IN THE SUPREME COURT OF BERMUDA

COMPANIES (WINDING-UP)

2007: No. 12

IN THE MATTER OF (1) IPOC CAPITAL PARTNERS LIMITED
AND IN THE MATTER OF (2) IPOC INTERNATIONAL GROWTH FUND LIMITED
AND IN THE MATTER OF (3) GAMMA CAPITAL FUND LIMITED
AND IN THE MATTER OF (4) CONVERGENCE CAPITAL LIMITED
AND IN THE MATTER OF (5) COM TEL EASTERN LIMITED
AND IN THE MATTER OF (6) FIRST NATIONAL TELECOMMUNICATIONS FUND LIMITED
AND IN THE MATTER OF (7) CONVERGENCE CAPITAL MANAGEMENT LIMITED
AND IN THE MATTER OF (8) AUGMENTATION INVESTMENTS LIMITED
AND IN THE MATTER OF (9) TELCO OVERSEAS LIMITED
("the Companies")

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Date of hearing: April 24, 2007
Date of Reasons: May 3, 2007

Mr. Kulandra Ratneser, Attorney-General Chambers, for the Petitioner, the Registrar of Companies
Mr. Mark Diel, Marshall Diel & Myers, for the Companies
Mr. Jeffrey Elkinson, Conyers Dill & Pearman, for LV Finance Group Limited ("LVFG")
Mr. David Kessaram, Cox Hallett & Wilkinson, for Santel Limited, Avenue Limited and Janow Limited ("the Alfa Companies")
Mr. Rod Attride-Stirling, Attride-Stirling & Woloniecki, for OAO CT-Mobile ("CTM")
Mr. Justin Williams, Williams, for Leonid Rozhetskin

Introductory

1. On January 12, 2007, the Registrar of Companies presented a composite Petition to wind-up the Companies under the provisions of section 132(8)(a) and/or section 161(g) of the Companies Act 1981.

2. The Second Respondent ("IPOC") has been involved in substantial and highly contentious litigation with LVFG, the Alfa Companies and CTM over the ownership of a block of shares in a Russian telecommunications company (said to be worth now in the region of US$1.5 billion) in various parts of the world for several years. This litigation commenced in Bermuda in early June, 2006, and highly publicised arbitration findings surrounding the use of IPOC and its affiliates as a vehicle for money laundering by a prominent Russian politician preceded the presentation of the Petition. Earlier still, the Minister of Finance had appointed an Inspector to investigate the Companies in or about 2004, and the completion of the Inspector's Report received attention in the media in the second half of 2006.

3. It is a matter of record that this Court has to date (a) recognised and enforced two Zurich arbitration awards in favour of LVFG against IPOC, (b) granted permanent anti-suit injunctions in favour of CTM and LVFG restraining IPOC from breaching certain arbitration agreements, and (c) granted certain interim injunctive relief in favour of the Alfa Companies, but refused other similar relief sought by them and certain affiliates. Each significant ruling of this Court has been appealed.

4. When the Registrar of Companies received what would normally be treated as a routine request under rule 22 of the Companies (Winding-Up) Rules 1982 for copies of the Petition from persons claiming to be creditors of IPOC, but who had been involved in this longstanding and bitter litigation story, he very prudently dealt with the requests in a cautious manner. IPOC was contacted, and it disputed the right of the rule 22 claimants to receive copies of the Petition. Its objections were based on the technical contention that the Applicants were not truly creditors and the more substantive concern that IPOC's position in a bitter dispute with the rule 22 claimants would be prejudiced if they obtained a copy of the Inspector's Report then apparently attached to the Petition.

5. On February 5, 2007, LVFG and CTM, and on February 6, 2007 the Alfa Parties, issued Summonses seeking to compel the Petitioner to supply a copy of the Petition in accordance with rule 22 of the Rules returnable for February 8, 2007. In the interim, the Companies issued an Ex Parte Notice Summons on February 6, 2007 which was heard on that same date. The Summons most significantly sought (a) to strike-out the Petition on abuse of process grounds and (b) an injunction restraining the Petitioner advertising the Petition or supplying copies of it to any person.

6. At that hearing, Mr. Diel contended that for the Inspector's Report referred to as being attached to the Petition to be disseminated would be an abuse of process. Mr. Ratneser indicated that out of an abundance of caution, a direction from the Court was being sought as to whether or not rule 22 applied. The Petitioner undertook not to supply copies of the Petition to persons claiming to be creditors until after LVFG's Summons had been determined. By consent the Companies' Summons was adjourned sine die with liberty to restore on 24 hours' notice.

7. On February 8, 2007, the Court gave directions for the hearing of the three rule 22 Summonses. Written Submissions were ordered to be filed by February 19, 2007 and the matter was to be listed on a convenient date thereafter. Mr. Ratneser indicated that an application for leave to amend the Petition would be filed, the object of which would be to "*disgorge information which should not go into the open market place*". The Court decided that the application for leave to amend should be dealt with before the rule 22 applications because it seemed possible that the Petitioner's anxieties about the application of rule 22 might no longer exist if the amendments anticipated were granted.

8. The amendment application was eventually scheduled for April 23, 2007[1] and the rule 22 applications for the following day. Leonid Rozhetskin's rule 22 Summons was issued on April 2, 2007, returnable for the same date. (The Alfa Parties, CTM, LVFG and Leonid Rozhetskin are collectively referred to as "the Applicants"). The amendment application was granted on April 23, 2007, and on the hearing of the rule 22 application, Mr. Ratneser was able to inform the Court that there were no longer

[1] On April 18, 2007, the Alfa Parties, LVFG and CTM filed applications seeking to be heard on the strike-out application. These were listed for April 23, 2007 and adjourned until after the determination of the rule 22 applications on the basis that the Applicants contended that they could hardly make a case for being heard unless it was first determined that they had a right to copies of the petitions.

any public interest objections to the rule 22 applications being granted, provided the Court was satisfied the Applicants were entitled to invoke the rule.

Decision to hear the Rule 22 Summonses without directions on April 24, 2007

9. In early April, I directed the Registrar to confirm to the Companies' attorneys that the April 24, 2007 hearing would be for directions only. Messrs. Marshall Diel & Myers confirmed their understanding in this regard in a letter dated April 18, 2007 to the Registrar without receiving a response either way. This was because two days earlier Messrs. Cox Hallett & Wilkinson had written to the Registrar saying that the Applicants were expecting a substantive hearing, without receiving a response one way or another.

10. On the morning of April 23, 2007 when the various applications came on for hearing, it was apparent that the issue of amendment was to be resolved by consent. Having conducted a cursory review of the most helpful written submissions[2], and noting that the London Solicitors representing the various corporate protagonists had travelled to Bermuda for the hearings listed for the first two days of last week, I formed the view that it would be wasteful in terms of costs to merely order directions for the rule 22 applications and list them for substantive hearing on a subsequent date. Written submissions had been filed two months previously and the amendment application had largely been delayed due to Counsel's unavailability in March. The applications were of a type which would ordinarily be dealt with summarily, and accordingly I decided to hear them substantively on April 24, 2007, without prejudice to the Companies' right to file evidence should such evidence be required.

11. In litigation where substantial sums are at stake, it is very easy for sensible case management to succumb to the parties' understandable inclination to argue every interlocutory point, large or small, with the level of preparation and analysis which is usually devoted to a trial. It is the duty of the Court, having regard to Order 1A of the Rules of the Supreme Court (as applied to winding-up proceedings by rule 159 of the Winding-Up Rules), to control this unruly tendency, as far as justice in all the circumstances permits. Nevertheless, a greater burden to give full reasons for any contentious decision on a matter of any consequence undoubtedly arises for the Court.

The contending positions

12. The Petitioner contended that as the Petition was in part based on section 132 of the Companies Act to which rule 22 did not apply, the applications for copies should be dismissed. In any event, it was contended the applications should only be entertained after the strike-out application had been determined to avoid the possibility of the Applicants acquiring sensitive information which it later turned out they ought not to have received.

13. This position was essentially supported by the Companies, in part on the additional grounds that (a) they were not creditors of IPOC at all, and (b) even if they were, the Applicants had no right to receive a petition dealing with eight other companies as well.

14. The Applicants broadly argued that (a) if the Petition also relied on the usual just and equitable ground, they clearly had a right to receive a copy irrespective of the position under section 132, which they submitted engaged the Winding-Up Rules, (b) their status as actual, contingent and/or prospective creditors of IPOC could not be seriously disputed and (c) they had an absolute right to receive a copy of the Petition upon request, not simply for the purposes of appearing on the hearing of the Petition itself. They had a right to support the Petitioner on the public interest strike-out application as well. Assuming the Petition was to be heard in open Court, the

[2] The Petitioner and the Respondent filed submissions, as did each of the four Applicants.

Applicants could not be restricted in their use of the Petition if they were entitled to receive it.

15. No binding or persuasive authority directly dealing with the application of rule 22 or its English equivalent could be found by any of the five legal teams appearing before the Court. The central issues previously[3] identified for determination were (a) what threshold of proof of an applicant's status as creditor had to be met so as to compel the Petitioner to supply a copy of the Petition, and (b) what jurisdiction did the Court possess in relation to a public interest Petition to restrain the Petitioner from complying with rule 22 or from disclosing confidential information contained in the Petition. In the course of the hearing, I raised the additional issue of the Court's power under rule 157 to extend the time for the Petitioner to comply with rule 22, assuming it applied. This flowed from a need to resolve the controversy joined by virtue of the Petitioner's submission that the applications should be determined after the strike-out application and the Applicants' submission that they had an immediate right to copies of the Petition irrespective of the stage of the proceedings.

Legal findings: what is the dominant purpose of rule 22?

16. Rule 22 provides as follows:

> "**Copy of petition to be furnished to creditor or contributory**
> *22 Every contributory, and in the case of a petition for the winding-up of a company every creditor, of the company shall be entitled to be furnished by the attorney of the petitioner with a copy of the petition within two days after requiring same, on paying the reasonable costs of the copy.*"

17. Rule 19 provides that every petition shall be advertised in an appointed newspaper at least seven days before the hearing, so rule 22 clearly is primarily designed to ensure that a creditor or contributory who sees an advertisement will have sufficient time to obtain a copy and serve a notice of intention to appear (on the hearing of the petition) on the petitioner "*not later than four p.m. on the day before the hearing*" pursuant to rule 25(4).

18. The Rules set no time-limit on when service and advertisement should occur. It is, on the face of the Rules, legally permissible to advertise before service and forestall the ability of the respondent to restrain advertisement of the petition. Only the rash petitioner would adopt such a strategy in relation to a petition presented in respect of a trading company which was potentially liable to be struck-out. In fact, it appears that this defect in rule 28 of the 1949 English Rules was corrected in 1979, so that premature advertisement of a creditor's petition in breach of the express advertisement rules has long been regarded as an abuse of process there[4]. Rule 4.11(2)(b) of the Insolvency Rules 1986 now provides that where the petitioner is not the company, advertisement shall take place "*not less than 7 business days after service of the petition on the company, nor less than 7 business days before the day so appointed.*" Advertisement for abuse of process purposes includes communication of the existence of the petition to third parties, not simply a newspaper notice.

19. The right of access to copies of the petition in England is similar to the Bermudian position. The main difference is that provision is made there for directors, who under section 124(1) of the 1986 Insolvency Act have the right to present a petition. Rule 4.13 of the English Rules now provides in substantially similar terms to the counterpart of rule 22 (save for the addition of "*director*"):

> *"Every director, contributory or creditor of the company is entitled to be furnished by the solicitor for the petitioner (or by the petitioner himself, if acting in person) with a copy of the petition within two days after requiring it, on payment of the requisite fee.*"

[3] At the February 8, 2007 hearing.
[4] *Re Signland Ltd*. [1982] 2 All ER 609, cited in *Re Doreen Boards Ltd.*[1996]1 BCLC 501, which was referred to in argument.

20. The normal Bermudian chronology would nevertheless be (a) presentation of petition, (b) service of petition, and (c) (assuming the respondent does not evince an intention of applying to strike-out and restrain the advertisement of the petition) advertisement. Under this scenario, when an application to strike-out was pending, rule 22 applicants would not learn of the existence of the proceedings from a newspaper advertisement placed by the petitioner. Unless they were privy to information from the petitioner (e.g. creditors) or from the company (e.g. contributories), third party creditors would not be likely to become involved at the strike-out stage. Third party creditors might, however, learn of the petition by inspecting the Cause Book shortly after a petition has been filed, or when (as usually occurs) recent filings are published in the daily paper.

21. Mr. Diel submitted that the administrative practice of this Court was subject to criticism because of the entering of particulars of winding-up proceedings in the Supreme Court Cause Book could then be published by the Royal Gazette. The fact that this might happen before the company could apply to restrain advertisement of the petition was inconsistent with justice and the scheme of the Rules. The English practice is for winding up matters to be designated as "*In Re a Company*" with a case number to avoid damage to a company's trading interests in cases where the proceedings might be struck-out[5].

22. There is considerable force to this submission, and in my view serious consideration ought to be given by the Registrar to adopting the English practice, which appears to be that save where the company itself is the petitioner, its name should not be entered in the Cause Book when winding-up proceedings are commenced against a company. This is consistent with both the modern English Rules and the important commercial reality that any form of advertisement of the filing of a winding-up petition against a solvent trading company may cause significant commercial damage. A Bermudian petitioner filing against a solvent company with a debt which may be disputed will typically make sure the respondent has an opportunity to take steps to halt publication, to avoid any potential liability for any actionable damage that might otherwise be caused if the petition were to be struck-out. Such protective steps might easily be defeated by entry of the filing of a winding-up petition against a named company in the public Cause Book.

23. In the present case the entry in the Cause Book did not refer to the winding-up jurisdiction of the Court. But any lawyer inspecting the entry seeing the reference to "*In the Matter of the Companies Act 1981*" without any reference to e.g. section 99 (scheme of arrangement) or section 261(restoration to the register), and the Registrar of Companies listed in the plaintiff column, would reasonably infer that a winding-up petition had been presented. A similar approach seems, on a cursory review of the Cause Book, to have been adopted with respect to other winding-up petitions. When recent filings are published in the local press, the *cognoscenti* will be put on notice that a winding-up petition has likely been filed. These observations on an important point of practice that was raised in argument are instructive in terms of shedding light on the spirit which informs the express terms of the 1982 Rules.

24. For the main question falling for initial consideration is whether the Bermuda statutory scheme envisages (or has as its dominant goal) the application of rule 22 in circumstances where the petition is liable to be struck-out. Or, more broadly, is rule 22 primarily intended to operate inflexibly without regard to the stage the proceedings are at and the reason the copy of the petition is sought for? The modern English law and practice supports the view that rule 22 (derived from an identical provision in the English 1949 Rules and substantially the same as the modern rule 4.13) is primarily designed to facilitate eligible persons receiving copies of a petition prior to the hearing of the petition. The usual Bermuda practice, the rule 19 and Cause Book loopholes notwithstanding, is no different.

25. Mr. Kessaram produced an interesting authority which illustrated that third party creditors may appear in support of a strike-out application: *In re International Tin Council* [1986] 1 Ch. 419. In this case Millett J (as he then was) joined a third party creditor as a co-respondent to a strike-out application in respect of a creditor petition. This was hardly an ordinary winding-up matter as the "company" was an

[5] Counsel also criticized the Minister of Finance for issuing a Press Release concerning the Petition.

international organisation which was admittedly insolvent, and the Attorney-General was given leave to support the successful strike-out application. The Court held that the I.T.C was not a company at all for winding-up purposes.

26. Under traditional English principles, it will potentially be an abuse of process to communicate the filing of a winding-up petition to third-party creditors before the company has been served, if damage is caused to the company's business: '*Palmer's Company Law*', paragraph 15.629. Premature advertisement by a contributory in breach of merely implicit provisions of the statutory rules has been held to be an abuse of process resulting in a petition being struck-out: *Re Doreen Boards Ltd.*[1996]1 BCLC 501. But this is in the context of a statutory framework within which the Court is expressly required to decide whether advertisement of a contributory's petition should take place at all by rule 4.23(1)(c)[6]. It is unclear how substitution can take place at the interlocutory stage without notification to third parties, so it seems improbable that third party creditors can never participate in a strike-out application at all. Indeed, since persons entitled to receive copies of a petition are all entitled to petition in their own right, the provision must in part be designed to facilitate substitution for the original petitioning creditor.

27. In these circumstances, I find the Bermuda legal position to be as follows. The dominant purpose of rule 22 is to assist either (a) persons wishing to appear or consider appearing on the hearing of a petition, or (b) persons wishing to apply or consider applying to be substituted for the petitioner. The question of substitution would, under the statutory scheme, ordinarily arise on the hearing of a contested petition. In my judgment, the question of substitution would also arise in the context of a strike-out application where the petitioner positively sought support because he formed the judgment that his petition was liable to be struck-out. However, I have never heard of a third party creditor actively participating in a Bermudian strike-out application. And this analysis primarily applies, in my judgment, to petitions presented by creditors or contributories where the identity of the petitioner is largely immaterial to the extent that they are exercising class rights.

28. Rule 22 follows rule 19, which deals with advertisements of a petition, and rule 20, which deals with service. Implicitly, a rule 22 request is expected by the scheme to be made after the petition has been served and the company afforded an opportunity to restrain (on the grounds that the petition is liable to be struck out on abuse of process grounds) all forms of advertisement of the petition (including responding to a rule 22 request). Rule 22 is found in a section of the Winding-Up Rules ("*PETITIONS*") which deals with the presentation, service and advertisement of petitions.

29. Rule 27 on substitution appears in the section of the Rules headed "*HEARING OF PETITIONS AND ORDERS MADE THEREON*". The rule provides as follows:

> **"Substitution of creditor or contributory for withdrawing petitioner**
>
> *27 When a petitioner for an order that a company be wound up by the Court is not entitled to present a petition, or whether so entitled or not, where he (1) fails to advertise his petition within the time prescribed by these Rules or such extended time as the Registrar may allow or (2) consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called in Court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned, or (3) if appearing, does not apply for an order in the terms of the prayer of his petition, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the Court would have a right to present a petition, and who is desirous of prosecuting the petition. An order to substitute a petitioner may, where a petitioner fails to advertise his petition within the time prescribed by these rules or consents to withdraw his petition, be made in chambers at any time."*

[6] [1996] 1B.C.L.C 501 at 504-505.

30. Rule 27 primarily contemplates substitution occurring at or prior to the hearing of the petition when circumstances arise which suggest that either (a) the petitioner lacks standing to proceed with the petition or (b) does not wish to proceed with his petition. Accepting that the main purpose of rule 22 is to facilitate persons entitled to petition to both appear at the hearing and to apply for substitution, rule 27 does not undermine the presumption implicit in the scheme of the rules as to when rule 22 will ordinarily come into play.

31. In my judgment, third party creditors or contributories would not ordinarily be expected to learn of the existence of a petition in respect of which a strike-out application that was launched until after the petition had been formally advertised and any strike-out application dismissed. Rule 22 is primarily designed to come into play at this stage of the winding-up process. The local idiosyncrasies of newspaper reports on Court filings which happen to name winding-up respondents, or indeed occasional late service of the petition, can have no bearing on the primary object of rule 22.

Legal findings: what evidential threshold must the Applicants meet to establish their right to a copy of the petition?

32. Rule 22 is only problematic in terms of identifying who is entitled to apply to the petitioner for a copy of the petition in relation to creditors. There will rarely be any difficulty in ascertaining whether an applicant is a contributory. It is obvious that the evidential threshold for creditors must be very low, principally because (a) the application is simply required to be made to the petitioner, not the court (it is essentially an administrative matter), (b) it would be extremely rare for someone who is not arguably a genuine actual, contingent or prospective creditor to have the slightest interest in obtaining a copy of a document as unexciting as a winding-up petition, and (c) the statutory scheme assumes that a rule 22 request will be made after advertisement and prior to a hearing in open court when members of the wider public will be entitled to attend. Indeed, Ground J. (as he then was) has entertained an application by a respondent company's debtor on the hearing of a winding-up petition presented by the company itself: *Re Electric Mutual Liability Insurance Company*, Supreme Court of Bermuda , Companies (Winding-Up) [1995] No. 436.[7]

33. This view is further supported by the fact that rule 22 (and its older English counterpart provision) has seemingly generated no case law for over 50 years. And the usual practice is that the petitioner's counsel will happily supply a copy of the petition to any person claiming to be a creditor who requests it, assuming there is no obvious reason to doubt the *bona fides* of the person making the request.

34. The fact that the debts relied upon are disputed can hardly be material in the context of rule 22, because (a) the petitioner would not know without enquiry of the company whether a debt was disputed or not[8], and (b) it is impossible to construe rule 22 as a workable provision if one implies that it confers on the petitioner both (i) a duty to investigate and (ii) a duty to adjudicate whether an applicant's debt is an undisputed one. Insolvency law confers the task of determining whether or not a purported creditor's debt is disputed *bona fide* on substantial grounds on the Court in the limited context of deciding whether a petitioning creditor has standing to proceed with a petition. If a winding-up order is made, the proof of debt process comes into play. There is no authority of which I am aware which suggests that the Court has no jurisdiction to hear a third party creditor whose debt is disputed, although the existence of a substantial dispute might well bear on the weight to be given to their views on the hearing of a petition.

35. The normal time limits fixed by the rules clearly do not envisage that the recipient of a rule 22 request from a creditor will carry out any extensive enquiry into the *bona fides* and/or merits of the status asserted. The two-day limit for complying with the request, as noted above, is primarily designed to allow a person who has been given

[7] Judgment dated 15th April 1996.

[8] Obviously the position would be otherwise where the company is the petitioner in cases of admitted insolvency, but in such cases creditors would for practical reasons be unlikely to need to appear on the hearing of the petition in any event.

seven days notice of the hearing of the petition an opportunity to receive it before filing a notice of intention to appear on the day before the hearing, in the ordinary run of the mill case. CTM, LVFG and the Alfa Parties have filed sworn evidence which supports the view that they are creditors of IPOC by virtue of various costs orders in their favour, in amounts which are either taxed but unpaid, or which have still to be taxed and paid. Leonid Rozhetskin appears to be a contingent creditor in that he has an outstanding clam for damages against IPOC. IPOC disputes their status as creditors and wishes to file evidence in this regard.

36. In my view, it was quite proper for the Registrar of Companies to query the Applicants' status as creditors with IPOC, in response to the initial LVFG rule 22 request because (a) there were legitimate public interest concerns about disclosing the contents of the Petition, and (b) in the highly publicised litigation between the parties which was pending at the time of the request, the Applicants were substantially debtors of IPOC rather than creditors. However, as a matter of law, a rule 22 applicant need do no more than demonstrate that they are arguably a creditor of the respondent company, and the bare assertion of their status should in ordinary cases be sufficient to trigger an obligation on the petitioner's part to supply a copy of the petition.

37. I accept the submission of the Alfa Parties in paragraph 23 of their February 19 Skeleton Argument: "*A creditor for the purposes of Rule 22 is a person who bona fide claims to be a creditor and whose claim is not plainly misconceived.*" Equally valid is the submission of LVFG (Skeleton Argument dated February 19, 2007, paragraph 17: "*…provided that the applicant for a copy of the petition asserts on credible grounds that he is a creditor, the petitioner is obliged to supply him with a copy. It is only if the claim to be a creditor is manifestly unfounded that the petitioner should be entitled to refuse to supply him with a copy.*"

38. In my view, assuming rule 22 applies to the Petition, the Applicants have met the evidential threshold and no need to resolve the disputes raised by IPOC arises. Nor can the fact that the Applicants' main commercial interest in the Petition arises from their status as IPOC's alleged debtors disentitle them from relying on the rule.

Legal findings: what jurisdiction does the Court possess to restrain a public interest petitioner from disclosing confidential information contained in the petition and/or from complying with rule 22?

39. When the present applications were initially filed, the Petitioner raised public interest objections to the Petition being supplied to the Applicants in its un-amended form. In light of the April 23, 2007 amendment Order, and Mr. Ratneser's helpful indication to the Court the following day, the captioned question no longer has the same significance as previously. This approach of excluding from the Petition any material the Crown considered to be genuinely confidential from a public interest perspective was consistent with the judicial observations on which Mr. Williams relied (Written Submissions, paragraph 23) in *Re Derek Colins Associates* [2002] All ER (D) 474[9].

40. The only question which falls for determination is a rather different one, which has two limbs to it. Firstly, does the Court have the jurisdiction to restrain the Petitioner from complying with rule 22 pending the determination of the strike-out application because the Companies may be prejudiced if the Petition is struck out on abuse of process grounds and the Applicants have used the Petition to the disadvantage of IPOC in the interim? And, secondly, since the Applicants are not creditors of eight of the nine respondent companies, do they have a right to an unexpurgated version of the entire composite petition?

41. In my view, there can be little doubt that the Court has the inherent jurisdiction, in the context of granting an injunction to restrain publication of a petition to restrain a petitioner from complying with rule 22. This was very fairly conceded by the Alfa Parties and LVFG, who were keen to point out that this inherent jurisdiction was the only jurisdiction the Court possessed in this regard. But this latter submission

[9] Transcript, paragraph 13. Judge Anthony Mann QC emphasised, however, that all allegations relied upon should be included in the petition.

overlooks an analogous power, not alluded to in any of the submissions, to extend the time for the Petitioner to comply with rule 22, or indeed any other time prescribed by the Rules. Rule 157 provides as follows:

> "**Enlargement or abridgement of time**
> *157.The Court may, in any case in which it shall see fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.*"

42. This is an unfettered discretion which can be utilised to do justice in all manner of circumstances, depending on the issues which fall for consideration in any particular case.

43. Mr. Diel is clearly right that in strict legal terms the Applicants, if entitled to invoke rule 22, are only entitled to a copy of the Petition as against IPOC. For the reasons that are set out below, I will postpone determining what form of the Petition the Applicants are entitled to receive until after the determination of the strike-out application, if necessary. This is because that application raises an important issue as to the form of the Petition which should proceed.

Legal Findings: does rule 22 apply to a petition under section 132 of the Companies Act 1981?

44. Mr. Ratneser for the Registrar of Companies advanced the interesting argument that a section 132 of the Companies Act 1981 petition was not governed by the Winding-Up Rules at all. The present Petition is perhaps the first contested petition to be filed under this statutory provision.

45. Section 132 in material part provides as follows:

> *"(8) If the Minister considers, after examining any such report that the company or any or its officers, agents or employees —*
>
> *(a) have knowingly and wilfully done anything in contravention of this Act or of any licence, permit or permission granted under this Act, he may direct the Registrar to petition the Court for the winding-up of the company;*
>
> *(b) are carrying on its affairs in a manner detrimental to the interests of the members of the company of the creditors of the company he may require the company to take such measures as he may consider necessary in relation to its affairs.*
>
> *(9) A copy of any petition referred to in subsection (8) shall be served on the company at least seven clear days before the day set by the Court for the hearing of the petition.*
>
> *(10) If the Court, on the hearing of any such petition, is satisfied that the company or any of its officers, agents or employees have done anything in contravention of the provisions of this Act or of any licence, permit or permission granted under the Act, the Court may —*
>
> *(a) make an order for the winding up of the company; or*
>
> *(b) impose a fine of two thousand dollars on the company; or*

> *(c) impose a like fine on any officer, agent or employee of the company who has knowingly and wilfully authorized or permitted any such contravention.*
>
> *(11) Where the Court makes an order for the winding up of a company under subsection (10) the company shall be wound up in the same manner and with the same procedure as if the circumstances leading to the order were circumstances referred to in section 161."*

46. Section 132 is found in Part X of the Act ("*Exempted Companies*"), and provides an alternative ground for winding-up exempted companies only following the appointment of an inspector and the receipt of his report. It is essentially a disciplinary power, because winding-up is only possible under section 132(10) where the Court "*is satisfied that the company or any of its officers, agents or employees have done anything in contravention of the provisions of this Act or of any licence, permit or permission granted under the Act"*. As an alternative to winding-up, however, the Court may impose fines.

47. In my view, neither a creditor nor a contributory could apply to be substituted as a petitioner under section 132(10), because only the Registrar has standing to wind-up under this section under the provisions of section 132(8)(a). The crucial question for rule 22 purposes is what does subsection (11) mean when it states that when a winding-up order is made, the company "*shall be wound up in the same manner and with the same procedure as if the circumstances leading to the order were circumstances referred to in section 161*."

48. I accept Mr. Ratneser's submission that this means as follows. The normal winding-up regime of Part XIII of the Act and the Rules governing the procedure after a winding-up order is made under section 161 applies to a company wound-up under section 132 as if it had been wound-up under section 161. The draftsman of section 132(11) clearly averted to the question of what procedure should govern section 132 petitions and adopted a form of wording which expressly included the normal winding-up procedure for the post-winding-up order stage. This is entirely inconsistent with an intention to apply the normal procedural rules to the pre-winding-up order phase.

49. This does, as the Applicants submitted, beg the question what procedure does apply when a section 132 petition is filed? Order 102 of the Rules of the Supreme Court 1985 applies to Companies Act applications generally, although it does not explicitly refer to section 132. This is not the only instance when procedural rules to give effect to uniquely Bermudian statutory provisions have been overlooked as our procedural code is substantially based on English rules. The Court of Appeal for Bermuda has held that where a statute permits an application which is not provided for by the Rules of Court, a gap in the procedural rules does not prevent the Court from granting substantive relief: *New Skies Satellite BV-v- FG Hemisphere Associates LLC* [2005] Bda LR 59. [10] But whether Order 102 does apply strictly or by analogy, the Court on the first hearing of a section 132 petition (or in advance of such hearing) would simply give directions for the further conduct of the petition. Depending on whether the company was solvent or insolvent, and whether the petitioner was actively seeking a winding-up order or a fine, the Court would consider what directions in terms of advertisement were required.

50. The Court would, therefore, in circumstances where a winding-up order was being seriously pursued, most likely under its inherent jurisdiction seek to apply the Winding-Up Rules by analogy to the extent that they are applicable. This is because if a winding-up order is made under section 132(10), and the normal winding-up procedure comes into play, certain statutory rules will potentially come into play with retrospective effect. Section 167(2) of the Act provides that a winding-up commences at the date of the presentation of the petition. The effect of a winding-up order under

[10] Rules to govern the procedure for applications to enforce arbitration awards under the Bermuda International Conciliation and Arbitration Act 1993 were subsequently brought into effect on January 1, 2006, through amendments to Order 11 and the introduction of Order 73 rule 10.

section 161 (as applied to section 132 petitions by section 132(11)) is that certain provisions relate back to the petition date, most notably the following:

> ***"Avoidance of dispositions of property etc. after commencement of winding up***
>
> *(1) In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.*
>
> *(2) Where any company is being wound up by the Court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."*

51. In summary, rule 22 does not in my judgment apply strictly to a section 132 petition, and creditors would have no automatic right to receive a copy for the purposes of considering applying for substitution if the petition was struck-out before or at the hearing of the petition. However, the Court does undoubtedly retain the discretion to allow creditors or contributories to be heard on the hearing of a petition, even though their interests would likely be given far less weight than in the context of the hearing of a creditor or contributory petition where the petitioner was asserting class rights on their behalf. After all, section 132(8)(a) restricts the Registrar's petition to regulatory infringements, with the terms of section 132(8)(b) suggesting that prejudice to the interests of creditors or contributories will not fall to be dealt with by winding-up under this section at all, but under section 161(g) if a section 132(8)(b) request is not complied with. Section 132(8), it is worth recalling, provides:

> "*(8)* **If the Minister considers, after examining any such report that the company or any or its officers, agents or employees —**
>
> *(a) have knowingly and wilfully done anything in contravention of this Act or of any licence, permit or permission granted under this Act, he may direct the Registrar to petition the Court for the winding-up of the company;*
>
> **(b) are carrying on its affairs in a manner detrimental to the interests of the members of the company of the creditors of the company he may require the company to take such measures as he may consider necessary in relation to its affairs.**"[emphasis added]

52. In practical terms this conclusion is not decisive, because the Petition combines an application for a winding-up order under section 132 (10) with an application for a winding-up order under section 161(g). The Court is specifically invited to look at breaches of the Act (section 132) and the 1998 Regulations made under the Bermuda Monetary Act (section 161(g)) "*collectively*" (Petition, paragraph 279). Of the statutory breaches pleaded, "*many of the breaches, particularly those arising under the BMA Act…are serious"* (Petition, paragraph 280). Section 132 of the Companies Act, according to its terms, does not permit a winding-up order to be made based on breaches of any other Act.

53. It would be nonsensical to hold that the Applicants were entitled to receive an edited version of the Petition, excising those portions which relate to section 132, if the Petitioner's case that the pleading must be read as a whole prevails. Therefore, the Applicants right to receive a copy of the Petition and, if so when, falls to be

determined on the basis that the Petition is presented under section 161(g) of the Act to which the Winding-Up Rules undoubtedly apply.

Legal findings: do any unique characteristics of the section 161(g) Petition oust the application of rule 22?

54. In my view, it is not seriously arguable that rule 22 does not apply to a public interest petition at all. Rather, because the main concern at the hearing of the Petition will be whether it is just and equitable to wind-up from a public policy perspective, the interests of creditors and contributories will have diminished significance. If it is theoretically possible that such parties could apply to be substituted as petitioners, the likely success of such an application in the present context seems doubtful, in conceptual terms, certainly at the present time.

55. I find that the Applicants are legally entitled as creditors (for rule 22 purposes) to a copy of the Petition. If the Petition is heard, it will be heard in open Court and it is drafted on the basis that the Court should consider the Companies as a group, not individually. In these circumstances, it seems to me that no question of editing out references to all Respondents save IPOC properly arises, but I will hear further argument on the editing issue if desired. The public interest character of the Petition impacts not on the application of rule 22 as such[11], but on the question whether the Applicants' rule 22 rights should not be exercised, as Mr. Ratneser firmly contended, until after the determination of the strike-out application. The practical rationale for adopting this submission is that the Companies' strike-out application raises an issue which bears on the very point of what form of the Petition should the Applicants receive.

56. There being no public interest objections to the Petition being disclosed in its amended form, no question of the Court exercising any inherent jurisdiction to restrain the Applicants from receiving the Petition, based on public policy grounds, properly arises. I make no decision on this disputed question, accordingly.

Findings: should the Petitioner's obligation to comply with rule 22 be extended under rule 157 until after the determination of the strike-out application?

57. The main significance of the character of the Petition is that the Court's primary task will be to resolve, as between the Petitioner and the Companies, whether the public interest requires that they be wound-up. This is supported by the case on which Mr. Ratneser relied, *Re Get Me Tickets Ltd.* [2006] EWHC 1058 (Transcript, paragraph 12).

58. In the present case it is clear that the applicant creditors wish to support a winding-up order and would like to be able to appear not just on the hearing of the Petition, assuming it takes place, but on the hearing of the strike-out application. As certain of the allegations relied upon in the Petition may have come to the authorities' attention through their defence of the various claims brought by IPOC, they may be able to lend certain logistical support to the Petitioner on certain evidential issues. But this would in reality arise out of their status as alleged debtors of IPOC, their status as creditors in truth being merely incidental to their defence of IPOC's claims. Their dominant commercial interest is in bringing IPOC's seemingly relentless pursuit of them and the "Megafon Stake" to an end. As explained in my provisional views on the conduct of the strike-out application which I have set out below, I am not minded to resolve any evidential issues at the interlocutory stage.

59. Two heads of opposition to the Applicants receiving copies of the Petition now were raised. Both relate to the central uncontested facts that (a) a strike-out application is

[11] It does potentially impact on the right of the Applicants to seek a copy of the Report referred to in the Petition, however, as the Petitioner has indicated that there are public interest objections, supported in part by section 132 (7) of the Act, to the Report itself being publicly aired.

pending, and (b) if the Applicants receive their copy now, it may subsequently be held that they were not entitled to receive the same.

60. The Respondents object to the Applicants appearing or being present at the strike-out application, and object to a copy of the Petition being supplied at any stage based on concerns as to what the Applicants will do elsewhere with the information contained in the pleading. The Petitioner felt that mere presence of the Applicants in the strike-out hearing would be a matter for the Court, but submitted they had no active role to play. Mr. Ratneser wanted to pursue the Petition fairly, not "*willy nilly*", and specifically contended that the rule 22 applications should not be acceded to at all until after the strike-out application is determined.

61. I have construed this latter submission as an application that, if I hold the Applicants come within rule 22, I should extend the time for the Petitioner to comply with the requests until after the determination of the strike-out application, provided that the Petition is not struck-out. The most important practical consideration which impacts on when the copy of the Petition is supplied arises from the pending strike-out application, which, if successful in part, might result in separate petitions for each company being filed. The Applicants would only have a right, in this eventuality, to receive a copy of the IPOC petition.

62. For these practical commonsense reasons, I find that it makes no sense to require the Petitioner to supply copies of the Petition in its present form to the Applicants at the present time. The Applicants have no discernable pressing interests as creditors to receive a copy of the Petition at this stage and no arguable right to be heard on the Companies' strike-out application if, for the reasons explained below, that application is substantially concerned with the issue of whether the composite Petition or nine separate petitions should proceed.

63. I do not think that it would be right in principle or realistic in practice to seek to restrict the use to which the Applicants make of the Petition once they are supplied a copy. It is inherently prejudicial for third parties to receive a copy of a Petition which may be struck-out. In the present case, actual prejudice to IPOC in its wider litigation battle with the Applicants is the more tangible risk, which I also take into account.

64. For these reasons, I find that the Petitioner's obligation to supply the Applicants with copies of the Petition under rule 22 of the Rules should be extended under rule 157 of the Companies (Winding-Up) Rules until after the determination of the strike-out application, but that this obligation shall be discharged in the event that the Petition is struck-out on the hearing of the Companies' pending strike-out application.

Should the Applicants be entitled to be present at the hearing of the strike-out application?

65. In my judgement, there is no good reason why the Applicants should not be entitled to be present at the hearing of the strike-out application. Having regard to their substantial dispute with IPOC, justice would not be seen to be done if they were to be excluded from a hearing which is of considerable relevance to their commercial interests, even if they have no right to appear as interested parties and no presently exercisable right to receive a copy of the Petition. Indeed, it is far from clear that any cogent grounds exist for an *in camera* strike-out hearing at all in relation to a public interest petition which has already been effectively advertised, and where no national security or other public interest grounds for secrecy exist. CTM's Skeleton Submissions (February 19, 2007, paragraph 1.6) sets out the following instructive passage from the speech of Viscount Haldane in the House of Lords case of *Scott-v-Scott* [1913] A.C. 417:

> "*…While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that*

justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

66. This *dictum* anticipated Article 6 of the European Convention on Human Rights, which in turn informed the following provisions of section 6 of the Bermuda Constitution:

> "*(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*
>
> *(10) Nothing in subsection (9) of this section shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court—*
>
> *(a) may be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or*
>
> *(b) may be empowered or required by law to do so in the interests of defence, public safety or public order."*

67. Section 6(9) creates, in effect, a rebuttable presumption that all hearings will take place in public. Section 6(10) provides that the ordinary law of Bermuda, statutory or common law[12], may validly empower a court to exclude the public (i.e. all non-parties) from any interlocutory proceedings on the grounds that it is "*necessary or expedient*". The other more specific grounds only have to be met to justify excluding the public from trials. So although the bar for excluding the public is lower in relation to interlocutory proceedings, the starting point is that anyone who wishes to attend any court proceeding should be entitled to attend. The Applicants' rights in this regard are far more extensive than their right to be heard as third parties on an interlocutory application which does not directly affect their rights directly and which, in particular, does not support any practical need to receive a copy of the Petition under rule 22 at this stage.

68. However, my provisional view is that in these circumstances the Applicants' applications to appear and be heard on the hearing of the strike-out application are, at this stage, liable[13] to be struck-out as an abuse of the process of the Court. The strike-out application, far more decisively than the hearing of the Petition, is a matter

[12] Section 102 of the Constitution provides: "*'law' includes any instrument having the force of law and any unwritten rule of law.*"

[13] It may be that these applications, which stand adjourned, may properly be restored due to presently unforeseeable future events.

between the parties to these proceedings and the statutory scheme does not envisage the participation of third parties, save perhaps (in relation to a private petition) at the invitation of a petitioner who shared the same class interest as the third party creditor. Adding the four Applicants to the strike-out application as parties would also add considerably to the length and costs of that application and be inconsistent with the Overriding Objective.

69. The involvement of the four creditors would also materially prejudice the Companies' fair hearing rights. In a case where they should be contending only against the Petitioner at the strike-out stage, they would instead, without any objective justification, be faced with five opponents. This would obviously reduce the amount of time (otherwise 50%) afforded to their oral arguments, and dilute the impact that their oral submissions would otherwise have. As Mr. Ratneser's position on the need for fairness rightly implied, the Companies' fair hearing rights are an integral part of the same public policy interests, protecting Bermuda's standing as an offshore financial centre, on which the Petition itself purports to be based.

70. If the Petition proceeds to hearing, this Court should be equally astute to ensure that the Applicants are only heard in respect of issues which properly affect them *qua* creditors. At present, the Petition is wholly based on regulatory concerns unconnected to conduct said to be prejudicial to creditors and the dominant status of the Applicants in relation to IPOC is that of debtors.

71. The Applicants may of course, if so advised, re-list their applications to be heard on the strike-out application for the effective date of the Companies' Summons. Otherwise they would be at liberty to apply to restore them in the unlikely event that any issues affecting their interests arise.

Provisional views: directions for the Companies' strike-out application

72. It seems to me to be appropriate for me to set out my provisional views on the Companies' strike-out application in the present Ruling because these views have influenced the resolution of the rule 22 applications, as well as with a view to achieving the Overriding Objective.

73. The Companies' strike-out Summons issued on February 6, 2007 seeks an Order that "*the Petition be struck-out and/or stayed on the grounds that it and/or the manner of its prosecution is an abuse of process*." The Summons is supported by the Affidavit of Mark Diel, which sets out various essentially un-contentious matters of record by way of complaint about the way in which the Petition has been drafted and/or prosecuted.

74. These complaints may be summarised as follows: (a) the Petition was only served two weeks after it was filed, (b) the Petition purported to attach the Inspector's Report, (c) the Minister of Finance improperly issued a press Release about the Petition, (d) IPOC's adversaries in hostile litigation were about to be supplied by the Petitioner with a copy of the Petition together with the Report, (e) because the Petition (and Report) deal with not just IPOC but also eight other companies, IPOC's adversaries would improperly be afforded an insight into the affairs of IPOC's affiliates if served with the Petition and Report and (f) the Petition is an abuse because the Companies have previously been fined for the regulatory breaches complained of.

75. It appears to me that the amendment of the Petition so that the Report is not an Exhibit deals with a large part of the Respondents' complaints. However, it also seems to me that if the Registrar wishes to put a Report which forms the basis of an arguable public interest petition into the public domain, this would be most unlikely to be held to constitute an abuse of process, even if it caused embarrassment and inconvenience to a respondent. No evidence has been filed, nor credibly could be filed, asserting that the Petition is an abuse in that it is bound to fail. Any "merits" points fall to be determined at the effective hearing of the Petition. The only strike-out issues which seem to be outstanding are (a) whether late service of the Petition combined with the Minister's Press Release, was an abuse of process, (b) whether the joinder of the nine Respondents in one petition is an abuse of process, and (c) whether

it is an abuse of process for the Registrar to seek a winding-up order in respect of regulatory breaches in respect of which the Companies have been fined.

Was late service of the Petition abusive?

76. My provisional view is that, for the reasons set out above in relation to the rule 22 issue, late service of a petition which facilitates advertisement of a Petition which is potentially liable to be struck out and has been presented against a solvent trading company is inconsistent with the spirit of the Rules. A disputed creditor petition, which was not promptly served, resulting in publicity which might otherwise have been restrained and demonstrable damage to the reputation of a prosperous trading company, might well in such circumstances be struck-out on abuse of process grounds. The Petitioner is not a disputed creditor deliberately misusing the winding-up machinery to improperly pressurize the Respondents into paying a disputed debt, however.

77. In the case of a public interest petition which is otherwise not obviously liable to be struck-out, and in relation to which no injunction restraining publication would likely be granted, it is not seriously arguable that late service resulting in premature advertisement, without more, would be a ground for this Court's discretion to be properly exercised in favour of striking-out. This conclusion appears even more justified in the present case where the fact that the Companies have been under a regulatory cloud is already in the public domain, and the Petitioner (as opposed to the creditors) cannot properly be said to have benefited in any discernable way from the late service and premature publication of the fact of the Petition's filing, of which the Respondents complain.

78. In any event, and more fundamentally, the late service complaint is highly artificial in real terms. On the essentially agreed facts, late service did not deprive the Companies of an opportunity to make the application they eventually made on February 6, 2007, nine working days later. It merely shortened the time within which such an application might have been made. The Companies admit being served with a copy of the Petition on January 26, 2007, a Friday. It appears that the Royal Gazette did not publish the fact of the filing until Wednesday, January 31, 2007[14]. The description of the filing, by accident or design, did not in any event refer to the filing as a winding-up matter at all, and came under a heading "Writs" and merely made the somewhat ambiguous reference to "*in the Matter of the Companies Act*" with no reference to the Registrar of Companies as a party at all. That this publication did not directly advertise the petition is supported by the fact that CTM's attorneys only approached the Registrar for a copy of the Petition based on "*enquiries at the Bermuda Supreme Court*"[15]. This reinforces the need for the Registrar to urgently reconsider the way in which third-party winding-up petitions are entered in the Cause Book, albeit that no harm was caused in the present case.

79. So the record does not support the contention that late service of the Petition, on the facts of the present case, was even arguably an abuse of process. The Companies' attorneys wrote the Registrar of Companies on January 31, 2007 and made only one complaint which foreshadowed only one application to Court for relief. They requested an undertaking that the Report referred to in the Petition not be served on the Applicants to avoid the need for them to apply for injunctive relief[16]. If a strike-out application was being seriously considered, at this stage the Companies should have also requested the Registrar to undertake not to advertise the Petition in any way until such time as they filed (or confirmed that they did not intend to file) a strike-out application. After all, they had been in possession of the Petition for a weekend and had two further working days to consider whether they wished to pursue this remedy, which is typically pursued immediately upon receipt of the Petition because of the peculiar idiosyncrasies of Bermuda's Winding-Up Rules and, no doubt, the

[14] Page 1 of Exhibit "NKR-1" to the February 5, 2007 Nigel Rawding Affidavit filed in support of CTM's rule 22 application.
[15] Page 2, Exhibit "NKR-1" to the Rawding Affidavit.
[16] Exhibit "MACD-1" to the February 6, 2007 Mark Diel Affidavit.

longstanding local practice in terms of entering filing details of winding-up matters in the Cause Book.

80. The notion of restraining advertisement of a public interest petition on the grounds that it is liable to be struck-out on abuse of process grounds is so improbable and probably unprecedented, that it is entirely understandable that the strike-out application option did not spring to the minds of the Companies' legal advisers until over a week after service of the Petition. The Minister of Finance's Press Release was seemingly issued on February 5, 2006, according to the newspaper article of the following day on which the Companies rely[17]. The Press Release, seemingly for the first time, advertised to the world at large (as opposed to those who happened to inspect the publicly available Cause Book in the period immediately following January 12, 2007) the fact that winding-up proceedings had been commenced in January, 2007 against the Companies. To the extent that it may be suggested that the Registrar's legal advisers ought to have advised the Minister of Finance not to publish any details about the Petition because it was liable to be struck-out as an abuse, this argument seems to be entirely without merit because the Petitioner's legal advisers appear to have had no reasonable grounds for suspecting that the application belatedly made on February 6, 2007 would be made. The position would be entirely different if the Press Release had been issued between presentation on January 12 and service on January 26, 2007. It was in fact admittedly issued 10 days after the Petition was served.

81. This limb of the Companies' strike-out application, in my provisional view, is liable to be summarily struck-out.

Is the use of a single composite petition abusive?

82. Should the Petitioner have filed a composite petition, or is the Petition an abuse of process because nine separate petitions were not filed? This issue is not one which can be summarily resolved in the absence of agreement between the parties. Three main approaches will likely be contended for. The Petitioner's choice was to file a single petition for all nine companies on the basis that the investigation was carried out on the group as a whole, and the decision to wind-up must properly be determined on a collective basis. This approach is non-traditional, and the second option, the main alternative, would be to suggest that nine separate petitions should have been filed, even if they were to be listed for hearing together. A third possible option would be file a composite petition, but to assign separate matter numbers to each respondent so that the composite Petition would list proceedings 12-20 instead of one action number, or possibly even proceedings 12A-12I.

83. These matters all appear to be largely administrative if, as appears to be the case, there is no fundamental objection in principle to the Court looking at the question of winding-up in relation to a commonly-owned group of companies at the same time and in the round. If the Applicants are entitled to appear on the hearing of the Petition by virtue of their status as creditors of IPOC alone, they will hear the full case put against the other companies as well. In order to consider the case against IPOC, they will have to understand the broader picture which the Court will be asked to take into account. Subject to hearing Counsel, and based on an admittedly superficial analysis of the Petition, it is difficult to see what real prejudice would flow from the Applicants receiving the Petition in its present form.

84. It is equally difficult to see what substantive complaints can be made about the notion of a composite petition, assuming that a technical breach of the rules has occurred. Section 132 (10) and section 161(g) both require the commencement of proceedings by a petition. No objection would appear to arise from seeking alternative forms of relief within one proceeding. A winding-up order is being sought under two separate statutory provisions, but orders if made will both take effect as if made under section 161(g) of the Act. Assuming the Winding-Up Rules apply in terms of form to relief sought under both sections, it is far from clear that a separate petition is required for each company:

[17] Exhibit "MACD-5" to Mark Diel's February 6, 2007 Affidavit.

"**Title of proceedings**

7 (1) Every proceeding in a winding-up matter shall be dated, and shall, with any necessary additions, be intituled as follows—

IN THE SUPREME COURT OF BERMUDA

COMPANIES (WINDING-UP) No. [blank] of 19 [blank]

In the Matter of the Companies Act 1981.

and in the matter of the company to which it relates. Numbers and dates may be denoted by figures.

(2) The first proceeding in every winding-up matter shall have a distinctive number assigned to it in the office of the Registrar."

85. However, it does seem to me that the established practice of regarding each winding-up or bankruptcy proceeding as a separate proceeding is grounded in principle. The scheme of insolvency law and bankruptcy law is entirely different to ordinary adversarial civil proceedings which, enforcement of judgments apart, come to an end when judgment is entered. In a winding-up by the Court, which is deemed in law to commence when the petition was presented if a winding-up order under section 161 is made, for practical purposes the winding-up commences when an order is made. The winding-up process is required, absent perhaps the sort of scheme of arrangement which this Court has approved in relation to reinsurance companies which wrote business on a pool basis, to be carried on a company by company basis. Different companies in a group are likely to have different creditors and inter-group claims.

86. To the extent that the Petitioner is seeking to wind-up the Respondents, a separate proceeding is for these reasons required so that, post-winding-up, if not before, the winding-up proceedings in relation to each company may be separately identified. The recent practice of this Court has been for petitioners of related companies to file separate petitions but thereafter, where for instance they are being reorganised under a Chapter 11 Plan of Reorganization (with or without a Bermuda scheme of arrangement) to permit composite summonses and affidavits to be filed, as practicalities may dictate. Pragmatism, rather than abstract legal theory or inflexible adherence to procedural rules, has become the hallmark of modern insolvency law and practice. But this approach is explicitly justified by the longstanding Rules:

"**Formal defect not to invalidate proceedings**

158 (1) No proceedings under the Act or the rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court."

87. The following provisions of the Rules of the Supreme Court, which explicitly deal with the form of process utilised to commence proceedings, illustrates the general civil law position:

"2/1 Non-compliance with rules

1 (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not

nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed." [emphasis added]

88. My provisional view is, therefore, that the use of a composite petition is not in and of itself so abusive-if it is abusive at all- as to justify this Court exercising its discretion in favour of striking-out the Petition altogether. However, at the very least, principle will probably require a further amendment of the Petition to assign separate action numbers (perhaps 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H, and 12I) to each Respondent. Rule 159 of the Rules provides that the civil practice of the Court shall apply to any matter not expressly addressed by the Rules. One such topic is consolidation, and the Rules of the Supreme Court on consolidation, even if not strictly applicable without modification to the winding-up context, are probably a useful guide to the main practical question of whether the Court should consider the Companies together or apart:

"4/10 Consolidation, etc. of causes or matters

10 Where two or more causes or matters are pending in the Court, then, if it appears to the Court—

(a) that some common question of law or fact arises in both or all of them, or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

(c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them."

Is it abusive to seek a winding-up order in respect of regulatory breaches in respect of which fines have been levied?

89. No detailed evidence has yet been filed in respect this complaint, which on its face seems merely to relate to fines levied "*under the Companies legislation*" (Mark Diel February 6, 2007 Affidavit, paragraph 9). The most serious matters complained of in the Petition are breaches of the Bermuda Monetary Authority Act and Regulations. It is not alleged that the fines were paid as part of a legally binding arrangement that no winding-up proceedings or other regulatory action would be commenced in respect of the misdemeanours in question. It is doubtful whether the Crown could lawfully enter

into such an arrangement, and clear evidence of any such agreement would have to be produced to support the case that a petition brought in breach of contract was an abuse of the process of the court. No such evidence has yet been filed.

90. My provisional view is that even if this limb of the Companies' strike-out application is arguable, it would be impossible, or at least difficult, to assess the weight to be given to the complaint in isolation from the case on the Petition overall. With a view to saving time and costs, avoiding unnecessary interlocutory appeals, and bearing in mind that difficult questions should not be resolved at the strike-out stage, I would be minded to direct that this issue be tried on the hearing of the Petition. It seems to me that in light of the extensive publicity which the investigation into the affairs of this corporate group and the general propriety of its activities have received over recent years, this is in any event a case which the wider interests of justice requires to be heard on its merits in open court. For these reasons, I would, even if this point appeared meritorious, decline to exercise the discretion to strike-out at the interlocutory stage.

Provisional views on strike-out application: conclusion

91. In summary, my provisional view is that the only issue which ought to be determined at the interlocutory stage is (a) whether a composite petition should proceed, and (b) if so, how should it be styled. The late service complaints should be dismissed summarily, and the complaint about seeking winding-up on the grounds of conduct for which fines have been imposed should be determined on the hearing of the Petition.

92. The Respondents' Summons should, I direct, be re-listed for effecting hearing on the issues referred to in the previous paragraph on a date convenient to Counsel and the Court, who should submit agreed dates to the Registrar within seven days. At that hearing, I will hear Counsel on the question of the need for further argument on any other strike-out points at this stage.

Summary of findings

93. My findings on the rule 22 applications, and my provisional views on the adjourned strike-out and application to be heard at the strike-out applications, are as follows:

    93.1 the main function of rule 22 in the statutory winding-up scheme is to allow persons entitled to petition in their own right and who have received formal notice of the hearing of a winding-up petition to decide whether to appear on the hearing of the petition and/or to apply if necessary to be substituted as petitioner;

    93.2 any person who claims in good faith to be an actual contingent or prospective creditor qualifies as a creditor for rule 22 purposes. The Applicants have met the necessary evidential threshold, which is very low indeed and does not require the Petitioner (or the Court) to resolve any disputes about the validity of a rule 22 claimant's debt which may be raised by a respondent, assuming rule 22 applies to the present Petition;

    93.3 rule 22 does not strictly apply to a petition under section 132(8)(a) of the Companies Act 1981, because section 132(11) expressly provides that the ordinary winding-up procedure only applies after a winding-up order is made. In the absence of express rules applying to this type of petition, the Winding-Up Rules would most likely apply, with modifications, by analogy. Because in this case the Petition also seeks a winding-up order on the traditional just and equitable ground, for all practical purposes the Court is required to proceed on the basis that rule 22 does apply;

93.4 it was conceded by the Applicants that the Court may by injunction restrain the Petitioner from complying with rule 22 as part of the well-recognised jurisdiction to restrain advertisement of a Petition which is likely to be struck-out on abuse of process grounds. In addition, the Court may under rule 157 of the Companies (Winding-Up) Rules extend the time for the Petitioner to comply with rule 22 beyond the two days prescribed for ordinary cases " *in any case in which it shall see fit*";

93.5 the public policy character of a petition presented by the Registrar of Companies does not oust the application of rule 22, although, in this context, the argument that the Applicants have no tangible interest in the Petition as creditors at the strike-out stage has even greater force than it would in the context of a creditor's petition. The Applicants are entitled as creditors for rule 22 purposes to receive a copy of the Petition, unless it is entirely struck-out;

93.6 the time prescribed by the Rules within which the Registrar of Companies as Petitioner is required to comply with rule 22 is extended until after the determination of the strike-out application. This is consistent with the time within which rule 22 would ordinarily be complied with when a strike-out application was pending. It is also consistent with good sense since the strike-out application is likely to resolve what form of Petition, if any, should proceed to hearing and should properly be supplied to the Applicants, whose main commercial interest is not their status as creditors of IPOC (one of nine Respondents), but rather their status as IPOC's debtors.

93.7 my provisional view is that the Applicants' applications to be heard on the strike-out application are liable to be summarily dismissed, and should be adjourned generally with liberty to restore. They may restore them for the next effective hearing of the strike-out application if so advised. However, the Applicants are obviously entitled to attend the strike-out hearing, to avoid any appearance of "secret" justice.

93.8 my provisional view also is that, having regard to both the Overriding Objective, traditional strike-out principles, and the interests of justice in a case of public importance, this is not an appropriate case for the Court to exercise the exceptional discretion to strike-out altogether at an interlocutory hearing in Chambers, even if arguable grounds for so doing are made out. However, the strike-out application does raise arguable concerns about the constitution of the proceedings which should be resolved at an early stage. The Companies' Summons should be listed for effective hearing on this issue and, if necessary, for argument as to whether further issues ought to be dealt with at the interlocutory stage.

94. I will hear Counsel, if required, as to costs. However, an appropriate Order may well be to make no order as to costs as between the Applicants and the parties to the Petition and to order that the costs as between the parties should be in the Petition.

Dated this 3rd day of May, 2007

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KAWALEY J.