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OFFSHORE CASES

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BERMUDA

SUPREME COURT

In The Matter of Titan Petrochemicals Group Limited (Provisional Liquidators Appointed) [2014] SC (Bda) 74 Com (23 September 2014)

SECTION 99 OF THE COMPANIES ACT, 1981 - NOTE CREDITORS - CONTINGENT CREDITORS - DEFINITION OF CREDITOR

Applications for directions in relation to convening meetings at which schemes of arrangements will be proposed to a company's creditors or shareholders are typically an uneventful, *ex parte*, affair. At the hearing of the present application by the Company under Section 99 of the *Companies Act, 1981* (the "Act") for leave to convene meetings of creditors in Hong Kong to consider and potentially approve a scheme of arrangement, counsel for the Company and the Joint Personal Liquidators ("JPLs") both addressed the Court, *inter alia*, on the apparently novel Bermudian law point of the ability of Note-Holders to vote as contingent creditors at their class meeting. It was common ground that this Court should follow persuasive judicial authority and practice from a variety of common law jurisdictions and permit voting on this basis. However, a problem arose because the Court had previously decided that Note-Holders who did not actually hold notes did not qualify as contingent creditors for the purposes of presenting a winding up petition: *Re Bio-Treat Technology Limited* [2009] SC (Bda) 26 Civ (28 May 2009); [2009] Bda LR 29 (Bell J). Counsel was accordingly compelled to distinguish the present case from Re Bio-Treat Technology Ltd and/or to demonstrate why it ought not to be followed.

Section 99 of the Act provides in salient part as follows:

"*(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs*".

This Section falls within Part VII of the Act and the term 'creditor' is not defined, either for the purposes of Part VII or the Act as a whole. The crucial legal question placed before the Court was whether or not Note-Holders qualified as 'creditors' for the purposes of Section 99 because they were contingent creditors of the Company.

The Judge found it easy to conclude that Bell J's decision should not be followed in the present case and the Note-Creditors were entitled to vote on the proposed Scheme as contingent creditors and provided three main reasons. Firstly, since judgment was handed down in that case, a new judicial consensus has emerged in several common law jurisdictions with which we have strong commercial and legal ties, the underlying beneficial interest owners in a Global Note have sufficient standing to vote as a creditor at a Scheme meeting. Secondly, the crucial facts of the earlier decision as regards to the legal relationship between the underlying beneficial owners and the Scheme company were materially different. And, thirdly, Bell J's narrow definition of who qualified as a contingent creditor arose in the analogous but different context of determining who had standing to petition to wind up a company.

The Judge noted, the Court has in the past accepted the principle that underlying owners of notes ought to be entitled to vote at a scheme meeting, notwithstanding the fact that legal title is vested in a single global Note-Holder. This acceptance was based on a practical desire to make legal voting rights reflective

of economic reality, in a context where the unified legal title represented by a Global Note appeared to be based on administrative and commercial convenience rather than legal substance. It was not based on any considered and rigorous legal analysis as to who qualifies as a creditor for the purposes of Section 99 of the Act. This intellectually light approach was noted as having been informed by an appreciation that Section 99 is designed to facilitate commercial bargains which attract the support of majorities in value. If such support is forthcoming and no sustainable challenges to the fairness of the meeting procedures are advanced at the sanction hearing then the Scheme proceeds. If the Scheme does not attract the requisite support and/or overcome objections advanced at the sanction stage then the Scheme fails. Where a majority in number representing 75% in value of creditors of an insolvent company, agree the underlying beneficial holders of notes should be entitled to vote and other candidates for voting rights waive those rights, the weight of such commercial consensus provides no encouragement for the sanctioning Court to explore theoretical legal impediments to approving the proposed Scheme.

The Judge was keen to point out that nothing in the present Judgment should be read in any way as doubting the soundness of the factually and legally distinguishable case of *Re Bio-Treat Technology Limited* [2009] Bda LR 29, particularly as it relates to the standing of contingent creditors to present winding up petitions.

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