and such petition may be presented by the company, a director, or by any one or more creditors, a contributory of the company, or by all of or any of the above parties, together or separately;

Section 183 of the Act defines "contributory" as:

> "(a) every person liable by virtue of this Act to contribute to the assets of a company in the event that it is wound up under this Act; and
> (b) every holder of fully paid up shares of a company."

Interestingly, the definition of "contributory" in the IBC Act is even wider and a person liable to contribute to the assets of a company in the event of winding up includes—

> "any person alleged to be a contributor in proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons."

Further, s. 93 (e) of the IBC Act (cf. 186 (e)) of the Act) provides that one of the grounds on which the court may wind up a company is—

> "(e) if the court is of the opinion that it is just and equitable that the company should be wound up."

[26] Furthermore, in written submissions, the applicants specifically referred to the principle that the right of a contributory to apply for winding up of a company of which he or she is a member is a right conferred by statute and one which cannot be abrogated or restricted even by provisions in its Articles of Association (*Re Peveril Gold Mines* [1898] 1 Ch. 122).

[27] The applicants also submitted that "*Only having satisfied itself of a petition's competence, that is, the petitioner has both requisite standing and cause of action to present it, is the Court's winding up jurisdiction purposefully invoked on application for appointment of a provisional liquidator of a Company*", citing *Deloitte & Touche AG v Johnson* [2002] 1 BCLC 485 (at 491).

[28] I agree with the petitioner that the argument as to lack of standing by the petitioner as contributory must fail, as it seems the petitioner clearly fulfils the requirements of a contributory with the meaning of s. 183 of the Act and s. 89 of the IBC Act.

Issue III: Whether *prima facie* case for making winding-up order

[29] The first and general attack on the JPL order is that none of the legal prerequisites under s. 199(2) (a)(b) for the appointment of a provisional liquidator was satisfied. That section provides as follows:

> **S. 199. Provisional Liquidator: appointment, powers and termination**

> "(1) Subject to this section and any Rules made under section 252, the court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.
>
> (2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or any relevant regulator on the grounds that—
>
> (a) there is a prima facie case for making a winding up order; and
> (b) the appointment of the liquidator is necessary—
> (i) to prevent the dissipation or misuse of the company's assets,
> (ii) to prevent the oppression of minority shareholders,
> (iii) to prevent mismanagement or misconduct on the part of the company's directors, or
> (iv) in the public interest.
>
> (3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that—
> (a) the company is or is likely to become unable to pay its debts within the meaning of section 188; and
> (b) the company intends to present a compromise or arrangement to its creditors.
>
> (4) A provisional liquidator has the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he was appointed and the court may limit the powers of a provisional liquidator in such a manner and as such time as it considers fit."

[30] As set out above, s. 199 provides for an application to be made for the appointment of a provisional liquidator by three classes of person (a creditor, contributory, or regulator) under subsection (a) on the grounds that there is "*a prima facie case for making a winding up order*" and (b) where it is necessary to (i) prevent the dissipation or misuse of the company's assets, (ii) prevent minority oppression; (iii) to prevent mismanagement or misconduct by the directors; or (iv) in the public interest. Thus, the test introduces what has been described in the context of similar rules in the Cayman Islands as "four hurdles" (see *In the Matter of ICG I*, (unrept., FSD 0192 of 2021, per Doyle, J)). There, Doyle J. held, in respect of s. 104(1) of the (Cayman) Companies Act (2021 Revision), which is similarly worded to s. 199(2), that an applicant seeking the appointment of a provisional liquidator pending the determination of a winding-up petition has four main hurdles to jump (criteria which I gratefully adopt as applicable to an application under s. 199(2)):

> "(a) The applicant must satisfy the court that a winding up petition has been duly presented and a winding up order has not yet been made (the "presentation of the winding up petition hurdle");
> (b) The applicant must satisfy the court that the applicant has standing to make the application, i.e., the applicant is a creditor, contributory or the Authority (the "standing hurdle");
> (c) The applicant must satisfy the court that there is a prima-facie case for making a winding up order (the "prima facie case hurdle"); and
> (d) the applicant must satisfy the court that the appointment of the provisional liquidator is necessary in order to prevent the dissipation or misuse of the company's assets; and/or the

> oppression of minority shareholders; and/or mismanagement or misconduct on the part of the company's directors (the "necessity hurdle")."

[31] I will leave to one side for the moment the question of whether the "*presentation of the winding-up petition hurdle*" has been met, subject to what I will have to say later on the arguments directed to the verifying affidavit. As discussed under Issue II, the "standing hurdle" has been met. I now come to the "*prima facie case hurdle*".

Prima facie case

[32] Mr. Glinton QC referred to the case of *In Re Highfield Commodities* [1985] 1 WLR 149, where Megarry, V-C observed that [158]: "*the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding up order will be made*." The test was set out more comprehensively in *Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors Ltd.* [2011] EWCA Civ. 1116, where Rimer LJ said [76]:

> "76. The appointment of a provisional liquidator to a trading company is, however, a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and it requires the giving by the court of the most anxious consideration. In *Union Accident Assurance*, Plowman J. explained the two-fold approach that he proposed to take: He said, at [1972] 1 ALL ER 1105, 1110-b:
>
> > "There are two matters though, which seem to be relevant for me to consider. The first is whether the department had made out a good prima facie case on the hearing of the petition. Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time. If the department has not made out a good prima facie case for a winding-up order then clearly I think it would not be right to appoint a provisional liquidator. On the other hand, if the department has made out a good prima facie case for a winding -up order, then the second matter for my consideration arises, namely, whether in the circumstances of this case it is right that a provisional liquidator should have been appointed.
>
> 77. With one qualification, I would respectfully regard that as a good working approach to the disposition of an application for the appointment of a provisional liquidator. The qualification is that I would, however, regard the continued use in this context of the phrase "good *prima facie* case" as unsatisfactory. In *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396, at 404F [1975] 1 ALL ER 504, [1975] RPC 513, Lord Diplock said of the phrase "*prima facie* case" that it "may in some contexts be an elusive concept", and Plowman J's chosen phrase also included a "good", which may perhaps tend to increase the risk of elusiveness. Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the creditor must cross before inviting such an appointment ought to be nothing less than a demonstration that he is *likely* to obtain a winding-up order on the hearing of the petition."

Are there grounds for just and equitable winding up?

[33] Mr. Glinton QC contends that there are no allegations in the winding up petition that would support an application for winding up on the just and equitable ground based on functional deadlock of the company as claimed (paras. 8 and 17 of the petition):

> "8. Since in or about 2015, the Company has been at gridlock as the Members are unable to reach an agreement on any fundamental issue concerning the direction and management of the Company. Having regard to the fact that the Company is equally owned by two members it is impossible to pass any resolution in the absence of an agreement and in its current state the Company cannot properly function."
>
> 17. The petitioner claims to be entitled to a winding up order against the Company in accordance with Section 89 of the Act [IBC] and Section 186 (e) of the Companies (Winding Up Amendment) Act, 201 on the basis that it is just and equitable to do so having regard to the fact that the Company cannot function due to gridlock."

[34] On behalf of the petitioner, Mr. Hanna referred to the statement of principle in *Halsbury's Laws of England*, Vol. 16 (2017) para. 360 that a company may be wound up on the ground that the winding up is just and equitable "*where it is impossible to carry on its business owing to internal disputes which have produced a state of deadlock*". Reference was also made to *In Re Yenidje Tobacco Company Ltd.* [1916] 2 Ch. 426, where Lord Cozens-Hardy, drawing on the analogy with partnerships, concluded that a company could be wound up on the basis of deadlock, and the modern statement of the principle in *Chu v Lau* [2020] UKPC 24. In the latter, Lord Briggs, speaking for the Board, explained the principles thus:

> "14. A just and equitable winding-up may be ordered when the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding-up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability to function at board or shareholder level. Functional deadlock of this paralysing kind was first clearly recognized as a ground for a just and equitable winding-up by Vaugh Williams J. in *In re Sailing Ship Kentmere Co.* [1879] WN 58, a decision on the jurisdiction conferred by section 79 of the (UK) Companies Acct 1862 (25 & 26 Vict, c. 89).
>
> 15. Secondly, where the company is a quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding-up, essentially on the same grounds as would justify the dissolution of a true partnership…. […]
>
> 17. The important potential distinction between the two types of breakdown case is this. If there is complete function deadlock, then a winding-up may be ordered regardless whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding-up even where there may not be a complete functional deadlock. In the former case winding-up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course, both may exist together, and complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two party quasi-partnership like the present."

[35] I do not understand Mr. Glinton QC to be taking any issue with the principle that the remedy of winding-up may be available in law to a company that is in functional deadlock. But his contentions were that despite the general averments of deadlock, (i) it was not impossible under the company's constitutive documents for it to continue to carry out its affairs, and (ii) there were alternative remedies which the petitioner ought to have pursued.

[36] As to the first point, reference was made to several provisions of the Company's Articles of Association, which the applicants contend are aimed to avoid the gridlock of the sort that concerns the Petitioner as a member, for example Cls. 25, 26, 27 and 32. Cl. 25 prescribes that no business may be transacted unless a quorum of members (not holding less than 51% of the voting shares) is present. Cl. 26 provides that if a quorum is not present within half an hour after the time appointed, the meeting, if called by a member shall be dissolved, but in any other case may be adjourned to a time not less than 24 hours from that meeting, and if there is not a quorum within 15 minutes of that meeting, the members present shall constituted a quorum. Cl. 27 provides for the Chairman of Board of Directors or Deputy Chairman in his stead to preside as Chairman, but if these persons are not present within 15 minutes of the meeting, the Directors shall choose one of their number or otherwise the members present shall choose one of the members. Further, Cl. 32 provides that in the case of equality of votes, the Chairman of the meeting shall be entitled to a casting vote.

[37] In other words, the applicants contend that these (and similar provisions) show that "*the Company's Articles of Association is not, nor is it drafted to result in a suicide pact among members of the Company*".

[38] Next, there is the issue of alternative remedy. This was recognized by the Privy Council in the *Chu v Lau* case, where they stated:

> "20. It is well established that winding-up is a shareholder's remedy of last resort. But this does not mean that winding-up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word. […]
> 21. […] In *In re a Company* (No. 002567 of 1982) [1983] 1 WLR 927, at p. 933, Vinelott J held that "other remedy" in section 225(2) [of the UK Companies Act 1948] was not limited to a statutory remedy provided only by the court. For example, an unreasonable refusal to accept a fair offer for the applicant's shares might bar relief by way of winding-up. The Board agrees with this analysis."

[39] In this regard, counsel referred the court to s.191(3) of the Act, which provides that if a petition is presented "*by members of the company as contributories on the ground that it is just and equitable that the company should be wound up*," the court has jurisdiction to make the following alternative orders in respect of the company: (1) regulating the conduct of the company's affairs in the future; (2) requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do something omitted to be done; (3) authorizing civil proceedings on behalf of the company in such terms as the court may direct; and (4) providing for the purchase of the shares of any member of the company by other members or the company itself.

"The necessity hurdle"

[40] The applicants also contend that the petitioner has failed to satisfy the threshold of any of the necessary grounds mentioned in sub-paragraph (b) of s. 199(2), which, as indicated, operate conjunctively with s. 199(2)(a). In this regard it is necessary to closely examine the Hanna affidavit, particularly in light of the prescription at O. 4, r. 2 of the CLR which provides:

> "**Supporting affidavits (O 4., r 2)**
>
> 2. (1) The application shall be supported by an affidavit or affidavits containing all the evidence upon which the applicant relies, to which all the documents intended to be relied upon must be exhibited." [Emphasis supplied.]

The Hanna Affidavit

[41] The Hanna affidavit sets out at paragraphs 4-7 the basic information about the company. It indicates that the petitioner, Mr. G. Nembri, is a fifty percent shareholder, along with his brother Mr. A. Nembri, who holds the other 2,500 shares. The company is an IBC and the "*current registered agent of record of the Company*" is said to be Dominion Services Ltd. It is also indicated that Mr. Moss, since about 20 April 2017 "*has held himself out to be the President of the Company*", and that since the same period Ms. Lightbourn "*has been the secretary of record*". The deponent says further that he is instructed that the petitioner never voted to have Dominion or Mr. Moss or Ms. Lightbourne appointed, and he is therefore instructed that the appointments are invalid. At paragraphs 8-9, he states that he is instructed that since 2015, the company has been at gridlock over the management, and that while Mr. A. Nembri has not consented to the petitioner's request to place the company in voluntary liquidation, he nevertheless has continued to take unilateral steps vis-à-vis the company, key of which are the appointment of Mr. Moss and Ms. Lightbourne. Paragraphs 10-11 set out the circumstances under which the former directors and registered agent resigned at the end of 2016, and indicate that the petitioner and Mr. A. Nembri were not able to agree upon replacements. In paragraph 10, the deponent states that by virtue of a purported written resolution passed solely by Mr. A. Nembri on 20 April 2017, there was a purported change to the Articles of Association and the current appointments made.

[42] In paragraph 13, the deponent sets out the relevant provisions of the company's articles relating to its management, which it is said require a quorum of 51% and a resolution approved by more than 50% for approving any resolutions, and which effectively requires the unanimous participation and agreement of both shareholders. It is further alleged that based on the lack of participation by the petitioner in the appointment process, the petitioner is of the view that Mr. A. Nembri and Mr. Moss "*have conspired to take improper steps to prejudice his interests in the Company*." Paragraph 14 indicates that a letter was sent to Mr. Moss on 3 October 2018 from the petitioner's counsel indicating that he had not been properly appointed, and urging him to "*cease and desist from taking any steps*" in his purported capacity as director. In paragraph 15, the deponent states that the petitioner determined that "*his only recourse is to*

seek to wind up the company" because of (i) the gridlock; (ii) the unilateral steps taken by Mr. A. Nembri; and (iii) the intentions and role of Mr. Moss.

[43] In paragraphs 16-17 it is indicated that there was a delay in proceeding with the winding-up because Mr. G. Nembri experienced health problems, but now he is in a position to proceed with the winding up process. The deponent states at paragraph 17 that:

> "… [I] am instructed, as aforesaid, that it is the Petitioner's position that, due to certain steps recently taken by Mr. Moss in his purported role as Director, and ostensibly at the direction of Mr. A Nembri, it is imperative that Mr. Moss's purported role as Director of the Company cease immediately and that Provisional Liquidators be appointed so as to manage the affairs of the Company until the winding-up Petition can be heard."

[44] In paragraph 18, it is stated that the company holds a bank account with LGT Bank AG in Liechtenstein ("the Bank"), which is said to contain a significant amount of money belonging to Andrea and Georgio as members of the company. It is averred at paragraph 19-20 that the petitioner was contacted by the Bank and made aware that by Resolution dated 8 May 2020 ("the Banking Resolution"), Mr. Moss conveyed to the Bank that he was entitled, *inter alia*, to access the Account, and provided the Bank with the following documents: (i) Certificate of Incumbency confirming that he was a director of the company; (ii) change of mailing address form dated 8 May 2020, confirming Dominion's address as the new address for the Bank to use in relation to the company; and (iii); an Email Agreement, also dated 8 May 2020, enabling, *inter alia*, instructions to be provided to the bank by electronic means. I set out paragraphs 21 and 22 below:

> "21. I am instructed, as aforesaid, that the Petitioner finds Mr. Moss's recent actions with attempting to take control of the Account alarming and entirely improper in the circumstances. Further the Petitioner is of the view that unless Mr. Moss's conduct is immediately restrained, irreparable harm could come to both the Company and to him. Additionally, the Petitioner is concerned that if Mr. Moss has taken steps in relation to accessing the Account, he may seek to, or may already have, taken steps in relation to other assets of the Company.
>
> 22. As Mr. Moss has not been properly appointed as a Director of the Company, he should be taking no steps in relation to its affairs. In any event, having regard to all of the circumstances surrounding the Company, the Petitioner considers that it would be just and proper for this Honourable Court to intervene and permit the appointment of Provisional Liquidators so that the affairs of the Company can be managed fairly and under the supervision of this Honourable Court pending the determination of the Petition."

[45] Paragraph 23 then nominates Mr. Anthony Kikivarakis and Ms. Cheryl Simms as the proposed joint official liquidators and indicates their willingness to serve in that capacity. The affidavit concludes at paragraph 24 with the deponent's statement of truth.

Discussion

[46] I will return to the issue of the Hanna affidavit when I come to look at whether there were exceptional circumstances justifying the *ex parte* application, and in the context of the

challenge to its admissibility. But putting to one side any technical defects in the affidavit for the time being, in my view there is very little by way of evidence in that affidavit to demonstrate that the petitioner was "*likely*" to obtain a winding-up order on the hearing. As appears clear from the statutory provisions providing for alternative relief (s. 191(3)) and the case law, a petition by a contributory falls into a special category, and the court has wide powers to fashion alternative relief. For example, the Privy Council accepted in *Cho v Lau* that an unreasonable refusal to accept a fair share buy-out might bar relief to a winding up order. Thus, on the prospect alone that an offer to purchase could possibly be made and might have been accepted, or if unreasonably refused might constitute a bar to any relief, it could not be said that a winding up order would be made.

[47] As to establishing any of the wrongs set out in s. 199 (2) (b), the affidavit fell far short of the heavy burden on the petitioner to show that the assets of the company were being, or were likely to be, dissipated to the detriment of the petitioner, and/or that there was a serious risk that assets may not continue to be available to the company unless JPLs were appointed (see *Rochdale Drinks*, Lewison J., paras. 111, 113.).

[48] There is the suggestion that the steps taken by Mr. Moss vis-à-vis the banking arrangements were to take control of the bank account, and that this was being done pursuant to some conspiracy between Mr. Moss and Andrea. But these were bare, unsubstantiated second-hand allegations and innuendos, made in circumstances where there was plainly no evidence to support them. For example, but for the issues raised as to whether he was properly appointed, the actions taken in respect of the bank account would be ordinary administrative functions undertaken by a company's officers.

[49] The most that can be said was that Mr. Moss was aware that there was disagreement between the members about the manner in which he was appointed. But as noted, the petitioner was free to challenge the appointments and obtain relief by ordinary civil proceedings. Neither were there any specific allegations of any culpable behavior involving any breach of duty, or mismanagement or misconduct. In any event, Mr. Moss strongly repudiated the allegations in his first affidavit:

> "19. I say respectfully regarding the Hanna Affidavit, without prejudice to the Company's application to set it aside for reasons stated in the Motion or derogating from the Company's and my right to rely on its contents, that allegations in paragraph 13 thereof [that] I conspired with Mr. Andrea Nembri "to take improper steps to prejudice [the Petitioner's] interest in the Company" are unfounded and false, a designed and essential predicate under section 199 of the Act for appointment of provisional liquidators. I am both offended and embarrassed by the allegations, and that the Act could be so manipulated to procure such appointment, by maligning my professional reputation as counsel and attorney and personal character."

[50] Perhaps the most telling factor in assessing whether the "necessity hurdle" was met appears very clearly from the note of the hearing. The requirements under that section were never raised nor brought to the attention of the judge, and *ex facie* there is no basis on which it could be said that the section was satisfied. In all the circumstances of this case, and for further

reasons that will emerge later in this ruling, I do not accept that the evidence established that a winding-up order would likely have ensued, such as to invoke the statutory jurisdiction to appoint provisional liquidators. This hurdle was not crossed.

[51] Before leaving this matter, I would comment that counsel seemed to have approached this matter as if it were merely a perfunctory application. An *ex parte* application that might seriously affect the rights of persons in their absence, even if only on a temporary basis, should never be approached as if it were a walk in the park; *a fortiori* where it concerns an application for the appointment of provisional liquidators that might sound the death knell for a company. It is counsel's duty to specifically advert to the matters which he has a legal and factual burden to establish; it is not the duty of the judge to inquire.

Issue IV: Whether verifying affidavit compliant with Act and Rules (Ord. 3)

[52] At a conceptual level, Mr. Glinton QC contended that there cannot be a *prima facie* case made out for a winding up order in the instant case, as this general requirement presupposes that there is a competent or valid petition, and in the absence of a verifying affidavit, there is no competent petition on which a *prima facie* case can be founded.

[53] Ord. 3 of the CLR provides as follows:

> **Verification of petition (O.3, 3)**
>
> "3. (1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.
> (2) A creditor's petition in respect of debts due to two or more different creditors must be separately verified by or on behalf of each creditor.
> (3) The verifying affidavit shall be sworn by—
> (a) the petitioner; or
> (b) a director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition."

[54] The applicants trained heavy fire on the alleged deficiencies in the verifying affidavit, mainly on the grounds that the swearing of the affidavit predated the presentation of the petition and therefore it could not qualify as a verifying affidavit. It was therefore said to be fundamentally defective. Support for this proposition was placed on the textual Rules and a line of old English authorities, to which I shall come presently. To the contrary, the petitioner argued that the fact that the affidavit was sworn before the petition was presented was not fatal to the petition or the application, relying in this regard on a corpus of more recent case law from other Commonwealth jurisdictions, as well as a construction of the CLR 2012.

[55] The papers reveal that the verifying affidavit was sworn and dated the *20 November 2019* before a notary public in Lugano, Switzerland, in respect of a petition that was then only in draft form and which bore the generic heading "*2019/COM/Com*…". It contained the material averment: "*The statements in the Petition now shown to me and marked "Exhibit G.N.1" are*

true to the best of my knowledge, information and belief". Mr. Glinton QC also initially objected to the affidavit on the ground that it lacked an apostille under the 1961 Hague Convention, but it turned out that in fact the original did include an apostille, which had unfortunately not been reproduced in several of the copies. The petition that was the basis for the grant of the JPL order was dated the 14 August 2020, and only filed 21 August 2020, as action "*2020/COM/Com/00038*". The verifying affidavit was also filed on 21 August 2020 in support of the petition, and the cause number added to it.

[56] Mr. Glinton QC's core argument, as indicated in oral submissions, was this:

> "It is virtually impossible for any affiant to swear to a fact which is not yet in existence. On the 22 November 2019, when this affidavit purports to have been sworn by Mr. Nembri in Lugano Switzerland, there was no such proceedings as proceedings 00038."

[57] In support of this proposition, he relied on a line of English and Commonwealth authorities, the first of which was the case of *Western Benefit Building Society* [1864] 368 ER pg. 409, a decision of Master of the Rolls, Sir John Romilly. The headnote of that short report reads:

> "An affidavit in support of a petition to wind up sworn before the presentation of the petition is ineffectual, and it must be resworn before an order can be made on the petition."

The Master of the Rolls added:

> "This affidavit amounts to nothing; it must be resworn and the order dated subsequently."

[58] The next case was the judgment of Tadgell J. in the Australian case of *Re Rolex Transport Pty. Ltd.* (1985) 3 ACLC 332, from the Supreme Court of Victoria. That case concerned a petition to wind up Rolex Transport Pty. Ltd., on the grounds that the company was unable to pay its debts and that it was just and equitable that it be wound up. The affidavit verifying the petition was sworn by the petitioning creditor before the petition was presented, and the question arose as to whether the affidavit could be relied on at the hearing of the petition without it being resworn. The court eventually made the winding up order, but only subject to the verifying affidavit being resworn.

[59] Before looking at any of the reasoning, it is useful to say something about the company rules which his Lordship was construing in that context. There, the relevant provision was s. 20 of the Companies Rules 1962, which provided as follows:

> "(1) Every petition shall set out in the prayer thereof the nature of the relief sought and shall contain all the allegations necessary in support thereof and shall be verified by affidavit.
> (2) The affidavit verifying the petition shall be made by the petitioner or by one of the petitioners, if more than one, or where the petition is presented by a corporation by some director secretary or other principal officer thereof, and shall be filed immediately after the petition has been presented, and such affidavit shall be sufficient *prima facie* evidence of the statements in the petition."

[60] The predecessor to this Rule was r. 19 of the 1944 Companies Rules, which provided that the affidavit should be "*sworn after and filed within four days after the petition is presented and such affidavit shall be sufficient prima facie evidence of the statements in the petition*." Commenting on the earlier rule, the Judge said:

> "That rule was copied from the equivalent English rule which, so far as I am aware, is still in that form. That is to say, under the 1944 Rules and the English Rules it was or is contemplated that a verifying affidavit should be sworn in proceedings to which it relates. This accorded with the Chancery practice, that an affidavit which was sworn before the commencement of a proceeding could not in general be used in that proceeding notwithstanding that it was filed in it, at all events, without being re-sworn."

[61] I now set out a few passages from the Ruling [pg. 334]:

> "The question now arising seems to be whether under the 1962 Rules the procedure is to be taken as having been altered from the former practice. Speaking for myself, I think it is seriously to be doubted that the 1962 Rules intended any such alteration of practice. I would accept that over the years since the 1962 Rules came into operation many winding up orders have probably been made upon petitions verified only by affidavits sworn before the petitions were presented. From what I can gather, however, from those judges to whom I have spoken about it this has probably occurred because the matter has not been adverted to and not because of any consciously or deliberately adopted practice. […]
>
> The practice of making a winding up order without any evidence sworn in the proceedings upon which to found the order appears to me to be a most undesirable one. I think it is a practice which is calculated sooner or later to produce an injustice. After all, if an affidavit can be relied on as of right if it has been sworn before the presentation of the petition, it could theoretically be sworn at any time, perhaps a great distance in time, before the presentation of a petition. It might therefore become out of date by the time the petition is presented, let alone be heard.
>
> I think that the Court ought to be vigilant in matters of evidence to ensure that procedures are adopted whereby an injustice is not threatened in litigation of this kind."

[62] In support of the argument that a verifying affidavit filed in advance of the petition was not bad, the petitioner referred the court to a pair of cases from the Malaysian High Court, in which the court was concerned to examine whether affidavits filed in advance of the petition in bankruptcy petitions met the requirements of the Bankruptcy Act and Bankruptcy Rules. Quite properly, and to their credit, counsel for the petitioner laid over both authorities to the court, although they were relying on only one of them, since the judges in the cases came to opposite conclusions.

[63] In *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MJL 32, decided 14 January 1991, Joseph, Jr. J held that an affidavit verifying a creditor's petition filed on 9 November 1989 where the petition was dated 10 November 1989 did not comply with s. 6 of the Bankruptcy Act 1967 and r. 106 of the Bankruptcy Rules, which required that the creditor's petition be verified by an affidavit as to the truth of the contents thereof. The learned judge stated [33]:

> "It is trite law that an affidavit must be made in some cause or matter pending in court. An affidavit cannot support an 'unborn' petition as a petition comes to life only when presented.
> In *The Western Benefit Building Society*, Sir John Romilly MR decided that an affidavit sworn before the presentation of the petition 'amounts to nothing'. That case was followed in the local case of *Chin Yoon Timber Co v Overseas Lumber Bhd* where Syed Othaman J (as he then was) struck out a winding-petition because the affidavit was sworn before the presentation of the petition.
> I therefore agree with the submissions of counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the court conferred by s. 131 of the Bankruptcy Act. Nor for that matter, is it open to me to extend the time for filing as there is no valid petition before the Court. As was well put in the case of *Chin Yoon Timber* at p. 174: "...The question of extension of or abridgement to which this rule relates does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls said in the *Re Western Benefit Building Society*, you cannot verify to an un unborn petition; a petition only comes to life when presented…".

[64] In *Re Modh Sharif bin Sapie, ex pa Malayan Banking Bhd* [1992] 2 MLJ 102, the court was presented with a similar situation, where the bankruptcy petition was signed 5 March 1991 and the affidavit verifying it affirmed that same day. The petition and the affidavit were filed on 13 March 1991. Objections to the validity of the petition on the grounds that the affidavit of the truth of the contents of the petition was affirmed before the petition was presented were rejected by VC George J, who diverged from the decision in *Sobri bin Arshad*. In coming to his conclusion, His Lordship placed great significance on the fact that the statutory provisions did not prescribe a timeline for swearing the affidavit [104, 106]

> "It is s. 6(1) of the Act that provides that a creditor's petition shall be verified by affidavit. This provision is repeated in r. 106(1) of the Bankruptcy Rules (1969) ('the rules'). The equipollent r. 24 in the Companies (Winding-up) Rules 1972 provides that the affidavit verifying the petition for the winding up of a company 'shall be sworn after and filed within four days after the petition is presented'. However, neither the said s. 6(1) of the Act or the said r. 106(1) of the rules (nor any other provision in the said Act and in the said rules thereunder) prescribes when the affidavit verifying the bankruptcy petition is to be sworn and filed." […]
>
> Now apart from *Sobri bin Arshad* each of the judgments that has been referred to herein has been in respect of the swearing and/or filing of the affidavit verifying a petition to wind up a company—the complaint in each case having been that there had been a contravention or non-adherence to r 2 of the Companies (Winding-up) Rules 1972 which, as has been seen, expressly provides a time frame for the affidavit to be sworn and filed. *Sobri bin Arshad* and the instant case are bankruptcy proceedings. As has been seen, in bankruptcy proceedings no time frame is prescribed for the swearing and filing of the verifying affidavit."

[65] Similarly, the petitioner urges that the new rule in the CLR 2012, as expressed at O. 3, r. 3, does not include a specific timeline as was contained at s. 21 of the Companies (Winding-Up) Rules 1975, which the CLR replaced. That rule was the equivalent of the old UK rule on the

point, and required the affidavit to be "*sworn after and filed within four days after the petition is presented*."

[66] It is true that the new rules omit any specific reference to a timeline for swearing and filing the verifying affidavit. But with great respect, I do not share the view that any failure to specify a period for swearing and filing the affidavit was intended to do away with the ancient and established rule and practice that a verifying affidavit ought to come after the originating process or other document which it seeks to verify. In fact, Ord. 1, r. 4 of the CLR provides that "*every affidavit or other document filed in the court office shall comply with the requirement of RSC Orders 41 and 62*". Ord. 41, r. 1 speaks to the form of an affidavit and provides that: "…*every affidavit sworn in a cause or matter must be entitled in that cause or matter*."

[67] As pointed out, the purported verifying affidavit was sworn in November of 2019, and it may have been intended to verify a petition which the petitioner was about to present. But in fact, no petition had been presented, and there was no cause of action in which the affidavit could have been sworn. As explained, the affidavit is entitled "*2019/COM/COM...*" and the action number 00038 was obviously interpolated when the petition was presented and filed on 21 August 2020, that being the action number assigned to the petition ("2020/COM/Com/00038".

[68] Apart from any legal principle, it occurs to me that it is a simple matter of logic that a verifying or supporting affidavit must necessarily be sworn subsequent to (or at the very least contemporaneously with) the document which it is intended to verify or support. This must be so as a matter of a commonsense linguistic construction; an affidavit can only *verify* or support an application, document or originating process that is already in existence. The 2019 affidavit could not have purported to verify the petition presented in 2020.

[69] During the course of the hearing, I enquired of counsel whether they had come across any cases from the region dealing with the point, and they indicated they had not. However, in my later researches, I came across the decision of the Cayman Islands Court of Appeal in *HSH Cayman I GP Limited, HSH Cayman II GP Limited, HSH Cayman V GP Limited and HSH Coinvest (Cayman) GP Limited v. ABN Amro Bank N.V. London Branch* [2010] (1) CILR 114. While not directly dealing with the same factual situation, I think the ruling is instructive and supportive of the view I have taken of the verifying affidavit in this case. Not only does the Ruling emanate from a distinguished appellate panel (Chadwick, P., Forte and Mottley, JJ. A.), but it appears that the CLR 2012 hews closely to the corresponding Caymanian Rules.

[70] In that case, the Court of Appeal set-aside on appeal winding up orders made upon a petition which it held failed to comply with the Companies Winding-Up Rules 2008 in several material respects, and stayed the petitions pending any application to the Grand Court to amend or strike them out. Among the complaints which the Court of Appeal upheld were that: (i) the petitions had not been separately verified on behalf of each lender as required (O.3, r.3 (2)); the verifying affidavits had not been sworn by some person with "personal knowledge" of the matters giving rise to the petitions (O. 3, r.3(3)(b)), but instead by an agent acting on behalf of the petitioner who had verified it based on information supplied by others; (3) that the nominated liquidators

had sworn affidavits of their qualifications and their fitness to act not in the petition that was being challenged, as they had been sworn in advance of that petition and presumably in another petition (O. 3, r. 4(1)); and (iv) that the affidavits were not served "together with" the petitions and not immediately after the petitions had been presented (O.3, r. 5(2)).

[71] Although the general approach of the Court of Appeal in upholding mandatory compliance with the Rules is important, the case is cited in particular with respect to the non-compliance of the liquidators' affidavits. The equivalent Caymanian Order is virtually indistinguishable from O. 3, r. 4(1) (and similarly numbered) which states that "*Every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator…".* It then requires to be stated the liquidator's qualifications and willingness to act.

[72] The liquidators appointed by the judge in the winding up order, which was made on the 13 November 2009, were a Mr. David Walker and Mr. Ian Stokoe of Pricewaterhouse Coopers. Apparently, Mr. Walker swore an affidavit on 1 September 2009 (the petition was not presented until 8 September 2009), which was made "*in connection with the petition of the Royal Bank of Scotland plc for the appointment of myself …as official liquidators to HSH Cayman I GP Ltd*…". After he had sworn his affidavit, it appears the cause number of the petition in the case was added to it. Similarly, Mr. Stokoe swore an affidavit on 4 September 2009, "*in connection with the petition of ABN MARO Bank liquidator to HSH Cayman I GP Ltd*.", and again the cause number of the petition was subsequently added. This is what the Court of Appeal said about the issue:

> "In that affidavit [the Stokoe affidavit] he qualified himself, and expressed his willingness to act, as required by O.3, r. 4(1), but, as in the case of Mr. Walker, he did so, not in respect of the petition in the present case, but in respect of some other petition which (at the time) he thought that ABN AMRO Bank N.Y. Long Branch had presented, or was about to present in which he had been (or would be) nominated as a joint liquidator. And, as in the case of Mr. Walker, after Mr. Stokoe had sworn his affidavit, the cause number of the petition in the present case was added to it. The complaint made on behalf of the company is that Mr. Stokoe's affidavit of September 4th , 2009, does not purport to be—and could not be—an affidavit supporting the petition for the purposes of O. 3, r. 4 (1). There is obvious force in that complaint as well."

[73] Justifying its rationale for upholding strict compliance with the rules, this is what the Court said in relation to the rule regarding service of the petition, but which has significance for observance of the rules generally [45]:

> "It is important to keep in mind the purpose of the rule which requires service of the verifying affidavit, with the petition, immediately after the petition has been presented (O.3, r. 5 of the Winding Up Rules). It is not an irrelevant formality. The presentation of a petition is capable of having an immediate and serious effect on the company and those with whom it does business. The purpose of the rule is to give the company the earliest opportunity to satisfy itself whether or not there is a proper foundation for the petition, so that it can (if so advised) apply to strike it out or to stay proceedings."

[74] Importantly, the Court noted that there was no default provision under the Rules that empowered the court to grant relief from the consequences of failure to comply with the provisions and that recourse could not be made to the general procedural provisions in the Grand Court Rules which provided for non-compliance to be treated as an irregularity capable of amelioration by the court (Ord. 2, r. 1) [see Ord. 2, r. 1 of the R.S.C.]. This was because the companies Winding Up Rules constituted a self-contained scheme for the winding up of companies. The Court also held that while recourse could be made to the inherent jurisdiction of the court to supplement the rules, the inherent discretion could not be used to adopt an approach and outcome that would be different from the application of the rules: *Raja v. Van Hoogstraten* (No. 9) EWCA Civ. 1444.

Whether petition can stand alone

[75] As a fallback position, the petitioner also contended that the petition and verifying affidavit are distinct documents, and therefore the validity of the petition does not depend on the verifying affidavit. Several authorities were cited in support of this proposition: *Walker v Fletcher* [1842] 115 ER 574; *Saint Benedict's Land Trust Limited v London Borough of Camdem* [2017] EWHC 3370 (Ch.); *Re Martmel* (No. 17) Pty Ltd. 8 ACSR 125; and *In the Matter of China Emperor and ors. v Paulsen* [2008] 5 BHS No. 73.

[76] In *In re St. Benedicts Land Trust Limited*, the issue was raised as to whether a petition which was verified by an unsigned witness statement was a nullity in accordance with rule 7.6 of the UK Insolvency Rules 2016. After considering the requirements of the rules, which provided for verification either by a statement of truth endorsed upon the petition or in a separate witness statement, the court concluded that based on a construction of the rules a petition will not be rendered a nullity by the absence of verification by a separate witness statement at the time at which the petition is filed. The court said:

> "25. …The obvious purpose of verification by a statement of truth of the matters set out in a petition is to provide the court at the hearing of the petition with the evidence upon which to decide whether or not there are grounds to make the winding up order. <u>But until that time, unless an application is made to strike out or prevent prosecution, there is no obvious occasion upon which the court would have to consider the evidence in support of the petition.</u> In saying that, I am in no way suggesting that verification is not a most important requirement of the Insolvency Rules, and I find it difficult to conceive of circumstances in which the court would think it appropriate to make a winding up order if the petition had not been verified by a statement of truth. But it does not seem to me that the absence of verification makes the petition invalid *ab initio*." [Emphasis supplied.]

In coming to this conclusion, the judge referred to and applied the *Re The Western Benefit Building Society* case (which has been referred to), in which Romilly MR allowed the petition to stand subject to the anterior affidavit being resworn.

[77] In *In the Matter of China Emperor*, the affidavits and petition were all filed on the same day (8 October 1999). The affidavits were clearly in violation of rule 21 of the Companies Winding-Up Rules 1975, which then required a verifying affidavit to be filed within four days

after the presentation of the petition. However, the judge did not order the affidavit to be resworn, but exercised his discretion to extend the time period pursuant to s. 99 of the 1975 Rules, which provided for the court to extend time for doing anything under the Act on such terms as it deemed fit, and adjusted the time so as to allow the affidavit verifying the petition to be deemed properly filed. The Court of Appeal refrained from commenting on whether the judge had properly exercised his discretion, as the point was not challenged on appeal, so the issue was not determined. But it is notable that the CLR 2012 does not contain an equivalent section to s. 99 of the old rules for extension of time. Interestingly, in the *HSH Cayman I GP Limited* case, the Caymanian Court of Appeal was of the opinion that the defects in the liquidators' affidavits could not be remedied by retrospective extension of time, but only through directions for amendment, which had not been sought.

[78] The case of *Walker and Fletcher* is exemplary of the line of cases decided under UK statutory provisions which stipulated that the supporting affidavit should be "annexed to the bill". This phrase was construed by the courts as requiring that the affidavit be sworn a day or two before the bill was filed, since the only practical way the affidavit could be filed with the bill was to have it sworn beforehand. *Re Martmel* is in a similar vein. There, the Supreme Court of Queensland held that Rule 47(1) of the Companies (Queensland) Rules 1987, which required that "…*every application shall be supported by an affidavit which verifies the application and is filed with the application*" did not disqualify an affidavit sworn 11 days prior to the filing of the application to wind up. There the court said, after an extensive review of the common law authorities on the point [132]:

> "In the result it is clear that the different practice with respect to affidavits sworn in support of an application to wind up depends upon the terms of the rules themselves. It seems the old pre-1862 practice of permitting the affidavit verifying the petition for winding up to be sworn prior to the date of presenting the bill or petition where the rule required that the affidavit be annexed to the bill is apposite to r. 47(2). The practical difficulties of any other course are obvious and referred to in the various judgments to which I have referred. Where, however, it is clear that the rule requires the affidavit to be sworn or filed after the filing of the application, this practice will not prevail except in special circumstances."

[79] It is clear therefore, that the decision in *Martmel* was based on the pre-1862 line of cases, and the judge in his summing up also emphasized that the practice to be adopted with respect to the swearing of the verifying affidavit was based on the construction of the applicable rules. There is no universal principle that can be extrapolated from the cases.

[80] I accept, as a general principle, that a petition commencing an action is not rendered void *ab initio* because of any defect in the verifying affidavit. Order 9, r. 3 (which applies by virtue of Ord. 3, r.1 of the CLR) provides that a petition is presented by leaving (filing) it at the Registry. But this may be a distinction without any real significance. The verifying affidavit is *prima facie* evidence of the statements in the petition; without the verifying affidavit, the petition is effete. In the *St. Benedict's Land* case, the judge noted that the purpose of the verifying affidavit was to provide the court with the evidence of whether there were grounds to make the winding-up order, to which I might add, or whether a winding-up order is likely to be made, in the case of an application for appointment of provisional liquidators.

[81] The thrust of the applicants' case is that there was no evidence supporting the petition, and therefore no order appointing provisional liquidators could be founded on it. I agree. The verifying affidavit was sworn nearly nine months before the presentation of the petition, intituled in a 2019 intended action, and could not have verified the truth of a petition never presented until August of 2020. Interpolating the cause number of the 2020 petition into the purported verifying affidavit does not cure this defect. I would hold that the affidavit is ineffectual. In fact, to some extent, and despite their arguments to the contrary, the petitioners recognized this conundrum, and intimated during the hearing that they were inclined to pursue a course of action to remedy the position. This, however, was strenuously opposed by the applicants on the ground that one could not retrospectively correct the state of affairs with respect to evidence supporting an application and order that had already been made. However, as the petition itself has not yet been heard, I will say no more about this.

Issue V: Whether exceptional circumstances to make *ex parte* order

[82] In this regard, Mr. Glinton QC submits that based on a construction of O. 4, the basal position is that an application by a creditor, contributory or regulator should be made on notice (at least 4 days) to the company. The only departure from the basic rule is where there are exceptional circumstances which justifies an *ex parte* application. The rule, so far as relevant, is set out below:

> **Application by summons (O. 4, r. 1)**
>
> "1. (1) An application by a creditor, contributory or the regulator for the appointment of a provisional liquidator on one or more of the grounds contained in section 199(2) of the Act shall be made by summons on notice to the company.
>
> 2. The company shall be entitled to at least 4 clear days' notice of the application unless the court is satisfied that there is some exceptional circumstance which justifies the application being made ex parte." [Emphasis supplied.]

[83] He contended that the petitioner had not disclosed anything in the petition justifying moving the court *ex parte*, and neither did the Hanna affidavit, which in any event was being challenged on procedural grounds. Mr. Glinton QC also laid great stress on the short note of the hearing produced by counsel for the petitioner, in particular pointing out that the note failed to evince that any exceptional circumstances were established or drawn to the attention of the judge.

[84] I was not assisted by counsel with any authorities on the point of what constitutes *exceptional circumstances* in the context of a without-notice application for the appointment of provisional liquidators. Mr. Hanna in his written submissions argued that the applicants' reference by analogy to the principles on *ex parte* injunctions were not apposite the principles to be exercised by a judge hearing an *ex parte* application under O. 4. As was stated in his written submissions,

> "it is respectfully submitted that the rules which govern the *ex parte* application to appoint a provisional liquidator differ significantly than those which apply to an *ex parte*

injunction. In this regard, the rule speaks for itself as it sets the bar for the hearing of an application *ex parte* as being within the discretion of this Honourable Court."

[85] However, no authority was cited for this proposition. Mr. Hanna is right that the provision under Ord. 4 requires the judge to be satisfied, but in my judgment this is hardly different from the test to be satisfied for a judge to entertain an application for an *ex parte* injunction: the judge always has to be satisfied that there are exceptional circumstances which justify the application being heard without notice to the other party. As a discretionary power, it must be exercised judicially by reference to objective considerations.

[86] In this regard, I was able to derive some assistance from the UK Court of Appeal case of *Revenue and Customs Comrs v Rochdale Drinks Distributors Ltd.* [2001] EWCA Civ. 1116, and the UK High Court case of *Revenue and Commissioners v Winnington Networks Ltd. and another* [2014] EWHC 1259.

[87] In *Rochdale Drinks*, which was an appeal against the discharge of an *ex p*arte order appointing provisional liquidators, Lewison LJ said:

> "111. …Because the appointment of a provisional liquidator is so intrusive, an application for such an appointment made without notice needs to be justified by exceptional circumstances. A judge should not entertain an application of which no notice has been given unless either giving notice would enable the Defendant to take steps to defeat the purpose of the remedy (as in the case of a freezing or search and seizure order) or there has been literally no time to give notice before the remedy is required to prevent the threatened wrongful act. Any notice is better than none: see *National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd.* [2009] UKPC, [2009] 1 WLR 1405, para. 13, [2009] Bus LR 1110. […] Although, as Rimer LJ has explained, HRMC had been investigating RDD for over three years before the application to Peter Smith J, in all his 126 pages Mr. Mann gave no evidence at all to justify the making of the application without notice. I regard this as a serious omission before Peter Smith J; although by the time of the contested hearing before Floyd J it had lost its significance." [Emphasis supplied.]

[88] The *Winnington Networks Ltd.* case concerned an application by HRMC as creditors of the companies in respect of VAT assessments running into multi-millions of pounds sterling, based on monies generated by fraudulent and fictitious trading. Norris J. stated the principles applicable to applications made without notice for the appointment of provisional liquidators, insofar as relevant, as follows:

> "[3] The principles upon which I will proceed in dealing with these applications are as follows. First, that the appointment of a provisional liquidator is a most serious step and (as the Court of Appeal has indicated), should be the subject of most anxious consideration.
>
> [4] Secondly, the application is without notice: in those circumstances it needs to be justified by exceptional circumstances. A judge should not entertain an application of which no notice has been given unless either giving notice would enable the Defendant to take steps to defeat the purpose of the remedy, or there has been literally no time to give notice. The applications are made without notice in the instant case on the first of those grounds.

> [5] Thirdly, this is not a trial of the petition itself and accordingly, one is proceeding upon a provisional and interim basis.
>
> [6] Fourthly it is for the petitioner to show that the petitioner is likely to obtain a winding up order on the hearing of the petition. This involves demonstrating that the petitioner is entitled to present the petition and that a material part of the petition debt is not capable of serious dispute.
>
> [7] Fifthly, on a without notice application, for a provisional liquidator, that latter assessment falls to be made without the company having had the chance to demonstrate that it does not have a good arguable case in support of a dispute to as to the debt. The court must therefore be assured that it has a fair picture of the circumstances in which the petition is presented and in that regard, that the petitioner has given full and frank disclosure. …" [Emphasis supplied].

[89] Norris J. held that the application in that case was properly made without notice because of the lack of integrity of the management of the companies (e.g., the allegations of fraudulent trading), the need to preserve digital records (which were easily capable of deletion) on computers, mobile phone and other devices on which it was held, and the ease with which funds could be moved to the offshore accounts (in the Seychelles), which the companies used to enable funds to be moved "*freely and secretly*" as part of their fictitious trading. However, this conclusion was arrived at based on copious evidence presented by HMRC in their application following their investigation of the suspected fraud, which included transcribed recorded conversations. In respect of the banking arrangements, the judge stated: "*HMRC pray in aid these banking arrangements as supporting the inference otherwise well-supported by the documents and expressly confirmed in the course of the recorded conversations that what is taking place is fictitious trading*."

[90] It appears that, to the extent any exceptional circumstances were being relied on in the instant case, they consisted of the allegations relating to what was said to be the recent conduct of Mr. Moss to "*take control of the account*", and the concern that if he took steps to access the account he could do the same (and may have already done the same) with respect to the assets of the company. This, it was said, would cause irreparable harm to the petitioner and the company. The backdrop to all of this was an allegation of conspiracy between Mr. Moss and Mr. A. Nembri to prejudice the petitioner's interest.

[91] If a petitioner is able to show on credible evidence that a company's cash or other assets are likely to be dissipated or disposed of, or even records destroyed, if notice were given before liquidators can take control of the assets or records, no one would query that those circumstances would constitute exceptional grounds for making an *ex parte* application for appointment of provisional liquidators, as illustrated in the *Winnington Networks Ltd.* case.

[92] However, as already pointed out in respect of the "necessity hurdle", there was very little by way of evidence before the court to substantiate any of the general allegations. Secondly, the petitioner's counsel had sent a letter since October 2018 indicating that Mr. Moss should "*cease and desist*" and it was well open to them to have applied for injunctive or other relief to prevent him acting on behalf of the company if the petitioner had concerns about the company's assets. Thirdly, no explanation was offered as to why, if the petitioner became aware of Mr. Moss's communication with the bank from early May 2020, that it was not until the 21 August 2020 that the petition was presented and an *ex parte* application made nearly three months later for the appointment of provisional liquidators. There is an attempt to explain away this delay by saying

that Mr. G. Nembri had fallen ill, but this rings rather hollow since the petition had been drafted and the "verifying" affidavit sworn from November 2019.

[93] Regrettably, there were no reasons given for the Judge's decision and order. Counsel for the petitioner indicated that based on the hearing note (which of course was provided by counsel for the petitioner) the judge was "*more than satisfied that there was an exceptional reason why the application had to be heard ex parte*." There are a few references in the note to the judge reportedly indicating that after reading the documents it was accepted that the matter was urgent and had to be dealt with urgently.

[94] In all the circumstances, I would agree with submissions by counsel for the applicants that there were no exceptional circumstances to justify hearing the application on an *ex parte* basis, and if there were any, they were *not* disclosed in the petitioner's evidence.

Issue VI: Whether full and frank disclosure

[95] Under this head, Mr. Glinton QC alleges that there were several material matters of fact and law that the petitioners failed to disclose to the court, which was their duty on an *ex parte* application. He referred to *Art Corporation v Schupann* [1994] *The Times* (21 January) where, on an application for a *Mareva* injunction, Sir Peter Pain said that it was vital for counsel to do all he could to direct the court's attention to relevant defence affidavits. The judge referred to counsel putting the possible defence for the defendant in erroneous terms as "*a gross error*." Counsel also referred to the case of *Copeland v Smith* [2001] 1 WLR 1371 [1372] where Buxton LJ indicated that counsel had failed in their duty to the court on an *ex parte* application by not drawing to his attention the existence of an authority which was relevant for the court's consideration.

[96] These cases do no more than recite the salutary principles, perhaps most memorably stated by Ralph Gibson L.J. in *Brinks Mat Ltd. v Elcombe and ors.* [1988] WLR 1350 [1356], that there is a duty on an applicant on an *ex parte* application to make "*a full and fair disclosure of all material facts*"—those facts which it is material for the judge to know in dealing with the application. This extends to legal and procedural aspects of the case (see *Tugusheve v Orlov and others* (No.2) [2019] EWHC 2031 (Comm)).

[97] In this regard, the applicants identify several examples of alleged failures by the applicants, which include: (i) the fact that counsel from the firm representing the petitioner swore the affidavit in support of the application which they knew was challengeable; (ii) the procedural non-compliance with the Act and CLR (in particular the status of the verifying affidavit); and (iii) certain facts concerning the petitioner's business dealings which were material for the judge to know.

[98] An example of the latter is indicated at para. 17 of the first Moss affidavit:

> "17. From what I know is true of the state of the Company's business affairs, which the Petitioner's brother, Mr. Andrea Nembri, also confirms is true (despite the facts averred at paragraph 6 of the Petition) the Petitioner has not been fulsome in his Petition nor in

> instructions for the making of the Hanna affidavit; in that, a material fact as to the Company's principal asset from ownership of a business called Nembri Industrie Tessili srt. As it happens (which has not [been] disclosed to the court) a court arbitrator in Italy on 8 July 2018 awarded US$1.4 million against the Petitioner that he stripped the business of, that is unpaid and stands at US$1.9 million. It seems the Petitioner benefits if the Company is ordered wound up."

[99] At paragraph 21 of that affidavit, Mr. Moss also indicated that he was concerned based on information given to him by Mr. A. Nembri, that one of the joint provisional liquidators, Mr. Kikivarakis, had been in contact with the liquidator of that company (Mr. Baiguera) in Italy to participate in a partnership meeting called for 24 September 2020, in which it was proposed that the "*expected forgiveness of the Petitioner's debt to the company will be voted on*."

[100] The joint provisional liquidators responded to this by affidavit, confirming that they were in contact with the Italian liquidator of the company and were made aware of the 24 September 2020 meeting, although their view was that "*the meeting should not be proceeded with*" and this they said was indicated to the liquidator. However, they state further that they did not attend the meeting, nor any other scheduled meetings, and that they were informed that the meeting was cancelled due to the non-attendance of the JPLs. They did, however, take steps to "*protect the assets of the Company pending the hearing of the petition*" and to preserve the bank account. Considering the neutral role taken by the provisional liquidators, which is only to be expected, I will say no more about this. I will note in passing, however, that the beneficiary of an *ex parte* order continues to be under a duty to make disclosure to the court of material facts that come to his attention following the grant of the order and before the *inter partes* hearing.

[101] Mr. Hanna rejects the allegation that there were any failures by the petitioner to give full and frank disclosure. As stated in his written submissions "…*the Hanna Affidavit sets out all the material matters which related to the application and which were relevant to the Court's consideration as to whether or not the application should be granted*". However, as made clear by *Brinks Mat*, "*materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers*" [pg. 1356].

[102] In the circumstances of this case, I have little difficulty in coming to the conclusion that the petitioner fell far short of the duty to make full and frank disclosure to the court. Firstly, as indicated, the affidavit did not advert to the factual issues mentioned by the applicants, and functionally it could not could not have dealt with any legal or procedural issues which were material to the application. The note of the hearing does not record that counsel made any submissions on legal or procedural issues to the court, so this duty could not have been discharged.

[103] I remind myself that a judge faced with failure of an applicant to provide full and frank disclosure does not automatically have to set aside the order obtained as a result. As pointed out in *Brinks Mat*, "*Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the facts to the issues which were to be decided by the judge on the application*." In my judgment, the non-

disclosure of matters such as the discrepancy with the verifying affidavit and the obvious issues with the affidavit in support of the application were central to the issues which the judge had to consider. For these reasons alone, I think the applicants are entitled *ex debito justitiae* to have the *ex parte* order set aside.

Issue VII: Whether Hanna affidavit should be struck out

[104] Mr. Glinton QC also directed substantive arguments to striking out the Hanna affidavit, on the grounds that it is inadmissible in that it fails to comply with the requirements of Ord. 41, r. 5(1) and (2) and that as a witness statement sworn by counsel of the firm representing the petitioner, it is an abuse of process and tends to embarrass and prejudice the proceedings (Ord. 41, r. 6). The provisions of those rules are almost too-well known to require repeating, but Ord. 41, r. 5 requires that an affidavit "*may only contain such facts as the deponent is able of his own knowledge to prove*", although an affidavit for use in interlocutory proceedings may contain statements on information and belief with sources and grounds identified. Rule 6 permits the court to strike out of an affidavit any matter which is "*scandalous, irrelevant or otherwise oppressive*."

[105] In this regard, the applicants contend that Mr. Hanna swears the affidavit, not in the capacity of agent for the petitioner, but as

> "**the Bahamian counsel for the Petitioner**" for whom he is making the Affidavit in support of the Petitioner's application "**to protect his interest in** […] **the Company pending the determination of the Winding Up Petition**"; and, regarding the sources of information, that they derive from "(ii) **review of the instructions provided by the Petitioner**; and (iii) **from information provided to me by the attorneys of my Firm with direct involvement in the action**…".

[106] It is further contended that the several averments prefaced with "*I am instructed by the petitioner*", or like phrases, constitute "*in-house witnessing of evidence*", a practice which is deprecated in the cases (see *Belgravia v CIBC Trust Company (Bahamas) Ltd*. [2005/CLE/gen/00785], unrept., per Adderley J.). Further, it is said that the execution of the affidavit for use in these proceedings constitutes the deponent a witness in the proceedings, who, being an attorney of the firm representing the Petitioner, is legally incompetent to act in such capacities simultaneously.

[107] In support of the latter proposition, I was referred to several cases from this jurisdiction and the Caribbean, and *Practice Direction No. 1 of 1995*, issued by Gonsalves-Sabola, CJ dated 20 March 1995. These include the *Belgravia* decision (*supra*), and the decisions of the West Indian Associated States Court of Appeal in *Murray v Jacobs* [1966-1967] 10 WIR 490, and *Casimir v Shillingford and Pinard* [1966-1967] 10 WIR 269.

[108] In *Belgravia*, Adderley J. held that it was improper for counsel making the affidavit to be one and the same as counsel from the firm acting for the party, stating as follows:

> "…[T]he plaintiffs objected to the affidavits of fact sworn on behalf of the defendant by Sophia Rolle as Associate at the law firm Lennox Paton. Mr. Simms expressed the view that the rule relates to the case in which an individual attorney acting in the case, not another member of his firm, swears the affidavit, but no authority was given to support this view. In the absence of authority, it seems to me that unless there is a demonstrated firewall between attorneys in a firm it must be bad practice for any attorney in the firm to swear affidavits containing material facts on behalf of a client who, as in this case, where the client has officers available to swear affidavits. Such practice flies in the face of the practice Direction No. 1 issued by Gonsalves-Sabola, CJ dated 20 March 1995 and various authorities dealing with the undesirability of such a practice on the principle that an attorney should not be both counsel and witness in the same case because of the embarrassment it might cause the court. It seems to me that depending on the circumstances the sanction should be that the offending affidavit not be admitted, and that there be a requirement that it be re-sworn by the proper person, and that costs thrown away occasioned by the re-swearing be borne by the attorney. I have not taken that action in this case but counsel should take note."

[109] Then, in *Murray v Jacobs*, Lewis CJ, elaborated on the earlier decision in *Casimir*, which denounced the practice of attorneys swearing affidavits for use in proceedings in which the attorneys are also appearing as counsel, as follows:

> "The Court has intimated that this unfortunate practice which has grown up, of members of the Bar swearing affidavits as to facts in causes before the court, and then appearing as counsel in the same cause, is one that should be stopped. The reason is, that where the acceptability or otherwise of an affidavit is a matter which the court has to determine, it is not proper, and is embarrassing to the court, that it should be placed in a position of having to decide whether counsel who appears before the court is not acceptable. Counsel by swearing an affidavit as to facts material to a cause makes himself a witness in the cause and ought not at the same time to appear as counsel."

[110] Mr. Glinton QC also referred to the case of *Hayward, et. al. v. Striker Trustees Limited, et. al.* [2021/CLE/gen/No. 1137], where it was said that Winder J. struck out an affidavit sworn by counsel in the firm of Harry B. Sands, Lobosky and Company, attorneys of the plaintiff Haywards appearing not by the deponent but a senior managing partner at that firm. It was indicated in written submissions that the Judge ordered the offending affidavit be struck out and removed from the Court's file and, subject to a number of paragraphs it contained being excluded, also gave leave for the affidavit to be re-sworn and filed by a certain date. However, as there does not appear to be any written reasons for that decision, I am unassisted with respect to the reasons on which the learned judge exercised his discretion.

[111] Mr. Hanna's riposte is that at common law there is no actual prohibition on counsel accepting both roles, subject to having to elect if it becomes necessary for the evidence to be tested, and the ability to erect a Chinese wall between counsel who only swears an affidavit and does not appear. Firstly, he cites the case of *Zanadu Ltd. (c.o.b. Xanadu Beach & Marina Resort) v. Bahamas Hotel Catering and Allied Workers Union* [1992] BHS J. No. 91 where Sawyer J. said (para. 15):

> "Mr. Thompson had also objected to the admissibility of the affidavit of Mr. Bethel—but, unless I am mistaken, I do not think he vigorously pursued that—on the ground that it contained hearsay which is not admissible and he referred to the Evidence Act (Ch. 52) and Order 38 of the Rules of the Supreme Court. Mr. Thompson did suggest that the plaintiff's affidavit evidence ought to have been resworn by someone who could be cross-examined thereon, rather than by counsel. Although I have always held the view that counsel are not well advised to swear affidavits as to facts (other than perhaps merely formal facts) because it may render them liable to cross-examination and may also cause them to lose sight of that objectivity which is supposed to be one of the hall-marks of the legal profession, nevertheless, it does not seem to me that under the Rules or the general law as it presently stands, I am in a position to strike out an affidavit simply because the deponent thereof is counsel and attorney. See e.g., Halsbury's Laws 4th Ed., Vol. 3, paragraph 527."

[112] There is to be found in the reference to *Halsbury* cited, the following statement of principle:

> "In several cases barristers have, at the request of their clients, given evidence as to what occurred during negotiations for the settlement of their action or as to the circumstances in which they consented to compromise. In some cases counsel have made statements from their places at the bar without being sworn; in other cases counsel have given evidence on oath, either from their places at the bar on from the witness box.
> There is no rule of law which prohibits a barrister from acting or continuing to act as counsel in a case in which he is or becomes a witness; but such a practice is in general undesirable and ought to be avoided if at all possible.

[113] Counsel then also referred to the Canadian case of *CBS Holding Co. v. Canada [2017] F.D.J. No. 347*. In that case, the Federal Canadian Court of Appeal drew a technical distinction between "*counsel*" and "*other members of the firm*" in coming to the conclusion that a lawyer who affirmed an affidavit for CBS was not "counsel" for CBS, such as to justify the judge casting doubt on the propriety of her affidavit. The Court reasoned that she appeared as witness and not advocate, and it was another member of the firm who was the advocate, drawing on the analogy of the distinction in UK practice between solicitors and barristers.

[114] On the point of admissibility of the evidence, I start by pointing out the obvious that the hearing of an application for the appointment of provisional liquidators is not the hearing of the petition. It is an interlocutory application basically to preserve the status quo pending the determination of the winding up proceedings and therefore the provision of Ord. 41, r. 5(2) permitting the use of statements of belief with the sources identified are applicable. But even this exception is subject to clear limits. In *Savings & Investment Bank Ltd. v Gasco Investments (Netherlands) B.V and Others* [1984] 1 WLR 271, Peter Gibson J. said [282]:

> "Neither counsel has been able to cite any authority which elucidates the scope of what is or is not permitted by Od. 41, r. 5(2). It is obvious from the sub-rule itself that it operates as an exception from the primary rule of evidence stated expressly in Ord. 41, r. 5(1), that a person may only give evidence as to facts, which he is able of his own knowledge to prove. Rule 5(2), by its including statements of information or belief, plainly allows the adduction of hearsay. <u>It also allows a statement of belief, that is to say, an opinion; but in</u>

> its context that belief must be that of the deponent, and such statements will have no probative value unless the sources and grounds of the information and belief are revealed. To my mind the purpose of rule 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identified by specifying sources and grounds of his information and belief. What the sub-rule allows the deponent to state that he had obtained from another must, in my judgment, be limited to what is admissible as evidence." [Emphasis supplied.]

[115] In my view, several of the concerns registered by the applicants in respect of the affidavit are well founded. For example, there are several paragraphs (6, 7, 8, 13, 16, 19, 21) where the deponent states that he "*is instructed*" or words to that effect without there being any indication of whether these are instructions from the petitioner or from counsel in the firm with carriage of the matter, in violation of sub-rule 5(2). Even more egregious, at several paragraphs, the deponent purports to speak to the views or beliefs held by the *petitioner* (not the beliefs of the deponents based on statements or information given to him) as follows:

Para. 5:	Due to the fact that he never voted for the appointment of Dominion…..the Petitioner's position is that…
Para. 15:	Due to his concerns with respect to: (i) the fact that the Company is unable to function due to gridlock ….the Petitioner determined that his only recourse is to seek to wind up the Company
Para. 21:	[…] Further, the Petitioner is of the view that unless Mr. Moss's conduct is immediately restrained….Additionally, the Petitioner is concerned that…
Para. 22:	As Mr. Moss has not been properly appointed as a Director of the Company, he should be taking no steps….In any event, the Petitioner considers it would be just and proper

[116] It should also be appreciated that several of these paragraphs (21, 22) go to the heart of the matters which the petitioner would have been required to satisfy to obtain the appointment of the provisional liquidators under s. 199(2) of the Act. In my judgment, the affidavit is violative of Ord. 41, r. 5(1) (2) in many respects, and has little probative value.

[117] With respect to counsel swearing the affidavit being from the same firm as counsel moving the application, I must admit that I find this a most troubling point. There are obviously many categories of affidavits, whether they are called technical or formal affidavits, in which it is obviously quite convenient and appropriate for counsel to swear the affidavit. In particular cases, for example matters dealing with settlement attempts during litigation, none other but counsel with carriage can swear the affidavits. But in my considered view, affidavits which seek to establish facts material to the application and which might have to be tested on cross-examination ought not to be sworn by counsel of the same firm presenting the application, and certainly not by the advocate appearing himself.

[118] I will say at once that I have never thought the distinction adverted to in the *CBS* case to be strong reasons for endorsing the "self-witnessing" practice, and in fact a careful reading of that case does not bear out that conclusion. That case concerned the filing of an affidavit in support

of a motion to enforce a tax settlement, which was sworn by a lawyer within the firm representing CBS. She refused to answer certain questions put to her during cross-examination by counsel for the Minister, citing solicitor-client privilege, and it seems that this is the context in which the controversy arose as to whether she was a proper affiant. In fact, it appears that the affidavit was largely tendered to prove the existence and terms of the tax settlement between the parties, and the court of appeal held that documents pertaining to the settlement were clearly admissible, as counsel had been involved in those settlement negotiations. What prompted the *obiter* remarks on the distinction between counsel and advocate by the appellate court was a suggestion by the Tax Judge that counsel in swearing her affidavit might have acted contrary to the rules of professional conduct, which the court described as "*an unfortunate slight*" upon the lawyer's professional reputation, considering that she clearly appeared as witness only.

[119] In any event, the danger in extending the dicta in the *CBS* case beyond its facts is illustrated by the case at bar, where, for example, Mr. Hanna specifically avers that to the extent that the information presented in the affidavit is not of his own knowledge, it is based, *inter alia*, on "*information provided to me by the attorneys of my Firm with direct involvement in this action*…". In other words, it is to be inferred that the person or persons appearing as advocates were the source for at least some of the information provided in the affidavit being deployed. So they might possibly be thrust in the invidious position of having to defend that which they advised or instructed, even if they did not swear the affidavit themselves.

[120] Another dimension to the propriety of the Hanna affidavit arising in the context of applications under the court's winding-up jurisdiction, is that the affairs of companies should always be spoken to by persons who have personal knowledge of them. It is clear, for example, with respect to the affidavit verifying the petition, that it is to be sworn by a person who has "*been concerned in and has personal knowledge of the matters giving rise to the petition*." There is no such qualification made to the affidavit in respect of the application for appointment of provisional liquidators, but in the context of the Rules and the requirements under s. 199(2), it could hardly have been intended that those grounds were left to be substantiated by an affiant who did not have personal knowledge of the matters.

[121] The facility of having in-house counsel swear material affidavits might be regarded as a simple matter of convenience. To my mind, however, it is a lazy indulgence that should not be encouraged or tolerated having regard to the relative ease with which affidavits can be procured from the proper principals wherever situated in the world by the use of information technology, even if it means filing such affidavits under cover of local affidavits until the requirements under the Hague Convention 1961 for apostilisation can be satisfied.

[122] While Mr. Hanna might be right to point out that there is no rule of evidence or at common law precluding the adducing of evidence by counsel in the firm representing the party, or by the advocate himself, subject to the rule of election, there is very little in the law or practice to condone it. All of the cases and authorities speak with one voice in deprecating the practice and indicate that it is to be avoided at all costs. In my view, it amounts to something more than an undesirable or bad practice; it necessarily diminishes the probative value of the

evidence before the court and always has the potential to embarrass and prejudice the proceedings.

[123] Having said that, the court has a very wide discretion in deciding how to treat evidence which may fall foul of the Rules. As said by Hall, J (as he then was) in *McMillen Trust (trustee of) v Rawat* (Equity Action 1407/1990), applying the judgment of Peter Gibson J. in the *Savings and Investment Bank Ltd.* case *(supra):* "*…where an affidavit…contains any matter which it ought not to contain, the court only need ignore the offending matter unless the breach is egregious*."

[124] I do agree that several of the breaches are significant and not trivial, but I would decline to exercise my discretion to strike it out, for the following reasons. Firstly, as indicated, the court has a discretion to ignore offending material in affidavits. Secondly, I have come to the conclusion in any event that the affidavit is of minimal evidential value, and did not satisfy the requirements of s. 199 (2). Thirdly, I would decline to strike out solely on the basis that the affidavit was sworn by a member of the firm appearing for the petitioner, as the dicta in the cases is directed mainly to the mischief of comingling duties as witness and advocate.

CONCLUSION AND DISPOSITION

[125] In all the circumstances of this case, and for the reasons given, I order that the *ex p*arte order made on the 27 August 2020 appointing the joint provisional liquidators be set aside. I also find that the verifying affidavit sworn on 19 November 2019 is ineffectual for non-compliance with the Act and Rules. In light of my finding as to the verifying affidavit, I stay all further proceedings on the petition, pending the hearing of the applicants' application to have it dismissed or struck out, and any application that the petitioner might decide to make by seeking any appropriate remedy to correct the underlying defect in verification or present a fresh petition. I also invite counsel to agree a draft Minute of Order reflecting this ruling. I will hear the parties as to costs.

[126] I am most grateful to all counsel for their valuable assistance to the court in respect of these matters, and for their patience in awaiting the court's decision and reasons.

Klein, J.

7 July 2022