

BRITISH VIRGIN ISLANDS HIGH COURT (COMMERCIAL DIVISION)

Somers Dublin Ltd A/C KBCS and Others - v- Monarch Pointe Fund Limited (Territory of the Virgin Islands) Claim No. BVI HCV 2008 of 97

UNPAID REDEEMING MEMBERS OF FUND IN LIQUIDATION - PRIORITY OF CONTINUING MEMBERS - SECTIONS 207 AND 197 OF THE INSOLVENCY ACT, 2003 (THE "ACT") CONSIDERED

The issue in this case was whether unpaid redeeming members had priority over the claims of continuing members of a fund in liquidation. *Somers Dublin Ltd A/C KBCS and Others* ("Somers") said that they ranked before members but after third party creditors such that they would be paid in priority to the continuing members who were only entitled to share in the surplus, if any, following distribution. Monarch Pointe Fund Limited ("Monarch") maintained that an unpaid redeeming member was neither a member nor a creditor and therefore entitled to nothing.

The Learned Commercial Judge rejected both submissions and held that Section 197 of the Act makes clear that the sum owed to a redeemed member was to be taken into account for the purpose of final adjustments of the rights of members and, if appropriate, past members between themselves. This meant that Section 207 (3) of the Act (which deals with the distribution of surplus assets among members) must be taken to include past members with sums due to them in their character as members. The Judge referenced the statement of the Hon Mde Janice George-Creque JA in *Westford Special Situations Fund Ltd -v- Barfield Nominees Ltd* where it was said that Section 197 was to ensure that past members who had not received the totality of their redemption proceeds before the commencement of a liquidation did not gain priority over members who had not redeemed in time. The Commercial Judge found that Section 197 relates to the surplus contemplated by Section 207(3) and that such surplus was to satisfy the claims of members, past and present as well as continuing members. Further, as Section 197 only speaks of an adjustment between members and, where appropriate, past members and no system of priorities, equity requires an application of the, *pari passu*, principle.

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