EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2011/040

(On appeal from the Commercial Division)

BETWEEN:

[1] SOMERS DUBLIN LTD. A/C KBCS
[2] CITCO GLOBAL CUSTODY NV- REF 209974/ARM
[3] FIDULEX MANAGEMENT INC.
[4] DAIWA SECURITIES TRUST & BANKING

Appellants

and

MONARCH POINTE FUND LIMITED

Respondent

Before:

The Hon. Mde. Janice M. Pereira — Chief Justice
The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Gabriel Moss, QC with him Mr. Andrew Thorp, and Claire Robey for the Appellants
Mr. Barry Isaacs, QC with him Mr. Oliver Clifton for the Respondent

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2013: February 13;
March 11.

Civil appeal – BVI company – Mutual fund – Redeemed members of fund in liquidation claiming redemption proceeds in priority to claims of continuing members – Whether judge right to order liquidator to distribute pro rata between continuing members and redeemed members

The appellants are four redeemed shareholders in the respondent mutual fund company incorporated in The Virgin Islands. The fund has been put in liquidation and the external creditors have been paid. There are not sufficient funds remaining to pay the redeemed shareholders, far less the continuing shareholders. The liquidator wished to pay the

remaining assets to the redeemed shareholders pro rata, and made an application to the High Court for directions to do so. The trial judge held as a matter of law that the claims of the redeemed members and of the continuing members should rank equally. This being an interlocutory order in the winding up petition, the redeemed members appealed to the Court of Appeal with leave of the court below.

Held: allowing the appeal, that:

1. A redeemed member is a creditor in respect of his unpaid redemption payment.

   Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported) followed; Kenneth M. Krys et al v Stichting Shell Pensioenfonds Territory of the Virgin Islands High Court Civil Appeal No. 36 of 2011 (delivered 17th September 2012, unreported) followed.

2. The purpose of section 197 of the Insolvency Act, 2003 is merely to subordinate the former members' claims (along with other claims arising out of membership) as creditor to that of ordinary unsecured (and usually external) creditors. When section 197 says that a past member "may not claim in the liquidation" it must be read as referring to and barring claims as an ordinary unsecured creditor, and not as barring claims as a deferred creditor as part of the "final adjustment of the rights of members and ... past members between themselves".

   Section 197 of the Insolvency Act, 2003 applied.

3. It was therefore wrong for the learned trial judge to have held that the redeemed members in their character as such should rank equally with the continuing members claiming a return on their capital. It was wrong to have held that redeemed members were not deferred creditors and as such entitled to have their claims against the Company satisfied in priority to any claim by the continuing members. The redeemed members must be paid before any surplus is ascertained out of which the continuing members may be paid.

   Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported) followed; Kenneth M. Krys et al v Stichting Shell Pensioenfonds Territory of the Virgin Islands High Court Civil Appeal No. 36 of 2011 (delivered 17th September 2012, unreported) followed.

4. Share capital is now an obsolete concept for BVI companies. The BVI Business Companies Act, 2004 removes the concept altogether, even with respect to par value shares. The mode of distribution of surplus among members on a liquidation depends ultimately on the Memorandum and Articles of a company, but section 34(1)(c) of the BVI Business Companies Act, 2004 provides a default

position. It provides that in the absence of anything to the contrary, a share confers "the right to an equal share in the distribution of the surplus assets of the company". There being nothing to the contrary in the Memorandum and Articles in the present case, each share carries an equal right to share in any surplus.

BVI Business Companies Act, 2004 applied.

JUDGMENT

[1] MITCHELL JA [AG.]: Monarch Pointe Fund Limited ("the Company") was incorporated in the Virgin Islands on 29th December 2003.[1] It carried on business as a mutual fund and operated under a Memorandum and Articles of Association in a form commonly adopted by institutions of this type. In particular, its Articles of Association provided for members to be able to redeem their shares in accordance with a set of regulations of the type which are frequently encountered in cases of this sort.

[2] On 17th August 2007, the Company suspended redemptions and sometime in 2008 the High Court appointed a liquidator. Material before the learned trial judge showed that when redemptions were suspended, seven redeemed members had yet to receive some $18 million between them of redemption proceeds to which they were entitled. The subscription price represented by the retained shares of some of the redeemed members, together with the subscription price represented by the retained shares of the other eleven continuing members, is some $47 million in total. The total nominal value of the unpaid redemption proceeds and retained capital subscriptions together is thus somewhere in the region of $65 million. After payment of all the Company's external creditors the liquidator has available to satisfy these liabilities a fund of some $3.5 million. If he distributes this fund *pro rata*, without distinguishing between continuing and redeemed members, each will receive about five cents in the dollar. If he pays the redeemed members in priority to the continuing members, the redeemed members will

[1] I take the facts from the judgment of 16th November 2012 where they are very helpfully set out.

receive about twenty cents in the dollar and the continuing members nothing. If he pays the fund to the continuing members without distributing anything to the redeemed members, each continuing member will receive just over seven cents in the dollar.

[3] The liquidator sought directions, *ex parte*, that he be permitted to make an interim distribution of the fund to the redeemed members in priority to any rights of continuing members. The learned trial judge by an order of 17th May 2012 refused to make such a direction and instead directed that the distribution be made rateably between the redeemed members (for the outstanding balance of their redemption proceeds) and the continuing members (for the subscription price paid for their shares). At the same time, he directed that notice be given to all redeemed and continuing members and that any redeemed or continuing member wishing to apply to vary the direction should make an application to do so within 56 days of entry of the order.

[4] Four redeemed members did make such an application. The learned trial judge made a further direction that any continuing member wishing to be represented on that application must give notice of its intention to do so by a certain date, and that in default the liquidator would represent the interests of the continuing members on the substantive hearing. That hearing eventually took place when the four redeemed members were represented by counsel and the continuing members' interests were looked after by counsel who appeared on behalf of the liquidator.

[5] The primary contention of counsel for the interests of the continuing members was that the fund should be distributed to the continuing members in proportion to the number of shares retained by each of them when the company went into liquidation, to the exclusion of the redeemed members. Alternatively, he submitted that the fund should be distributed between the redeemed and the continuing members rateably in proportion to the number of shares held by each at the commencement of the winding up. Counsel for the redeemed members submitted

that a redeemed member was to be treated as a creditor of the company, but deferred to an ordinary third party creditor. Thus, the liquidator was required, after the external creditors had been paid, to meet the claims of the redeemed members in priority to the continuing members. After considering the submissions and the authorities placed before him, the learned trial judge by a written judgment of 16th November 2012 concluded that section 197 of the Insolvency Act, 2003 ("the Act")[2] required that the fund is available to satisfy outstanding claims of members, past and present, in their capacity as such, as well as the entitlement of continuing members to a return on their capital. He decided that there was no need or justification for a third class of creditor, the redeemed members, floating uneasily between the external creditors and the continuing members. He therefore declined to vary his order of 17th May 2012. He gave leave to the applicant redeemed members to appeal to the Court of Appeal.

[6] An argument had been put forward at trial on behalf of the interests of the continuing members in support of the "black hole" solution. This was that section 207, combined with section 197, provided only for distribution to ordinary unsecured creditors sharing *pari passu* and to continuing members, leaving redeemed members as creditors who were no longer members in a void. The learned trial judge's solution to the "black hole" solution was to find that "member" in section 207(3) includes a redeemed member. It would, however, not be correct on the authorities cited to treat deferred creditors *pari passu* with members, as that conflicts with fundamental notions of priority. Section 207 only provides a *prima facie* order of priorities, being subject to other provisions of the Act. As section 207(1) states, the section applies only and to the extent that this Act or any other enactment provides otherwise. Section 197 does indeed provide otherwise. In the case of redeemed but unpaid members it provides for unpaid redeemers to be creditors, not able to compete with ordinary unsecured creditors, but taking part in a "...final adjustment of the rights of members and ... past members." In such an

[2] No. 5 of 2003, Laws of the Virgin Islands.

adjustment, past members who are deferred creditors, inevitably come before continuing members.

[7] Counsel for the redeemed members, Mr. Moss, QC, and for the interests of the continuing members, Mr. Isaacs, QC provided both oral and written submissions which set out the different contentions of the liquidator, on behalf of the continuing members, on the one side, and the redeemed members on the other. The difference of opinion turns on the interpretation of provisions of the Act.

[8] Counsel for the redeemed members submitted that the central issue in the appeal was, put simply: does an unpaid redeemed member of a BVI company in liquidation rank as (a) a deferred creditor with higher priority than an ordinary unredeemed member; or (b) have the same priority as an ordinary unredeemed member; or (c) have the same priority as other creditors; or (d) does he fall down a "black hole" and have no claim at all, as argued by counsel for the continuing members at trial? He submitted that solution (a) was the only one that made sense legally and commercially. Mr. Isaacs, QC submitted that the central premise of the appellants was that the redeemed members are creditors in respect of their claims for redemption proceeds; the second premise was that creditors are to be paid in priority to members in the fund in liquidation; and the conclusion drawn from these two is that redeemed members' claims are to be paid in priority to the claims of continuing members. The first premise, he urged, is false, as is the third. Redeemed members are members, and not creditors of the fund in liquidation.

[9] The relevant statutory provisions are not long and may be set out here. Section 9 of the Act defines "creditor" and provides, so far as relevant, as follows:

> "9. (1) 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, in the case of a debtor that is a company..."

[10] Section 11(2) deals with admissible claims. It provides that, subject to section 12, a liability at the time of the commencement of the liquidation is admissible in a liquidation of a company as a claim.

[11] Section 12 of the Act deals with non-admissible claims, and provides, so far as is relevant, as follows:

> "12. The following liabilities are not admissible claims in the liquidation of a company...
>
> (b) a liability that, under any enactment or rule of law, is of a type that is not claimable, whether on grounds of public policy or otherwise..."

[12] Section 197 deals with sums payable to members in their character as a member, and provides as follows:

> "197. 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."

Mr. Isaacs, QC, on behalf of the interests of the continuing members, urges four points. First, the section applies to a member and a past member. Second, it applies to a sum due to a past member in his capacity as a member. Third, it expressly includes a sum due by way of redemption proceeds. Fourth, it provides that a member and a past member may not claim in the liquidation of a company for such a sum. Since the provision is that the sum is not claimable, it follows that it is not an admissible claim in the liquidation.

[13] Section 207 falls under the heading "Claims" and prescribes the priority in which the assets of a company in liquidation shall be applied, paid and distributed. It provides, so far as relevant, as follows:

> "207. (1) Unless and to the extent that this Act or any other enactment provides otherwise, the assets of a company in liquidation shall be applied

(a) in paying, in priority to all other claims, the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority;

(b) after payment of the costs and expenses of the liquidation, in paying the preferential claims admitted by the liquidator in accordance with the provisions for the payment of preferential claims prescribed;

(c) after payment of the preferential claims, in paying all other claims admitted by the liquidator; and

(d) after paying all admitted claims, in paying any interest payable under section 215.

(2) Subject to section 151, the claims referred to in subsection (1)(c) rank equally between themselves if the assets of the company are insufficient to meet the claims in full, they shall be paid rateably.

(3) Any surplus assets remaining after payment of the costs, expenses and claims referred to in subsection (1) shall be distributed to the members in accordance with their rights and interests in the company."

It is the gravamen of the case for the continuing members that the redeemed members are to be paid under section 207(3), and not under section 197.

[14] This Court has recently considered and interpreted these sections in the Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al case,[3] and in the Kenneth M. Krys et al v Stichting Shell Pensioenfonds case.[4] Counsel for the interests of the continuing members submitted that neither of these decisions supports the premise of the redeemed members' appeal. Counsel for the redeemed members submitted that they do.

[3] Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported).
[4] Territory of the Virgin Islands High Court Civil Appeal No. 36 of 2011 (delivered 17th September 2012, unreported).

[15] In the Westford case, a member of the company had given notice of redemption and had been paid part of the redemption price, but the remainder of the payment had been delayed. The redeemer issued a statutory demand for the balance of the redemption price. The statutory demand not having been complied with, the redeemer issued an application for the appointment of liquidators over the fund. One of the issues in the case was whether the redeemers were "creditors" with standing to seek the appointment of liquidators.

[16] Mr. Isaacs, QC, counsel for the interests of the continuing members, submitted that the Westford case is authority for the propositions that: (a) a redeemed member is a creditor of the fund in the wider sense in respect of any unsatisfied redemption proceeds in respect of which he may sue the company and obtain judgment;[5] (b) a redeemed member is not a creditor of the fund in respect of any unsatisfied redemption proceeds in the liquidation of the company;[6] (c) a redeemed member's claim in respect of any unsatisfied redemption proceeds in the liquidation is a claim *qua* member; and (d) a redeemed member's claim in respect of any unsatisfied redemption proceeds cannot compete with and ranks behind claims of outside creditors in a winding up. Section 197 ranks the redeemed member's claim behind that of the outside creditor. He placed reliance on the statement that section 197 makes it clear that a member of a company (past or present) may not claim redemption proceeds once the liquidation is underway."[7] Redeemed members do not claim as creditors, they claim as members or past members. Claims for redemption proceeds may not be paid in priority to members' claims.

[17] The question of who is a creditor for the purposes of standing to apply for the appointment of liquidators under section 162 of the Act is dealt with in detail in the Westford judgment. Standing is considered by reference to the definition of

[5] Para. 20 of the judgment of the Court of Appeal.
[6] Para. 31 of the judgment of the Court of Appeal.
[7] Para. 30 of the judgment of the Court of Appeal.

creditor in section 9. Section 9 refers to "admissible claims". The concept of admissibility is defined in section 11. A redeemed member's claim is admissible under section 11(2)(a) as a liability of a company at the time of the commencement of the liquidation. The Court pointed out[8] that redeemers cannot claim in the liquidation of a 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 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." In other words, the Court of Appeal regarded the unpaid redeemed member's claim as "claimable" and therefore admissible, but only in the manner allowed by section 197, i.e., on a deferred basis, payable after outside creditors are paid and not claimable as an ordinary unsecured claim.

[18] The relevant ratio of the Court of Appeal decision is that the redeemed members in that case were not "creditors" for the purpose of appointment of a liquidator. This decision was limited to the meaning of "creditor" for the purpose alone of standing to apply for the appointment of liquidators. In a number of passages the Court made it clear that they regarded a redeemed member as a "creditor" in a more general sense. So, at paragraph 21, the Court stated that the redeemed member "is a creditor of the company in the wider sense in respect of any unpaid redemption proceeds." The paragraph goes on to say nevertheless that being a creditor in this general sense does not give the redeemed member standing to apply for the appointment of liquidators. Then, at paragraph 25 there is a passage stating that "it is true that the respondents were creditors of the Fund in respect of any outstanding redemption proceeds..."

[19] In the Shell Pensioenfonds case, the claim concerned an application by liquidators for an anti-suit injunction against a redeemed but unpaid member who

[8] At para. 21 of the judgment of the Court of Appeal.

was taking legal proceedings in Holland in respect of an account in Ireland with a view to gaining priority over the general body of creditors. The redeemed member had submitted to BVI jurisdiction by proving his claim in the liquidation. The appeal was allowed and an injunction granted. Pereira JA delivered the judgment of the Court and said this:

> "[4] ... It is not disputed that Sentry's liquidators have so far not ruled on Shell's proof of claim. Counsel for Shell surmises that this may be due to the current state of the law as interpreted by this court in Westford[4] *[Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported]* in which it was held that a redeeming shareholder claiming redemption proceeds was not a creditor for the purposes of bringing insolvency proceedings under the Insolvency Act, 2003 of the Virgin Islands. I underline this portion to make clear that Westford did not decide that an unpaid redeeming member is not a creditor of the company. It merely decided that as between outside creditors and redeeming members ... the Insolvency Act, 2003 subordinated the 'inside' creditor's rights to those of the 'outside' creditor, and that the Insolvency Act, 2003 restricted the right of an inside creditor, whose claim was derived from the inside creditor's character as a member, to bring insolvency proceedings as a creditor in reliance on such a claim. There is no statement in Westford which can or should be taken to mean that an unpaid redeemer is not a creditor of the company at all..."

[20] It is clear from the dicta in Shell Pensioenfunds and Westford that a redeemed member is a creditor in respect of his redemption payment (save for the purpose of filing an application to appoint a liquidator). Sections 9, 12 and 197 of the Act cannot be interpreted as overruling this right, either in nature or in form. Section 197 indicates only that redeemed members cannot rank *pari passu* with outside creditors and are therefore deferred to them. The reason why such a creditor is deferred is that his claim as a creditor is for a "... sum due ... in his character as a member ... by way of … redemption proceeds" in section 197. Nowhere in the Act does it provide that redeemed members should rank equally alongside continuing members by virtue of any adjustment or any other provision. Any adjustment must give higher priority to former members who have become creditors as a result of a

redemption than to mere continuing members. To do otherwise fails to give any weight to their rights as creditors, rather than members. Any "adjustment" necessarily involves redeemed members making a "claim".

[21] Section 197 lays out a general rule that deferred creditors may not claim as ordinary unsecured creditors, but with the proviso that their claims will be dealt with in the adjustment between members and former members under the second half of section 197, i.e., after ordinary unsecured creditors have been paid in full.

[22] The words "may not claim in the liquidation" in section 197 must refer to claiming as an ordinary unsecured creditor. It reflects the old common law legal principle that redeemed members are deferred creditors, postponed behind ordinary unsecured creditors. As deferred creditors, their claims are "... to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves."

[23] This interpretation is in keeping with long-standing rules of priority on a liquidation of a company. There is an analogy with the position of a "depositor" in an English building society. The word "depositor" is a misnomer, since persons who become members of the building society as a result of making a deposit are, while the deposit lasts, members and not creditors. However, once they give notice to withdraw their "deposit" and before payment, the withdrawing member's status changes. His status as a member or past member depends on the terms of membership, so that, if, e.g., termination of membership is subject to a period of notice and is not immediate, he remains a member, but in other cases he becomes a past member. In either case, he ranks as a deferred creditor, ranking behind outside creditors, but having priority ahead of continuing members.[9]

[24] The learned trial judge felt that the dictum in Sibun's case was of no assistance, but Lindley LJ was a very highly regarded judge, particularly in relation to

[9] Sibun v Pearce (1890) 44 Ch D 354, per Lindley LJ at p. 371.

partnership and company law, and his dictum, unchallenged in case law since 1890, is deserving of considerable respect. The approach in building society cases provides a good analogy. Redemption in a case such as the present terminates membership and the redeemed member becomes a deferred creditor, who necessarily ranks ahead of members who are not redeemed and therefore not creditors. It is clear that the purpose of section 197 of the Act is merely to subordinate the former members' claims (along with other claims arising out of membership) as creditor to that of ordinary unsecured (and usually external) creditors. When section 197 says that a past member "may not claim in the liquidation" it must be read as referring to and barring claims as an ordinary unsecured creditor, and not as barring claims as a deferred creditor as part of the "final adjustment of the rights of members and ... past members between themselves". This analysis is in accordance with the approach of this Court in Westford's case.

[25] Mr. Moss, QC submitted that another useful analogy is with declared dividends. When dividends are declared in favour of members, they constitute, prior to payment, a debt of the company, payable in a liquidation in priority to members.[10] Distribution among continuing members will depend on the terms agreed among them. Mr. Isaacs, QC points out that the New Zealand decision relied on by Mr. Moss, QC deals with dividends declared but not paid, involved the construction of a company's constitution, and in any event, the point went by consent.

[26] Mr. Moss, QC urged that cases under the English Companies Act 1948 are instructive in showing the history and rationale of the rule of priority. So, in the Electricidad case,[11] Slade J held:

> "True it is that the terminology of section 259(3),[12] like the terminology of section 302, is not very exact, because it does not make adequate

[10] In re Te Kumi Land Company Limited et al v Te Land Company Limited [1944] NZLR 924.
[11] In Re Compania do Electricidad de la Provincia de Buenos Aires Ltd. [1980] Ch 146.
[12] 259(3) provides:

> allowance for the fact that, beyond the categories of creditor (simpliciter) and contributory, there exists a third category, namely, the contributory who (i) is also a creditor of the company in his capacity as a member and (ii) while subject to deferment to outside creditors, is entitled to ask for his debt to be taken into account in any adjustment as between himself and his fellow contributories. The wording of section 259(3), however, does not in my judgment justify the conclusion that a person belonging to this third category is not in general to be treated as a creditor for the purpose of the statutory provisions relating to winding up and of the Winding-up Rules.
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> "... By necessary implication therefore, the section contemplates that sums due to former members in respect of dividends or otherwise due to them in their character as former members, whether or not they are contributories, will be treated as "liabilities" of the company and dealt with during the process of discharging "liabilities" of the company, rather than during the process of distribution therein referred to. If sums of this nature due to former members who are contributories are to be dealt with as "liabilities," it would be surprising in principle if sums due to present members were not to be dealt with in the like manner. Consequently, it would be surprising if all such sums did not fall to be treated as "debts" for the general purposes of the Act and the Winding-up Rules.[13]

His finding was that the present and former shareholders of a company to whom the company owed money by way of dividends or repayment of capital were to be treated in any winding up as creditors for the purposes of the sections of the Companies Act 1948 dealing with claims, subject only to the provisions for deferment contained in that Act. Mr. Isaacs, QC seeks to distinguish this case. Slade J, he urges, was considering the construction of a section of an English statute which is not similar to our section 197.

[27] In my view, the issue can be determined purely on the construction of the words of the Memorandum and Articles and the statute, with guidance provided by the Court of Appeal decisions from the Virgin Islands previously referred to. Section 207(3) of the Act deals with the distributable surplus. It provides that any surplus

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> "In the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call."

[13] At p. 172-173.

assets remaining after payment of the costs, expenses and claims shall be distributed to the members in accordance with their rights and interests in the company. The expression "surplus" usually means that which remains after discharging liabilities and costs.[14] Paragraph 7 of the Memorandum provides that each share shall participate in the surplus assets in the event of a distribution. Article 1 of the Articles defines the "surplus" as "the excess, if any, at the time of the determination of the total assets of the Company, over the aggregate of its total liabilities, as shown in its books of account, plus the Company's capital". Thus, liabilities are excluded from the definition of "surplus assets". The "sums due in the character as member" in respect of redeemed members under section 197 are liabilities of the company and are therefore excluded before the surplus distributable to members under section 207(3). It was therefore wrong for the learned trial judge to have held that the redeemed members in their character as such should rank equally with those claims by continuing members to a return on their capital. It was wrong to have held that redeemed members were not deferred creditors and as such entitled to have their claims against the Company satisfied in priority to any claim by the continuing members. The redeemed members must be paid before any surplus is ascertained out of which the continuing members may be paid.

[28] The learned trial judge, in dealing with distributions to members, fell into error in describing the mode of distribution amongst them. He used the expression "return of their capital contributions". Share capital is now an obsolete concept for BVI companies. The BVI Business Companies Act, 2004[15] removes the concept altogether, even with respect to par value shares. The starting point of returning "paid up share capital" to members in a liquidation is therefore flawed. The fact that the Memorandum and Articles of Monarch Pointe refer to "capital" and "surplus" is no more than a hangover due to the fact that the company was first

[14] In Re Crichton's Oil Company [1902] 2 Ch 86.
[15] No. 16 of 2004, Laws of the Virgin Islands.

incorporated under the International Business Companies Ordinance.[16] It was re-registered under the BVI Business Companies Act, 2004 in July 2006. From that date, it is correct to say that the references to capital and surplus do not reflect the law governing the company. The mode of distribution depends ultimately on the Memorandum and Articles of a company, but section 34(1)(c) of the BVI Business Companies Act, 2004 provides a default position. It provides that in the absence of anything to the contrary, a share confers "the right to an equal share in the distribution of the surplus assets of the company". There being nothing to the contrary in the Memorandum and Articles in the present case, each share carries an equal right to share in any surplus.

[29] I would therefore allow the appeal and order that paragraphs 1 and 2 of the order of 17th May 2012 be replaced with an order that the liquidator do pay the redeemed members of the fund *pro rata* their redemption price in priority to the distribution of any surplus assets to the continuing members.

[30] I would order the costs on the appeal of both of the liquidator (the respondent) and of the redeemed members (the appellants) to be costs in the liquidation of the Company in accordance with the Orders of Bannister J dated 13th December 2012 and 1st February 2013, to be assessed if not agreed.

Don Mitchell
Justice of Appeal [Ag.]

Janice M. Pereira
Chief Justice

Louise E. Blenman
Justice of Appeal

[16] Cap. 291, Revised Laws of the Virgin Islands, 1991.