TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/014

On appeal from the Commercial Division

WESTFORD SPECIAL SITUATIONS FUND LTD.

Appellant

and

[1] BARFIELD NOMINEES LIMITED
[2] VIRGINIA MOLINA AS TRUSTEE FOR THE MCKINSEY
[3] MASTER RETIREMENT TRUST

Respondents

Before:

The Hon. Mde. Janice George Creque	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverly Smith and Ms. Claire Robey for the Appellant
Mr. S. Jack Husbands for the Respondents

2010: September 22;
2011: March 28.

Civil Appeal – Commercial Law – appointment of liquidators over fund – locus standi – whether the respondents were creditors within the meaning of section 9.1(a) of the Insolvency Act with standing under section 162 of the Insolvency Act – section 197 of the Insolvency Act – Article 62 of the Company's Articles – payment in specie in part satisfaction of redemption price – whether the trial judge was correct in concluding that the interests transferred by the Transfer Agreements were not 'assets' within the meaning of Article 62 – whether an adjournment should have been granted in order that the giving of assets could be further explored – costs

The Appellant Fund incorporated in the Virgin Islands, is an investment fund regulated by the Financial Services Commission and acts as a feeder fund for a Master Fund which is incorporated in the Cayman Islands as a limited partnership. The assets of the Fund comprise its interest, in the Master Fund and its liability is analogous to the liability of a shareholder in a limited liability company. Articles 58 to 68 of the Fund's Articles of Association made provision for the redemption of a member's shares at the request of that

member whereupon the member would be entitled to payment of the Redemption Price determined in accordance with the formula set out in the Articles. Article 59 states that the redemption price is to be paid as to 90% of the redemption price no later than 30 days following the Redemption Date with the balance within 15 days after receipt by the Fund of its annual financial statements for the fiscal year. Article 62 states that on any redemption the directors shall have power to divide 'in specie' the whole or any part of the assets of the Company and appropriate such assets in satisfaction or part satisfaction of the Redemption Price. The Fund experienced difficulty brought about by the collapse of credit market liquidity in paying redemptions after the latter part of 2007. The respondents made redemption requests in respect of their shareholdings in the Fund. The respondents received partial cash payments pari passu during 2008 and 2009. The Fund however, delayed in making full payment. The respondents issued a statutory demand for the balance of the Redemption Price outstanding. The statutory demand remaining unsatisfied, subsequently issued an application for the appointment of liquidators over the Fund on the basis of the unsatisfied statutory demand. The Fund invoked its powers under Article 62 and sought to make payment 'in specie' by a proportionate transfer of assets of the Fund and sought to execute transfer agreements to effect the 'in specie' payment. The Fund also filed a notice of opposition to the appointment of liquidators contending among other things that the Redemption Price had been fully satisfied by the 'in specie' payment and that the respondents, in any event, were not creditors of the Fund in reliance on section 197 of the Insolvency Act and thus lacked standing to bring the application. The trial judge made an order for the appointment of liquidators over the Fund. The Fund appealed.

Held: allowing the appeal, setting aside the order of the learned trial judge appointing liquidators over the Fund, dis-applying the costs regime in CPR 65.13 and applying CPR 69B and awarding costs to the appellants:

1. The learned trial judge was wrong in proceeding on the basis that the respondents, as redeemers claiming redemption proceeds, were creditors of the Fund with locus to apply for the appointment of liquidators for the purposes of the Insolvency Act. A member relying on a debt due from a company arising in his character as a member is not a creditor of the company for the purposes of winding up the company.

   Dicta in SV Special Situations Fund Limited v Headstart Class F Holdings Limited [1906] 2 KB 119 at pg. 125 and in Western Union International Limited v Reserve International Liquidity Fund Ltd BVI HCV 2009/322 – unreported (26th January 2010) to the contrary effect disapproved.

2. Article 62, to which the respondents agreed, is clear. In essence, it says that the directors are empowered 'to appropriate' such assets in satisfaction (or part satisfaction) of the Redemption Price. It says nothing about requiring the respondents' acceptance to it to make the appropriation effective. Therefore once the appropriation has occurred and has been tendered or the redeeming shareholder so advised, then it becomes effective. The learned trial judge therefore erred in failing to properly apply the test in Sparkasse having failed to

properly or adequately assess all the relevant facts and circumstances guiding its application in the instant case.

Sparkasse Bregenz Bank AG v Associated Capital Corporation BVI 10/2002 (18th June 2003) followed.

3. The exercise of the learned trial judge's discretion in refusing the grant of the limited adjournment was outwith the generous ambit within which reasonable disagreement is possible.

4. With regard to costs, the prescribed costs approach on appeal is dis-applied notwithstanding CPR 65.13 in as much as CPR 69B specifically dis-applies the prescribed costs approach at first instance. Accordingly the following orders are made:

   (a) That the respondents bear the appellant's costs in the court below such amount if not agreed within 30 days, to be remitted to the court below to be assessed;

   (b) That the respondents bear the appellant's costs of the appeal such costs to be two thirds of the assessed costs found to be payable in the court below;

   (c) That the remuneration of the liquidators be remitted to the court below for assessment unless the amount of such remuneration is agreed within 30 days such remuneration to be paid by the appellant, provided that such sum paid by way of remuneration, shall be recoverable by the appellant from the respondents.

JUDGMENT

[1] GEORGE-CREQUE, J.A: On 22nd September 2010, the court heard and allowed an appeal against the order of the commercial judge made on 18th March 2010, appointing liquidators over the appellant ("the Fund") with written reasons to follow. We now so do.

The background

[2] The Fund, incorporated in the Virgin Islands, is an investment fund regulated by the Financial Services Commission and acts as a feeder fund for a master fund namely Westford Special Situations Master Fund LP, ("the Master Fund") incorporated in the Cayman Islands as a limited partnership.

[3] The assets of the Fund comprise its interest, as a limited partner, in the Master Fund. The liability of a limited partner in a limited partnership is limited to the amount of his capital contribution, in much the same way that the liability of a shareholder in a limited company is limited to the amount required to be paid up on subscription for his shares. [1]

[4] Articles 58 to 68 of the Fund's Articles of Association deal with redemption of shares. The Fund is required at the request of a member to redeem the whole or part of his shareholding on the redemption date at a redemption price, being the Net Asset Value per share on the valuation day immediately preceding the Redemption Date.[2]

[5] Article 59 of the Fund says in a nutshell that the redemption price is to be paid as to 90 percent of the Redemption Price no later than 30 days following the Redemption Date with the balance within 15 days after receipt by the Fund of its annual financial statements for the fiscal year.

[6] Article 62 states that on any redemption:

> "the directors shall have the power to divide in specie the whole or any part of the assets of the Company and appropriate such assets in satisfaction or part satisfaction of the Redemption Price."

[7] The respondents, during 2004 and 2005, subscribed for shares in the Fund pursuant to an offering memorandum dated 1st January 2004. The Master Fund, which performed well during the credit crisis, nevertheless experienced difficulty brought about by the collapse of credit market liquidity in paying redemptions after the latter part of 2007.

[8] In September and October 2007, the respondents submitted redemption requests in respect of their shareholdings in the Fund. The relevant Redemption Date was 31st December 2007, which date was also the Valuation Date. As at that date, the net asset value ("NAV") of the Fund was US$233.49 per share.

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[1] See: Article 12.1.1 of the Master Fund Partnership Agreement – Tab 10/471

[2] These terms are all defined in the Articles.

[9] The respondents, among other redeemers received partial payments made pari passu during the course of 2008 and 2009. The respondents however, being unhappy with the delay in the Fund making full redemptions issued a statutory demand for the sums remaining outstanding on their redemption requests.

[10] The Fund did not seek to set aside the statutory demand. Based on the unsatisfied statutory demand the respondents, on 9th February 2010, issued an application for the appointment of liquidators over the Fund. The Fund, in light of the application to appoint liquidators decided to utilise its powers under Article 62 by seeking to pay the amounts outstanding to the respondents by making an 'in specie' distribution of the Fund's assets being its interest in the Master Fund which, in essence, was the appropriate percentage interest calculated by reference to the then NAV of the Fund. To this end the Fund sought to execute transfer agreements to effect this 'in specie' payment.

[11] The Fund filed a Notice of Opposition to the application to wind up and relied on the following points:

(a) That the Fund was entitled to satisfy the upstanding balance of the Redemption Price in specie pursuant to Article 62;

(b) That the interests transferred by the Transfer Agreements satisfied the outstanding balance;

(c) That the debts owing had accordingly been discharged;

(d) That the respondents were not in any event "creditors" within the meaning of section 9(1)(a) of the Insolvency Act (2003) ("IA") with standing under section 162 of the IA to pursue the Application for the appointment of liquidators.

[12] The trial judge in making an order for the appointment of liquidators over the Fund concluded in an ex tempore judgment that:

(a) under the Transfer Agreements the transferees would make themselves liable without limit in time for all future and contingent liabilities of the limited partnership;

(b) a bundle of rights which involves currently assessed value but also time unlimited acceptance of liabilities did not fall within the meaning of 'assets' under Article 62; and

(c) no adjournment should be granted so as to consider whether some acceptable assets within the meaning of Article 62 could be provided.

[13] Conspicuously absent from the trial judge's ruling is any consideration of the fourth limb of the Fund's attack, namely whether the respondents were creditors within the meaning of section 9.1(a) of the IA with standing under section 162 to bring the application.

The Issues on Appeal

[14] The appeal by the Fund as succinctly put by counsel for the Fund, raised the following issues:

(a) whether the respondents were creditors within the meaning of section 9.1(a) of the IA with standing under section 162 of the IA; ("the Locus issue")

(b) whether the trial judge was correct in concluding that the interests transferred by the Transfer Agreements were not 'assets' within the meaning of Article 62; ('the Article 62 issue')

(c) whether an adjournment should have been granted in order that the giving of assets could be further explored ("the adjournment issue").

I propose to deal with the issues in the same order as raised.

The Locus Issue

[15] Although the issue as to whether the respondents were creditors formed a plank of the Fund's attack in their Notice of Opposition, it does not appear to have been pursued with much vigour at the hearing. The transcript at the hearing reveals the following exchanges between counsel for the respondents and the Court:[3]

> "The Court: I go back to their Notice of Opposition then. …"If contrary to the Fund's position, the redemption price remains outstanding the sum due to each Applicant would not represent an admissible claim in any liquidation by reason of section 197." So they would not be creditors. So we are in 197
> Ms. Corbett: It appears so, yes.
> The Court: So your next submission?"

The trial judge however without any further consideration of this aspect proceeded on the basis that the respondents were creditors within the meaning of section 162 of the IA. This approach may no doubt have been adopted in keeping with his approach applied in his earlier decision given in Western Union International Limited v Reserve International Liquidity Fund Ltd[4].

[16] An appropriate starting point in respect of the law on this issue is with a recital of the relevant provisions of the IA. Section 162 states, in essence, and among other things, that a creditor may apply for the appointment of a liquidator. Section 2(1) states that a "creditor" has the meaning specified in section 9. Section 9(1) states:

> "A person is a creditor of another person (the debtor) if he has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in (a) the liquidation of the debtor,... that is a company. …" (my emphasis)

Clearly then, a creditor of a company only has standing to apply for the appointment of liquidators over a company, if he has an admissible claim in the liquidation. In this regard section 197 becomes relevant. Section 197 states as follows:

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[3] See: pgs. 25-26 transcript of proceedings.
[4] BVI HCV 2009/322 – unreported (26th January 2010).

> "A member, and a past member, of a company may not claim in the liquidation of the company for a sum due to him in his character as a member, whether by way of dividend, profits, redemption proceeds or otherwise, but such sum is to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves." (my emphasis)

[17] Section197, construed in isolation, would appear to be unambiguous in saying that a member (past or present) in respect of a debt and thus a claim arising in that capacity (such as a claim arising from the right to redemption proceeds) could not bring an application to appoint liquidators by treating that debt (and thus such claim) as one which constituted them a creditor, for the purposes of section 9(1) and hence with standing to apply under section 162 of the IA. But that is not the end of the matter. The Business Companies Act (2004) ("BCA") subsequently came into effect, and section 197 must be juxtaposed against section 62 of the BCA which, in dealing with share redemption, says this:

> "(1) If a share is redeemable at the option of the shareholder and the shareholder gives the company proper notice of his intention to redeem the share:
>
> (a) The company shall redeem the share on the date specified in the notice, or … on receipt of the notice;
>
> (b) Unless the share is held as a treasury share under section 64, the share is deemed to be cancelled;
>
> (c) From the date of redemption, the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.
>
> (2) If a share is redeemable on a specified date:
>
> (a) ….
>
> (b) ….
>
> (c) ….

[18] It bears note that section 250 of the BCA refers to various enactments which have been either repealed, or amended by the BCA and these are specifically identified in schedule 3 of the BCA. Schedule 3 lists twelve sections of the IA which have been amended by the BCA. Section 197 of the IA is not among the sections listed

as having been amended or repealed which must be taken to mean that the framers of BCA having conducted the exercise of specifying in the schedule the specific provisions of the IA which have been amended or repealed, and section 197 of the IA, having not been so specified, that it was intended to remain as a free standing provision which is not to be read down by section 62 of the BCA as counsel for the respondents seek to suggest.

[19] Is section 197 of the IA in conflict with section 62 of the BCA? The Fund contends, in essence, that there are good reasons for a section 197 provision. Counsel for the Fund says firstly, that it is clearly undesirable that members who may have been responsible, through the officers they have elected, for the insolvency of the a company, should be able to compete in a liquidation on a *pari passu* basis with outside creditors in relation to sums due to them *qua* member and that this has led a number of jurisdictions to demote the members' claims behind those of other creditors. This approach, counsel for the Fund says, was achieved by section 197 of the IA. Apart from this counsel contends that a second rationale for the section 197 provision is to ensure that members who have redeemed before liquidation (and possibly have become past members) but have not been paid all of their redemption proceeds, do not gain priority over those members who did not redeem in time, thus preventing an unfair and unseemly scramble in the dying days of the company, and thus ensuring that members inter se are treated *pari passu*.

[20] Counsel for the Fund contends that section 62 of the BCA and section 197 of the IA are reconcilable once it is recognised that section 62(1)(c) and 62(2)(c) do not deal with ranking in a liquidation (which would be in conflict with section 197) but rather with the position of a shareholder once the shareholder has redeemed. In short, section 62 sets out, subject to any contrary provisions in a company's memorandum and articles,[5] the redemption process and makes a shareholder who has redeemed, an unsecured creditor in the wider sense in respect of any unsatisfied redemption proceeds in respect of which he may sue the company and

[5] S.59 of the BCA states that ss. 60, 61 and 62 do not apply to a company to the extent that they are negated, modified or inconsistent with provisions for the purchase, redemption or acquisition of its own shares specified in the company's memorandum and articles.

obtain judgment but not a creditor in the narrower sense for the purposes of section 162 of the IA by virtue of section 197 of the IA.

[21] I agree with this analysis. The redeemed shareholder, notwithstanding that he is a creditor of the company in the wider sense in respect of any unpaid redemption proceeds, encounters a restriction on the steps he can initiate in relation to a liquidation of the company. By virtue of section 197 of the IA the redeemed shareholder, notwithstanding that he may be a creditor of the company in the general or wider sense, simply does not get the right to apply to wind up the company or claim in its liquidation in the same way as an ordinary 'third party' creditor. This is the restriction section 197of the IA places on a member or past member in respect of a claim arising in favour of a member, qua member, in respect of the liquidation of a company, whilst section 62 of the BCA recognises that such a redeemed member in all other respects is a creditor (in the wider sense) of the company. Put succinctly, the redeeming member is a creditor of the company but not a creditor with locus to apply for the appointment of liquidators or to claim in a liquidation of the company other than in the manner permitted by section 197 which, in essence, says that where a sum is due to a member in his character as a member, (such as redemption proceeds) "such sum is to be taken into account for the purposes of the final adjustments of the rights of members and, if appropriate, past members between themselves." Once this distinction is understood the confusion in construing these provisions and confining them to their proper application should be considerably reduced.

[22] On the issue as to whether the claim to redemption proceeds arises in any other capacity save in his character as a member, I am quite satisfied that it is in the redeeming member's character as a member that the liability of the company to pay redemption proceeds and the claim by the redeeming member to receive such proceeds arises, based on the contractual relationship between the member and the company established by its memorandum and articles, in the absence of some other collateral agreement providing otherwise. In Soden v British &

Commonwealth Holdings Plc[6], a decision of the House of Lords in England, Lord Browne Wilkinson at page 323 in speaking of section 74(2)(f) of the Insolvency Act 1986 [UK] had this to say:

> "Section 74(2)(f) requires a distinction to be drawn between, on the one hand, sums due to a member in his character of a member by way of profits, dividends or otherwise and, on the other hand, sums due to a member otherwise than in his character as a member. In the absence of any other indication to the contrary, sums due in the character as a member must be sums falling due under and by virtue of the statutory contract between the members and the company and the members inter se constituted by section 14(1) the Companies Act 1985"

[23] It is worthwhile to recite section 74 of the Insolvency Act 1986 [UK] for the purposes of comparison with section 197 of the IA. So far as material, it says:

> "(1) When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of winding up, and for the adjustment of the rights of the contributories among themselves. (2) This is subject as follow … (f) a sum due to any member of the company (in his character as a member) by way dividends profits or otherwise is not deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."

In my view, although section 197 of the IA is not a verbatim mirror of section 74 of the Insolvency Act 1986 [UK], when sections 196 and197 of the IA are taken together, it is clear that the effect and objective of section 74 of the Insolvency Act 1986 [UK] and sections 196 and 197 of the IA are the same – that is, to subordinate the claims of members (past or present) arising in that character, to the claims of any outside creditor (i.e. a creditor who is not a member of the company). Indeed it may be said that section 197 is more specific than its UK counterpart in that it expressly includes redemption proceeds within the class of sums which may become due to a member qua member. There can be no doubt that the respondent's claim, and thus their cause of action against the Fund, arises from the statutory contract contained in the Fund's Memorandum and Articles by virtue of

[6] [1998] AC 298.

section 11 of the BCA[7] under which the Fund was incorporated. It is the Fund's Articles[8] on which the respondents rely for payment of the redemption proceeds. Accordingly, the Articles which form the statutory contract and its breach, is the cause of action on which the respondents' claims are grounded. The respondents have not sought to suggest otherwise, nor in my view could they. This basis, in my view, makes it pellucid that the claim based on outstanding redemption proceeds is one arising in the respondents' character as member notwithstanding that, having exercised their right to redemption, they are said to be past members. It matters not. They are caught by section 197 of the IA which restricts this type of debt from being treated as an ordinary creditor's debt. In short, a member relying on a debt due from a company arising in his character as a member is not a creditor of the company for the purposes of winding up the company. He is not allowed to compete with outside creditors of the company in a winding up on such a claim. This is what section 197 of the IA seeks to ensure by ranking his claim behind that of the outside creditor.

[24] The respondent, though acknowledging that the Fund raised a challenge to locus in its Notice of Opposition, contends that the Fund acknowledged that the respondents are creditors, in that they did not consider that they could in good faith seek to set aside the statutory demand and accordingly accepted that the respondents were creditors for the purposes of the IA with standing to apply for the winding up of the company. Counsel for the respondents also say that the Fund not having addressed the court on this issue below was now raising this issue on appeal for the first time.

[25] The first point as to whether the Fund accepted that the respondents were creditors, to my mind, adds nothing to the point once the senses in which the term 'creditor' may be used are accepted as I have already addressed in paragraphs 21 to 23 above. It is true that the respondents were creditors of the Fund in respect of any outstanding redemption proceeds, but that fact alone does not as a matter of

[7] This section states that the Memorandum and Articles of a company is binding as between a company and each member and as between member and member.
[8] See: Tab 9 Supplemental Record – Pg. 148-149.

law, make them creditors for the purposes of section 162 of the IA by virtue of section 197. In short, the respondents, although they are creditors of the Fund, are not creditors with standing to apply for the appointment of liquidators or to claim in a liquidation of the Fund.

[26] As to the second point, suffice it to say that the challenge to locus was expressly made in the Notice of Opposition and reference made thereto in the course of the proceedings. Whether or not the challenge was developed further in argument does not absolve the trial judge from addressing it, particularly if it goes to the grounding of the court's jurisdiction to appoint liquidators on the respondents' application. It cannot be doubted that the issue of locus goes to grounding of the court's jurisdiction to entertain the application. I agree with counsel for the Fund that even were the point not raised in the court below, the Fund is not precluded from raising it on appeal, being a challenge to jurisdiction. This is a long established legal principle. In Norwich Corporation v Norwich Tramways[9] Vaughan Williams LJ had this to say:

> "A point as to jurisdiction has been raised on this appeal which was not raised at trial… I have always supposed it to be well established law that the objection that the tribunal has no jurisdiction to entertain the case is one which, at all events in reference to proceedings in the high Court, may be taken at any time. If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty in my opinion, to give effect to that view, taking if necessary, the initiative upon itself."

[27] On the respondents' analysis of section 197 of the IA, they say that section 197 is only relevant after the liquidation of a company has commenced and deals exclusively with the admissibility of claims in a liquidation and thus does not affect the fundamental status of a party as a creditor before the commencement of the liquidation. Counsel for the respondents also contends that section 197 only settles the order of priority and does not relate to locus standi. Further he urges that it could not be contemplated that section 197 could take away the right of a "member creditor" in that way. These contentions appear to be in reliance respectively, on

[9] [1906] 2KB 119 at pg. 125.

the decisions in SV Special Situations Fund Limited v Headstart Class F Holdings Limited[10] and Reserve, two first instance decisions.

[28] In Headstart both parties were funds. Headstart held redeemable shares in SV. Headstart sought to redeem its shares but did not receive from SV the redemption proceeds. Headstart issued a statutory demand pursuant to section 155 of the IA, for payment of the redemption proceeds. SV applied to set aside the statutory demand. One of the bases of SV's challenge to the statutory demand was that Headstart did not have standing to serve a statutory demand as it was not a creditor of SV under the IA. The trial judge concluded [para.18] that section 12 of the IA 'is an all-encompassing definition of non-admissible claims'. She then opined, in essence, that:

(a) claims due to former members in respect of redemptions were not included in the list of non-admissible claims established under section 12;

(b) section 11 (listing liabilities which form the basis of admissible claims in a liquidation) was subject only to section 12 and was not subject to section 197, and thus section 197 could not be prayed in aid to whittle away section 11 or expand section 12 and therefore has no role in the definition of a creditor for the purposes of section 155 of the IA. In support of this construction she opined further that: "sections 2, 9, 11 and 12 all fall within Part 1 headed "preliminary provisions" and therefore are of general application. Not so section 197 which is contained in Part V entitled "Liquidation" and specifically under the subheading "Members".

(c) section 197 only needs to be adverted to after the liquidation is underway and the liquidator is considering what claims to honour and cannot be considered when determining whether Headstart is a creditor for the purposes of making a statutory demand under section 155 of the IA.

[10] BVI HCV 2008/0239 - unreported - (per Olivetti J 25th November 2008).

[29] Counsel for the Fund in this appeal says that the trial judge's reasoning is flawed in that:

(a) firstly, by suggesting that section 197 becomes relevant only once a liquidation is underway misses the point that it is only when a liquidation is underway that a claim is admitted. As such, a claim cannot be admissible in a liquidation before the liquidation starts but ceases to be so after that point.

(b) secondly, sections 11 and 12 clearly deals with what claims can and cannot be admitted to proof by the liquidator under section 207. If section 197 applies once the liquidation is underway (and thus section 12 is not all - encompassing at that stage), it begs the question why should section 12 be all – encompassing before liquidation commences.

(c) Thirdly, section 9 of the IA says that it is only a person who has a claim which "is, or would be" admissible in a liquidation that may be considered a creditor for the purposes of the IA. The use of the word "is" is a reference to the time after the commencement of a liquidation and the words "would be" is a reference to a time before a liquidation, the requirement being that when liquidation takes place, the claim would then be admissible.

[30] To my mind, the position would be incongruous were the case to be that section 197, which makes it clear that a member of a company (past or present) may not claim redemption proceeds once the liquidation is underway, could nonetheless on reliance on the same claim, be allowed to commence liquidation proceedings. Put simply, it would mean that whilst, a 'redeeming member' has a claim which enables him to take steps or commence a liquidation he would nonetheless be barred from having his claim admitted and treated as an ordinary creditor once the liquidation is underway. What then would be the point of having locus to commence a liquidation only to have your claim barred or not being admissible in the actual liquidation? It is clear to me that the entire scheme of the IA is to tie together the provisions in terms of who is considered a creditor for the purposes of commencing a liquidation, with those provisions which stipulate what claims are and are not admissible to proof once the liquidation commences. This, in my view, makes perfect sense and avoids the incongruous result the trial judge's reasoning in Headstart seems to suggest. Accordingly, I agree with counsel for the Fund that the trial judge's reasoning in Headstart is flawed and in this respect should

not be followed. I also agree with counsel for the Fund that although whether a person is a creditor for the purpose of serving a statutory demand (or applying for the appointment of a liquidator) is an analysis conducted before liquidation, section 9 requires that the admissibility of that person's claim is assessed by reference to what the position would be post - liquidation. The test as to whether a person has a claim which is or would be admissible in a liquidation so as to constitute that person a creditor for the purposes of the IA is a threshold requirement which must be addressed by reference to all relevant provisions of the IA as may be applicable to the particular facts and circumstances of the case as presented.

[31] In respect of Reserve, suffice it to say that the trial judge concluded that the redeeming shareholder was a creditor for the purposes of the IA, on grounds entirely different from those given by the trial judge in Headstart. He decided in Reserve that a past member (having redeemed) was a creditor for the purposes of the IA on the basis that the redemption proceeds were not due to the past member in his character as a member but rather 'as a seller entitled to the price.' Counsel for the Fund similarly urges that Reserve was wrongly decided and should not be followed. The decision in Reserve was appealed to this court, but interestingly, and in my view rightly, the appeal was, by consent, allowed and the decision of the trial judge set aside.[11]

[32] It is quite clear that the position, on reading sections 2, 9 and 197 of the IA, is that a redeeming shareholder claiming redemption proceeds has no locus to apply for the appointment of liquidators. For the foregoing reasons I consider that the learned trial judge was wrong in proceeding on the basis that the respondents, as redeemers claiming redemption proceeds, were creditors of the Fund with locus to apply for the appointment of liquidators for the purposes of the IA. Accordingly, their application ought to have been dismissed.

[11] Subsequent to the hearing of this Appeal, a Consent Order was made in Reserve, on 30th November 2010 allowing the Appeal and discharging the Order of the of the trial judge appointing liquidators.

[33] This conclusion is sufficient for allowing the appeal. However, for completeness, I address the two remaining issues in turn, assuming for those purposes that the respondents had locus to bring the application.

The Article 62 Issue

[34] The principles to be applied where the company asserts that the debt is disputed are well settled and the case of Sparkasse[12] is the watershed authority in this jurisdiction for the principle. Byron CJ [para.14] set it out this way:

> "The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried…."

[35] Article 62 of the Fund says this:

> "On any redemption (….) the directors shall have the power to divide in specie the whole or any part of the assets of the Company and appropriate such assets in satisfaction or part satisfaction of the redemption price." (my emphasis)

It is not disputed that the only asset of the Fund is its investment in the Master Fund and that where a redemption request is made which is to be met in cash, the feeder fund makes a corresponding redemption request to the Master Fund and the proceeds passed on from the Master Fund to the feeder fund which then passes it on to the redeemer. Where a redemption request is to be met by an appropriation of a part of the assets of the Fund, the only asset that the Fund could appropriate to satisfy the redemption request in specie would be an

[12] Sparkasse Bregenz Bank AG v Associated Capital Corporation [BVI 10/2002] (18th June 2003).

appropriate part of its interest in the Master Fund. This, counsel for the Fund says, must be what was contemplated (and I would add, 'agreed to') under Article 62, or, at the very least would have amounted to a strong prima facie case, satisfying the Sparkasse test (i.e. that the debt was genuinely disputed on substantial grounds) that such was the case. In this event, the application ought to have been dismissed. Instead, argues counsel for the Fund, the trial judge went further than the Sparkasse test by deciding the point when he held that the bundle of assets and liabilities proposed by the Transfer Agreement did not amount to an asset of the Fund within the meaning of Article 62 having considered that the Transfer Agreement was asking the respondents to accept unlimited liabilities. This appears to have ignored the fact that the Master Fund was a limited partnership which limited the liability of a partner in much the same way as a limited liability company. A partner's limitation was expressly so set out in Article 12.1.1 of the Articles of the Master Fund which were exhibited. Accordingly the liabilities could not in effect be unlimited in the sense considered by the trial judge as the respondents, in reality and as contemplated by Article 62 of the Fund, would be holding the interest in the Master Fund on the same terms as the Fund in accordance with Article12.1.1.

[36] On this issue the respondents contend, in essence, that the transfer of a portion of the Fund's interest in the Master Fund comprised in the Transfer Agreement was ineffective as the transfer was not accepted by the respondents and as such no in-specie distribution had occurred to discharge the debt. That being the case there could be no genuine dispute as to whether the debt was due as at 18th March 2010. It must be pointed out that the trial judge did not base his decision on this point (and there is no Counter Notice) but rather on the point that the in-specie distribution as set out in the Transfer Agreement could not be said to be 'an asset' of the Fund within the meaning of Article 62. Be that as it may, it raises the question as to whether a redeeming shareholder is required to accept an in specie distribution of the Fund's asset appropriated and tendered in satisfaction (or part satisfaction) of the Redemption Price. In this regard the language used in Article 62 is important. In essence it says that the directors are empowered 'to

appropriate' such assets in satisfaction (or part satisfaction) of the Redemption Price. As counsel for the Fund points out, this is the provision to which the respondents agreed and it says nothing about requiring the respondents' acceptance to it to make the appropriation effective. I would think that once the appropriation has occurred and has been tendered or the redeeming shareholder so advised then it becomes effective.

[37] I would conclude accordingly that the trial judge erred in failing to properly apply the test in Sparkasse having failed to properly or adequately assess all the relevant facts and circumstances guiding its application in the instant case. For this reason also, the appeal is allowed.

The adjournment Issue

[38] The Fund's primary complaint here is that the trial judge in the exercise of his discretion did so in a manner which fell 'outside the generous ambit within which reasonable disagreement is possible'[13] in that he failed to factor into his consideration the following:

(a) It was the first hearing of the application;

(b) There was uncontested evidence that the Fund was balance sheet solvent with an NAV of at least $97m;

(c) The appointment of liquidators was a draconian remedy;

(d) A limited adjournment was unlikely to prejudice the respondents and appears to based his refusal to grant an adjournment simply on the basis that there was no evidence before him as to the time scale in which it may be possible to realise any of the underlying assets of the Master Fund. The Fund also complained that the trial judge failed to address the alternative basis for the adjournment which was to afford an opportunity to see if suitable assurances or indemnities could be offered to meet the

[13] See: GvG [1985] 1 WLR 647; Dufour v Helen Air Corporation 52 WLR 188.

judge's concern that the respondents were being exposed to open-ended partnership liabilities, despite the fact that these points had been raised by him during the course of argument.

[39] The Fund accordingly contends that even if the learned judge was of the view that the interest offered by the Fund were not "assets" per Article 62 for the reasons he gave, then he ought to have allowed the Fund a reasonable opportunity:

(a) to deal with the points he had raised about the partnership liabilities whether by way of further evidence as to valuation or by way of assurances as to the limited nature of the liabilities; and/or

(b) to provide alternative assets through a redemption in the Master Fund.

The respondents in essence say that an adjournment would have merely been a postponement of the inevitable.

[40] Would further evidence as to valuation and /or assurances as to the limited nature of the liabilities have swayed the judge into accepting that the appropriation of a portion of the Fund's interest in the Master Fund amounted to assets within the meaning of Article 62? Interestingly, counsel for the respondents during the course of oral argument conceded that value would come into play in considering the 'asset' and therefore would have been relevant to the adjournment issue, but then sought to show in their skeletal arguments that the solvency of the Fund and the values placed on it and the Master Fund was viewed by the respondent with much scepticism. This in my view would clearly bring into play a genuine dispute as to the debt, applying the Sparkasse test. When this is factored into the equation along with the other factors mentioned at paragraph 38 above, and having regard to the fact of the manner in which the matters arose during the proceedings more or less at the instance of the trial judge, I am satisfied that the exercise of the learned trial judge's discretion in refusing the grant of the limited adjournment was outwith the generous ambit within which reasonable disagreement is possible. I would say however, that were the adjournment sought on the basis only of allowing an opportunity to explore whether a redemption of

assets from the Master Fund was available, I would be in agreement with the learned trial judge as I do not consider that an adjournment would have assisted.

Conclusion

[41] For all of the foregoing reasons the appeal was allowed and the order of the learned trial judge appointing liquidators over the Fund set aside.

Costs

[42] At the conclusion of the hearing of the appeal the court directed the parties to file and serve written submissions on costs by 8th October 2010. I have been ably assisted by the detailed submissions on both sides. I must mention that I was particularly impressed by the analysis of the costs regime in commercial matters conducted in the Virgin Islands which is governed by a new Part 69B which applies to the Virgin Islands only and for pointing out the seeming anomaly between the costs structure in relation to appeals from such matters vis-a-vis the costs structure at first instance which has sought to dis-apply the prescribed costs regime under CPR 65. Having digested them, I am satisfied that it would be illogical to adopt a 'prescribed costs' approach on appeal notwithstanding CPR 65.13 when CPR 69B at first instance specifically dis-applies this approach to commercial matters in the court below and treat the failure to address this in the parts of CPR dealing with appeals as an inadvertent omission. Accordingly, applying the costs regime guiding the commercial division of the Court at first instance, I consider that the following orders accord with the principles to be applied and best suit the ends of justice in this matter:

(a) That the respondents bear the appellant's costs in the court below (such amount if not agreed within thirty (30) days, to be remitted to the court below to be assessed;

(b) That the respondents bear the appellant's costs of the appeal such costs to be two thirds of the assessed costs found to be payable in the court below;

(c) That the remuneration of the liquidators be remitted to the court below for assessment unless the amount of such remuneration is agreed within thirty (30) days such remuneration to be paid by the appellant, provided that such sum paid by way of remuneration, shall be recoverable by the appellant from the respondents.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]