

JUDGMENT

1. By Summons dated 5th January 2023, Pan African Niger Ltd (“the Company”) seeks the strike out of the Petition filed 25th October 2022 and in the alternative an order that advertisement of the Petition be dispensed with and publication of it be restricted.
2. The Petition which is filed by Pan African Minerals Ltd (in Official Liquidation), (“the Petitioner”) seeks the winding up of the Company pursuant to s.92 (d) of the *Companies Act* (2022 Revision). It is brought on the basis that the Petitioner is a creditor of the Company in the sum of \$4,619,253.00 and that the Company is deemed to be unable to pay its debts and is accordingly insolvent. On 20th October 2021, the Petitioner served a statutory demand on the Company pursuant to s.93 of the *Act*. The Petition was filed about one year later on the 21st October 2022. The Petitioner asserts that the statutory period of 21 days has long been exceeded and the sum remains unpaid.
3. The Summons is brought on the ground that the alleged debt set out in the Petition is bona fide disputed by the Company on substantial grounds and that the Petition is not in the best interests of the creditors of the Company considered as a whole.
4. The Petitioner is incorporated in the Cayman Islands. On the 23rd April 2020, Michael J. Pearson and Stephen R. Cork were appointed as its Joint Official Liquidators (“JOLs”). It is the holding or parent company for the Pan African Minerals Group of Companies. At the time of its establishment the Group consisted of seventeen companies including the Company. The Group was set up by Mr. Vasile Frank Timis in order to explore mining interests in Africa.
5. The Company is incorporated in the Cayman Islands as an exempt company as at 10th October 2011. Mr. Timis has been a director of the Company since that date. It was established as a Special Purpose Vehicle (“SPV”) for the purpose of pursuing mining projects in the Republic of Niger, specifically uranium. To this end, on the 12th July 2013 the Company obtained four exploration licenses from the Government of the

Republic of Niger to search certain pieces of land for uranium. The licenses are due to reach final maturity in mid-2025.

6. On its establishment, the Company was a subsidiary of the Petitioner, and the Petitioner was its sole shareholder. In or around January 2017, Mr. Timis, who was then a director of the Company, arranged for the Petitioner's shareholding in the Company to be transferred to himself and certain other shareholders by way of the issue of an in-specie dividend. Mr. Timis and these shareholders now own the Company which is no longer a part of the Group. According to Mr. Timis the reason for doing so was to insulate the Company following the loss of certain mining rights in Burkina Faso. In addition to Mr. Timis, there are three other directors of the Company including Mr. Mark Ashurst.

THE ALLEGED DEBT

7. The Petition is verified by the First Affidavit of Mr. Pearson dated 21st October 2022. Mr. Pearson states that following the appointment of the JOLs on the 23rd April 2022, extensive financial investigations into the affairs of the Company were conducted. A number of unexplained transfers were identified which are said to indicate that the Petitioner is owed money by the Company.
8. It is asserted that between the 24th May 2012 and the 24th October 2013, another entity within the Pan African Group, Pan African Minerals Services Ltd., which was incorporated in the United Kingdom, ("PAMS UK") loaned \$5,011,621.00 to the Company. PAMS UK is now in liquidation. The amount was reflected in the books of that entity in 2013 as an Intercompany Loan, a debt repayable on demand. The critical aspect of Mr. Pearson's evidence for the purpose of this application is his assertion that the statutory accounts of PAMS UK for 2014 "*record that the benefit of the Company's obligation to repay the Loan was subsequently transferred from PAMS UK to the Petitioner.*"

9. Consequently, the conclusion of the JOLs is that the said Loan is a debt owed by the Company to the Petitioner.
10. There is a reduction in the amount as it is said that the Petitioner owes the Company \$392,368.00, the total of certain payments made to it between 30th June 2012 and 7th February 2019. When this is set off, it is alleged that the balance of the debt is \$4,619,253.00.
11. The Company raises three main issues in support of its contention that there is a bona fide substantial dispute as to the debt such that the Petition should not proceed.

THE LEGAL PRINCIPLES

12. Before considering the three issues, I remind myself of the applicable legal principles and approach on a strike out application such as this. Both Counsel drew the Court's attention to a number of authorities. It is fair to say that there is general agreement on the core legal principles. There is one area of dispute which is as to the threshold of proof. Counsel for the Company submits that its burden on the application to strike out is a low one. Counsel for the Petitioner submits to the contrary that a high threshold has to be met. I will review this below.
13. The general statement of principle is that of the Privy Council in the case of ***Parmalat Capital Finance Limited v Food Holdings Limited et al***¹. Where there are substantial grounds on which to dispute the existence of a debt, the court will dismiss the petition. The creditor would still have the option of seeking to establish the debt in the appropriate forum. The Board stated: -

“9 The next question is whether the debt is disputed. If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss

¹ [2008] CILR 202

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. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding-up order, even though there is a dispute: see, for example, Brinds Ltd. v. Offshore Oil N.L. (2). However, the Board does not find it necessary to examine the limits of the discretion, because they consider that there is no substantial dispute.”

14. In the case of *In Re GFN*², the Cayman Islands Court of Appeal (“CICA”), considered the appeal of the Appellant company against the making of a winding up order. The issue in part was whether on the hearing of a petition, the petitioner had established that it was in fact a creditor on a balance of probabilities, before the Grand Court could make a winding up order.
15. It was held that a court will normally dismiss or stay proceedings where there was a disputed debt. In appropriate circumstances where the court doubted that the debt was bona fide disputed or the petitioner would otherwise be without a remedy the court would allow the petition to proceed. The CICA concluded, following a review of a number of cases, that a petitioner must establish on a balance of probabilities that it is a creditor before a company can be wound up. While a court may exercise its discretion depending on the circumstances to decide such a question at the hearing of the winding up application itself, this must first be established for there to be standing.

² [2009] CILR 650

16. The CICA cited with approval the case of *Re Claybridge Shipping Co. SA*³. In that case the English Court of Appeal considered the appeal of United Bank Ltd. which had petitioned to wind up Claybridge Shipping Company Ltd. The company disputed the debt. The Appellate Court held that: -

“A person is a creditor so long as he has a good arguable case that a debt of sufficient amount is owing to him”

17. Lord Denning stated the underlying rationale for the jurisdiction to strike out petitions where there is a disputed debt. A petition for winding up should not be used as the means of getting in a debt which is bona fide disputed on substantial grounds. The learned Judge referred to the need for flexibility in the application of the rule of practice. It may be departed from where injustice might result, for example, where the companies concerned are foreign companies and the petitioner may be left without a remedy. It was suggested that the Companies Court should be able to “look into the bona fides of the defence raised”. If it was so insubstantial that a Queens Bench master would only give conditional leave to defend, the petition should stand.

18. Oliver LJ expressed similar views and stated that if a court is convinced that a dispute is a genuine one, genuinely raised and persisted in, and one which cannot conveniently be determined in a short space of time on the hearing of the one application, then the petition should not proceed.

19. The learned Judge noted that: -

“ ... it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings. Whilst I do not in any

³[1997] 1 BCLC 572

way, therefore, seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross-examination. The court must, I think, reserve to itself the right to determine disputes – even perhaps in some cases substantial disputes – where this can be done without undue inconvenience and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether.”

20. In the case of *Re A Company (No. 001946 of 1991) ex parte Fin Soft*⁴ where a promissory note was disputed on grounds of alleged fraudulent misrepresentations, the Court noted that the allegations as to misrepresentation had been raised late in the day. Harman J stated that in his view the true test is whether there is a bona fide dispute, meaning by this, whether there is a real and not fanciful or insubstantial dispute about the debt.
21. In *Allied Leasing and Finance Corporation v. Banco Economico S.A.*⁵, the CICA, on the issue of determining whether there was a bona fide dispute, cited with approval the dicta of the English Court in *Re Welsh Brick Industries Ltd.*⁶ The CICA concluded that inevitably the determination of whether or not the dispute is bona fide will involve some examination of the facts. The Court also noted that the burden rests on the company to show that the debt was disputed on substantial grounds.
22. However, any examination of the facts will be a limited one. In *Re Camulos Partners Offshore Limited v Kathrein and Company*⁷, the CICA referred to the dicta in several cases including the judgment of Vos JA in the case of *In Re Strategic Partners*

⁴ [1991] BCLC 737

⁵ [2000] CILR 118

⁶ [1946] 2 All E.R. 197

⁷ [2010] (1) CILR 303

*Turnaround Partnership Ltd*⁸. The Court provided guidance on the correct approach whether a petition is brought by a contributory or creditor.

23. In summary, it was stated that the winding up procedure is generally intended to be used in clear cases. On a strike out application a court may resolve issues of construction and law but the court cannot or will not resolve disputed questions of fact.⁹
24. The CICA referred to the case of *Mann v. Goldstein*¹⁰ and the observations of Ungoed-Thomas J. and stated: -

“The correct approach

58 It is clear that inevitability of failure is not the only—or, indeed, the usual—basis for striking out a creditor’s petition on the abuse of process ground. In Mann v. Goldstein (8), Ungoed-Thomas, J. observed ([1968] 1 W.L.R. at 1093–1094) that—

“it is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court’s inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process.”

59 And he went on to explain (ibid., at 1099) that it was not the legitimate purpose of the winding-up process to decide whether a petitioner claiming to be a creditor is a creditor. When a petitioning creditor’s debt is disputed on substantial grounds, the court should restrain the prosecution of the petition as an abuse of the process of the court “even though it should appear to the court that the company is insolvent.”

⁸ [2008] CILR 447

⁹ Paragraphs 17 and 22 of *In re Strategic Partners Turnaround Partnership Ltd.*

¹⁰ [1968] 1WLR 1091

...

“The true rule, which has existed for many years, is the rule of practice that this court will not allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds.”

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.”

25. On the threshold question, Counsel for the Company relied on the case of ***Tallington Lakes Ltd. v. South Kesteven District Council***¹¹. Etherton LJ stated therein that it is well established that on a winding up petition, the threshold for establishing that a debt is disputed on substantial grounds is not a high one. It may be reached even if on an application for summary judgment the defence could be regarded as “shadowy”.
26. Counsel for the Petitioner relied on the case of ***Sky Solar Holdings Ltd.***¹², in which Kawaley J. adopted the test on a strike out application as being whether the petition is “bound to be dismissed” because the petitioner’s locus standi is disputed. The learned Judge stated: -

“The Company is inviting the Court to strike-out the Petition before it is heard on its merits, not to dismiss the Petition on the grounds that a winding-up order should not be made. Mr. Isaacs QC commended the following test to the Court which I adopt. In Re Company ((No 003079 of 1990) [1991] BCLC 235 at 237, Ferris J held:

¹¹[2012] EWCA Civ. 443

¹² Grand Court FSD 190 of 2022(IKJ) Unreported Judgment of 12th October 2020

“In my judgment the test which I should apply is the test which appears from Stonegate Securities Ltd v Gregory and Mann v Goldstein [1968] 2 All ER 769, [1968] 1 WLR 1091. 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 standi of 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.”

27. Counsel for the Company sought to distinguish this case and argued that the above formulation was considered and stated in the context of a substantial cross-claim where there would be no net liability to support the petition which was brought. It is also submitted that the factual circumstances in that case raised the issue of an abuse of process because of the cross claim. Thus the argument is that on this application the Company need only show that the Petition may fail and not that it is *bound* to fail.
28. I do have some difficulty with the suggestion of Counsel for the Company. It appears to me that the learned Judge at that stage was referring to the general test and not to the application of the test to the circumstances under consideration. In the paragraph immediately following there was reference to the exceptional nature of the strike out jurisdiction.
29. In my view the tenor of the guidance in the cited cases is that the Court is to conduct some critical and forensic evaluation albeit to a limited extent as to whether the dispute about the debt is a substantial one. To do otherwise would be to simply accept what may be no more than a ‘cloud’ of insubstantial objections from an unwilling debtor.

THE EVIDENCE ON THE APPLICATION

30. Mr. Pearson filed a First Affidavit dated 21st October 2022 verifying the Petition and a Second Affidavit of the same date pursuant to Order 3 r. 4 (2) of the Companies Winding Up Rules. There is an Affidavit from Mr. Cork¹³ and an Affidavit from Ms. Chae Whorms¹⁴. There are two Affidavits from Mr. Timis¹⁵.
31. Mr. Timis states that the debt is disputed on three principal grounds. Firstly, it is disputed that there was a valid assignment of the debt from PAMS UK to the Petitioner. It is said that the JOLs have provided no evidence of this assignment. Secondly that if there was such an assignment, the debt alleged has at all times been contingent on the Company commencing mining operations and generating sufficient profits to repay the debt. This contingency has not crystallised. Thirdly it is said that the quantum of the debt claimed is significantly overstated.
32. Mr. Timis details his over thirty years' experience in the mining industry which has involved several major mining projects. He states that in his experience it is standard operating procedure for SPVs such as the Company to obtain support and/or funding from parent companies or investors until they become income generating. He states that without such provision, mining exploration entities would have solvency concerns from the outset and would be "crippled by a demand for repayment of nominal debt."
33. He states that there was parental support and assurances between the Petitioner and PAMS UK and all the Petitioner's subsidiaries which at that time included the Company. He says further that as part of this parental support and assurance it was a condition of the debt between PAMS UK and the Company that the Company would not be obligated to repay it unless and until the Company's mining operations passed the exploration stage and started generating sufficient revenue to do so. When the debt was transferred from

¹³ Second Affidavit dated 30th January 2023

¹⁴ First Affidavit dated 4th April 2023

¹⁵ Dated 9th January and 15th February 2023

PAMS UK to the Petitioner, it was transferred with this condition. The debt was never repayable on demand and the Petitioner understood this.

34. Mr. Timis produces three documents in support of this assertion as to the contingent nature of the debt. The first is a letter dated 29th September 2015 under the hand of Mr. Ashurst from the Petitioner to PAMS UK which was said to have been provided in the course of its 2014-year end audit. In this letter the Petitioner confirmed that the amount of \$59,610,606.00, which had either been transferred by PAMS UK to fellow group companies or used to pay suppliers on behalf of those companies, was made on its behalf and should be netted off against the balance owed to it. The second paragraph stated: -

“We further confirm that the balance due to Pan African Minerals Services Limited at 31st December 2014 was \$21,517,838 and that this balance is unsecured, interest free, and we will not seek its repayment until such time as the company has adequate funds.”

35. This is said to illustrate how the Petitioner as the parent company intended to treat receivables due not only from PAMS UK but from all its group subsidiaries.
36. The absence of a similar letter issued directly to the Company is explained by the non-requirement for the Company to produce audited financial statements.
37. The second document is a letter dated 17th April 2013, from the Petitioner under the hand of Mr. Ashurst as director, to the Ministry responsible for Mining in the Republic of Niger. In this letter, the Petitioner as the “Parent company” pledged financial support to the Company during its exploration activities.
38. The third is the Minutes of a meeting of the Board of the Petitioner dated 11th November 2019, in which a discussion is recorded relative to book entries showing monies owed by the Company and its subsidiary TM Exploration to the Petitioner (US\$6.2 million), an amount which Mr. Timis believed had been written off. The Minutes refer to the established accounting practice between a parent and exploration subsidiary and state: -

“10.4 FT confirmed that PANL is still in exploration mode. In any event he advised that it doesn’t have the monies to repay any such amount. MT had explained that these book entries would normally be adjusted, (written off); they relate to a period of time when the Niger Group was part of the PAML Group, and the established accounting practice is that monies given by a parent to an exploration subsidiary are not typically recoverable by the parent (i.e. with the exploration company not producing, and thereby not generating revenue). CN recalled MT saying that some of the referenced amount had been part of an earlier dispute with BTG.”

39. As to quantum, it is said by Mr. Timis that \$2,200,000.00 was transferred from the Company back to two companies within the group. In January 2014, at the direction of the Petitioner, US\$1,500,000.00 was transferred to Pan African Minerals Services, (Cayman) Ltd., a subsidiary of the Petitioner and in January 2014 and February 2014, a total of \$700,000.00 was paid to the Petitioner. Thus, the quantum of the alleged debt is said to be US\$2,419,253.00.
40. Mr. Timis also states that in the event of a winding up order the licenses will almost certainly be revoked. They cannot be transferred without the permission of the grantor. The Company is in what is described as a “care and maintenance” phase, meaning that it is only incurring the minimal costs required to keep it operating. These are being met by him personally or through a company of which he is the controlling shareholder, First Investment Holding Ltd.
41. He states that there is a real risk that if the Petition is advertised there will be irreparable harm to the Company which stands to lose its most valuable asset, the exploration licenses. In summary it is said that once advertised the issue of the insolvency of the Company would be raised and there would be doubt as to its ability to continue mining exploration. He exhibits legal advice from the Company’s overseas Attorneys confirming this in relation to the winding up of another related entity within the Group which advice is said to be equally applicable to the present Petition. The suggestion is that if there is a

hearing on the Petition which is then dismissed, there would be a risk of prejudice for no purpose. If the Petition is granted and liquidators are appointed, that appointment would be advertised and all the creditors would be notified in the same manner as the advertising of the Petition.

42. It is asserted that there are no actual third party creditors who are not already aware of the Petition proceedings and that any possible prejudice suffered by a “hypothetical creditor” needs to be balanced against the possible revocation of the mining licenses. Thus, it is said that the balance falls in favour of dispensing with the need to advertise.
43. In response to these assertions, Mr. Cork produces excerpts and a summary from the SAGE accounting system used by the Group of Companies. He states that these show that between May 2012 and October 2013, PAMS UK made loans to the Company in the form of direct bank transfers and also payments to suppliers on behalf of the Company.
44. He produces a copy of the statutory accounts for 2013 for PAMS UK. These were approved by the Board under the signature of Mr. Ashurst as director¹⁶. In Note 11 under the heading ‘related third party transactions’ the sum of \$71,112.00 is noted as being owed to PAMS UK by fellow subsidiaries of the Company. The Note further states:-

“Amounts due from entities with joint control comprise of intercompany loans receivable from several companies across the Group. These loans are deemed recoverable.

Loans owed to the parent entity, Pan African Minerals Limited are non-interest bearing and payable on demand”

45. Note 13 refers to receivables from entities with joint control as \$71,424.00. Note 17 refers to borrowings of intercompany loans (\$81,174.00) owed to the Petitioner, (the parent entity) and states:

¹⁶ Dated 26th September 2014

“Amounts owed to the parent entity represent intercompany loans payable to Pan African Minerals Limited. These loans are non-interest bearing and guaranteed by the ultimate controlling party.”

46. Exhibited to the Affidavit of Ms. Chae Whorms are the financial statements for PAMS UK for 2014. These were approved by the Board and signed by Mr. Ashurst as director.¹⁷ Mr. Cork refers to Note 19 thereof as recording a restatement of the 2013 intercompany loan balances. Various notes record that the receivables went from \$71,424,000.00 to \$8,601,000.00.
47. In respect of receivables due to PAMS UK, Note 12 states *“Receivables balances for 2013 were restated to reflect that the company had settled various liabilities of fellow subsidiaries on behalf of the parent company, and not on its own account.”* Notes 16 and 19 record similar statements. The balance of receivables transferred is stated to be \$62,703,000.
48. In addition to the statutory accounts, the underlying records in the SAGE accounting system specifically refer to the transfer of intercompany balances for 2013 in the slightly higher sum of \$63,333,931.00. The SAGE accounting extract showing the breakdown of this was produced. This was in the form of excel spreadsheets with the narrative *“Move to Group accounts 2013”*. These show various amounts paid by PAMS UK on behalf of the Company with money from the Petitioner. These add up to the \$5,011,621.00.
49. According to Mr. Cork, this documentary evidence is clear by whatever description is given to it, whether assignment, transfer or otherwise, that the Petitioner is the beneficiary of obligations owed by the Company to repay the Petition debt. He states also that in his experience as an accountant of over twenty years, intercompany loans are generally treated as being interest free and repayable on demand.

¹⁷ Dated 30th September 2015

THE ISSUES

50. Counsel for the Company's overarching submission and emphasis is that the Company is solvent on a cash flow basis. Counsel points to the evidence of Mr. Timis that all the Company's expenses and operating costs are being met by him or by one of his companies as and when they fall due. Counsel therefore argues that there is no evidence before the Court that the Company is unable to pay its debts.
51. Counsel submits that applying the test set out above to the facts of the instant case, there is a bona fide dispute on substantial grounds. It is urged that in circumstances where the effect would be that the Company would lose the licenses and where liabilities are being paid as and when they fall due, it would be far more appropriate for the JOLs to bring a writ action and establish liability. There is no reason that if liability is established it would not be paid because liabilities as they fall due are being met. Referencing *Montgomery v. Wanda Modes Ltd.*¹⁸, and what are said to be the substantial questions of fact arising, Counsel urged that this is not an appropriate case for the Petition for winding up to proceed.
52. In support of its application, the Company raises three main issues in Affidavit evidence and arguments:-
- i) It is a contingent debt and not repayable until the operations of the Company transition from exploration to successful production of uranium.
 - ii) The debt is not owed to the Petitioner but to PAMS UK and there is no evidence that the debt was assigned to the Petitioner. Even if it was assigned, it was assigned with the stated contingency.
 - iii) The quantum claimed is overstated.

¹⁸ [2002] 1 BCLC 289

53. Counsel said that the obvious benefit of an alternative remedy such as a writ action would be that the Court could hear from the directors in cross-examination in more detail as to what they understood when they signed these letters and had board meetings. It is urged that not only would the opportunity to cross-examine witnesses be of assistance but also that this is a case for proper pleadings and discovery.
54. The second aspect of the overarching submission is made by reference to the judgment of the Court in the case of *Camulos*. It is that there is an alternative remedy namely a writ action which is available to the Petitioner which is unreasonable for it not to pursue in these circumstances. In addition to the fact that the Company is not insolvent on a cash flow basis, it is submitted that the effect of a winding up order would be damaging to the Company. Counsel for the Company argues that this is not a genuine action which is brought for the benefit of all creditors. Rather it is an attempt by a creditor to force those behind the Company to make payments.
55. Counsel for the Petitioner submits in response that there is no substance to the issues raised and that this is a paradigm case of an insolvent debtor seeking to raise a cloud of insubstantial objections in the hope of avoiding the proper instigation of the insolvency regime.
56. I take each of the issues raised in turn.

THE CONTINGENCY ISSUE

57. Counsel for the Company submits that given the nature of the operation it was understood by those investing in it that returns or repayment on investment, depend on identifying and successfully developing mineral deposits. They understood that the Company is in the care and maintenance phase and that unless and until uranium is found it follows that no revenue is generated. It is further submitted that consistent with this understanding and the nature of the Company, to wit the business of mining exploration, funding was advanced to it by PAMS UK, Mr. Timis and First Investment Holdings on a contingency

basis. The contingency has not yet crystallised as there has been no find to date. Counsel said that the contingency will not crystallise if there is a winding up order as the licenses are highly likely to be revoked. If the Company goes into liquidation, it will generate no revenue as there will be no continued exploration.

58. Significant reliance is placed on the case of *In Re Grand State Investments Limited*.¹⁹ Counsel's argument is that the position on this application is the same as in that case. There are different contractual circumstances but the same principle applies which was to prevent a liquidity crisis.
59. In that case, the petitioner, a limited liability entity, was a contributory of the company, Grand State Holdings. It brought a winding up petition on the basis that the company had failed to pay the redemption price under the terms of a shareholding agreement. The company sought the strike out of the petition in part on the basis that the alleged payment of the debt was bona fide disputed on substantial grounds. In the main the company argued that the redemption request was conditional on the company having sufficient funds.
60. Parker J. considered the terms of the applicable shareholder agreement, in particular section 12 thereof and accepted the submission that it was arguable that it provided that the company did not have to pay the petition debt unless it had sufficient "legally available" funds to do so. In addition to section 12 of the agreement, there was provision for compensation for delayed payment of the redemption price. The learned Judge found that there was no basis to conclude that the company had legally available funds to pay the debt. The debt was therefore not payable.
61. The issue on the application was identified to be whether the petitioner had shown substantial grounds to establish the insolvency of the company or whether the debt was genuinely and substantially disputed. The conclusion was that the issue raised by the company gave rise to a bona fide dispute on substantial grounds and the petition fell to be struck out.

¹⁹ Grand Court Judgment Unreported FSD 11 of 2011 28th April 2021

62. In the instant case, Counsel for the Company asked rhetorically “why would the Petitioner advance money knowing that the Company had no means to pay until uranium was found?”.
63. It is submitted that the words in the 2013 accounts, that the loans were deemed fully recoverable which are referred to by Mr. Cork, are a reference to whether the debts are impaired such that they may need to be written down or off which is different from being “due and payable.” Additionally, it is said that they relate to all \$71 million of apparent debts and do not specifically relate to the debt alleged by the Petitioner.
64. It is said that Mr. Cork seeks to give expert or opinion evidence as to what is standard and general accounting practice. This cannot serve to establish the actual legal relationship between the parties on this application. It cannot provide evidence as to the nature of the actual accounting entries, the particular loan and the conditions or terms of loans which were agreed between the parties. Counsel argues further that the inferences sought to be drawn by Mr. Cork from standard language used in financial statements do not reflect how the mining industry operates and how the specific Group operated. It is said that Mr. Cork has no experience in the mining industry and cannot say whether standard accounting practice applies to mining exploration companies. Counsel said that, were such loans payable on demand, mining exploration companies would perpetually face imminent insolvency.
65. Counsel made submissions about the three documents produced by Mr. Timis in support of what is said to be the contingent nature of the intercompany loans. It is submitted that while the letter of 29th September 2015 under the hand of Mr. Ashurst was not from the Company to the Petitioner, it is indicative of the kind of arrangements of the Company and is reflective of the general practice in the Group. There is no expectation of repayment unless there is a find and money is generated.
66. As to the letter from the Petitioner to the Government of the Republic of Niger, Counsel submitted that the Company had to demonstrate in its application for licenses that it had the capacity and resources behind it to explore and recover uranium. This letter reflects

what is in other correspondence. Counsel argues that when Mr. Cork makes comments about this letter, he is presuming and does not know anything about the particular arrangements with that Government and cannot speak to the arrangements between the Company, the Petitioner and the Government of Niger. The presumptions do not reflect the reality of how the specific Group operated.

67. Counsel submitted that in the Board minutes produced, the discussions at paragraphs 10.3 and 10.4 demonstrate that the directors of the Petitioner believed that the debt was not enforceable. This reflects the commercial reality of the operation, and the expectation was that the debt would not be collectable. The only issue was to deal with this at a time after the liquidation. This is a situation where money was given to the Company by a parent on the basis that, if there was a discovery of uranium, the money would be repaid. There was no expectation that the money would be repaid. The directors did not think that it was collectible but thought that it would not be appropriate to effect a write-off on the eve of a liquidation.
68. Counsel for the Petitioner in reply to this issue submitted that the Company has asserted contingency arrangements but has not produced contemporaneous documents recording these terms or provided any particulars as to how and when these were agreed and by whom. Counsel asked the Court to note that Mr. Timis refers to an understanding not to any actual agreement or board minute where this was discussed.
69. Counsel referred to the case of *Nazir Ali v. Petroleum Company of Trinidad and Tobago*²⁰ and submitted that it would not even pass the test for the implication of terms in a bilateral contractual arrangement. In that case the Court said a term is to be implied if it is obviously necessary to make a contract work.

“It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work,

²⁰ [2017] UKPC 2

and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, “Oh, of course”) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”²¹

70. Counsel submitted that not only is there an absence of documentation but there is also a lack of commercial reality and of basic certainty about how the alleged contingency was to operate. The debt would be unenforceable. Counsel said that if the suggestion is that because the lender and the Company borrower knew that the Company would only be in a position to repay if it had funds, the debt was not therefore repayable on demand, this is illogical. Counsel noted that if the Company entered into different operations which generated funds, the debt would still not be repayable according to the position put forward by Mr. Timis.
71. Counsel said further that the suggestion that if there is no specific date of repayment it must follow that the debt is not repayable on demand is not a reasonable one. Counsel observed that for directors to advance money to a related entity on terms by which it had no right to demand repayment would be unusual. The borrower is now out of the Group and is no longer under the control of its parent, yet Mr. Timis’ claim is that the parent cannot demand repayment of the sums loaned. This is a claim which would only be to the benefit of himself and his fellow shareholders.

²¹ Paragraph 7

72. Counsel said that this also fails for basic certainty in that there are two alleged contingencies seeming too uncertain to be enforceable, the first being the Company's ability to repay the money and the second that its operations had transitioned from exploration to production.
73. Having considered the submissions on this issue and the factual circumstances in so far as they are readily apparent given the nature of this application, in my view the submissions of the Petitioner are persuasive. Mr. Timis says that there was an understanding on the part of the Petitioner and refers to the nature of mining companies. In the case of *Grand State Investments Ltd.*, the Shareholders Agreement contained specific and express terms that the Court reviewed before concluding that those terms evidenced a contingency. In this case, no written agreement or document is produced which specifically refers to what is said to be the applicable contingency arrangements. Although the debt is recorded and restated in the financial statements and explained by multiple notes, the alleged contingency arrangements urged by the Company are not reflected therein.
74. I accept as Counsel for the Petitioner suggests that one would expect the contingency to be recorded in some way in the accounts. The fact of the absence of any such record does not support the assertion being made. Mr. Cork notes that the funds are treated in the accounts as a loan and not an investment. He says that that there is a record in the accounts of some impairment. Note 4 to the 2014 financial statements sets out an analysis of items included within operating loss and includes an impairment for intangible loss but there is no record of any impairment with respect to investments in subsidiaries or receivables. The absence of such a record would be inconsistent with a contingent debt.
75. The accounts are said to be prepared according to *International Financial Reporting Standards (IFRS)*. The evidence is that *under these standards the accepted practice is to account for undocumented intercompany loans as fully repayable on demand subject to any impairment.*

76. The expectations and circumstances of mining companies are readily understandable, but it strains credulity to suggest or imply that international accounting standards or practices would somehow vary depending on the nature of a company.
77. The three documents produced by the Company have been considered. Counsel for the Company said that the Court routinely gives implied terms and relied on these documents as a basis for the submission that the contingency arrangements can be inferred. According to Counsel the documents show that there was a business efficiency to arrangements which have been agreed and that there was no intention that there should be repayment until there was a find. In response the point is well made that none of these directly relate to the alleged debt. Mr. Cork states and I accept that on their face the three documents relate to a different debt and/or different arrangements. In summary Mr. Cork points out that :-
- i) The letter of 29th September 2015 relates to a different debt owed by a different company. It does not relate to loans made by PAMS UK to the Company. It speaks not to inability to make a demand, but an intention not to do so. The letter states that the Petitioner will not seek repayment until such time as PAMS UK has adequate funds which is not the same thing as saying that there is no entitlement to call in the debt.
 - ii) The letter to the Ministry does not and cannot provide evidence of contractual agreements within the Pan African Group and the terms of the agreements. It is a letter of financial support and does not provide evidence that the loan is contingent.
 - iii) The Board minutes do not refer to this debt or to the alleged contingency. They refer to a belief that another debt was written off and do not address the issue of the obligation to repay.
78. I conclude that even if it is accepted that there was this understanding as Mr. Timis asserts, it is evident that this did not translate into an actual contingent arrangement. The point

made by the Petitioner of some resonance is that “*whether a lender would in practice call in its lending is wholly separate from whether it has agreed to divest itself of the right to make a demand.*” This in my view is decisive on this issue.

THE ASSIGNMENT ISSUE

79. The second issue of whether or not there was an assignment is described by Counsel for the Petitioner as one of some primacy. It is a challenge to the standing of the Petitioner to bring the Petition.
80. By s.94 (1) (b) of the *Companies Act*, an application for the winding up of a company shall be by petition presented by “any creditor or creditors (including any contingent or prospective creditor or creditors”.
81. Section 92(d) provides that a company may be wound up if the company is unable to pay its debts. Section 93(a) provides that a company shall be deemed unable to pay its debts if a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due has served a statutory demand and the company has failed to pay same for three weeks thereafter.
82. Counsel for the Company submits that from the evidence referred to by Mr. Cork, PAMS UK is actually the party who had advanced the money. The right thus vests in PAMS UK. The burden is on the Petitioner to show that it would have a valid claim as a creditor, where the factual starting point is that PAMS UK is the creditor. It is for the Petitioner to show that the liability was transferred to it and that it is in a position to present this Petition.
83. The Company’s primary submission is thus that the Petitioner has failed to provide evidence that the debt was legally assigned to it by PAMS UK, that no notice of assignment was provided to the Company and that the Petitioner cannot establish that it is a creditor of the Company. The submission therefore is that the debt on a contingent basis is not owed to the Petitioner but to PAMS UK, a subsidiary of the Petitioner. The

Court is invited to find that the Petitioner is not in fact a creditor and lacks standing to bring the Petition.

84. Reliance is placed on the ***Property (Miscellaneous Provisions) Act*** (2022 Revision) which provides in part that legal assignments of debts are to be made in writing and upon notice to the debtor. It states: -

5. (1) Subject to subsection (2), any absolute assignment by writing signed by the assignor or the assignor's agent lawfully authorised in writing (not purporting to be by way of charge only) of any debt or thing in action, of which express notice in writing has been given to the person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice —

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor.

(2) If the person liable in respect of such debt or thing in action has notice —

(a) that the assignment is disputed by the assignor or any person claiming under that assignor; or

(b) of any other opposing or conflicting claims to such debt or thing in action, that person may, if that person thinks fit, either call upon the person making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the Trusts Act (2021 Revision) or any statutory modification or successor thereto.

5A. Requirements for assigning equitable interest.

5A. (1) *An assignment of an equitable interest subsisting at the time of the assignment may be made only —*

(a) in writing, signed by the person assigning the interest or that person's agent lawfully authorised in writing; or

(b) by will.

(2) However, subsection (1) shall not apply to the creation or operation of a constructive, implied or resulting trust.”

85. Mr. Timis asserts in his Second Affidavit that there is no evidence that notice of the purported assignment was ever given to the Company. Counsel for the Company says that the first that the Company heard of it was in October 2021 when it received correspondence from the Petitioner's attorneys.

86. Counsel notes that while Mr. Cork sets out in some detail certain book entries entered in the Group accounting system there is no evidence or written record of an effective legal assignment of debts from PAMS UK to the Petitioner as distinct from a movement of book entries. There is no evidence that the directors considered, approved or gave instructions to effect the alleged transfer of the debt.

87. Counsel refers to the large sums involved and notes that at the relevant time the amounts represented 88% of the assets of PAMS UK and 78% of its liabilities. Against this background, Counsel submits that it would be surprising if they were in fact legal assignments rather than mere book entries for group accounting purposes. The argument is that if these were in fact assignments the magnitude of them would have given rise to a formal record in the minutes of a Board Meeting.

88. Counsel submits that:-

“The evidence which the Petitioner has adduced, of an accounting exercise under which accounts of a parent and subsidiary were netted off in a group accounting

system is not sufficient as a matter of Cayman Islands law to establish that a debt was validly assigned from PAMS UK to the Petitioner.”

89. As to any possible equitable rights on the part of the Petitioner, Counsel argues that the Petitioner has not pleaded nor produced any evidence of this. The second part of this submission is that even if the Petitioner did have such a right, in the absence of a written agreement, an indirect creditor or ultimate beneficial recipient of repaid funds, a creditor of a creditor, would be insufficient to establish standing under s.94(1)(b) of the *Companies Act*.
90. Counsel for the Petitioner submits that this is an issue which was not raised prior to the presentation of the Petition and referred to it as an attempt to recharacterise accounting records which are clear, as an assignment. The records evidence proper accounting treatment of the relevant payment. Counsel submitted that even if this was an assignment the suggestion that a notice of assignment must be given before an assignee can present a petition is erroneous.
91. Counsel relied on the judgment of the Court in the case of *In Re Steel Wing Company Limited*²² for the submission that an equitable assignee can present a petition. In that case the issue was whether the assignee of a part of a debt owed by the Steel Wing Company was a creditor who was entitled to present a winding up petition under the *Companies (Consolidation) Act 1908*. The Court (Lawrence J.) determined that an assignment of a part of a debt did not fall within the meaning of the relevant Act and thus it could not operate to pass the legal right to that portion of the debt to the petitioner. The petitioner was not therefore a creditor of the company in law. However, such an assignment operated in equity to transfer the part which had been assigned.
92. The Court stated that the omission of the words “at law or in equity” after the word ‘creditor’ in the *Companies Act* did not mean that ‘creditor’ was confined to one at law. This given the passing of the Judicature Acts which made such additional words

²² [1921] 1 Ch. 349

unnecessary. It was concluded that the word “creditor” in the *Act* includes a creditor in equity as well as a creditor at law and that a creditor in equity can petition for the winding up of a company.

93. The dicta in the case of *Steel Wing Company Limited* was applied by the Privy Council in the case of *Parmalat*. It was stated in the judgment therein that in winding up proceedings an equitable assignor has a sufficient interest without joining the assignee.
94. Counsel also drew to the Court’s attention the case of *Charnesh Kapoor v. National Westminster Bank plc, Kian Seng Tan*²³ in which the English Court of Appeal applying the dicta in *Parmalat* held that an equitable assignee of a debt is entitled in its own right to bring proceedings for the debt.
95. A case cited by Counsel which was of particular assistance on this point is *Tele-Art Inc v. Nam Tai Electronics Inc v. Bank of China*²⁴. The British Virgin Islands Court of Appeal considered the application of s.116 (a) of the *Companies Act Cap 285* of the Laws of the British Virgin Islands. This is a deeming provision which is in broadly similar terms to s.93 (a) of the Cayman Islands *Companies Act*.
96. The Appellate Court was of the view that s.116 (a) of the *Act* sought to define a creditor for the purpose of winding up proceedings. The Court referenced similar provisions in the *Companies Act* of England and Wales of 1862 and cited with approval the dicta in the case of *Re Montgomery Moore ship Collision-Doors Syndicate*²⁵ that the creditor who is entitled to petition includes a creditor by equitable assignment.
97. In respect of both the contingency issue and the assignment issue Counsel for the Company urged that the format of these proceedings is not the appropriate one for settling these kinds of issues. Counsel said that there is more to the restatement and assignment issue than has been presented to the Court. The directors have not had access to the records since the liquidation. There is no explanation given for the records, for the

²³ [2011] EWCA Civ 1083

²⁴ [1999] ECSC J0125-1

²⁵ [1903] 72 LJ Ch 624

transactions or for what this exchange was. It was said that the Company does not have the ability to produce records or evidence and that the Court is being asked to make a decision based on insufficient information. These proceedings are not designed for full evidence.

98. Counsel submitted that it is correct that there is a lack of formality in the way intercompany loans are documented but that this is not unusual given the intercompany relationships. Counsel said that while it is regrettable that there was not more formality, or more detailed evidence, the only way the issues can be properly determined is by listening to what the directors say under cross-examination. Counsel said that there is not enough evidence, there is one set of accounts and reference to the SAGE accounting system.
99. In my view in the instant case, the accounting records are clear and incontrovertible. It is of note that there is no challenge to the records themselves. No errors are raised. What is being said is that on the face of them they would be insufficient to establish the existence of a debt to the Petitioner and that some other additional document is required. It is said that evidence is required of a legal assignment.
100. In considering whether this amounts to an issue such that there is a bona fide substantial dispute. I have considered the following: -
- i) The way in which PAMS UK operated.
 - ii) The fact of the accounting records.
 - iii) The late raising of this issue of assignment.
101. I take note of the way in which PAMS UK operated. There was no challenge or demur to Counsel for the Petitioner's description that it operated as a "pass through entity" which provided management services and distributed funds to the Group. Counsel makes the point that the letter of 29th September 2015, signed by Mr. Ashurst, confirms how PAMS UK was used.

102. The Petitioner provided funds to PAMS UK which it then paid out for the benefit of subsidiaries within the Group including the Company which was a subsidiary up to 2017. It is not disputed that the 2013 records show amounts provided to PAMS UK by the Petitioner which PAMS UK paid out on behalf of other entities including the Company. Large tables of extracts from the accounting records recording outward and inward payments were provided to the Court.
103. The Petitioner in effect says that visible on the face of the unchallenged records is that the 2013 accounts recorded these payments as an indirect liability. The funds were recorded as PAMS UK owing the Petitioner and the Company was recorded as having a matching liability to repay PAMS UK. In the 2014 accounts this was restated or corrected to replace the indirect liability with a direct one. The 2014 accounts therefore reflected the correct position that PAMS UK had settled various liabilities for fellow subsidiaries and not on its own account. Thus, payments made on behalf of the Company with the Petitioner's money were now recorded as directly liable from the Company to the Petitioner.
104. As I understand it, put simply, the 2014 accounts were restated to eliminate the conduit entity PAMS UK which had not in fact acted on its own account in making payments and had not benefitted from the funds.
105. It is an undisputed fact and of much significance that at all material times Mr. Timis and Mr. Ashurst were directors of both the Company and the Petitioner. Mr. Ashurst was also a director of PAMS UK. While the Company asserts that it was given no notice of any assignment, the accounting transactions are recorded in the Company's own records. Both the 2013 and 2014 statutory accounts were signed off by Mr. Ashurst. The logical conclusion as Counsel for the Petitioner submitted is that his signature evidences confirmation and approval of the restatement. To this I would also add knowledge of the restatement through the mind of its director.

106. The correspondence is exhibited to the Affidavit of Ms. Whorms. In response to the service of the Statutory Demand on the 26th October 2021, Counsel on behalf of the Company pointed out deficiencies with it. These included that it was unsupported by particulars of the books and records and there was no statement of the date on which the debt fell due. The second challenge was that the debt did not exist, and that the Company has a claim in the sum of \$392,367.63. On the 29th October 2021, the response on behalf of the Petitioner was to agree to set off the \$392,367.63 and to provide additional particulars of the debt by reference to the statutory accounts. This specifically referred to the transfer of debt from PAMS UK.
107. By letter dated 9th November 2021, the Company maintained its position that the Statutory Demand was defective. Paragraph 3 of the letter complained that the Petitioner was seeking to advance claims which are alleged to arise from historic and complex intercompany dealings through an entirely inappropriate means. It stated also that “the accounting transactions recorded between the various companies forming the Pan African Group can only be properly understood in the context of contemporaneous records which would require discovery and witness evidence...”. Paragraph 5 referred to proceedings in relation to another entity within the Group and again referred to the Group’s accounting being complex and not necessarily reflective of the true position with respect to intercompany liability.
108. Following service of the Petition, the Company responded by letter dated 1st November 2022. It was said therein that the debt was disputed on the substantial grounds previously stated and five additional matters were listed. Under Item 1 it was stated: -

“1. The assertion in the Demand that “monies were advanced” to PAN is potentially misleading. We are instructed that while some cash was advanced from PAMS UK to PAN, the Petition Debt also arose through the allocation to PAN of a portion of the liabilities of the Pan African Group as part of a book-keeping exercise, and via the payment of PAMS UK of certain invoices owed by PAN.”

109. Items 2 to 5 raised what is said to be the contingent nature of the debt and that the transfer from PAMS UK to PAML included the parental support and assurances which existed between the two entities and all its subsidiaries. It was stated that in accordance with that parent support it was agreed that the Company would not be obligated to repay any intercompany debt including the Petition debt to the Petitioner unless and until the Company's mining operations "transitioned from exploration to production and started generating sufficient revenue for PAN to repay the intercompany debt." There was then a reference to the three documents produced by Mr. Timis. There was no reference in this letter to the issue of assignment. The issue was first raised in the Affidavit of Mr. Timis.
110. Counsel for the Company submits that the Company has acted bona fide and disputed the debt in correspondence in October and November 2021, a year before the Petition was filed and has been consistent in its position since then. Counsel rightly acknowledges that the Company did not raise all of the matters now relied on with specificity and gives the reason as being due to the unparticularised and defective nature of the Demand. It is said that having raised the defects and disputed the existence of the debt there was no onus or reason to provide the Petitioner with notice of all the bases of the dispute.
111. I am also mindful of the submission of Counsel for the Company that the Correspondence addressed various deficiencies in the Statutory Demand and does not purport to be setting out the Company's position on the substantive claim. However, it is noted that on the face of it, the liability always rested in the Company, albeit indirectly and not with the conduit entity. That indirect position was clarified and changed in 2014. The Company through Mr. Ashurst knew and accepted that it was directly liable by virtue of the 2014 statutory accounts. It cannot be a substantial dispute of the debt for the Company to now say in effect that one should go back to the 2013 accounts or that the 2014 accounts do not state the correct position.
112. Against the factual background summarised here and above it would not be unreasonable to describe the now raised issue of an assignment as somewhat artificial and possibly

contrived. I accept the submissions made on behalf of the Petitioner that the characterisation of this as an assignment by the Company is erroneous.

113. If I am wrong about this, the statute and the authorities make clear that an equitable assignee of a debt has standing as a creditor to petition for winding up.

THE QUANTUM ISSUE

114. In his First Affidavit, Mr. Timis asserts that the debt is disputed on the third ground that the quantum of the alleged debt is significantly overstated. This ground was pursued by the Company in written submissions but not vigorously in oral submissions.
115. In oral submissions, Counsel for the Petitioner submitted that there is not a single document to support the transfer of some \$2.2 million and noted that the initial response to the Statutory Demand referred only to \$392,367.63. No further amount was then mentioned. The additional amount is not supported by any evidence.
116. For my part I note that even if the amount of the alleged debt claimed is reduced as asserted by the Company, the remaining balance of over \$2 million would be well above the statutory threshold.
117. The position is clearly summarised in the case of *Re Tweeds Garages Ltd*²⁶. It was held that a dispute as to the precise sum owed where it could be established that the petitioner was a creditor for a sum which would entitle it to a winding up order is not a sufficient answer to the Petition.

GENERAL - EXERCISE OF DISCRETION

118. Counsel for the Company argued that even if the Court finds that the debt is not substantially disputed, in the circumstances of this case the Court should exercise its

²⁶ [1962] Ch 406

discretion to strike out the Petition. The Petitioner submitted in response that there is no principled basis for the Court to do so.

119. Counsel for the Company urged that a winding up order is not in the best interest of the Company. Counsel relied on the judgment in the case of *In Re Wyser-Pratte Eurovalue Fund Limited*²⁷ as the basis for the submission that the Court may refuse to make winding up orders when to do so would lead to significant losses. The consequence of winding up in this case would be that what assets the Company has will be lost, the Company would lose its mining licenses and the opportunity for successful exploration. This would be the end of the Company.
120. Counsel for the Company also referred to the case of *Adamas Asia Strategic Opportunity Fund Limited*²⁸ and made the second point that the nature of the remedy is a collective one for the benefit of all creditors and there would be no benefit to all the creditors by this Petition.
121. In *Re HSH Cayman I GP Limited et al*²⁹, the Court (Jones J.) held that if the Petitioner established inability to pay debts there was a prima facie right to a winding up order unless there were exceptional circumstances justifying the refusal or stay of proceedings:
-
- (1) *“Given that the debts were not disputed and that it was established that the companies were unable to pay their debts, the petitioner would have a prima facie right to immediate court orders winding up the companies on the grounds of their insolvency, unless there were exceptional circumstances justifying the refusal or stay of the proceedings, and since no such circumstances had been found here, the companies would be wound up. Neither the companies’ claims to balance sheet solvency; the possibility of an increase in the realizable value of their investments; nor their claims that the current management was best placed to retain their value would*

²⁷ [2010] 2 CILR 194

²⁸ FSD 72 of 2019 (IKJ) Unreported July 2019

²⁹ [2010] (1) CILR 157

constitute special reasons justifying the refusal of the winding- up orders or the stay of the petitions--in any event, on the basis of the valuation evidence it was likely that, in the instant case, the companies were not balance sheet solvent. These were commercial matters for the company's creditors and not the court to determine – the creditors were entitled to prefer a compulsory winding up conducted by an official liquidator over continuing with the existing management.”

122. The Petitioner's submission in response is that such an argument would fall to the substantive application. Counsel submitted that there are no details of the Company's assets, no accounts and no cash flow statements before the Court. There is no information as to whether there might be claims. For over a decade there has been no finding of uranium. The Company is doing nothing. It is in the care and maintenance phase. Funds are provided as and when needed. Its liability is increasing. The Company's arguments cannot possibly be a basis to strike out the Petition.
123. Ultimately, in reply Counsel for the Company accepted the position that the issue of the exercise of discretion is one for a substantive hearing. Counsel stated *“We do say even if debt is not disputed the Court should exercise discretion not to make a winding up order, but those arguments will be made if there is a substantive hearing.”*

ADVERTISING

124. Counsel for the Company sought an order that if the Petition is to proceed that advertising of it be restricted. Counsel submitted that the purpose of advertising is to alert creditors. In circumstances where the Company is in the care and maintenance phase, all creditors are known. All known creditors are already aware of the Petition. All shareholders are known. No one would be disadvantaged by not advertising the Petition. There would be no risk to any third party.

125. Counsel for the Petitioner indicated that no point was taken on this, and that the Petitioner is neutral on this aspect of the application.
126. Given the nature of the circumstances outlined by the Company in respect of possible loss of its licenses, the nature of the creditors and the methods available to protect their interests, it appears to me that the balance is in favour of restricting the advertising of the Petition in the manner sought by the Company.

CONCLUSIONS

127. For the reasons set out above, the conclusion is that the debt is not bona fide disputed on substantial grounds. The Company's application for the strike out of the Petition is refused. The Company's application to restrict publication of the Petition is granted.
128. Should there be disagreement as to the payment of costs arising from this application, each party may file written submissions within 14 days from the date of delivery of this judgment.
129. As I bring this judgment to a close, I must record my gratitude for the patience, graciousness and understanding extended to this Court by Counsel in affording me the time to complete this document. Such courtesies extended by Counsel played no small part in the completion of this judgment in the way I have done, whilst having full days in Court in other divisions. Again, I am grateful.

Dated this the 29th August 2024



The Hon. Justice Cheryll Richards KC
Judge of the Grand Court