

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Spectrum Galaxy Fund Ltd -v- Xena Investments Ltd HCVAP 2011/40

INSOLVENCY ACT - BVI APPEALS - WHETHER ASSIGNEE OF REDEMPTION PROCEEDS CAN ATTAIN THE CHARACTER OF A CREDITOR WITH LOCUS STANDI TO SEEK LIQUIDATION OF A COMPANY

Xena Investment Limited (“Xena”) applied for and was granted an order appointing joint liquidators over Spectrum Galaxy Fund Ltd (“Spectrum”) on the basis that Xena, as an assignee of redemption proceeds had *locus standi* to seek the liquidation of Spectrum. Spectrum appealed. The sole question arising on the Appeal was whether an assignee of redemption proceeds stood in a better position than the redeeming shareholder and by virtue of the assignment attained the character of a creditor with *locus standi* to seek the liquidation of a company.

The Court followed its previous decision in *Westford Special Situations Fund Limited -v- Barfield Nominees Limited et al* and allowed the Appeal. It held that a claim for redemption proceeds is precluded by virtue of Section 197 of the *Insolvency Act* (the “Act”) from being an admissible claim and caught by the prescription contained in Section 12(c) of the Act. Section 197 provides that a “... member and a past member, of a company may not claim in the liquidation of a company for a sum due to him in his character as a member, whether by way of dividends, profits, redemption proceeds or otherwise...”.

Whilst the Court accepted that Xena was not a member of the Spectrum Fund, it was of the view that all that Section 197 sought to do was to capture those type of claims which a person may make and which would only arise by virtue of that person’s membership or shareholding in a company and that it was descriptive of the characteristic of the claim. The Court further held that the assignment of a claim, having that characteristic (and therefore a non-admissible claim), does not thereby convert it simply by virtue of having been assigned, into a claim of a

different character. As a result, Xena’s claim as an assignee of the redemption proceeds was found to be a non-admissible claim in the liquidation and not capable therefore of conferring on Xena the character of a creditor with *locus standi* to apply for the appointment of liquidators over Spectrum.

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