

## BERMUDA SUPREME COURT

### *In the matter of Titan Petrochemicals Limited* [2013] Sc (Bda) 60 Com (26 July 2013)

### SUBSTITUTION APPLICATION - CHANGE OF PETITIONER

On 10 May 2013, the Court ruled that the Petition presented on 10 July 2012 by Saturn Petrochemicals Holdings Limited ("Saturn") was liable to be struck-out on the basis that Saturn lacked standing. Saturn applied, *inter partes*, for leave to appeal against this determination.

Saturn's Petition was accordingly adjourned to 23 July 2013 when KTL Camden's application to be substituted as Petitioner was also listed for effective hearing. At the 23 July 2013 hearing, the Company was granted leave to appeal. This was on the basis that the Judge proposed on that same date to both strike-out Saturn's Petition and adjudicate KTL Camden's substitution application so that either there would be no petition before the Court at all, subject to Saturn's appeal, or the Petition would be amended so as to substitute the new Petitioner. Saturn's application was not opposed by the Company.

At the end of the hearing of KTL Camden's substitution application, the Judge decided to grant the application for leave to amend the Petition. The Judge proceeded to set out the reasons for his decision to accede to the substitution application.

#### **Legal Findings: Principles Governing Substitution Applications**

The basic principles governing substitution as set out in Rule 27 of the *Companies (Winding-Up) Rules 1982* were not in dispute. However, in the Court's Judgment it was stated that substitution is appropriate not just where it is clear that an insolvent company should be wound up as soon as possible, but also where it is clear that an insolvent company will be liable to be wound up unless some alternative restructuring can be implemented.

Winding up proceedings, with or without provisional liquidators in place, can serve a useful purpose in practicality (if not technically) 'holding the ring' while an alternative to a liquidation is explored. Where an insolvent company attempts to implement an out of court restructuring without presenting its own winding up petition, it will always be vulnerable to an unpaid creditor's petition being validly appointed. Whether or not a winding up order ought in fact to be made is a distinct and separate question.

It was noted that the second competing policy against substitution is where controversy lay in the present case; because the Company contended that the alleged Petition debt was genuinely disputed. In this regard, the test applied by the Supreme Court in another substitution case (*Re: Gerova Financial Group Ltd.* [2012] Bda LR 20) was relied upon. It appeared to the Judge to be well settled that it is only if there is a genuine or *bona fide* dispute which is based on substantial grounds that a winding up court is required to consider staying or dismissing the winding up proceedings on the grounds that the relevant dispute ought to be determined in arbitration proceedings or in some other contractually agreed forum. The scope of an unpaid creditor's access to the winding up jurisdiction of the Court is defined by a single test and is not materially reduced simply because its claim happens to be based on a contract containing an arbitration or exclusive jurisdiction clause mandating the adjudication of disputes by some other tribunal.

Taking the above into account, the Judge held that it was clear that there was no genuine dispute based on substantial grounds as to KTL Camden's status as a net creditor of the Company.

For the above reasons on 23 July 2013, the Judge granted KTL Camden leave to be substituted as Petitioner under an Amended Petition.

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