IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 106 of 2023 (AWJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF JUNIPER LIFE SCIENCES LTD.

IN CHAMBERS

Coram:	**Walters J. (Acting)**
Appearances:	**Mr Richard Millett KC (via Zoom) and Mr Jonathon Milne and Mr Jordan McErlean of Conyers for the Plaintiff** **Mr Alain Choo-Choy KC and Mr Denis Olarou and Ms Kalyani Dixit of Carey Olsen for the Defendant**
Present:	**Mr Rudianto and Mr Shankar of Oon & Bazul LLP (both via Zoom)**
Heard:	**18 September 2023**
Draft circulated:	**17 October 2023**
Judgment issued:	**23 October 2023**

JUDGMENT

1. This is an application dated 16 June 2023 by Juniper Life Sciences Ltd. ("JLS" or the "Company") for an order striking out a winding up petition dated 27 April 2023 (the "Petition") presented by RBH Holdings ("RBH") pursuant to s. 92(e) Companies Act (2023 Revision) (the "Act") (the "Strike Out

Application"). S. 92(e) of the Act gives the Court jurisdiction to make an order for the winding up of a company if it is of the opinion that it is just and equitable to do so.

2. This action is related to Cause FSD59 of 2023 (AWJ) in which the parties are the same. In that proceeding, RBH seeks an Order rectifying the register of members of JSL pursuant to s.46 of the Act[1] (the "Rectification Application" and the "Rectification Proceedings"). The background to the dispute in the Rectification Proceedings is set out at some length in my judgment dated 8 June 2023 handed down following a hearing on 27 and 28 April 2023. I will not repeat that detail here other than to say, in summary, that the shareholding of RBH in JSL was redeemed by JSL with effect from 22 October 2022. The redemption was carried out by JSL as what has been described as a "self-help" remedy in relation to a wider dispute between Mr Rudianto, the owner of RBH and the ultimate owners of the other shares in JSL.

3. My judgment in that action related to an application by JSL for a stay of the Rectification Proceedings (the "Stay Summons") in favour of arbitration relying on a number of different agreements between a variety of parties which contained arbitration clauses. For the reasons set out in my judgment, I dismissed the application by JSL. JSL has appealed that decision, and the appeal was heard immediately after the Strike Out Application. I have dealt with the appeal in a separate judgment which will be handed down contemporaneously with this decision.

4. Correspondence was exchanged between local counsel prior to the hearing of the Stay Summons. On 29 March 2023, Conyers Dill & Pearman LLP ("Conyers") wrote on behalf of RBH to JSL's then counsel Stuart Walker Hersant Humphries[2] ("Stuarts"). In the letter, Conyers says that, amongst other things:

---

[1] *"If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register be rectified; and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have that person's name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally, the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register: Provided that the Court may direct an issue to be tried, on which any question of law may be raised."*

[2] Hearing Bundle B/4/262-263.

"You have had months to take instructions from your client. As you are aware, our client has been forced to make the Rectification Application due to the expropriation of RBH's shares and your client's refusal to rectify the register by consent. The Company has no reasonable basis to oppose the Rectification Application."

They went on to say as follows:

*"**Maintaining the Status Quo***

Having regard to your client's actions and conduct to date, RBH intends to present a petition to wind up the Company pursuant to section 92 (e) of the Companies Act in due course.

As you are aware, section 94 (3)(b)(i) of the Companies Act states:

"A contributory is not entitled to present a winding up petition unless … (b) the shares in respect of which that person is a contributory, or some of them, either were – (i) originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition;"

RBH is concerned that, by virtue of your client's transparent strategy of delay, the Rectification Application may not be determined prior to the six (6) month anniversary of the expropriation of RBH's shares.

Accordingly, in order to protect RBH's position, in its capacity as a shareholder of the Company, please confirm by return whether your client is prepared to agree that our BH is existing rights to present a winding up petition is preserved by way of a consent order which provides that RBH may bring a petition within 30 Days following the Court's determination of the Rectification Application. If that is agreed, we shall circulate a draft consent order to that effect."

5. Although the Petition was filed on 27 of April 2023, it was not issued by the court until 11 May 2023. In the preamble to the Petition RBH is described as being a shareholder in JSL. The grounds for winding up were set out as follows:

"73. It is just and equitable to wind up the Company under section 92(e) of the Companies Act for the following reasons, as set out above and summarised below:

(a) The Board of Directors of the Company has breached the legal bargain between shareholders as contained in the Articles by their decision to pass the written Resolution of the Board of

Directors of [JSL] dated 27 October 2022 exercising the discretion under Article 9.1(c) of the Articles dated 21 December 2021 to redeem the 5,000 ordinary shares held by [RBH] at the par value of US$5,000 with effect from 27 October 2022 which constituted an exercise of a power for an improper purpose and is void (or, alternatively, voidable); and

(b) For the same reasons, set out at (a), by virtue of the Board of Directors of the Company passing the Resolution, there has been a justifiable loss of confidence in the management of the Company."

6. Starting on 14 August 2023[3] (after the application had been made by JSL to strike out the Petition) there was a further exchange of correspondence between Conyers and Carey Olsen who had come on the record for JSL. On 14 August 2023, Conyers reminded Carey Olsen of the presentation of the Petition and the effect of s 99 of the Act which provides that:

"When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void."

7. Conyers also referred to previous correspondence with Stuarts on 20 December 2023 in which Conyers requested that JLS provide the following undertakings to RBH:

"1. Preserve all documents and records which may be relevant to this matter and/or

2. To maintain the status quo by not doing any act which may materially prejudice RBH's rights and/or interests without at least 30 days written notice to our firm, including;

a. disposing of any of the Company's assets held directly or indirectly (including any subsidiaries such as Juniper Biologics and Juniper Theraputix Pte. Ltd);

b. causing the Company and/or any subsidiaries (including any subsidiaries such as Juniper Biologics and Juniper Theraputix Pte. Ltd) to undertake any new debt;

c. dealing in the shares of the Company and/or any subsidiaries, including Juniper Biologics and Juniper Theraputix Pte. Ltd;

[3] Hearing Bundle B/5/303-311

d. passing board resolutions or members resolutions of the Company and/or any subsidiaries, including Juniper Biologics and Juniper Theraputix Pte. Ltd; and

e. do any other act which may prejudice RBH."

8. Other than confirming that all documents will be preserved, no undertakings were offered by Stuarts on behalf of JSL.

9. Conyers then raised with Carey Olsen the urgent need for an explanation about what they described as a substantial reorganization of the JLS group structure ("the "Reorganization") which had led to JLS's wholly owned subsidiary, Juniper Holdings Ltd no longer holding ordinary shares in two subsidiaries. Conyers says that those shares appeared to then be held by JTB Holdings, a newly incorporated Cayman Islands entity. Conyers took the view that these were very significant transactions which were not validated by a validation order dated 31 July 2023 made for the purposes of s.99 of the Act and providing only for the payment of the parties' legal and other professional fees.

10. Conyers demanded an explanation for the transaction and repeated the request for undertakings in similar terms to those requested from Stuarts. The form of undertakings requested was as follows:

"1. continue to preserve all documents and records which may be relevant to this matter;

2. maintain the status quo by not doing any act which may materially prejudice RBH's rights and/or interests without at least 30 days written notice to our firm, including;

a. disposing of any of JLS's's assets held directly or indirectly (including any subsidiaries such Juniper Biologics and Juniper Theraputix Pte. Ltd to the extent JLS presently directly/indirectly has an interest in them);

b. causing JLS and/or any subsidiaries (including Juniper Biologics and/or Juniper Theraputix Pte. Ltd, to the extent JLS presently directly/indirectly has an interest in them) to take on any new debt;

c. dealing in the shares of JLS and/or any subsidiaries, including Juniper Biologics and/or, Juniper Theraputix Pte. Ltd to the extent JLS presently directly/indirectly has an interest in them;

d. passing board resolutions or members' resolutions of JLS and/or any subsidiaries, including Juniper Biologics and/or Juniper Theraputix Pte. Ltd, to the extent JLS presently directly/indirectly has an interest in them; and

e. do any other act which may cause prejudice RBH."

11. Carey Olsen replied on 18 August 2023 and denied that there had been a disposition of the Company's property and denied that s.99 of the Act was engaged. They did provide some explanation of the Reorganization which they say was carried out in anticipation of a potential investment. Apparently that investment failed to complete, and the restructuring was subsequently reversed. In conclusion, Carey Olsen confirmed in its letter that JSL would offer undertakings expressed as follows (the "Undertakings"):

"d. That said, and in the interest of addressing any concerns that RBH may have, the Company is prepared to offer the following undertakings in good faith for the duration of the Winding Up Petition.

i. The Company will maintain the existing status quo by not concluding or procuring the conclusion of any transaction which may materially prejudice RBH's alleged rights and/or interest (which are denied) without at least 14 days' written notice to your firm of any such proposed transaction, including any transaction:

1. disposing of any of the Company's substantial assets or procuring the disposal of any substantial assets held by the Company's subsidiaries;

2. causing the Company, or procuring any of the Company's subsidiaries, to take on any new debt of more than US$5 million; and,

3. dealing in any of the shares in the Company.

ii. Save that none of the undertakings in (i) above shall prejudice the rights of the Company and/or any of its subsidiaries from conducting their day-to-day business and enter into transactions in the ordinary course of their respective businesses."

12. As at the date of this hearing Conyers had not responded substantively to the undertakings offered.

The Strike Out Application

13. JSL seeks orders striking out the Petition pursuant to GCR O.18, r. 19(1)(a) and (d)[4] and/or pursuant to the inherent jurisdiction of the Court on the basis that at the relevant time:

13.1 JSL was not a "contributory" pursuant to ss.89 and/or 49 of the Act;

13.2 JSL did not have any tangible interest in the Petition; and/or

13.3 JSL did not satisfy the requirements in s.94(3)(b)(i) of the Act.

JSL reserved its rights in relation to its contention that the issues raised by the Petition are subject to mandatory arbitration as outlined above.

14. GCR O.18, r.19 provides as follows:

> *"**19**. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court,*
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under subparagraph (1)(a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."*

15. S.89 of the Act defines "contributory" as meaning:

> *"(a) every person liable by virtue of section 49 to contribute to the assets of a company in the event that it is wound up under this Law; and*
>
> *(b) every holder of fully paid up shares of a company;"*

The relevant provisions of s.49 of the Act read as follows:

[4] Applicable in winding up proceedings by virtue of Companies Winding Up Rules ("CWR") Order 3, rule 2(5).

"49. In the event of a company being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves:

Provided that —

(a) a past member shall not be liable to contribute to the assets of the company if that person has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up;

(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after the time at which that person ceased to be a member;

(c) a past member shall not be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them under this Law;

(d) in case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which that person is liable as a present or past member except where such member or past member holds or held shares of a class which are expressly stated in the memorandum of association to carry unlimited liability, as provided in section 8(2);…"

S. 94 of the Act sets out the circumstances in which an application for the winding up of a company may be presented:

"(1) An application to the Court for the winding up of a company shall be by petition presented either by —

(a) the company;

(b) any creditor or creditors (including any contingent or prospective creditor or creditors);

(c) any contributory or contributories;

…

(3) A contributory is not entitled to present a winding up petition unless either —

(a) the shares in respect of which that person is a contributory, or some of them, are partly paid; or

(b) the shares in respect of which that person is a contributory, or some of them, either were —

(i) originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition; or

(ii) have devolved on that person through the death of a former holder."

Position of JSL in relation to the Petition

RBH locus standi

16. JSL argues that standing to bring a winding up petition is restricted to contributories who are registered as such in the register of members of company[5]. Even if a contributory does have standing, JSL argues that the Court should dismiss a petition if the contributory cannot establish that it is entitled to share in surplus assets on a winding up[6].

17. JSL contends that it is an indisputable fact that that RBH is not a contributory. RBH ceased to be a contributory on 27 October 2022 and the register of members of the Company is prima facie evidence of the membership in the Company[7]. On that basis, it is argued that RBH had no *locus standi* to either present the Petition or proceed with it. Indeed, JSL says that RBH recognized this as evidenced by Conyers letter of 29 March 2023 in which JSL was invited to agree that RBH's alleged existing right to present a winding up petition was preserved pending the outcome of the Rectification Application.

18. JSL argues that RBH is not a contributory within the meaning of s.89 of the Act. It says that RBH is not the holder of fully paid shares as required by s.89(b) of the Act. It also argues that RBH is not liable to contribute to the assets of the Company in winding as required by s.89(a) because s.49(d) provides that no contribution shall be required from any present or past member except in respect of any "unpaid" amount in its shares. RBH's shares had been fully paid up so it is argued that RBH does not fall within s.89(a).

---

[5] See e.g. *Hannoun v R Limited and Banque SYZ Company Limited* [2009] CILR 124. Although a lack of standing does not automatically render a petition a nullity see e.g. *In the matter of Natural Dairy (NZ) Holdings Limited* unreported FSD 186 of 2016 (NSJ), 2 March 2017 and *In the matter of BAF Latam Credit Fund* unreported FSD 24 of 2021 (RPJ), 16 March 2021.

[6] *Re GATX Flightlease Aircraft Company Ltd* unreported 282 of 2004 (Henderson J), 23 June 2005.

[7] S. 48 Companies Act.

19. Mr Choo Choy KC submitted that there are no Cayman Islands decisions that interpret the meaning of "*contributory".* In his written submissions he provides an interesting analysis of the approach of the English courts to this question albeit in the context of the various English Companies Acts. In summary, under English statute, "*contributory*" has been defined solely by reference to whether shareholders were liable to contribute to the assets of the company in winding up. That definition created what have been referred to as absurdities under English law (such as a fully paid up shareholder arguably not having standing to present a winding up petition) which were resolved by the English courts adopting a wide or "*purposive"* reading of the relevant provisions[8].

20. S.89 of the 2007 revision of the Act contained language similar to that in English statute; namely a definition of *"contributory"* by reference to whether the shareholder was liable to contribute to the assets of a company on winding up. That was amended in the 2009 revision of the Act to expand s.89 to include subsection (b) being holders of fully paid up shares. On that basis, it is submitted by Mr Choo Choy that a narrow reading of s.49 is sufficient.

21. He suggests that a wide reading the effect of which might arguably be to include past fully paid members into the definition of contributory which would in itself produce absurdities elsewhere in the Act such as the right of past members with no economic interest in the winding up having, for example, a right to sit on liquidation committees.

22. Mr Choo Choy goes on to argue that even if RBH could satisfy the Court that as a past fully paid up contributory it fell within the meaning of s.89, it would still have to satisfy the further test set out in s.94(3) of the Act. This was the approach adopted by Segal J in *Re Natural Dairy (NZ) Holdings Limited* who considered s.94(3)(b)(i) and was satisfied that the settled approach required that petitioners be registered members of the company.

23. Although his judgment does not go into detail, it appears that it was also argued before Segal J that subsection (i)[9] should be interpreted so as to subject the entirety of the subsection to the requirement that in order to present a petition, shares must have been held by the contributory for six months whether they were originally allotted to that member or acquired subsequently from another contributory. Indeed, Mr Choo Choy suggested that this is the natural meaning of the wording. On this point, I was referred to the 2007 revision of the Act. S.96 (the predecessor of s.94) dealt with applications for

[8] See e.g. *Re Phoenix Oil and Transport Co. Ltd.* [1958] Ch. 560 and *Re Consolidated Goldfields of New Zealand LD. [1953] Ch. 689.*

[9] "*originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition"*

winding up petitions and provided that a petition may be presented by any one or more than one creditor or contributory of the company. In The Companies (Amendment) Bill 2007 which led to the amendment of s.96 and its substitution with what is now s.94, the Memorandum of Objects and Reasons explained that:

> "*Subsection (3) clarifies the circumstances in which shareholders can present petitions. Its effect is to impose a constraint upon "vulture funds" and those who buy shares with the intention of realising value by liquidating the company".*

24. Mr Millett KC disagreed and made the point that there would be no need to make reference to the original allotment of shares if the six-month requirement applied to all members regardless of how they acquired their shares. Although not directly relevant to this application, and not an issue in relation to which I have to make a finding of law, my impression is that taking into account the reason for the amendment of the section, the natural and ordinary meaning of the wording is that the six-month requirement does not apply to those originally allotted shares and only requires that those subsequently acquiring shares otherwise by original allotment must have held them for six months before having *locus standi* to present a petition. This appears to be consistent with the approach taken by the authors of *Hollington on Shareholders' Rights* which considers at paragraph 10.05 the similar wording of s.124(2)(b) of the English Insolvency Act 1986. That subsection reads as follows:

> *"(2) Except as mentioned below, a contributory is not entitled to present a winding-up petition unless either-*
>
> *...*
>
> *The shares in respect of which he is a contributory, or some of them, either were originally allotted to him, or have been held by him, and registered in his name, for at least six months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder."*

Hollington goes on to summarize that the principal *locus standi* requirement is therefore that the petitioner's shares either were originally allotted to them or have been held by them and registered in their name for at least six months in the last 18 months before the presentation of the petition. Although the wording in the English Insolvency Act is not identical to that in the Act it seems to me that it is sufficiently close in the relevant part for that approach to be treated as the correct one.

25. Mr Choo Choy's position on standing therefore is that having ceased to be a member on 27 October 2022 the Petitioner was not a registered member when it presented the Petition on 11 May 2023 and, whether required or not, had not held the shares for six months prior to doing so.

Lack of tangible interest

26. Mr Choo Choy refers to the decision of the Judicial Committee of the Privy Council in *CVC Opportunity Equity Partners Limited and Opportunity Invest II Limited v Demarco Almeida*[10] in which Lord Millett noted that: *"…it is well established that a shareholder with fully-paid shares has no* locus standi *to present a winding-up petition unless there is* prima facie *evidence that there would be a surplus on a winding up.*"[11]. He says that the principle goes further than that and that a petitioner must show that it will share in that surplus. In the case of *GATX Flightlease Aircraft Company Limited*[12] Henderson J consider the question of what a petitioner has to show to demonstrate a tangible interest. The reported note of his decision states:

> *"A contributory petitioning for a winding up must show that—*
>
> *(1) there is likely to be a substantial surplus of assets available for distribution among the shareholders (*Re Othery Construction Ltd.*, [1966] 1 All E.R. 145, applied;* In re Harris Simons Construction Ltd.*, [1989] 1 W.L.R. 368, applied;* Black *v.* Sumitomo Corp.*, [2003] 3 All E.R. 643, applied;* In re Diamond Fuel Co. *(1879), 13 Ch. D. 400, applied);*
>
> *(2) it has a tangible interest in the winding up (*In re Rica Gold Washing Co. *(1879), 11 Ch. D. 36, applied;* Deloitte & Touche A.G. *v.* Johnson*, 1999 CILR 297, applied); and*
>
> *(3) there is a probability that it will share in the surplus assets."*

27. Mr Choo Choy argues that it is impossible for RBH to meet this requirement (which he says has to be judged as at the date of the presentation of the Petition) as it is a past member with fully paid shares. It has no liability under s.49 of the Act and no economic interest in any winding up. It is argued that it is no answer for the Petitioner to say that the analysis might be different if it eventually succeeds in the

[10] [2002 CILR 77] at 13.
[11] See also *Applications to Wind up Companies,* Derek French, 4 edn., paragraphs 8.85 and 8.87.
[12] [2004–05 CILR Note 38].

Rectification Proceedings because the question of standing has to be established at the time of presentation of the petition. In *Re HL Bolton Engineering Co Ltd*[13] it was stated that:

> *"If the petitioner is to qualify as a person entitled to present such a petition, it must be on the ground that he is a contributory at the time when he presents the petition"*

Alternative remedy and abuse

28. JSL also argues that the Court has jurisdiction to dismiss a petition as an abuse of process where there exists an alternative and more suitable remedy. It contends that the test is whether an alternative remedy is available and whether the petitioner is acting unreasonably in not pursuing it[14].

29. On behalf of JLS reference is made to RBH's own characterization of the winding up proceedings. In its written submissions for the 4 April 2023 hearing RBH said:

> *"RBH could of course present a protective petition now before the 6 month period expires but that would risk a waste of costs if RBH obtains its order and is restored to the register."*

It is argued that RBH has taken no steps to seek to amend the Petition since it was presented and that on RBH's own case the Rectification Proceedings are an adequate remedy. JLS goes on to say that where a petitioner has a suitable alternative remedy, it is an abuse of process (and a ground for striking out the petition) to fail unreasonably to pursue that remedy. In *Camulos Partners Offshore Limited v Kathrein and Company*[15], the Court of Appeal dealt with an appeal against the refusal of the Grand Court to make an order restraining a petition in circumstances in which it claimed by the company that the petition was bound to fail. Allowing the appeal it said amongst other things:

> *"60 It is the fact that the petitioner is seeking to make improper use of the court's winding-up jurisdiction to resolve an inter partes dispute which attracts the sanction of a strike-out. To invoke the court's winding-up jurisdiction to resolve a dispute in circumstances where the claim is bound to fail is an example—but as the disputed debt cases show not the only example—of improper use.*
>
> *61 That the position in the Cayman Islands, in this respect, is the same was confirmed by the Privy Council in Parmalat Capital Fin. Ltd. v. Food Holdings Ltd. (9), in a passage to*

[13] [1956] Ch 577 at 581.
[14] *Nicholas Martin v Circumference Holdings Ltd* unreported FSD 56 of 2021 (RPJ), 3 May 2021.
[15] [2010 (1) CILR 303].

which Vos, J.A. referred (2008 CILR 447, at para. 17) in his judgment in Strategic Turnaround (10). The opinion of the Board in Parmalat was delivered by Lord Hoffmann, who said (2008 CILR 202, at para. 9):

> *"If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor, first, to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding-up procedure. A party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a bona fide disputed debt."*

***Contributory's* petition**

62 Given that the power to strike out a creditor's petition under the inherent jurisdiction of the court is plainly exercisable in order to protect the court's winding-up process from abuse—and is not confined to cases where the petitioner's claim is bound to fail—it would be (at the least) surprising if the position were different when the petition is brought by a contributory under the "just and equitable" ground. Analysis of the authorities shows that there is no difference in principle: the difference in outcome follows from the fact that it will often be found, on the facts, that the petitioner has no alternative remedy. It cannot be said to be an abuse of process to invoke the court's winding-up process if winding up is the only remedy available to meet the wrong of which the petitioner complains, unless, of course, the petition for a winding-up order is bound to fail. Further, it may well be said that, in a case where the petitioner does have an alternative remedy which, in the court's view, it is unreasonable for him not to pursue, the petition is bound to fail because it cannot be "just and equitable" to make a winding-up order in circumstances where the court's winding-up process is being abused or alternatively, that it cannot be "just and equitable" to make a winding-up order in circumstances where it is not needed in order to provide the petitioner with a sufficient remedy.

Charles Forte Invs. Ltd. v. Amanda

CVC/Opportunity Equity Partners Ltd. v. Demarco Almeida

74 The decision in Charles Forte Invs. Ltd. v. Amanda (4) was considered by the Privy Council in CVC/Opportunity Equity Partners Ltd. v. Demarco Almeida (2), an appeal from this

court. In delivering the opinion of the Board, Lord Millett said (2002 CILR 77, at paras. 57–58)

> *"57 The special nature of winding-up proceedings and the loss which they may cause the company and its shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondents to yield to the petitioner's demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition for the making of a winding up order.*
>
> *58 Where the petitioner can achieve his object by other means, therefore, he may be restrained from bringing winding-up proceedings. In Charles Forte Invs. Ltd. v. Amanda, a minority shareholder complained of the board's refusal to register transfers of his shares to a third party. He threatened to present a winding-up petition unless the board registered the transfers. He was restrained from presenting a petition. The shareholder had other and more suitable remedies available to him, namely an action for rectification of the register or proceeding by way of motion under s.116 of the Companies Act 1948, and his threat to employ the machinery of winding up was an attempt to place pressure on the board to reverse its decision and an abuse of the process of the court."*

30. JSL argues that the mischief targeted by the authorities is the pursuit of winding up proceedings when a less extreme remedy is adequate. The pursuit of winding up proceedings in parallel with an adequate, less extreme remedy, it argues makes the abuse worse not better.

31. Generally, JSL argues that the Court should resolve the standing point now rather than later as suggested by RBH. It says that the standing point turns essentially on questions of law and does not does not involve complex issues of fact. It also argues that although the Petition has not been advertised, its presentation will become public once this judgment is published and it is oppressive in the circumstances for that position to remain. Having said that, no evidence of prejudice was relied on by the Company.

Position of RBH in relation to the Petition

GCR O.18, r. 19 and inherent jurisdiction of the court to strike out

32. RBH argues that when considering whether there is a reasonable cause of action, the Court is required to assume that the facts pleaded in the Petition are true. This is consistent with GCR O. 18, r.19(2) which provides that no evidence is admissible in relation to an application to strike out on the basis that no reasonable cause of action is disclosed by the relevant pleading. RBH refers to *In the Matter of New Silk Route Advisors, L.P.*[16] in which Doyle J commented on this point as follows:

> *"31. … Even when considering a strike out under paragraph (1) (d) namely "it is otherwise an abuse of the process of the court", the court needs to take care in its consideration of the admissible evidence before it during a strike out hearing.*
>
> *32. In my judgement in AquaPoint L.P. (FSD; 23 November 2021) at paragraph 10(5) I referred to authority which indicated that the hearing of a strike out application is not the place for resolution of disputed facts the parties in the case presently before me sensibly acknowledged that to determine the loss of trust and confidence ground would require a trial. The court must normally assume that the facts asserted by the petitioner are true at the strike out hearing stage. If the court, on a review of the material that is properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioner's favour on the petition, then it must usually let it go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing. A court should be prepared to scrutinise the properly available undisputed evidence supporting the allegations and to strike out the petition if it is obviously unsustainable. In AquaPoint, I reiterated the obvious point that it is only if it can clearly be seen that the just and equitable ground for winding up cannot be established that it be appropriate to strike out the petition there is clearly a danger in pre-judging the outcome of the hearing of a petition and the court strike out jurisdiction needs to be exercised carefully. Equally, the court needs to be careful to ensure the winding up procedure is not being improperly used."*

33. Similarly, in *Tianrui (international) Holding v China Shanshui Cement Group*[17], the Court of Appeal made clear that;

[16] Unreported, FSD 278 of 2021 (DDJ), 10 February 2022.
[17] [2019 (1) CILR 481] at [28].

"it is only if it can be clearly seen at the outset that the just and equitable ground for winding up cannot be established that it will be appropriate to strike out the petition …"

In *Youbi* Capital *(Cayman) GP*[18] Parker J said:

"… the Court accepts, that it should apply the following principles:

"(1) The Court will only strike out a petition in a "plain and obvious" case.

(2) It is not appropriate to seek to resolve disputed issues of fact on an application to strike out: disputed issues of fact should be resolved when the petition is heard.

(3) If the actions of a company (through its directors) have resulted in a justifiable loss of confidence in the management of the company, then a contributory has a statutory right to petition for the winding up of the company on the just and equitable ground."

34. In relation to the exercise of the Court's jurisdiction to strike out a claim pursuant to GCR O.18, r.19(1)(d) and/or its inherent jurisdiction, RBH refers to *Johnson v Gore Wood and Co*[19] a case in which the Hose of Lords considered the question of abuse of process in the context of two sets of legal proceedings. Lord Bingham commented:

"It is, however, wrong to hold that because a matter could have been raised in earlier proceedings, it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic approach to what should in my opinion the a broad, merits-based judgement which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a parties misusing or abusing the process of the court by seeking to raise before the issue which could have been raised before. As one cannot comprehensively lists all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. … It is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask

[18] Unreported, FSD 0140 of 2022 (RPJ) 4 April 2023. See also *Minority Shareholders Law, Practice and Procedure*, 6th edn by Victor Joffe KC at paragraph 8.112 and *Applications to Wind up Companies*, 4th edn by Derek French at paragraph 8.224.
[19] [2014] A.C. 1 at 31.

whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by its special circumstances."

35. RBH also refers to *Hunter v Chief Constable of the West Midlands Police*[20] in which Lord Diplock started his judgment by saying that the case concerned:

"… the inherent power which any court of justice must possess to prevent misuses of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

36. In his submissions, Mr Millett reiterated that the fact that RBH is no longer a member recorded in the register of members for JSL is because of what RBH alleges is an improper exercise of the power of the board of directors of JSL. That is the issue before the Court in the Rectification Proceedings. It cannot be right he says that JSL can rely on its own wrongful actions in support of its Strike Out Application. Mr Millett maintains that the conduct of JSL provides solid grounds for RBH to seek its winding up and that this is compounded by the action taken by JSL as part of the Reorganization which makes the grounds for winding up and the case against a preliminary strike out stronger by the day.

37. The general thrust of Mr Millett's submissions was that it is premature to deal with the substantive issues arising in the Strike Out Application at this stage and that they should be left to be dealt with at the hearing of the Petition. I will deal with those submissions in more detail below.

RBH locus standi

38. RBH contends that JSL wants to "have its cake and eat it too" by seeking to stay the Rectification Proceedings, seek leave to appeal against the dismissal of that application and to now seek to strike out the Petition and effectively stifle RBH's efforts to have its name restored to JSL's register of members. It goes on to say in its written submissions:

"37. Before RBH issued the Petition, JLS flatly rejected RBH' various attempts in correspondence to obtain JLS's consensual agreement to preserve RBH's rights to present a winding up petition pending resolution of the Rectification Application.

[20] [1982] AC 529 (HL) at 536.

…

> *39. RBH was forced to present the Petition as a protective measure at great expense, given that JLS would not agree to preserve RBH's rights following its improper and invalid removal from the register of members. After the Petition was presented, JLS also rejected all of RBH's reasonable attempts to agree a consensual stay of the Petition pending an expedited resolution of the Rectification Application. Now JLS purports to seek a strike out of the Petition on the alleged basis that it has "no choice" but to do so, despite failing to engage with RBH's reasonable attempts to agree these matters by consent."*

39. RBH takes the position that where the question of locus standi of a contributory to bring or participate in winding up proceedings is disputed, it is appropriate to decide that matter as part of the substantive trial of the petition as part of the Court's case management powers. The authors of McPherson & Keay's *Law of Company Liquidation*[21] note:

> *"At one time the view which prevailed was that if there was a dispute concerning a member's shareholding and, hence, his or her right to petition for winding up, the petition should be dismissed by way of analogy with the situation where a creditor petitions for a winding-up order and the company disputes the debt founding the petition. It was then up to the petitioner to have his or her right to membership decided in separate proceedings. The Court of Appeal in Alipour v Ary adopted a more liberal view. The court said that it may take any dispute into account and find that given the company's circumstances it is appropriate that the dispute be decided outside the petition. The court went on to say that the petition of a contributory should not necessarily be dismissed if there is a dispute over the petitioner's standing."*

40. *Alipour*[22] related to a winding up petition presented by the petitioner who claimed to be the registered holder of 10 shares in a foreign company. Allegations were made by the directors that the petitioner's share certificate was a forgery. The English Court of Appeal said[23]

> *"The position as we see it, in the light of the authorities as affected by the current procedures of the Companies Court, is this. (1) A creditor's petition based on a disputed debt will normally be dismissed. (2) It will not be dismissed if the petitioning creditor has a good arguable case that he is a creditor and the effect of dismissal would be to deprive the petitioner of a remedy*

[21] 5th edn, paragraph 4-103.
[22] [1977] 1 W.L.R. 534.
[23] 546 B.

> *or otherwise injustice would result or for some other sufficient reason the petition should proceed. (3) On a contributory's petition where the locus standi of the petitioner is disputed, the court will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require the petitioner to seek the determination of the dispute outside petition."*

The same principles were applied by McMillan J in *Torchlight Fund L.P.*[24]

41. Although as mentioned above, there was no evidence relied on by JLS to suggest that the Petition has caused it prejudice, it does seek to distinguish *Alipour* on the basis that it is not seeking that the standing issue is determined in separate proceedings. Mr Choo Choy argues that the Court should resolve the issue now in this action as it is essentially a question of law not an issue requiring substantial evidence. Mr Choo Choy does say that the action of RBH in issuing the Petition was precipitous and designed to exert pressure on JLS prior to the resolution of the Rectification Application. He also says that the *Alipour* principles do not apply to an abuse of process argument.

42. Mr Millett argues that it would be wrong to allow JLS to obtain a collateral advantage by not only appropriating RBH's shares but to taking advantage of such action by seeking to deny RBH the statutory right to petition for JLS's winding up. He argues that where RBH as petitioner claims to be an original allottee of shares, provided that it can show an arguable right to retrospective rectification of the register, the Court should assess the respective harm and prejudice to the parties in staying, proceeding with or dismissing the Petition. By way of example, Mr Millett refers to the case of *Re Starlight Developers Ltd*[25] which involved a petition presented under s.459 of the English Companies Act 1985[26]. The petitioner accepted that his name was not on the company's register of members at the time of presentation of the petition and that he had never been on the register, but he claimed to be entitled to have the register of members rectified under s.359 of the Companies Act 1985 with retrospective effect from 1999 so as to show him as the holder by allotment rather than transfer of 45 shares in the company pursuant to a pre-incorporation agreement with the respondents, subsequently adopted by the company. The respondent disputed this and said that the petitioner was never allotted any shares and that he gave up any beneficial interest which he might have had in the company's shares for cash in April 2001. The judge considered various authorities and said as follows:

[24] Unreported, FSD 103 of 2015 (RMJ) 9 November 2017.
[25] [2007] EHWC 1660 (Ch).
[26] Grounds of unfair prejudice for which there is no statutory equivalent under the Act.

"14. The third case is a decision of Mr Justice Mervyn Davies given on 12th February 1988 in Re Quickdome Ltd [1988] 4 BCC 296 . Again it was a case where the petitioner claimed to be a transferee within the meaning of section 459(2) by virtue of holding a transfer executed in blank as to the name of the transferee by a subscribing shareholder. The petition was struck out because at the highest the petitioner had only an uncompleted agreement for transfer rather than an executed transfer. In passing, Mr Justice Mervyn Davies referred to a passage in a judgment of Mr Justice Brightman in Re JN2 Ltd [1978] 1 WLR 183 to which I shall refer shortly. Again it is to be noted that it was not suggested on behalf of the petitioner in Re Quickdome Ltd that his locus *could be made good by an application for retrospective rectification.*

15. Re JN2 was a contributories' winding up petition in which there was a triable issue whether the petitioner, who was not a registered member, was an allottee of shares in the company with standing therefore to present a petition on that ground. If she was, she had standing; if not, she did not. The full passage from which Mr Justice Mervyn Davies cited a part in Re Quickdome is to be found at page 187 starting at G as follows:

> *"I turn to the second issue, whether on the facts of this case the court should allow the petition to remain on the file having regard to the fact that the petitioner is not a registered shareholder and her right to be a registered shareholder is disputed and, as I hold on the evidence before me,* bona fide *disputed.*
>
> *"It is, of course, common practice to dismiss a creditor's petition if the debt is* bona fide *disputed by the company. This seems to me to be a wholly proper attitude to be adopted by the court. The presentation of a winding up petition has an immediate effect on the ability of a company to deal with its assets, although capable of mitigation by an appropriate order under section 227. Frequently in the case of a trading company the presentation of a petition will damage the financial standing of the company. It therefore seems to me obviously correct that the court should not allow a creditor's petition to remain on the file longer than is necessary once the status of the creditor is in doubt.*
>
> *"In my judgment, this reasoning applies with even greater force to a petition by a person whose status as a contributory is in dispute. In the case of a disputed creditor's petition, the petitioner has at least an unsatisfied claim against the assets*

> *of the company. A person asserting that he is a contributory has not, in so asserting, any claim against the company's assets. It makes no difference whatever to the quantum of the company's assets whether the contributory succeeds or fails in his claim to be a shareholder. It therefore seems to me to be all the more important that he should not be permitted to present a petition and thereby interfere with dispositions by the company of its assets and risk damaging the financial standing of the company, so long as his right to be a shareholder of the company is in dispute. Basically, the dispute is not between the company and a person claiming against the company, but between a shareholder and a person claiming to be a shareholder. Let that dispute be settled first before the company is brought on to the scene by the presentation of a petition. By being brought on to the scene I mean of course as a substantial party. By dismissing the petition the court is not driving a litigant from the judgment seat, or doing any injustice to him. The court will be merely requiring him to establish his right to present a petition before he is permitted to take a step which has such an immediate and potentially damaging effect on the company. In these circumstances I propose to dismiss the petition."*

16. *It is to be noted that the claim to be an allottee in Re JN2 was not in terms made as a claim to rectify the members' register, but it was a claim that if resolved in the petitioner's favour would have shown that she had* locus *to present the petition when it was presented. It is also to be noted that although this case was not relied upon in terms by the respondents before me, Mr Justice Brightman's view that* bona fide *disputes going to a petitioner's standing to present a petition should be resolved before the presentation of the petition was broadly supportive of the respondents' submission to the same effect in relation to section 459 petitions.*

...

18. *I must now express my conclusions as a result of the effect of those authorities and the parties' submissions. First, before coming into force of the Civil Procedure Rules there was a body or authority to the effect that firstly, the restriction as to the types of person with standing to present a s.459 petition should be firmly enforced by striking out non-qualifying petitions. Secondly, in relation to winding-up petitions, a bona fide dispute as to the petitioner standing to present a petition should lead to the dismissal or striking out*

of the petition, leaving the petitioner first to establish his or her standing by separate proceedings. Thirdly, no case had established that the principle which I have just identified in relation to winding-up petitions should be applied to s.459 proceedings where no winding up is sought in the alternative. Fourthly, in none of the cases under s.459 was alleged that the petitioner could have perfected his or her standing by retrospective rectification of the register of members and on their facts it seems to me that retrospective relief by way of rectification would not have been obtained even if the allegations relied on by the petitioners in those cases had been made good.

19. *Following the coming into force of the Civil Procedure Rules, Re Hoicrest points to a possibly greater incentive to fashion a case management solution to the resolution of disputes which, although not raised by the appropriate form of proceedings, need to be resolved, and a case management solution falling short of the striking out of the dismissal of the inappropriate proceedings if some other solution would avoid an unnecessary increase in costs. I am not persuaded that the principle enunciated by Brightman J. in Re JN2, salutary though it is in relation to winding up petitions, is directly applicable to s.459 petition. Winding-up petitions produce potentially immediate and damaging consequences for the subject company well in advance of their final determination. For example, legal consequences flow from the date of presentation of the petition and serious practical consequences flow from the advertisement of the petition. The same is not hold good, at least to the same effect, in relation to s.459 petitions and in this case so far as advertisement is concerned that has been ordered to be stayed.*

20. *The exercise of a tribal claim with reasonable, i.e. not purely fanciful, prospect of success for retrospective rectification from a date ante-dating the presentation of the petition means, first, that the court cannot be sure today that rectification will not lead to the petitioner having been deemed to have had the necessary standing throughout. Secondly, there is therefore a risk that if the petition is struck out now, the time and money so far spent on it will have to be re-spent on a substituted identical fresh petition in due course if this petition is struck out. Thirdly, if the petition is dismissed with costs now that the petitioner shows later that it was only due to the respondent's fault that the petition was not registered as a member throughout, that order may work a real injustice. By contrast, if the position is stayed now with costs reserved, neither of those two adverse consequences or risks would flow."*

43. RBH refers to the case of *Sky Solar Limited*[27] in which Kawaley J. considered the circumstances in which the Court might exercise the strike out jurisdiction:

> *"It is well-recognised that the Court should not exercise the exceptional strike-out jurisdiction based on a complaint which can be cured through an amendment", applying the guidance of Ferris J in Re a Company ((No 003079 of 1990) [1991] BCLC 235 at 237:*
>
> > *"In my judgement the test which I should applies a test which appears from Stonegate Securities Ltd v Gregory and Mann v Goldstein [1968] 2 All ER 769 … That is to say if I can now see that the petitions, if and when they come on for substantive hearing, are bound to be dismissed because the locus stand I have the petitioners is disputed, then it would be appropriate to strike out the petitions and not leave them on file with a view to them coming back before the court at some future time, when the result will inevitably be the one that I have indicated. Of course if I am not satisfied that that is inevitably the result then the test is not satisfied and I ought not to strike out."*

44. Mr Millett argues that if the Rectification Application is successful and RBH is restored to JLS's register of members with retroactive effect, then costs will be wasted requiring RBH to start again and issue a new petition. If it was unsuccessful then he accepted in oral submissions that the Petition will fall away because the just and equitable argument will fail. He also made much of the argument that the Strike Out Application is just another example of JLS seeking to stifle RBH's claim to have the share register rectified and thereby effectively pre-empt the outcome of any dispute resolution process[28] or proceedings between Mr Rudianto and the beneficial owner of JLS.

Tangible Interest

45. Mr Millett argues that RBH does have a tangible interest in JSL. He says that if RBH is restored to the register of what he says is a valuable company, then it will have a tangible interest in its winding up or alternatively seeking to have a fair value established for its shareholding and having its shares purchased by way of a buyout.

[27] Unreported, FSD 190 of 2019 (IKJ), 12 October 2020.
[28] Indeed, the question of mediation has been the subject of recent correspondence between the Singapore offices of Allen & Gledhill on behalf of Sylvan Asia Growth Fund 1 Pte. Ltd. and Oon & Bazul acting for RBH and Mr Rudianto although no material progress appears to have been made in that regard.

Alternative remedy and abuse

46. He argues further that the Petition is not an alternative remedy but instead, the Rectification and Application and Petition are cumulative remedies. S.46 of the Act empowers the Court to make orders for costs and damages in favour of a successful applicant for rectification, but RBH can only extract fair value for its shares through the presentation of a just and equitable widening up petition. He also makes the point that in the absence of the Petition and the effect of s.99 of the Act the Restructuring would not have been reversed and JLS would not have offered the Undertakings.

Undertakings

47. During the course of his submissions in reply to Mr Millett, I asked Mr Choo Choy whether the Undertakings (which had been offered in these proceedings) might be offered in similar terms in the Rectification Proceedings. After taking instructions overnight he confirmed when the hearing resumed that in the event that the Petition is struck out his client was prepared to give undertakings in the Rectification Proceedings for the duration of those proceedings or further order in the same term as the Undertakings. For ease of reference, the Undertakings are as follows:

> *"i. The Company will maintain the existing status quo by not concluding or procuring the conclusion of any transaction which may materially prejudice RBH's alleged rights and/or interest (which are denied) without at least 14 days' written notice to your firm of any such proposed transaction, including any transaction:*
>
> *1. disposing of any of the Company's substantial assets or procuring the disposal of any substantial assets held by the Company's subsidiaries;*
>
> *2. causing the Company, or procuring any of the Company's subsidiaries, to take on any new debt of more than US$5 million; and,*
>
> *3. dealing in any of the shares in the Company.*
>
> *ii. Save that none of the undertakings in (i) above shall prejudice the rights of the Company and/or any of its subsidiaries from conducting their day-to-day business and enter into transactions in the ordinary course of their respective businesses."*

During the course of argument in relation the application for leave to appeal in the Rectification Proceedings he further clarified that the Undertakings would include any dealings by its wholly owned

subsidiaries, Juniper Holdings Ltd, J Holdings and JTB Holdings (which holds the interests in Juniper Biologics Ptd Ltd and Juniper Theraputix Ptd Ltd which were held direct by JSL prior to the Restructuring).

48. After the conclusion of the Strike Out Application and application for leave to appeal, Mr Millett and Conyers had the opportunity to take his own instructions on the offer made. In a letter from Conyers to the Court dated 21 September 2023 they set out their client's position which in summary is that terms used in the undertaking such as "*materially prejudice*", "*substantial assets*", "*day to day*" or "*ordinary course*" of business are too vague and it is unclear how they would be enforced. Concerns were also concerned about the bona fides of JSL in view of the removal of RBH from its register of members, JSL's attempts to delay the Rectification Proceedings, JSLs refusal to engage in ad hoc mediation and the Restructuring.[29]

49. In a letter of reply dated 22 September 2023, Carey Olsen responded by saying that their client does not accept that such terms are ambiguous and suggesting that such terms are often used in orders such as asset freezing injunctions. They go on to say that qualifications of materiality and substantiality are obvious and a practical necessity. They add that to the extent that opinions may differ as to whether transactions meet those thresholds, JSL will have to bearing in mind the fact that it has offered undertakings to the court with the exposure of a finding of contempt if the undertakings are breached. On that basis they say that it will have to err on the side of caution.

Analysis and discussion

50. The Court has a wide discretion when considering exercising its jurisdiction to strike out pleadings or proceedings under GCR O.19,r.18 or its inherent jurisdiction.

51. There is no doubt that, rightly or wrongly, RBH has ceased to be a member on JLS's register of members. That issue is clearly the subject of the Rectification Application and is not to be resolved in these proceedings.

52. As the quoted extract from *Camulos* mentions, winding up-proceedings have a special nature. As was said in the above quoted extract from *Re JN2 Ltd,* a winding up petition (whether presented by a credit

[29] This position has to be considered in conjunction with the undertakings they themselves requested from Carey Olsen on 14 August 2023 where they use the expressions "*materially prejudice*", "*directly or indirectly*" and "*do any other act which may cause prejudice to RBH*". What was requested was substantially the same as the undertakings requested from Stuarts on 20 December 2022.

or contributory) has an immediate effect on the ability of the company to deal with its assets (subject to a validation order) and frequently in the case of a trading company the presentation of a petition will damage the financial standing of the company.

53. I have carefully considered all of the arguments put forward by the parties.

54. Although Mr Millett has argued that the questions of whether RBH is a contributory with locus to petition and has a tangible interest in the outcome of a winding up are disputed issues that should be dealt with at the hearing of the Petition, I find it difficult to see those issues, on the facts of this case as anything other than legal issues. It might be that if the Petition had been presented by RBH in its capacity as an original allottee of shares on JSL Mr Millet's argument would have had more weight but that is not the case.

55. Rightly or wrongly, RBH is no longer the holder of fully paid up shares in JSL. On that basis I see no way to argue that it is a contributory within the meaning of ss.89 and 49 of the Act.

56. I also see no way to argue that when the Petition was issued it could be said that RBH had a tangible interest in the winding up of JSL. Indeed, Mr Millett puts his client's case on this point on the basis that RBH in effect has a prospective interest, assuming that it is successful with the Rectification Proceedings.

57. In my view, neither of these issues raises complex questions of fact that should be dealt with at the hearing of the Petition.

58. The Petition was clearly presented by RBH to protect its position. That much has been said in correspondence and submissions. It is also clear that an order rectifying the register of members is not a remedy available within the Winding Up Proceedings. To some extent it could be argued that in fact the presentation of the Petition may have protected RBH's position in relation to the Reorganization because JSL was pressed to offer the Undertakings in that regard and did revers the steps that had been taken. As I have explained above, the Undertakings have now been offered in the Rectification proceedings. Overall, I am of the view that the Rectification proceedings do peroxide RBH with an appropriate remedy to resolve its standing as a shareholder in JSL.

59. The options available to the Court are to either stay these proceedings or dismiss them. In view of what I have said above, based on the facts of this case and the offer of the Undertakings in the Rectification Proceedings, I think that the appropriate order to make is to dismiss the Petition. As Brightman J said in *Re JN2:*

> *"By dismissing the petition the court is not driving a litigant from the judgment seat, or doing any injustice to him. The court will be merely requiring him to establish his right to present a petition before he is permitted to take a step which has such an immediate and potentially damaging effect on the company."*

The Undertakings were offered on the basis that an order striking out the Petition is made and in my contemporaneous judgment in the Rectification Proceedings and for the reasons given in that judgment, I have accepted the Undertakings. RBH will have the benefit of those until the Rectification Proceedings are concluded or further order and if it is successful in those proceedings, it may at that point, if so advised, issue another winding up petition.

The Hon. Mr. Justice Alistair Walters
Judge of the Grand Court (Actg.)