BERMUDA
SUPREME COURT

In the Matter of Kingate Management Limited [2012] SC (Bda) 52 Com

COMPANIES - WINDING UP - SECTION 167(4) COMPANIES ACT - APPLICATION TO CONTINUE CIVIL ACTION - ENTITLEMENT TO BE JOINED TO APPLICATION - SECTION 175(3) COMPANIES ACT

An Application was made by the Joint Liquidators of Kingate Global Fund Limited (in liquidation) and Kingate Euro Fund Limited (in liquidation), the "Funds". The Funds were Plaintiffs in a pre-existing civil action against Kingate Management Limited (the "Company"). The Application sought leave to pursue the civil action against the Company following the winding up of the Company in March 2012. The main question raised by the application was whether the claims asserted against the Company ought to be continued in the civil action pursuant to Section 167(4) of the *Companies Act, 1981* (the "Act") or advanced instead through the proof of debt process in the Company's liquidation. The Shareholder Defendants in the civil action (who were also creditors of the Company) sought to be joined to the aforesaid application.

It was noted by Counsel for the Company that the rationale underlying the statutory liquidation stay is to prevent a creditor from gaining an advantage over other creditors and to prevent a company in liquidation being subjected to actions that are expensive and carried on at the expense of the creditors of the company. As such, the Funds needed to advance grounds which on balance justified the pursuit of its claim by litigation against the Company, rather than by the usual course of lodging a proof of debt on winding up. Counsel for the Funds argued that Section 167(4) of the Act conferred discretion upon the Court to lift the automatic stay of proceedings either unconditionally or subject to conditions.

The Court held that the Funds' application should be granted. In reaching a decision, the Judge recognised that the Company had no or no significant liquid assets but did have insurance cover which would possibly fund some defence costs and potentially meet at least some of the liability to which the Company was exposed in relation to the Funds' claims. The Judge also noted that as the Company had no liquid assets, any suggestion that the Funds should prove in the liquidation instead of continuing their action against the Company and its co-Defendants in the civil action was artificial. The Judge stated that unless the Company itself were to seek to recover the distributions made to its shareholders or file claims against its directors and officers, it would have no assets to distribute, making the proof of debt process a barren exercise. The reality was that if the Funds' claims were successful, it would have no impact on the assets of the Company available for general distribution as such assets did not presently exist.

In respect of the joinder application, the Judge held that Section 175(3) of the *Act* provided no jurisdictional basis for joining a creditor as a respondent to an application made against a company in liquidation under Section 167(4).

Whilst the Judge noted that it is impossible to rule out exceptional scenarios where a creditor might have standing to participate in an application to lift the liquidation stay, he excluded the circumstances of the current case.