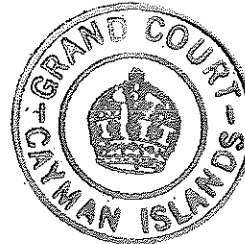


1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

3 **CAUSE NO. FSD 95 OF 2013 (AJEF)**

4  
5 The Hon. Mr. Justice Angus Foster  
6 In Chambers  
7 15<sup>th</sup> and 28<sup>th</sup> August 2013



8  
9  
10 **IN THE MATTER OF THE COMPANIES LAW (2012 REVISION) (AS AMENDED)**

11  
12 **AND**

13  
14 **IN THE MATTER OF ARAMID ENTERTAINMENT FUND LIMITED**

15  
16 Appearances: Ms. Laura Hatfield and Mr. Kai McGrielle of Solomon Harris for the Petitioner

17  
18 Mr. Stephen Alexander and Mr. Aristos Galatopoulos of Maples and Calder for  
19 the Company

20  
21 **RULING**

22 **Introduction**

23  
24 1. This ruling concerns the liability, if any, in the particular circumstances, for costs on the  
25 withdrawal of a creditor's winding up petition. The company concerned contended that  
26 the petitioner should pay the company's costs of and incidental to the petition. The  
27 petitioner contended that there should be no order for costs so that the petitioner and the  
28 company would each bear their own costs or, alternatively, that a decision on liability for  
29 costs in respect of the withdrawn petition should await the outcome of certain litigation  
30 between the petitioner and the company in New York.



1 Background

2  
3 2. On 10<sup>th</sup> July 2013 KBC Investments V Limited (“KBC”) presented a petition for the  
4 winding up of Aramid Entertainment Fund Limited (“the Company”). The Company is  
5 an exempted company and carries on business as a mutual fund registered with the  
6 Cayman Islands Monetary Authority under the Mutual Funds Law (2009 Revision). The  
7 Company invests by providing principally short and medium term financing to producers  
8 and distributors of film, television and other entertainment media secured by various  
9 means over assets of the borrower. The Company is involved in several types of such  
10 financing one of which is known as “slate” financing. This involves investment in the  
11 production by a selected film studio of a specified number of films over several years.

12  
13 3. As at April 2011 Charles Frederic & Co LLC (“CFC”), in its capacity as custodian for  
14 The Stillwater Market Neutral Fund 111 SPC on Behalf of Stillwater Matrix Segregated  
15 Portfolio (“Stillwater”), was the registered owner of 88,730.4950 Class B redeemable  
16 shares in the Company (“the Shares”).

17  
18 4. On certain dates from 23<sup>rd</sup> May 2011 until 16th April 2012 a proportion of the  
19 shareholdings in the Company, including the Shares, were compulsorily redeemed by the  
20 Company. However, on 11<sup>th</sup> July 2011 the Company informed CFC by email that it  
21 would hold back all amounts due in respect of the compulsory redemption of the Shares  
22 until the “Wimbledon” proceedings which the Company had initiated in New York were  
23 finally determined. For convenience I shall refer to those proceedings as “the Stillwater  
24 Proceedings”, which is how they were referred to during the hearings before me. The  
25 Stillwater Proceedings were initiated by the Company and two other related entities  
26 against Stillwater, CFC and others, but not KBC, on 25<sup>th</sup> July 2011 in the Supreme Court  
27 of the State of New York. I shall consider the Stillwater Proceedings later in this ruling.

28  
29 5. The amount due by the Company in respect of the redemptions of the Shares is  
30 US\$1,068,530.31 (“the Distribution Proceeds”). Although the redemption proceeds due  
31 to all other shareholders involved in the redemption process were paid by the Company,  
32 payment of the Distribution Proceeds was and remains withheld by the Company.

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6. In 2007 KBC had provided certain financing to Stillwater in security for which the Shares were pledged as collateral. As a result KBC was entitled to exercise certain rights over the Shares. During 2012 KBC foreclosed on the Shares and all of Stillwater's rights and interest in the Shares were transferred to KBC and the Shares became beneficially owned by KBC. CFC remained the registered owner of the Shares but thereafter as custodian for KBC.

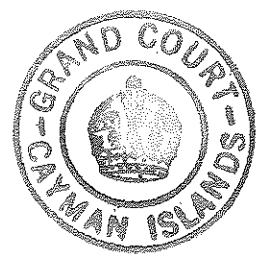
7. On 8th February 2012 the trial judge of the Supreme Court of the State of New York dismissed all the claims made by the Company and the other plaintiffs in the Stillwater Proceedings. The Company and the other plaintiffs subsequently appealed to the Appellate Division of the New York Supreme Court against the order for dismissal of their claims

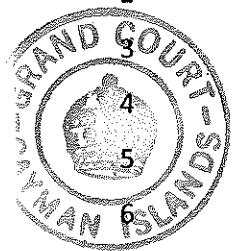
8. On 18<sup>th</sup> April 2013 the right to the Distribution Proceeds was expressly assigned by CFC to KBC. It was not disputed on behalf of the Company at the hearings before me that this was a valid assignment.

9. On 24<sup>th</sup> April 2013 KBC wrote to the Company giving notice of the assignment of 18<sup>th</sup> April 2013 and demanding payment of the Distribution Proceeds by 1<sup>st</sup> May 2013.

10. On 30<sup>th</sup> April 2013 the Appellate Division of the New York Supreme Court refused the appeal by the Company and the other plaintiffs in the Stillwater Proceedings and affirmed the dismissal of all the claims by the court at first instance.

11. On 3<sup>rd</sup> May 2013 a statutory demand dated 2<sup>nd</sup> May 2013, pursuant to Section 93 of the Companies Law (2012 Revision) ("the Law"), for payment of the Distribution Proceeds was served on the Company on behalf of KBC. Under the statutory demand payment of the Distribution Proceeds was due on or before 24<sup>th</sup> May 2013. KBC subsequently voluntarily extended the time for payment to 30<sup>th</sup> May 2013. No payment of the Distribution Proceeds was or has since been made.





1 12. On 30th May 2013 the Company and the other plaintiffs in the Stillwater Proceedings  
2 applied to the New York State Court of Appeals, which is the court of last resort in New  
3 York State, for reconsideration of the decision of the Appellate Division affirming the  
4 dismissal of the claims and in the alternative for leave to appeal against that decision.  
5 Those applications were heard by the New York State Court of Appeals on 7<sup>th</sup> June 2013  
6 but as yet no decision has been issued.

7  
8 13. On 10<sup>th</sup> July 2013 KBC's petition for the winding up of the Company based on the non-  
9 payment of the Distribution Proceeds pursuant to the statutory demand was filed and then  
10 served on the Company the same day. Later the same day, 10<sup>th</sup> July 2013, but after  
11 service of the petition, the Company filed electronically proceedings against KBC and  
12 certain related entities in the Supreme Court of the State of New York, ("the KBC  
13 Proceedings"). In those proceedings the Company alleges claims against KBC and the  
14 other defendants which, if established, would exceed the amount of the Distribution  
15 Proceeds. I shall consider the KBC Proceedings as well later in this ruling.

16  
17 14. It is not disputed that the KBC Proceedings have not yet been served on KBC itself,  
18 although there is a dispute in the affidavit evidence as to whether the proceedings have  
19 been validly served on the associated entities of KBC in New York which are also named  
20 as defendants.

21  
22 15. The evidence on behalf of KBC is that it first became aware that the KBC Proceedings  
23 had been filed when a press release about the commencement of the proceedings was  
24 issued on 12<sup>th</sup> July 2013. The primary evidence of the Company in opposition to the  
25 petition (the affidavit of one of its directors, Mr. Roger Hanson) was served on KBC on  
26 24<sup>th</sup> July 2013 and re-served in revised form on 30<sup>th</sup> July 2013. KBC says that Mr.  
27 Hanson's revised affidavit was the first time it became aware that the Company was  
28 seeking to rely on the KBC Proceedings to found a cross-claim and set-off against the  
29 Distribution Proceeds.

30  
31 16. On 1<sup>st</sup> August 2013 KBC applied for leave to withdraw its petition in light of the  
32 Company's evidence served in response. KBC say that it accepted that it would be

1 inappropriate to seek to have the Company's claim to set-off determined in winding up  
2 proceedings.

3  
4 17. On 1<sup>st</sup> August 2013 I duly gave KBC leave to withdraw its petition pursuant to O.3, r.7 of  
5 the Companies Winding Up Rules (2008) (as amended). The application was not opposed  
6 by the Company except costs which were clearly in dispute. That determination of costs  
7 was adjourned for hearing on a future date. The hearing ultimately took two full days,  
8 over a week apart.  
9

10 The Relevant Legal Principles

11  
12 18. Section 11 (1) of the Grand Court Law (2008 Revision) ("the Grand Court Law")  
13 provides inter alia:

14  
15 " *The [Grand] Court .....shall possess and*  
16 *exercise..... the like jurisdiction ..... which is vested in or capable of being*  
17 *exercised in England by-*

18  
19 (a) *Her Majesty's High Court of Justice.....*  
20 *as constituted by the Supreme Court of Judicature (Consolidation) Act 1925,*  
21 *["the 1925 Act"] and any Act of the Parliament of the United Kingdom*  
22 *amending or replacing that Act".*  
23

24 19. The 1925 Act was replaced by the Supreme Court Act 1981 ["the 1981 Act"]. Section  
25 51(1) of the 1981 Act provides:

26 " *Subject to the provisions of this or any other enactment and to rules of court, the costs*  
27 *of and incidental to all proceedings in-*

28 .....  
29 (b) *the High Court, and .....*

30 .....  
31 *shall be in the discretion of the court"*



1 Accordingly, by virtue of Section 11 (10) of the Grand Court Law, subject to any other  
2 Law and to rules of court, the costs of and incidental to all proceedings in the Grand  
3 Court are in the discretion of the Court.  
4

5 20. Section 24 (1) of the Judicature Law (2007 Revision) is in virtually identical terms to  
6 Section 51(1) of the 1981 Act and provides:  
7

8 *“Subject to the provisions of this or any other Law and to rules of court, the costs*  
9 *of and incidental to all civil proceedings in-*

10 .....  
11 *(b) The Grand Court,*  
12 .....  
13

14 *shall be in the discretion of the relevant court.”*  
15  
16

17 21. It is therefore clear from the relevant legislation (and it is well-established), that, subject  
18 to the provisions of any relevant Law or rules of court, the costs of and incidental to any  
19 civil proceedings in this court are a matter for the court’s discretion. In the English case  
20 *Aiden Shipping Ltd v. Interbulk Ltd [1986] AC 965* the House of Lords held that the  
21 discretionary power to award costs contained in section 51 (1) of the 1981 Act (which is  
22 applicable to the Grand Court pursuant to the Grand Court Law and effectively replicated  
23 in the Judicature Law, as I have explained above) was expressed in wide terms and that  
24 therefore there was no justification for implying a limitation to the effect that costs could  
25 only be ordered to be paid by parties to the proceedings, which was the issue in that case.  
26

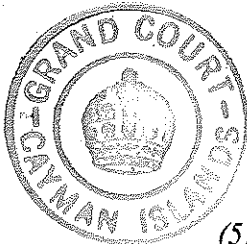
27 22. The Grand Court Rules (“GCR”) are largely based on the English Rules of the Supreme  
28 Court 1991 at which time the 1981 Act was in force. They are the relevant rules of court  
29 in this jurisdiction to which the court’s general discretion as to costs is subject. O. 62 of  
30 the GCR is the order relating to costs. Rule 4 provides inter alia as follows:



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(1) *This rule shall have effect unless otherwise provided by any Law [There is no Law which provides otherwise in the instant case]*

(2) *The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*



.....  
(5) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs".*

23. In the present case it was submitted on behalf of the Company and conceded by counsel for KBC that, in light of the terms GCR O.62, r.4 (2) and (5) above, on the withdrawal of a winding up petition by the petitioner, as on the dismissal of such a petition, the Court would ordinarily order costs to follow the event and the petitioner would be required to pay the company's costs of and incidental to the withdrawn winding up petition. In my view that is consistent with the rules and is clearly correct. However, sub-rule (5) provides for the possibility of an exception to this usual rule, namely that when it appears to the Court that some other order as to costs should be made in the circumstances of the case concerned, the Court may make such other order. This possibility of an exception to the usual rule, which was relied upon by counsel for KBC in the present case, was rightly accepted in principle by counsel for the Company, although, of course, it was his case that it had no application in the circumstances of the present case.

24. The express power of the Court to make some order other than the usual order that costs shall follow the event is clearly consistent with and an aspect of the Court's wide general discretion in relation to costs. It is clearly by the terms of sub-rule (5) of GCR O.62, r.4 itself. The various cases concerning costs on the dismissal or withdrawal of a winding up



1 petition to which I was referred at the hearing were, in my view, illustrations of the court  
2 exercising or declining to exercise that discretion to depart from the usual rule that costs  
3 follow the event in circumstances where it appeared to the court that it should or should  
4 not do so.

5  
6 25. In *Re M McCarthy & Co (Builders) Ltd (No 2)* [1976] 2 All ER 339 a petition for  
7 winding up was dismissed on the terms that the company concerned should pay the  
8 petitioner's costs. Brightman J. considered that the company was responsible for the  
9 confusion over the identical names of two companies, the wrong one of which the  
10 petitioner had innocently petitioned to wind up. The petition was dismissed but in the  
11 view of the judge the responsibility for the error lay with the company and it should  
12 therefore meet the petitioner's costs. The circumstances of that case are, of course,  
13 different from the circumstances of the present case but in my view it is nonetheless an  
14 example of the court departing from the usual rule on costs in the exercise of its  
15 discretion. According to the judgment (page 340):

16  
17 *"It was conceded on both sides that the court has a discretion in relation to the costs of*  
18 *the substituted petitioner. The court in the proper exercise of its discretion might dismiss*  
19 *the petition, which has now been amended, without costs, or it could order that the costs*  
20 *of the substituted petitioner are paid by the 1975 company."*

21  
22 26. I was also referred to an Australian authority, *Re Mailrite Pty Ltd* [1985] 9 ACLR 863  
23 from the Queensland Supreme Court. In that case the creditor petitioner consented to the  
24 dismissal of its winding up petition in light of the material filed by the company in  
25 opposition to the petition. However, the petitioner contended that it had acted reasonably  
26 in presenting the petition in light of the company's failure to comply with a statutory  
27 demand and the fact that the petitioner had had no notice prior to the presentation of the  
28 petition that the debt concerned was disputed by the company. The petitioner sought an  
29 order that the company therefore pay its costs. On the other hand the company contended  
30 that in the circumstances the petitioner, who bore the risks of presenting the petition and  
31 who at the hearing consented to the dismissal of the petition, ought to pay the company's  
32 costs of the petition. There were therefore some similarities to the circumstances in the



1 present case. Reference was made in the judgment (page 867) to *Halsbury Vol. 7, 4<sup>th</sup>Edn,*  
2 *para 1035* where it is said inter alia:

3  
4 *“A petition may be dismissed without costs and this is now the general rule where*  
5 *a creditor, whether he is a judgment creditor or simple creditor, has acted*  
6 *reasonably in presenting the petition.”*

7  
8 The judgment continues:

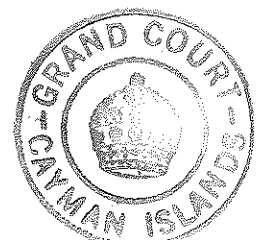
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10 *“ It is therefore a question of discretion in all the circumstances of the case*  
11 *..... ”*

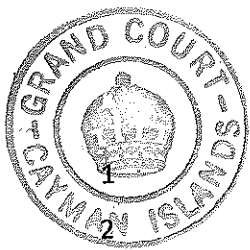
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13 There is then a quotation (page 868), with approval, from an Australian text on company  
14 law as follows:

15  
16 *“From the foregoing decisions it clearly emerges that the fundamental consideration of*  
17 *the court in the exercise of discretion whether as to the petition or as to costs is the*  
18 *reasonableness of the presentation of the petition. If the presentation is unreasonable,*  
19 *such as to constitute an abuse of process, the proceeding will be stopped: Re a Company*  
20 *[1894] 2 Ch 349 and see Re Parker, Davies and Hughes [1953] 1 WLR 1349. A petition*  
21 *presented with a view to enforcement of payment a debt bona fide disputed is an abuse of*  
22 *process and should be dismissed with costs: London and Paris Banking Corporation*  
23 *(1875) LR 19 Eq 444” .....*

24  
25 And the judgment goes on:

26  
27 *“Whilst it is clear that the company is able to pay its debts and that it now appears that*  
28 *there is a dispute as to the debt, it cannot be said that the petition was presented with a*  
29 *view to enforcement of a debt bona fide dispute. No such dispute was drawn to the*  
30 *attention of the receivers of the petitioning company at any time before the petition was*





presented. Indeed, this did not appear until very late in the proceedings when the affidavit of Mr. O'Brien was filed and served on 23 April 1985.

In all the circumstances of this case, I am not prepared to hold and I do not hold that the petition was presented unreasonably. I have derived assistance from the passage quoted in Halsbury above to the effect that that a petition may be dismissed without costs. It is there said that this is the general rule where a petitioning creditor has acted reasonably in presenting his petition and that a petitioning creditor will not be awarded costs where the petition is dismissed. I see no distinction between dismissal or withdrawal in this context.....Accordingly, in the overall exercise of my discretion, I dismiss the petition by consent but make no order as to costs”.

I found this a relevant and helpful analysis.

27. In *Re Lanaghan Bros Ltd* [1977] 1 All ER 265 Brightman J. again ordered that in the circumstances of that case, which satisfied him of the propriety of the presentation of a winding up petition, the petitioner’s costs of the petition, which had to be dismissed, should be paid by the respondent company. He said:

“It so happens that on 9<sup>th</sup> March 1976, I heard another case, *Re M McCarthy & Co (Builders) Ltd (No 2)*, in which a petition had been properly presented but was dismissed in the particular circumstances.

.....

In the present case I intend to direct that the petition be dismissed on the terms that the costs of [the petitioning creditor] are to be paid by the company. I take the same view as I took in the different circumstances of *Re M McCarthy & Co* [ibid]. The petitioning creditor has proceeded without any fault whatever on his part.....Now that the petition must be dismissed it seems to me only just that the petitioning creditor, if he be a creditor, should be given his costs of the petition, which he presented with complete propriety. I propose therefore to make an order not only that the petition be

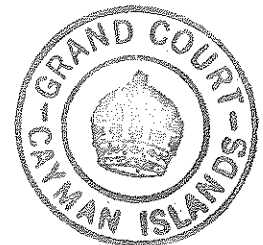
1           *dismissed but also that the company should pay the costs of the petitioner. If this*  
2           *is a second departure from what is said to be the general rule, then once again I*  
3           *say, so be it.”*  
4

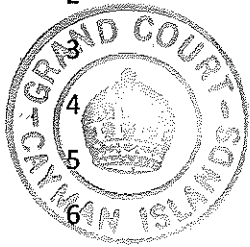
5 28. I was also referred by counsel for KBC to the report of a case in the Bermudan  
6 Commercial Court: *Re Gerova Financial Group Limited [2012] SC (Bda) 18 Com (19*  
7 *March 2012)* in which the test of the reasonableness of the petitioner in presenting a  
8 winding up petition which was withdrawn without opposition save as to costs was  
9 endorsed and applied. The circumstances, in brief, were that there were three petitioners  
10 for the winding up of the company concerned. The second petitioner was the assignee by  
11 the first petitioner of an unpaid default judgment against the company. The third  
12 petitioner was a judgment creditor in respect of another unpaid summary judgment  
13 against the company in respect of an entirely different debt. Only the second and third  
14 petitioners were relevant for purposes of the judgment. Counsel for all parties  
15 summarised the legal principles applicable in respect of costs on the withdrawal of a  
16 winding up petition in a way which the court considered to be correct. The court agreed  
17 with the submission that “*where a petition has been reasonably and properly presented,*  
18 *the withdrawing petitioner is entitled to their costs*” and reference was made to the  
19 decision of Brightman J. in the *Lanaghan Bros* case (supra). The judge (Kawaley J.) went  
20 on (para 23) to confirm:

21  
22           *“ Of course where a petition is dismissed because it was improperly presented, for*  
23 *instance, being based on a disputed debt, the petitioner will ordinarily be*  
24 *required to pay the costs of the abortive petition..... ”*  
25

26 And at para 27:

27           *“ Despite Harman J’s ritual incantation to the effect that winding-up proceedings*  
28 *ought not to be used for debt collection purposes, [In Re a Company [1983]*  
29 *BCLC 492 at 495] in my judgment there can be no impropriety in threatening or*  
30 *bringing winding-up proceedings where a company fails within a reasonable time*





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to pay what reasonably appears to the unpaid creditor to be an undisputed debt.....

*What is and will likely always be recognised as abusive is the actual or threatened presentation of a petition based on a debt which is in fact disputed in good faith on substantial grounds. Between these two boundary marks, however, lies a middle ground in which an infinite variety of potential instances of abusive or unreasonable conduct by a petitioning creditor may be found to exist.”*

After considering all the particular circumstances of the case Kawaly J. continued (para 41):

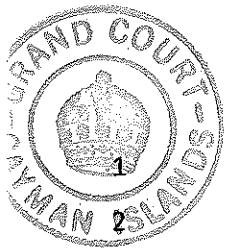
*“Nonetheless, the cumulative effect of the intensive tactical manoeuvring which Aramid [the second petitioner and, coincidentally, the Company in the present case] has deployed in relation to its prosecution of the present Petition passes a tipping point which requires this Court to find that it has acted unreasonably and should not be awarded its costs in relation to its abortive Petition. ....”*

In relation to the third petitioner the judge said:

*“ Applying recognised principles, Marseilles [the third petitioner] is entitled to its costs. I do not find that Marseilles’ conduct of the petition was to any extent unreasonable in light of the circumstances in which it withdrew its support for the present proceedings”*

The court in that case too had regard to the reasonableness and propriety of the presentation of the petition in the particular circumstances.

29. These authorities and others to which I was referred but have not thought it necessary to cite since they all essentially turned on their own particular circumstances, do make it clear that it is well established that the court has a broad discretion to depart from the



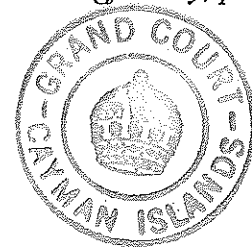
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3 usual rule in relation to the costs of a winding up petition which is dismissed or  
4 withdrawn if it considers that some other order should be made in the particular  
5 circumstances. The usual rule, which is expressly stated in the GCR, is that costs should  
6 follow the event. It is almost trite law that the winding up jurisdiction of the court may  
7 not be invoked in respect of a debt which is disputed on bona fide and substantial grounds  
8 and if the court is satisfied that such is the case there will be no doubt that the company  
9 concerned will have its costs in the event that the petition is dismissed or withdrawn as a  
10 result. However, the court has an express discretion to depart from the usual rule on costs  
11 if it considers that some other order should be made in the particular circumstances. The  
12 question which it is usually appropriate for the court to consider in the case of a  
13 dismissed or withdrawn winding up petition when the petitioner opposes the company  
14 getting its costs and seeks no order for costs or applies for its own costs or makes some  
15 other application in relation to costs, is whether the presentation of the petition was  
16 reasonable in all the circumstances. If the court is so satisfied the court may in its  
17 discretion depart from the usual rule and make such other order in relation to the costs of  
18 the petition as it considers appropriate in the circumstances. In the present case KBC  
19 opposed the Company being awarded its costs of the withdrawn petition but did not seek  
20 its own costs. Its case was that no order for costs should be made and consequently that  
21 each party should bear its own costs. The Company, on the other hand, argued that the  
22 circumstances of this case did not justify the court departing from the usual rule, which, it  
23 submitted, by reference particularly to *Re Fernforest Ltd [1990] BCLC 693*, the court  
24 should be reluctant to do.

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31 30. I should also mention here, while considering the relevant legal principles, that KBC  
submitted, as an alternative to its principal position that there should be no order for the  
costs of the petition, that the decision on costs should await the outcome of the KBC  
Proceedings in New York, which would determine whether or not the Company does or  
does not have a valid set-off against the debt on which the petition was founded. In that  
respect counsel for KBC relied upon the judgment in *Re Sykes & Sons Ltd [2012] EWCH  
1005 (Ch)*; *[2013] Bus LR 106* in the English High Court. In that case the winding up  
petition was dismissed on the ground that the debt on which it was based was subject to a

1 dispute which it was not appropriate to resolve in the winding up proceedings but the  
2 company had only belatedly produced documentation in support of its dispute of the debt.  
3 Moreover the genuineness of that documentation was questioned. The company applied  
4 for its costs of the petition and of its application to restrain advertisement of the petition.  
5 The Deputy High Court Judge adjourned the company's application to await the outcome  
6 of separate proceedings at which the disputed issues could be resolved. At paragraph 26  
7 of the judgment he said:

8  
9 *“ Turning to the facts of the instant case, I accept Mr. Nersessian's submissions*  
10 *[for the petitioner] to the effect that, notwithstanding that the petitioner gave it*  
11 *every reasonable opportunity to do so, the company did not set out the basis for*  
12 *its dispute in relation to the final account in any, or any meaningful way, prior to*  
13 *the presentation of the petition.”*

14  
15 And at paragraph 31:



16  
17 *“Whilst having full regard to the principles set out in In re Fernforest Ltd [1990*  
18 *BCLC 693 and in In re UK (Aid) Ltd [2003] BCLC 351 which I have discussed*  
19 *above, I do regard the combination of these circumstances in which the company*  
20 *did not give any meaningful account of its defence prior to the petition and only*  
21 *belatedly produced documents which might, if authentic, be capable of supporting*  
22 *its case, as wholly exceptional and as justifying a departure from the general rule*  
23 *as to costs which I have considered above.”*

24  
25 He continued at paragraph 35 and then at paragraph 39:

26  
27 *“35. Because I cannot resolve the crucial factual issues now, it seems to me that I*  
28 *have a choice. I can either adopt a necessarily rough and ready approach and*  
29 *make no order as to costs, which at least balances the risk of injustice to each*  
30 *side and reflects the inadequacies of the company's response to the petitioner's*  
31 *claim and the unsatisfactory manner in which it adduced certain important parts*

1            *of its evidence. Or I can adjourn the question of costs to await the outcome of*  
2            *proceedings to resolve the dispute.....*

3  
4            *39. For these reasons, whilst making a decision now would be expedient, in my*  
5            *judgment, given the exceptional circumstances of this case, the most appropriate*  
6            *course to ensure that justice is achieved between the parties is to adjourn the*  
7            *issue of costs to await the outcome of proceedings in which there can be*  
8            *disclosure and cross-examination and (in particular) the issue of the authenticity*  
9            *of the manuscript valuations can be addressed.”*

10  
11    31.    The *Sykes & Sons* case, is, in my view another illustration of the extent of the court’s  
12            discretion to adopt whatever course in relation to the costs of a dismissed or withdrawn  
13            winding up petition that it considers most equitable and appropriate in the particular  
14            circumstances



15  
16    The Parties’ cases

17  
18    32.    The Company contends that the usual rule that costs should follow the event as provided  
19            for in GCR O.62, r.4 (2) and (5) should apply, that the court should be reluctant to depart  
20            from it and that therefore the costs of the petition which has been withdrawn should be  
21            the Company’s. It is submitted for the Company that there is nothing in the circumstances  
22            of this case to justify departing from the usual rule where KBC has inevitably had to  
23            withdraw its petition because the debt on which it is founded is clearly disputed, being  
24            subject to set-off of the Company’s cross-claims, which greatly exceed the amount of the  
25            Distribution Proceeds. Those claims derive indirectly from the Stillwater Proceedings in  
26            the one case and are made directly in the KBC Proceedings in the other case. The  
27            Company argues that both these claims and the resulting set-offs were known to KBC  
28            before it presented its petition and that KBC went ahead with the petition at its own risk.  
29            In such circumstances, it was contended, it was not reasonable or proper for KBC to have  
30            presented its petition when it did and the costs of the petition, which inevitably had to be  
31            withdrawn, should accordingly be awarded to the Company. The Company argues in

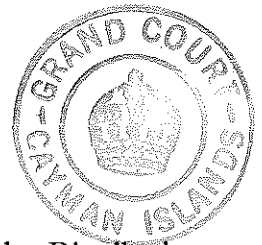
1 addition that it was unreasonable of KBC to have presented its petition to wind up the  
2 Company when the Company is clearly solvent and also because KBC had acquiesced in  
3 the Company withholding payment of the Distribution Payments.  
4

5 33. KBC does not accept that the claims in the Stillwater Proceedings, to which it is not a  
6 party, give rise to a cross-claim against it. However, in any event it contends that, the  
7 claims in those proceedings having been dismissed both at first instance and on appeal by  
8 the New York Supreme Court, there was no cross-claim or substantial or valid dispute  
9 about the Distribution Proceeds based on the Stillwater Proceedings when its petition was  
10 presented. KBC's case also is that it had no notice of the claims against it by the  
11 Company as subsequently set out in the KBC Proceedings before it presented its petition.  
12 It says it was only when it became aware of those claims that it applied to withdraw its  
13 petition. As far as the solvency of the Company is concerned KBC relies on the non-  
14 payment of the statutory demand. In relation to acquiescence KBC contends that the facts  
15 do not bear out such an allegation. Accordingly, KBC submits that in all the  
16 circumstances it was reasonable for it to present the petition when it did.  
17

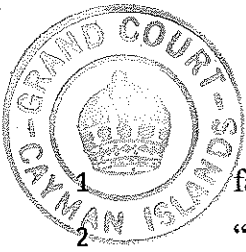
18 The Stillwater Proceedings  
19

20 34. The Company contends that it has a right to set-off the amount of the Distribution  
21 Proceedings against the amount of its claim against Stillwater in the Stillwater  
22 Proceedings which, if upheld, would greatly exceed the amount of the Distribution  
23 Proceedings. KBC was not named as a defendant in the Stillwater Proceedings, indeed  
24 was not even mentioned, but the Company argues that KBC is in the same position as  
25 Stillwater as its assignee.  
26

27 35. The claim in the Stillwater Proceedings is for damages of US\$80m on grounds of alleged  
28 tortious interference, intentional harm and another similar alleged cause of action  
29 principally in respect of a proposed transaction in 2010 between the Company and a third  
30 party, ABRY Partners, for the sale of the Company's portfolio of assets. It is alleged that  
31 certain of the defendants, though not expressly the Stillwater entities, deliberately made







1 false claims to the Company's shareholders that they were being defrauded, which caused  
2 "discord" between the Company and its shareholders concerning the proposed transaction  
3 as a result of which the Company ultimately felt compelled to withdraw from the  
4 transaction to its loss. However, as the judge of the Supreme Court of New York State  
5 said in his written ruling of 8<sup>th</sup> February 2012 dismissing the complaint, the purported  
6 basis for any alleged liability of the Stillwater entities or of CFC as defendants is not  
7 clear.

8  
9 36. Be that as it may, the uncontested evidence before me is that under New York law a  
10 decision and order of a trial court at first instance is final and binding notwithstanding  
11 that the party affected has appealed. The fact that there is an appeal pending against a  
12 judgment or order does not alter the finality or enforceability of that judgment or order,  
13 unless there is a stay. The law is that "a judgment pending appeal is entitled to the same  
14 effect as a final judgment". That, of course, is also the position under Cayman Islands  
15 law. The undisputed evidence is also that in the Supreme Court of the State of New York  
16 there is no stay recorded of either the decision and order by the Supreme Court at first  
17 instance dismissing the Stillwater Proceedings or of the order of the Appellate Division  
18 affirming that decision. Accordingly those decisions are final and binding as against the  
19 Company notwithstanding the Company's pending application for re-argument or  
20 alternatively for leave to appeal.

21  
22 37. In light of the position as explained above, it seems to me that it was reasonable for KBC  
23 to take the view that the Company's claims in the Stillwater Proceedings were no longer  
24 extant and that they could properly proceed on that basis. Counsel for the Company  
25 argued that it was not reasonable for KBC to present a winding up petition until the  
26 Stillwater Proceedings were "finally" determined and that those proceedings give rise to a  
27 genuine dispute over whether the Distribution Proceeds are payable of which KBC were  
28 obviously aware prior to presentation of the petition. However, the claim on which that  
29 alleged dispute is based has been dismissed (twice) and that dismissal is to be treated as  
30 final and binding on the Company. It was not disputed that such dismissal acts as an  
31 estoppel against the Company from further asserting its alleged claim against Stillwater.  
32 The fact that the Company has applied for re-argument or, alternatively, leave to appeal is

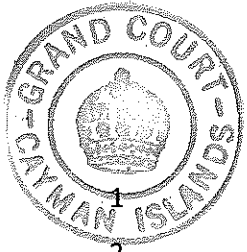
1 not relevant. I therefore do not accept the argument of counsel for the Company in this  
2 regard. I am of the opinion that it was not unreasonable in the circumstances for KBC to  
3 proceed on the basis that there was no substantial valid dispute with respect to payment  
4 of the Distribution Proceeds based on the claim in the Stillwater Proceedings.

5  
6 The KBC Proceedings  
7

8 38. The principal dispute between the parties was whether KBC knew of the claim made  
9 against it, now pleaded in the KBC Proceedings, before its service of the petition. As I  
10 have already explained, the KBC Proceedings were filed in New York after the petition  
11 was served but the Company contends that KBC knew of the Company's claim against it  
12 as now made in the KBC Proceedings before it presented the petition.

13  
14 39. The defendants named in the KBC Proceedings are not only KBC but five associated  
15 entities of KBC, including its ultimate parent, KBC Bank NV, the well-known Belgian  
16 bank, as well as Stillwater and CFC. In the New York Complaint KBC and its associated  
17 entities are together referred to as the KBC Defendants and the relevant claims are made  
18 against the KBC Defendants rather than KBC individually. The principal claims alleged  
19 against the KBC Defendants, apart from certain injunctive type relief in respect of the  
20 Shares, are firstly that the KBC Defendants have no rights in respect of the Shares,  
21 which, it is contended still belong to Stillwater and in respect of which only Stillwater has  
22 any rights. However, the claim of which the Company argues KBC was aware prior to its  
23 presentation of the petition relates to alleged misuse by KBC of confidential financial  
24 information relating to the Company's investments and in particular its investment made  
25 in 2008 by way of contribution to partial financing of a "slate" of films (see paragraph 2  
26 above) by a specific film studio in California, known as the "Beverly Slate". It is alleged  
27 by the Company that the KBC Defendants, including KBC, as investors in the Company,  
28 obtained confidential information concerning the Company's investments, in particular  
29 the Beverly Slate investment, which KBC passed to its "agent", Fortress Investment  
30 Group LLC ("Fortress"), who then allegedly misused that information to wrongfully

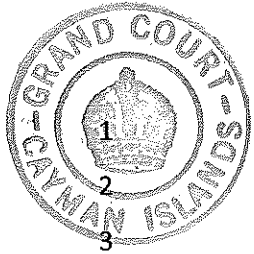




1 interfere with the Company's investment in the Beverly Slate to the detriment of the  
2 Company.

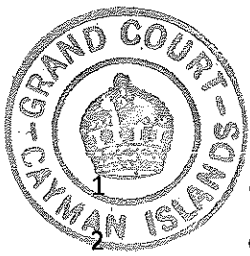
3  
4 40. The Company argues that KBC was aware of its claim in relation to the Beverly Slate  
5 from or about February 2012 when the Company brought proceedings in Los Angeles,  
6 California against Fortress relating to its involvement in the circumstances surrounding  
7 the Beverly Slate (the "Fortress Proceedings"). Although KBC is not a defendant to or  
8 even mentioned in the Fortress Proceedings, the Company argues that KBC must have  
9 become aware of the Fortress Proceedings soon after they were commenced and that it  
10 knew that it was implicated in the allegations against Fortress relating to its actions in  
11 relation to the Company's investment in the Beverly Slate. In the circumstances I found  
12 this suggestion somewhat far-fetched. The Fortress Proceedings made no claim against or  
13 even any reference to KBC and nothing was done by the Company at that time to assert,  
14 still less substantiate or particularise, any claim against KBC relating to the Beverly  
15 Slate. The Fortress Proceedings were initiated some 18 months before the KBC  
16 Proceedings were commenced in New York. In my view the Fortress Proceedings did not  
17 clearly indicate to KBC that the Company was making a claim against it of the kind now  
18 alleged in the KBC Proceedings. In fact the circumstances suggest rather the contrary,  
19 namely that no claim was being made against KBC. I do not accept the argument that it  
20 should somehow have been obvious to KBC from that time that the Company was  
21 making such a claim against it. No such claim was in fact made by the Company until it  
22 filed the KBC Proceedings in New York on 10<sup>th</sup> July 2013. Notice thereof was brought to  
23 KBC's attention thereafter. I do not consider that the contention that KBC knew that the  
24 Company was making the claim which it now makes against it in the KBC Proceedings  
25 from February 2012 is made out.

26  
27 41. The Company also contends that its claim against KBC as now made in the KBC  
28 Proceedings was made clear to representatives of KBC in correspondence or discussions  
29 prior to the presentation of the petition. The chairman of the entity which provides  
30 technical service to the Company, Mr. David Molner, stated in his affidavit that in the  
31 course of a telephone call during the first week of June 2012 from Mr. Tom Melsens, the



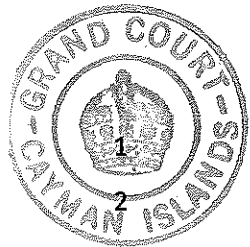
managing director of KBC, to discuss the release of the Distribution Proceeds, he explained to Mr. Melsens that the Company held KBC partly responsible for damage caused to the Company in connection with the Beverly Slate. According to Mr. Molner, Mr. Melsens denied that KBC was liable to the Company and that the Company would have to prove any such liability in court and that *“the prospect of litigation between [the Company] and [KBC] would be expensive, messy ..... time consuming and uncertain”*. In his affidavit Mr. Melsens contended that this telephone conversation was only one of many telephone conversations, emails and meetings between him and Mr. Molner thereafter regarding the withholding by the Company of the Distribution Proceeds. He said that he expressly recollected that his reference in the telephone conversation to prospective litigation between the Company and KBC being *“expensive, messy ..... time consuming and uncertain”* was to court proceedings to enforce payment of the Distribution Proceeds. Mr. Melsens denied that at any time had Mr. Molner asserted that the Company held KBC partly or at all responsible in relation to the alleged actions of Fortress in connection with the Beverly Slate. He said that if Mr. Molner had done so it would have changed the whole context of their subsequent discussions concerning possible settlement in relation to the Distribution Proceeds.

42. In the circumstances I find what Mr. Melsens says to be more plausible and probable. If, as Mr. Molsen claims, he had raised with Mr, Melsens in that telephone conversation the allegation that KBC was partly responsible for damage caused to the Company in connection with the Beverly Slate and Mr. Melsens had denied that allegation and made his comment about having to litigate over that claim, that does not seem at all consistent with the fact that the Company took no steps of any kind against KBC thereafter to substantiate or pursue that alleged claim, particularly having regard to KBC’s demands for payment of the Distribution Proceeds and, later, in light its formal written demand for payment, followed by the statutory demand. Furthermore, Mr. Melsens says the telephone conversation in June 2012 was only one of many between him and Mr. Molner, as well as emails and meetings, concerning release of the Distribution Proceeds, yet Mr. Molner says nothing in his evidence about saying anything more to Mr. Melsens about the alleged claim against KBC. The fact that there were indeed many such



1 communications between Mr. Molner and Mr. Melsens during 2012 is confirmed in the  
2 evidence of Mr. Hanson. Overall I find Mr. Melsens' evidence more likely and  
3 persuasive in this respect and I am not at all convinced that the Company's alleged claim  
4 against KBC in connection with Fortress and the Beverly Slate was raised with KBC in  
5 any meaningful or significant way in the communications between Mr. Molner and Mr.  
6 Melsens.

7  
8 43. Counsel for the Company also relied upon the evidence of Mr. Hanson in this respect. As  
9 already mentioned, Mr. Hanson is a director of the Company. In his third affidavit Mr.  
10 Hanson refers to an email which he sent to Mr. Melsens on 3<sup>rd</sup> July 2013 requesting  
11 confirmation from KBC that no rights of KBC in the Shares or distributions in respect  
12 thereof would be included in any sale of assets by KBC in which he required that: "  
13 .....*following the sale of KBC's investment portfolio, no less than \$75 million of cash or*  
14 *readily liquidated assets will be maintained within KBC to satisfy a damages award that*  
15 *is likely to be entered in favour of [the Company] in respect of its multiple claims against*  
16 *KBC.*" (my emphasis). Mr. Hanson says that this was a reference to the Company's  
17 various claims against KBC in connection with its involvement with Fortress and the  
18 Beverly Slate, which he had referred to in his first affidavit. He says that he did not  
19 specify these claims in his email to Mr. Melsens because "*I believed that Mr. Melsens*  
20 *was already aware of these claims.*" He went on to say that he was aware that Mr.  
21 Molner had had a number of discussions with Mr. Melsens and that "*as far as I was*  
22 *aware, David Molner had made it very clear to Mr. Melsens the nature of [the*  
23 *Company's] claims. I saw no need to repeat these points in correspondence.*" Of course  
24 Mr. Hanson had not been a party himself to any of the discussions (as referred to in  
25 paragraph 42 above) between Mr. Molner and Mr. Melsens. In my opinion it cannot be  
26 said that KBC was made properly or meaningfully aware of the claim against it which the  
27 Company now makes in the KBC Proceedings simply by Mr. Hanson's reference in his  
28 email of 3<sup>rd</sup> July to "*multiple claims against KBC*". Mr. Hanson may or may not have  
29 believed that Mr. Melsens was already aware of such a claim but that is nothing to the  
30 point. In fact Mr. Melsens responded to Mr. Hanson's email on 10<sup>th</sup> July 2013, prior to  
31 the filing of the winding up petition, and said inter alia: "*As to your second point, I am*



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*admittedly at a loss. You refer to "multiple claims against KBC". But unless my lawyers have been deleterious or we have not been duly served, I am not aware of a single claim of [the Company] against KBC or any of its affiliates. The absence of any such claim or claims is also self-evident, as KBC has gone out of its way repeatedly to work together with [the Company] in resolving any and all issues and has never been in a position to harm [the Company]."*

44. I was also referred by counsel for KBC to the affidavit of Mr. Aviam Navo, who is an Executive Vice President of and internal legal counsel to KBC. Mr. Navo's evidence is that at no stage during the communications between KBC and the Company from July 2011 onwards did the Company give any notice to KBC of any of the allegations now made in the KBC Proceedings. While Mr. Navo was not himself party to most of those communications, it does seem to me highly likely that if any representative of KBC had been given notice that the Company was making a claim against KBC based on the allegations now made in the KBC Proceedings, Mr. Navo, as internal counsel to KBC, would have been informed of that.

45. Even after service upon the Company of the statutory demand, which is an obvious precursor to a winding up petition, the Company still did not give any indication to KBC of the claim which it now makes in the KBC Proceedings. There was correspondence between the attorneys representing the Company and the attorneys representing KBC following service of the statutory demand in which the attorneys for the Company set out in considerable detail their reasons for contending that a winding up petition was unjustified and inappropriate and the basis on which it would be opposed. They placed considerable emphasis on the cross-claim which they claim derives from the Stillwater Proceedings and raised various other points as well but they made no reference at all to any claim against KBC based on what is now contented by the Company in the KBC Proceedings. That is all the more significant in my opinion in light of the fact that the KBC Proceedings must have been in the course of preparation for some time in the period between service of the statutory demand and the service of the petition, yet no mention of any such claim was made in response to the statutory demand or in the

1 subsequent correspondence. There was no indication that the Company was about to file  
2 the KBC Proceedings. Indeed one might infer from the circumstances with some  
3 justification that this was intentional and that there was a deliberate tactic on the part of  
4 the Company not to give any prior notice to KBC of the KBC Proceedings and the claims  
5 made therein before they were filed. I find the Company's case that KBC was made  
6 aware of the claim now made in the KBC Proceedings before it filed and served the  
7 petition to be unconvincing and not established.

8  
9 Insolvency

10  
11 46. It was also argued on behalf of the Company that the Company is clearly solvent on a  
12 cash flow basis (which counsel for each of the parties agreed is the appropriate basis on  
13 which to determine solvency for these purposes, rather than on a balance sheet basis) and  
14 that it would therefore be inappropriate and prejudicial to wind up the Company and  
15 therefore unreasonable of KBC to petition for such winding up. This was one of the  
16 objections to a winding up petition raised on behalf of the Company in response to  
17 service of the statutory demand. Mr. Hanson exhibited to his first affidavit an unaudited  
18 statement of the Company's financial position as at 30<sup>th</sup> June 2013 which showed the  
19 Company had cash and cash equivalents of some USD 19m, although with significant  
20 liabilities. Counsel for the Company submitted that if a company is clearly solvent, as it  
21 was said the Company is, the court can and usually will dismiss a petition for the winding  
22 up of the company.

23  
24 47. It was pointed out on behalf of KBC that section 93 of the Law provides that a company  
25 shall (my emphasis) be deemed unable to pay its debts if it neglects to pay the sum  
26 specified in a statutory demand within three weeks of its service. The statutory demand  
27 served on the Company on 3<sup>rd</sup> May 2013 remains unpaid, although it was accepted on  
28 behalf of KBC that ultimately the Court has a discretion as to whether to make a winding  
29 up order (see section 92 of the Law). KBC's position was that the court can rely on an  
30 undisputed and unpaid statutory demand, notwithstanding evidence of the company's  
31 solvency.



1 48. In the present case, even taking the Company's evidence of its financial position at face  
2 value, it does not seem to me inevitable in the circumstances, having regard in particular  
3 to the unpaid statutory demand, that the Court would have dismissed KBC's winding up  
4 petition had it proceeded. If there is a failure to pay a statutory demand and the company  
5 alleges it is nonetheless solvent and should not be wound up simply on that ground, the  
6 obvious answer is for the company to pay the demand or risk being wound up. In my  
7 view it is only if the company contends bona fide that the debt demanded is disputed on  
8 some substantial ground that it could properly seek to justify non-payment; its solvency  
9 may be a factor in those circumstances but its ability to pay cannot be a good ground  
10 alone for non-payment of a debt. I do not consider that a company could properly justify  
11 non-payment of the debt on which a petition is based purely and simply on the basis that  
12 it is solvent and can pay but just chooses not to pay without more. In the present case I do  
13 not agree that the Company's apparent solvency, assuming it was known to KBC, of  
14 itself made it unreasonable for KBC to issue its winding up petition when it did. The real  
15 issue is whether the Company has legitimate cross-claims against KBC which, if  
16 established, would exceed the amount of the Distribution Proceeds (being the debt  
17 specified in the statutory demand and the petition) such that the debt would be  
18 extinguished and whether KBC was aware of such cross-claims before it filed and served  
19 its petition.

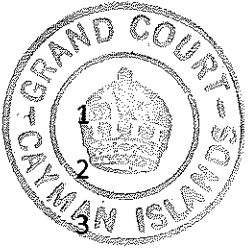
20  
21 Acquiescence

22  
23 49. The Company also submits that KBC's presentation of the winding up petition was  
24 unreasonable because, it argues, KBC had acquiesced in the withholding of payment of  
25 the Distribution Proceeds by the Company. On 11<sup>th</sup> July 2011 Mr. Hanson on behalf of  
26 the Company emailed CFC as registered holder of the Shares and, having made reference  
27 to the Stillwater Proceedings, stated:

28  
29 *"Given the pending litigation [the Stillwater Proceedings] against [Stillwater and*  
30 *another defendant] no distribution payments were made, or will be made by [the*







Company] to or for the benefit of [Stillwater] until such time as the litigation is finally determined'

4 On 9<sup>th</sup> August 2011 Mr. Melsens of KBC emailed Mr. Hanson and one of his co-directors  
5 and said:

6 *"As you may be aware, KBC is a leverage provider to [Stillwater], which is an*  
7 *investor in [the Company]. We understand that [the Company] has initiated*  
8 *litigation against Stillwater (among other parties) and that this legal action is*  
9 *pending in the NY courts. It has come to our attention that [the Company] has*  
10 *suspended the distribution of redemption proceeds to Stillwater.*

11  
12 *Despite the on-going litigation, we have not seen any similar precedent of a fund*  
13 *withholding redemption proceeds to just one of its investors. As we are not aware*  
14 *of the legal grounds you base yourselves on to deny such distributions, can you*  
15 *kindly specify the background in full and identify the legal grounds (plus any*  
16 *relevant provisions in [the Company's] constituent documents) you are relying on*  
17 *to deny these distributions to Stillwater?*

18  
19 *Can you please also detail what you are doing with these redemption proceeds in*  
20 *the interim? Are these funds being held in a segregated escrow account? Are they*  
21 *part of [the Company's] NAV calculations"?*

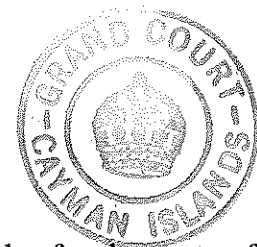
22  
23 50. Mr. Hanson contends in his affidavit evidence that this email dated 9<sup>th</sup> August 2011 from  
24 Mr. Melsens did not amount to an objection or challenge to the withholding of payment  
25 of the Distribution Proceeds by the Company but was simply a request for information.  
26 He says that nothing was heard from KBC challenging the non-payment of the  
27 Distribution Proceeds until its letter demanding payment on 24<sup>th</sup> April 2013, some 18  
28 months later (see paragraph 9 above). However, this evidence is not consistent with Mr.  
29 Hanson's evidence that there were many communications between Mr. Melsens and Mr.  
30 Molner throughout 2012. Mr. Hanson says he assumed that in those communications Mr.  
31 Molner made the Company's allegations against KBC concerning the Company's

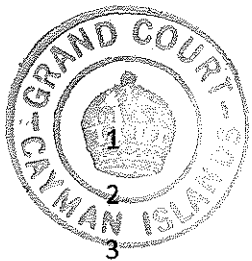
1 Beverly Slate related investment clear to Mr. Melsens (which is denied by Mr. Melsens),  
2 but if that was so it seems to me almost inconceivable that such allegations would not  
3 have been made to Mr. Melsens in response to and in the context of attempts by Mr.  
4 Melsens to obtain payment of the Distribution Payments (which Mr. Melsens anyway  
5 says was what the communications were in fact about).  
6

7 51. Mr. Melsens' email dated 9<sup>th</sup> August 2011 does not seem to me to amount to an  
8 acceptance by him of the withholding of the Distribution Proceeds. It appears from what  
9 he says that he had only recently become aware that the Company was not going to make  
10 the Distribution Payments. He was indeed seeking information about the Company's  
11 entitlement not to pay but the tenor and tone of his comments go further than that and do  
12 not, in my view, indicate any acknowledgment or recognition that the Company was so  
13 entitled; on the contrary he appears to me clearly to be objecting to the Company's  
14 action. In my opinion Mr. Melsens' comments do not support the Company's argument  
15 that KBC acquiesced in the Company's withholding payment of the Distribution  
16 Proceeds. I also consider that the communications between Mr. Melsens and Mr. Molner  
17 throughout 2012 are inconsistent with any acquiescence or waiver by KBC of its  
18 entitlement to payment of the Distribution Proceeds. In fact it is clear that almost as soon  
19 as the Stillwater Proceedings were dismissed by the court in New York, shortly after  
20 which the right to the Distribution Proceeds was assigned to KBC as beneficial owner of  
21 the Shares, KBC took active steps to recover payment.

22  
23 Conclusions  
24

25 52. KBC's first position is that in this case there should be no order for the costs of the  
26 withdrawn petition. The Company's position is that the usual rule on costs should apply,  
27 so the Company should have its costs of the petition. KBC's alternative case is that the  
28 Court's decision on the costs of the petition should await the outcome of the KBC  
29 Proceedings in New York. This submission was based upon the course adopted in the *Re*  
30 *Sykes* case referred to at paragraph 27 above. In my view the decision as to which party,  
31 if any, should pay the costs of the petition would not obviously be assisted by whether the





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Company or KBC is successful before the Court in New York. The issue in New York will be whether or not KBC is liable to the Company in respect of the Company's claims made against it. In my view the answer to that has no real bearing on whether or not it was reasonable in all the circumstances for KBC to present its winding up petition when it did. In my view that is not to be determined with the benefit of hindsight. In the circumstances of this case I do not believe the outcome of the KBC Proceedings would be relevant to or should affect a decision on liability for the costs of the petition. In my opinion deferring the decision on costs to await the outcome of the KBC Proceedings would not be helpful or appropriate. I also agree with counsel for the Company that it is possible that the KBC Proceedings, like any court proceedings, could possibly continue for a long time before a final decision is reached. I consider that it would be undesirable to defer the question of liability for the costs of the petition until some unknown date possibly long in the future.

15 53. In the circumstances of this case, which I have summarized, explained and discussed  
16 above, and having regard to the arguments and submissions which I have considered to  
17 be relevant for these purposes, I have reached the view that it was reasonable for KBC to  
18 have filed and presented the winding up petition, now withdrawn, when it did.

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20 54. As I have already explained, I am satisfied on the evidence that the only objections by the  
21 Company to KBC's attempts to obtain payment of the Distribution Proceeds of which  
22 KBC was aware prior to the filing of its petition, were the alleged cross-claim arising  
23 from the Stillwater Proceedings and, latterly, the Company's solvency and KBC's alleged  
24 acquiescence in the withholding of payment of the Distribution Proceeds. In my opinion  
25 KBC were entitled to treat the Stillwater Proceedings as having been dismissed and no  
26 longer extant. For the reasons I have explained as well, I do not consider that the  
27 Company's arguments based on its solvency and KBC's alleged acquiescence are  
28 sufficiently meritorious to have made it unreasonable for KBC to proceed with a winding  
29 up petition in the knowledge thereof.

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31 55. In addition I am satisfied on the evidence overall that it is probable that KBC was not  
32 made aware at all, and certainly not in any sufficient or meaningful way, before filing its

1 winding up petition, that the Company was relying upon a claim against KBC based on  
2 the allegations now made in the KBC Proceedings. I have already considered and  
3 commented on this and made my views clear. I should add that KBC's attorneys  
4 obviously recognized, as soon as KBC became aware of the KBC Proceedings, that the  
5 claims made by the Company therein, which, if established, would exceed the amount of  
6 the Distribution Proceeds, would be inappropriate for determination in winding up  
7 proceedings. KBC's attorneys were clearly familiar, as would be expected, with the law  
8 that the winding up jurisdiction of the court may not be invoked in respect of a disputed  
9 debt. Consequently, quite properly, they then applied on behalf of KBC for leave to  
10 withdraw the winding up petition. While I do not make too much of this, I consider it  
11 reasonable to infer that if KBC had previously been made aware of the claims which the  
12 Company now makes in the KBC Proceedings it would not have filed the petition in the  
13 first place. Knowing of the possible cross-claim by the Company based on the Stillwater  
14 Proceedings, as it obviously did, KBC did not file its petition before those proceedings  
15 had been dismissed.

16  
17 56. I have considered and applied the legal principles as set out above and in the exercise of  
18 my discretion I have concluded that in the particular circumstances of this case it is  
19 appropriate and fitting for the court to depart from the usual rule in relation to costs,  
20 which I accept the court should be slow to do. In my view the fairest and most just course  
21 in this case is to require each party bear its own costs of and incidental to the withdrawn  
22 petition, including the costs of this hearing. I shall therefore make no order for costs.

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25 DATED this 25<sup>th</sup> day of October 2013

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29 **The Hon. Mr. Justice Angus Foster**

30 **Judge of the Grand Court**

