IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 9 OF 2007

IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

AND

IN THE MATTER OF A PETITION TO WIND UP GFN CORPORATION LIMITED

IN OPEN COURT
THE 12-13TH AND 15TH JANUARY 2009
BEFORE THE HON. CHIEF JUSTICE

Appearances: **Mr. Michael Crystal QC instructed by Mr. Matthew Crawford of Maples and Calder for the Official Liquidators of the Petitioner, Bancredit Cayman Limited (in official liquidation)**

Mr. Thomas Lowe QC instructed by Ms. Cherry Bridges of Ritch & Conolly for the respondent, GFN Corporation Limited

RULING ON LOCUS STANDI TO PETITION

1. Bancredit Cayman Limited ("the Petitioner") is an insolvent bank now in official liquidation before this Court. Until 4 September 2003, it carried on business as a bank from within the Cayman Islands, having held an Unrestricted Class B Bank and Trust Licence since July 1988.

2. By its official liquidators ("the JOLs"), the Petitioner seeks the winding up of GFN Corporation Limited("GFN"), an exempted limited liability Cayman Islands company, on the ground that GFN is indebted to it in the sum of $96,153,651 arising out of an overdraft accrued on account numbered 71472, opened by GFN with the Petitioner in 1996.

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3. GFN was the holding company for a group largely trading in the Dominican Republic ("the DR") called the Grupo Financial Nacional ("the GFN Group"), which conducted business operations in numerous fields. The GFN Group, which included the Petitioner and other banks incorporated in the DR (Banco Nacional de Credito SA, "Bancredito") and in Panama (Bancredito (Panama) SA), was owned and controlled by the Pellerano family of the DR, and in particular Manuel Arturo Pellerano ("Pellerano").

4. The MAP Trust, a trust for the benefit of Pellerano and his family, owns the share capital of GFN.

5. Until his conviction in the DR on 17 August 2006 for fraud in relation to the affairs of the GFN Group, Pellerano was Chairman of the GFN Group and was a director of the Petitioner as well as of many other companies within the GFN Group.

6. Notwithstanding that the indebtedness is reflected in the books and records of the Petitioner in that manner described above, on this petition coming on for hearing, GFN now seeks to challenge the petition on the basis that the indebtedness is not owed. GFN asserts by way of affidavits filed by certain of its former senior employees that the indebtedness shown in account No. 71472 is not that of GFN itself but that of GFN Capital S.A., a related but separate entity within the GFN Group of companies of which the Petitioner was itself an affiliate, and that the indebtedness has been discharged.

7. It must be noted here however, that those speaking in this context on behalf of GFN have not been consistent in their evidence on the matter. First, it was asserted by Maria Isabel Concepcion (described as the Chief Financial Officer of

the Banking and Insurance companies within the GFN Group), in her affidavit of 13 March 2007, that Account 71472 was never in the name of GFN itself, but in the name of GFN Capital. However, in her second affidavit of 27 August 2007, Ms. Concepcion accepted that "account no. 71472 appears to have been operated by certain employees of GFN as the account of GFN Corp." and that (in paragraph 7) "I believe I wrongly assumed that account no. 71472 had always been in the name of GFN Capital. I now know that not to have been the case".

8. Despite this acknowledgement as to the identity of the account, the assertion arises in the affidavit (dated 31 August 2007) of Mauricia Santos – described as the vice president of Finance – that Account 71472 was not treated as an account of GFN within the GFN Group but instead as an account of GFN Capital.

9. That challenge to the indebtedness having been raised in the evidence, Mr. Lowe Q.C. now challenges the petition on jurisdictional grounds. He argues that the Court, presented as it is now with what he describes as a bona fide and substantial dispute as to the indebtedness upon which the petition is based, has no jurisdiction to hear the petition unless and until that dispute is resolved.

10. Put another way, the argument is that as there is a bona fide and substantial dispute as to the debt, the petitioner has not established to the appropriate civil standard of proof required by the Companies Law ("the Law"), that it is a creditor so as to afford it *locus standi* to petition to wind up GFN in keeping with the provisions of the Law.

11. These provisions of the Law are the oft cited sub-section 94(c) and (d) and sub-section 95 (a), being respectively those subsections which provide that a company may be wound up if it is unable to pay its debts (s. 94(c)) or if the Court is of the

opinion that it is just and equitable that a company should be wound up (s. 94(d)) and as to insolvency (inability to pay its debts), being so deemed if (in the case of s.95(a)), a creditor has served a statutory demand for payment of the debt which demand has gone unsatisfied.

12. Here the Petitioner relies on its unsatisfied statutory demand for payment of the overdraft liability (which is still accruing) as proof that GFN is unable to pay its debts and so is insolvent within the meaning of section 94(c). The Petitioner also relies on the ground under section 94(d) that it is, in any event, just and equitable that GFN be wound up because even on the basis of GFN's defence, GFN is admitted to be shown on the books of the Petitioner as the account holder of account 71472 and so the circumstances under which GFN Capital S.A. or any other related GFN entity, is alleged to have become indebted to the Petitioner for the amounts shown due in GFN's account, demand an enquiry by the Court. Further, that such an enquiry can only properly be carried out by liquidators appointed by the Court.

13. Given the circumstances of this case as described above, one may well regard the proposition that GFN should be wound up on one or other of the two bases presented as being self-evident. That, perhaps, is why Mr. Lowe concedes that if there is jurisdiction to hear it now on the basis of the debt being established, the petition would not be opposed.

14. The evidence propounded in support of the petition is far-reaching. For instance, as to the justification for an enquiry based on the just and equitable ground, Mr. Fogerty (one of the JOLs) in his second affidavit states as follows (at paragraph 16):

"In fact, the relationship between the Petitioner and other entities in the GFN Group, including in particular GFN Corporation Limited, cries out for a thorough investigation, because the Petitioner appears to have been used as a conduit for the extraction of depositors' funds, by way of overdrafts, for use in the other business of the GFN Group.

It appears that Pellerano, (the Principal of the GFN Group), a director of the Petitioner and GFN Corporation Limited, procured Bancredito and its affiliates to act, not in the interest of its depositors, but in the interests of other entities in the GFN Group at the expense of those of the depositors. An investigation of GFN Corporation Limited's affairs is particularly important given that it was the recipient of large sums from the Petitioner, so that the Petitioner can better identify the uses to which its assets were put by other companies in the GFN Group."

15. Despite all that, having regard to Mr. Lowe's submission that the showing of *locus standi* to petition as a creditor is a threshold issue going to the jurisdiction of the Court which the petitioner must cross before the petition might be heard, I am obliged to resolve that issue now.

16. It must be acknowledged to be trite and settled law that where a person petitions to wind up on the basis of being an unpaid creditor, his status as a creditor must be demonstrated before he will have *locus standi* to petition.

17. But the earlier case dicta – such as from ***Mann v. Goldstein, [1968] 1 W.L.R. 1091*** – which precluded the admission of disputed debts as debts upon which a

creditor's petition could be founded – has since been considerably refined in the case law.

18. Now the position is as most authoritatively stated by the Privy Council in ***Re Parmalat Capital Finance Limited*** *[2008] BCC 371* (at para. 9):

> ***"If a petitioner' 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. 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 NL (1986) 2 BCC 98,916."***

19. ***The Parmalat*** case was on appeal from this jurisdiction and a similar issue has come before this Court since then and considered most recently in ***Re Strategic Turnaround Master Partnership, Limited, Cause 276 of 2008*** (unreported ruling issued at first instance on 28th November 2008, and on appeal in an unreported judgment delivered on 12 December 2008, at paragraph 33 on this point).

20. The assertion that the petition, in the circumstances of this case, should be dismissed and the Petitioner first required to resolve the dispute over the debt in a separate action is, it must be said, an unattractive proposition, not least because it arises for the first time in the petition coming on for hearing and where there has

not been filed any application by the respondent to restrain or strike out the petition. The argument simply arises therefore, as an objection being taken now on the hearing of the petition by way of defence to the petition.

21. Thus, if the Court accedes, it must do so on the face of the objection itself, on the mere assertions in the affidavit evidence filed on behalf of GFN giving rise to what GFN says is the *bona fide* and substantial dispute over the indebtedness. The Court would therefore be taking that assessment of GFN's objection merely at face value, as a basis for denying its own jurisdiction to hear a petition which otherwise appears to be entirely in keeping with the Rules of Court and to have been regularly filed in keeping with the requirements of the Law.

22. I can state immediately, in agreement with Mr. Crystal, that I very much doubt that such a proposition could properly reflect the requirements of the Law on *locus standi* to petition.

23. Rather, as many of the decided cases show – culminating most recently and authoritatively in ***In Re Parmalat*** in the Privy Council (above)– the existence of a dispute over the indebtedness – even a *bona fide* and substantial dispute – does not extinguish or even suspend the jurisdiction of the Court to hear the petition. Rather, the rule – which is a rule of practice – is that the Court will not ordinarily allow the petition which is an unsuitable process in such circumstances, to be used for the pressing of such a claim as it is likely to be prejudicial to the Company in forcing it to compromise its position.

24. Ordinarily therefore, a bona fide and substantial dispute over the indebtedness will be required to be first resolved in a separate action and the petition process

reserved for circumstances where the unpaid debt has been already established beyond reasonable dispute.

25. A number of the cases illustrate how this rule has worked in practice: typically where the Court proceeds to hear the position, it is either after the court decides in limine, that there is in fact no bona fide or substantial dispute or if it perceives such a dispute as one which is given to summary disposition, there and then decides the dispute and depending on the outcome, proceeds to hear the petition to wind up.

26. A most pertinent example of this latter approach is to be seen in ***Re: Claybridge Shipping Co. [1997] 1 BCLC 572*** – a case with notably similar circumstances to the present, as it involved a bank seeking to wind up a company to recover a debt owed to the bank but which the company disputed.

27. While in no way gainsaying the principle that the petitioning bank in that case needed to show its locus standi to petition, dicta in the case (from Lord Denning in particular) suggests that a creditor - in order to establish its standing as such – only needs to show, when faced with a dispute in that regard, that it had a good arguable case. On the facts, the very accounting records of the bank itself which evidenced the indebtedness, suggested the existence of that good arguable case.

28. Lord Justice Oliver stated the principle rather less categorically but, it seems to me, to the same effect by emphasising the importance of not denying a creditor with a *prima facie* claim the most just and convenient way of establishing the claim: (at p.579 a – d):

> ***"...the refusal of the Court to entertain cases where the underlying debt is said to be disputed is, in my judgment, a***

matter of practice only. It is not, in general, convenient that the very status of the petitioner to proceed with his petition should be fought out on a winding-up petition. But the Court must, I think, remain flexible in its approach to such cases....whilst I do not in any way...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 facts 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 case, 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."

29. As Lord Justice Oliver also explains elsewhere in his judgment (ibid paragraphs c-d), the Court does regularly take upon itself the burden of determining disputed claims in petitions based on the just and equitable ground, and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then claim that because a dispute of fact cannot be decided without cross-examination, the petition should be left to be determined in some other proceedings.

30. In recognising here the force of the dicta from ***Re Claybridge*** and the approach taken in that case and, indeed, in others already referenced and to be considered below, I must explain that I do not understand any of them to have questioned the *locus standi* principle. At all events, a petitioning creditor must show standing to petition, whether on the ground of an unpaid debt proving insolvency or on the just and equitable ground, before he petitions to wind up. Rather, the question becomes, as I see it, how he might be required to establish his standing, in the face of a challenge to the very indebtedness or other basis on which his petition is based.

31. The case of ***In Re Russian and English Bank [1932] 1 Ch. 663,*** is cited by Mr. Crystal as one in which an approach to that question, different from that taken in the other cases but nonetheless appropriate to be followed here, was taken.

32. The circumstances were as ever unique. There, a competing creditor to the petitioners raised the objection that as the petitioners' debt was disputed it could not be made the foundation of a petition. What makes the approach taken by the Court different from in the other cases was its willingness to grant the petition despite its recognition, per Bennett J., at (p. 670) that "***there are no doubt strong grounds for challenging the petitioners' debt and it is abundantly clear that it is a disputed debt".***

33. In allowing the petition to proceed nonetheless, Justice Bennett relied entirely on what he perceived to be the extenuating circumstances confronting the petitioners: the debtor Company, a Russian foreign banking company which had been allowed to carry on business in England, had already been dissolved in Russia and so it

was no longer possible for the petitioners to proceed with their separate writ action, which they had earlier instituted for the purpose of establishing their debt.

34. Accordingly, per Bennett J (at p. 670):

> *In these circumstances (the petitioners) will be without a remedy unless they can proceed by way of a winding-up petition. The mere fact that there is an order in the petition will not establish that they are creditors of the Company. It will be the duty of the Liquidator to find out the rights of the petitioning creditors, and if necessary, to reject their claim.*
>
> *It does not seem to me that the general rule against a disputed debt being used as the foundation of a winding-up petition should be applied in the present case, where the persons whose debt is disputed would otherwise be without redress.*
>
> *In these circumstances, as no possible harm can be done to anybody by a winding-up order being made and as the creditors who oppose the winding-up on this petition are themselves desirous that the Company should be wound up, I overrule their objection and make an order on this petition for the compulsory winding-up of the Company."*

35. Albeit decided only at first instance, the case has been cited without disapproval in subsequent cases by the English Court of Appeal in *Alipour v Ary [1997] 1 WLR 534* and in *Re A Company [1997] BCC 830 (per Chadwick J.).*

36. It is an important case in at least two respects relevant to the present matter.

37. In the first place, it recognises that, as a practical matter, the question of *locus standi* to petition is indeed a threshold issue going to the jurisdiction of the Court

to hear a petition. As such, as Bennett J. emphasised what is required is a *prima facie* showing. Or, as Lord Denning stated it in ***Re: Claybridge***, a good arguable case in that regard. A conclusive finding as to the existence of the indebtedness can only ever be made in the context of the winding up itself after the books and records of the company will have been examined by the liquidator and a decision taken to accept or reject the proof of debt.

38. Secondly, and again as ***Re Claybridge*** shows (per Lord Justice Oliver, ibid) it must always be open to the Court as a matter of discretion, to say that in exceptional circumstances, the rule against petitions based on disputed debts, should not be followed because to do so would result in injustice or unjustifiable inconvenience or hardship to a petitioner. In such circumstances, the court will not simply leave the question of *locus standi* unresolved, or as Mr. Crystal described it – "hanging in the air".

39. This principle should now be regarded as settled in Cayman Islands law.

40. In ***Allied Leasing and Finances Corporation v Banco Economics SA, 2000 CILR, 118***, the Court of Appeal allowed a petition to wind up despite the existence of a dispute over the indebtedness on which it was based. The Court of Appeal as held, first of all, that the petitioner had shown prima facie, that the debts alleged in the petition were outstanding and therefore had locus standi to petition.

41. Further, citing and applying ***Re Claybridge (above),*** that dismissal of a petition on the ground of a dispute was a rule of practice only which could be waived in exceptional circumstances when it was desirable – as proved to be the case there – that the petition should proceed.

42. Finally and most conclusively on this point, as Lord Brightman said on behalf of the Privy Council in ***Brinds Limited & Ors. v Offshore Oil N.L. & Ors.*** *[1986] BCC 98,916 (PC)* at 98,921 – 98,222:

> ***"It is a matter for the discretion of the judge whether a winding-up order should be made on a disputed debt, and it is also a matter of discretion whether he decides the substantive question of debt or no debt. Their Lordships agree with the observations of Gibbs J in Re QBS Pty Ltd. Qd.R. 218 at p.225:***
>
> > *"It seems to me that in every case it becomes necessary for the court to exercise its discretion as to how far it will allow the question whether or not the dispute is bona fide to be explored. In some cases it may be very easy to decide this question on the petition and affidavits in reply. In other cases however it may be difficult to determine whether or not the dispute is bona fide without determining the merits of the dispute itself. In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard."*

The same line of reasoning was adopted by this Board in an appeal from New Zealand, Bateman Television Ltd. v Coleridge Finance Co. Ltd. [1971] NZLR 929 at p.932."

43. After careful consideration of the very helpful arguments of both of the learned counsel in this case, and having regard to the particular circumstances – not least the exceptional circumstances of a debt recorded on the books of the petitioner bank belatedly being said to be ascribable to some other entity – I have no doubt that in this case, and in the exercise of discretion, the rule of practice should be relaxed.

44. I affirm that the Court has jurisdiction – on the *prima facie* showing of the debt as explained above – to hear the petition notwithstanding the dispute (as to whether the debt is in fact owed, the amount and as to the insolvency of GFN) that has been raised on the evidence and direct that that dispute be resolved in the context of the hearing of the petition itself, rather than requiring that it be resolved in the context of a different action.

JUDGMENT ON THE PETITION

45. Having ruled as expressed above, I proceeded to the stage of the actual hearing of the petition on the two grounds stated in it: (i) that having been presented with the statutory demand and having failed to pay the debt GFN is deemed unable to pay its debts and is insolvent and (ii) that further and alternatively, it is just and equitable that GFN be wound up so that there can be an investigation into its affairs by officers of this Honourable Court.

46. However, shortly after having commenced the petition hearing, Mr. Crystal proposed (with the concurrence of Mr. Lowe) that I might shorten these proceedings by adopting the following course: In light of my ruling on *locus standi* and in light of the very wide powers given by section 100 of the Law, I could proceed to hear the petition on the basis of only the just and equitable ground, leaving the insolvency ground unresolved (and available to be revived on appeal, if necessary).

47. As these are two separate and free-standing grounds for a winding-up petition there was no doubt that this could be done as a matter of the exercise of its discretion by the Court determining its own procedure.

48. This approach would involve me having to proceed at least on the *prima facie* basis already decided that account 71472 was indeed nominated in the name of GFN, the respondent (a fact which Mr. Lowe concedes insofar as the account was nominated up until April 2003) as that conclusion is what is minimally required to recognise the Petitioner's standing to petition on either ground. The fact that GFN is shown on the books of the Petitioner to have been the account holder of account 71472 since it was opened in 1996 is surely at least a *prima facie* basis on which to regard the Petitioner as a creditor of GFN for the overdraft sum which is the subject of the petition. Beyond that, I would not however, need to examine the otherwise disputed questions of indebtedness and insolvency, because that examination would not be necessary to establish the just and equitable ground based as it is ultimately upon the Petitioner showing that, in all the circumstances of the case, an enquiry into the affairs of GFN Corporation is necessary and justified in order to resolve the Petitioner's claim.

49. This approach immediately commended itself and was adopted and so I proceeded to hear the petition on the just and equitable ground alone.

50. The material circumstances and evidence in support of the just and equitable ground is unrefuted (save for specific issues identified by Mr. Lowe but none of which, to my mind, fundamentally affects the matter).

51. That material is conveniently described in paragraphs 14-26 of the petition itself and in the skeleton arguments of Mr. Crystal on behalf of the Petitioner, all as verified by the affidavit evidence filed on its behalf by Mr. Fogerty and by documentary exhibits to that affidavit evidence. That material set out in the petition appears under the heading "Need for an Investigation" as follows:

> *"15. Both of the Company and the Petitioner form part of the GFN Group of companies. The Company* ["GFN"] *is the ultimate beneficial owner of the Petitioner.*
>
> *16. The Petitioner is heavily insolvent. As at 30 May 2006, the Petitioner admitted creditors totalled USD107,951,630.15 and a further USD109,374,406.32 of claims had been submitted to the Petitioner's joint official liquidators (the "JOLs") for adjudication.*
>
> *17. As at the date of the Petition realisations of the Petitioner's assets total USD21,994,838.61.*
>
> *18. Including the Petition Debt, the Petitioner's net claims against GFN Group companies total in excess of USD137 million. The Petitioner's recoveries to date as against GFN Group companies*

are slightly in excess of USD60,000, which sum was paid by GFN International Investment Corporation (another Cayman Islands incorporated company) to secure the dismissal of the winding up petition against it in respect of the sum in question.

19. *The failure of these GFN Group companies, including* ["GFN"], *to repay their debts to the Petitioner is the major cause of the depth and extent of the Petitioner's insolvency. Of the Petitioner's claims against GFN Group companies, the Petition Debt is the largest.* [(Here Mr. Lowe QC registered one of his clients' formal objections to the evidence, as an aspect which is, of course, in light of the defence to the petition, not admitted)].

20. *Given that the Petitioner and* [GFN] *were under common management and ultimate control, responsibility for this state of affairs rests with the same persons, including the other common directors of the Petitioner and GFN.*

21. *The Petitioners' audited accounts for the year ending 31 December 2002 were expressed to have been approved by [`GFN's] board of directors on 21 February 2003 acting by Pellerano (as a director of GFN) and Raisa Gil De Fondeur (as secretary of GFN). These accounts give no indication of the extent of the irrecoverable liabilities owed to the Petitioner by the GFN Group companies.*

22. *On 17 August 2006 Pellerano and Juan Filipe Mendoza ("Mendoza") were sentenced to three years imprisonment and to a*

fine of RD$1 million each (approximately USD29,000) by the Dominican Republic Courts. [(Subsequently increased on appeal at least in the case of Pellerano, to eight years imprisonment)]. Mendoza was a director of the Petitioner and has represented the GFN Group generally in its dealings with the Petitioner both before, and since, the Petitioner's winding up.

23. *Pellerano and Mendoza's convictions were based in large part on unauthorised and improper loans they caused Banco Nacional de Credito ("Bancredito") to make to other GFN Group companies, the records of which loans they subsequently falsified and manipulated. Bancredit was treated by the GFN group as the Cayman Islands branch of Bancredito.*

24. *The Dominican Republic Courts found, amongst other matters, that Pellerano and Mendoza manipulated and concealed information regarding the status and extent of Bancredito's loans so as to block and divert the Dominican Superintendency of Banks (the "Superintendency of Banks") from exercising proper supervision over Bancredito.*

25. *The Central Bank and the Superintendency of Banks have also brought a separate penal action against Pellerano and Mendoza in respect of alleged frauds committed by them at Bancredito.*

26. *These matters require investigation by independent liquidators appointed by this Honourable Court.* [The JOLs] *are appropriate persons to conduct such investigation given their existing*

appointment in respect of the Petitioner, a member of the same group of companies as [GFN], and *has the extensive knowledge and understanding of the workings of the GFN Group that they have gained as a result."*

49. The unrefuted aspects (except as otherwise indicated)of its written submissions on which the Petitioner relies are as set out in Mr. Crystal's skeleton arguments at paragraphs 39 – 43 as follows:

39. First, the apparent failure of the Petitioners' statutory accounts and CIMA returns to deal accurate with the petition debt and the rights against the GFN Group generally. For example, returns made to CIMA purported to show the Petitioner as having an excess of assets over liabilities of $12,580,000 at 31 December 2002, $13,508,000 at 31 March 2003 and $15,612,000 at 31 June 2003. It appears that the true financial position of the Petitioner was not reported to CIMA on its returns. Amongst other things, the exposure of the Petitioner to Account 71492 was not referred to in the last three CIMA returns submitted by the Petitioner on 31 December 2002, 31 March 2003 and 31 June 2003. Item 26 in the CIMA return requires the bank to indicate the "Ten largest Market Loans", while Item 28 requires it to set out "Large exposures to individual non-bank counterparties and groups of closely related non-bank counterparties." The Petitioners' returns to CIMA made no reference to the exposure reflected by the overdraft to entities in the GFN Group on Account 71472.

40. *Secondly, the Liquidators have uncovered suspicious transactions on Account 71472 that occurred between late December 2002 and early February 2003.*

In particular:

(1) *Bancredit was obliged to file audited accounts for the year ended 31 December 2002. It was also obliged to file returns with CIMA.*

(2) *Prior to 30 December 2002, Account 71472 was overdrawn in a sum in excess of USD51 million. The extent of that unsecured inter-group debt was a matter highly relevant both to Bancredit's accounts and its CIMA returns.*

(3) *By the end of 30 December 2002, Account 71472 was in credit by USD277,500. By 2 January 2002* ***(sic)****, it was once again overdrawn though in a sum of only about USD600,000. By 3 February 2002* ***(sic)****, the overdraft had increased to in excess of USD60 million.* **[(The reference here should be to 3rd February 2003 when the overdraft is shown at RELF1 (PP33-36 of Mr. Fogerty's 1st affidavit – Vol 4 Tab 8 of his hearing bundles – to have been $60,966,229)].**

(4) *Save for the period from 30 June 2003 to 3 July 2003 (which also coincided with the date for a CIMA return), this was the only period in the 18 months up to the*

appointment of the Controllers on 3 September 2003 that Account 71472 was not substantially overdrawn.

[(In fact, by the date of the intervention of CIM ON 3RD September 2003, the overdraft on Account 71472 stood at over USD96 million)].

41. *This pattern of transfers is in itself suggestive of manipulation in relation to Account 71472, an impression confirmed by an analysis of the specific entries giving rise to the brief absence of an overdraft. It appears that accounts at Bancredit were manipulated to eliminate the overdraft on Account 71472 by using credit balances owed to other customers for the period between the end of December and the beginning of February. In particular:*

(1) The elimination of the overdraft on Account 71472 was achieved by two significant credits on 30 December 2002:

(a) a credit to Account 71472 of USD36,059,033, which was a transfer from an account held by Cap Cana, a customer of Bancredit which was not part of the GFN Group; and

(b) A credit to Account 71472 of USD15,590,000, which was apparently a transfer from Caribbean Energy Corporation ("CAREC"), a linked company in the GFN Group.

(2) On 3 February 2002, following an e-mail from Evelina Ortega, the two credits were reversed by debits in the same

sums, which increased the overdraft on account 71472 to in excess of USD60 million.

42. *Thirdly, the suspicious alteration in the name of the account-holder for Account 71472 in April 2003: see paragraph 32. (By 1 April 2003, at a time when the Petitioner was insolvent, the overdraft on Account 71472 amounted to USD78,448,690. It appears that, at around the end of April 2003, the records of the Petitioner were manipulated to suggest that "Capital" rather than the Company was the holder of Account 71472).*

1. Those involved in the manipulation appear to have wanted to try to replace a debt owed to the Petitioner by GFN, a Group holding company with significant assets, with a debt owed only by GFN Capital, a Panamanian subsidiary of GFN International Investments, which did not have an interest in the other parts of the GFN Group, to the detriment of the Petitioner. The identities of those involved in the manipulation have not yet been discovered by the JOLs.

2. The JOLs have not been able to identify in the Petitioner's records any evidence of an agreement between the relevant parties, including the Petitioner, for the transfer of the obligation represented by the overdraft on Account 71472 to GFN Capital, nor have, the JOLs been unable to identify any commercial rationale from the Petitioner's perspective

for such a transfer, or any consideration provided to it. By contrast, the benefit to the respondent GFN, and its shareholder, the MAP Trust, is plain: it thereby purports to escape a very significant liability.

43. *Fourthly, the criminal conviction of Pellerano in the DR. In short, the DR Judgment describes how Pellerano procured Bancredito to advance sums, deposited at Bancredito by savers to linked entities conducting other businesses in the GFN Group. The audited accounts of Bancredito were manipulated so as to obscure this activity".*

50. Here I must comment briefly on the evidential significance of Mr. Pellerano's conviction.

51. To the extent that the rule in ***Hollington v Hewthorn & Co. Ltd.*** *[1943] KB 587* still applies, it of course, precludes the Dominican judgment operating by way of estoppel, that is, as a binding judgment on the foregoing issues of collusion and manipulation - in these proceedings joined between the Petitioner and the GFN. Not only are the present different parties than those before the Dominican Court when Pellerano was convicted, the factual issues subsumed in the Dominican conviction of Pellerano are widely different from those arising now for determination of the question of winding up of GFN on the ground that it is just and equitable to do so. The fact of the conviction and the findings upon which it was based, are therefore irrelevant to the determination now of the factual basis upon which I might decide to grant the petition to wind up GFN. This, it seems, is all the more so the position in law because the earlier judgment on conviction

arose in criminal proceedings: see for a recent analysis of the surviving applicability of the rule in ***Hollington v Hewthorn*** (above); ***Secretary of State for Trade and Industry v Bairstow [2003] EWCA 321*** (especially at pp11-12).

52. Nonetheless, Mr. Crystal submitted that while I may not regard as proven facts in these proceedings, the factual matters established for the purposes of the conviction of Pellerano (and for that matter, Mendoza) by the Dominican Court in its judgments, I may have regard to them as "background" considerations going to show the need for the enquiry as a basis for the winding up of GFN on the just and equitable ground. Mr. Lowe QC did not argue against that premise and I think it must be correct: There is no question of my attributing to GFN here the misconduct in respect of which Pellerano has been convicted. Rather, because of his common influence or control over the affairs of Bancredito, GFN Capital and the GFN Group itself and other entities within the GFN Group as their principal; his proven fraudulent manipulation of their affairs is clearly a factor in all the circumstances of this case showing the need for an enquiry. This is especially as to the possible extent to which the putative debtor/creditor relationship between GFN and the Petitioner may have been affected.

53. In the wider context of the allegations in this petition, the case authorities have also clearly established that the Court has jurisdiction, in the exercise of its statutory discretion (given here by sections 94 and 100 of the Companies Law), to wind up a company on the basis that an investigation into its affairs is necessary and justified. In the present circumstances, more especially because an investigation into GFN's affairs relating to the petitioner, is justified.

54. Section 100 is itself expressed in very wide terms:

> *"Upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally and may make an interim order or any other order that it thinks just, and any such order shall be published by Government Notice."*

55. In the exercise of the equivalent statutory powers in England, Chadwick J (as he then was) granted a petition to wind up a substantially insolvent UK holding company where the petition was presented by an Australian company member of the same group, on the basis that it was just and equitable that the latter be afforded an investigation into the affairs and dealings of the former: ***Bell Group Finance (Pty) Ltd. (In Liquidation) v Bell Group (UK) Holdings Ltd.*** ***[1996] BCC 505.***

56. As in the present case, not only were the two companies there closely affiliated within the same group, there was also, as here, a prima facie showing of a significant indebtedness owed by the respondent UK holding company to the petitioning Australian affiliate and it appeared that those who controlled their affairs – shortly before it had become apparent that the entire Group of companies was massively insolvent – had granted comprehensive securities over their properties and undertakings in favour of a syndicate of English and Australian banks. The liquidators of the Australian petitioner affiliate sought the investigations in the interests of its creditors, with a view to achieving the unravelling of those securities so as to recover the indebtedness owed by the UK Holding company. Otherwise, the UK Holding company would have had no assets whatsoever against which the indebtedness could be recovered.

57. At page 512 D-E Chadwick J. expressed himself in the following terms addressing the arguments on behalf of the UK Holding company in opposition to the petition:

> *"In my view there is no doubt that the court has jurisdiction to make a winding-up order in circumstances in which the company has no assets and where the only purpose of the order would be to enable an investigation to take place into the company's affairs. That must follow from the legislation itself. Section 125(1) of the Insolvency Act 1986 to which I have already referred, enjoins the court not to refuse a winding up order on the ground only that the company has no assets. Lack of assets cannot by itself be a ground for refusing an order if there is some other reason to make one."*

58. Chadwick J proceeded to consider the earlier cases (including 19th century cases decided at a time when the English insolvency regime was based on legislation expressed in terms similar to our section 100).

59. In this regard in *In Re Krasnapolsky Restaurant & Winter Garden Company [1892] 3 Ch 174* Vaughan Williams J. had seminally expressed the principle in these terms:

> *"If the circumstances are such as to suggest that an investigation into the circumstances of the company, under the Companies (Winding Up) Act 1890, will be likely to turn out to the advantage of the unsecured creditors; that alone is a sufficient ground for making a compulsory order. In other words, if the circumstances*

appearing by affidavit are sufficient to shew, prima facie, that an investigation into the formation or promotion of the company or the issuing of debentures or shares is required, that alone is an advantage to the unsecured creditors. They are the persons who have the greatest interest in such an investigation being held, and I believe it was in their interest that the Legislature intervened."

60. This principle – that the need for an investigation into the affairs of a company can be a free-standing basis for the making of a winding up order on the just and equitable ground – is already recognised in Cayman law: see ***In re Parmalat Capital Finance*** *2006 CILR 171, 179 (para. 18),* per Henderson J.

61. That liquidators should have the power to investigate as widely as the circumstances may require is also, it should be noted, a matter recognised in the statute itself. See section 127 of the Companies Law. And ***In Re Pantmaenog Timber Co. Ltd.*** *[2004] 1 AC 158* the House of Lords recognised the wide ambit of the similar statutory powers conferred on liquidators in the United Kingdom as including "the taking of investigations into the causes of their companies failure and the conduct of those concerned in its management or affairs."

62. It is in furtherance of this statutory power and remit that the JOLs say that the petition to wind up GFN should be granted in the interests of the Petitioner (and ultimately its depositors) as creditors of GFN, as well as in the public interest in the Cayman Islands that such an investigation should take place in circumstances such as those presented here.

63. I am satisfied that in the present case GFN should be wound up.

64. It is, in my view, essential in the interests of the creditors of GFN (not only the Petitioner, but all creditors, given that any order made for winding up shall operate collectively "in favour of all creditors and all contributors of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory" – section 96 of the Law) that an investigation into the affairs of GFN be conducted.

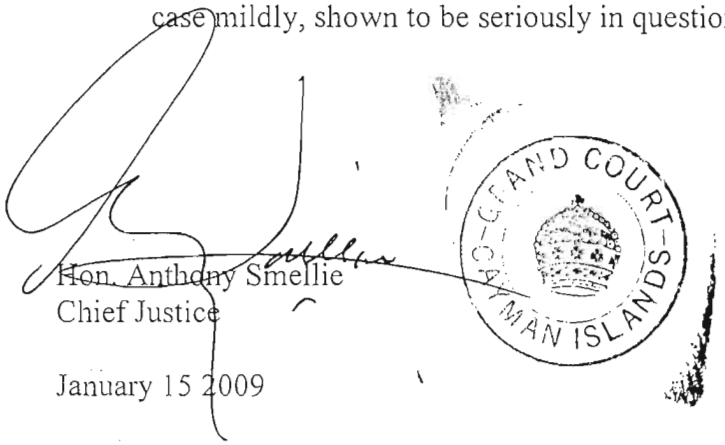
65. This, I accept, is also in the public interest of the Cayman Islands as both the place where GFN was incorporated and where the Petitioner was allowed to conduct business, with the benefit of a license granted under the Cayman Islands laws and subject to the regulation of CIMA.

66. As Mr. Fogerty explained in his affidavit in support of the petition, the relationship between the Petitioner and GFN "cries out for a thorough investigation", as the Petitioner appears to have been and is a conduit for the criminal extraction of depositors' funds by way of massive overdrafts granted to related parties, for use in the other businesses of the GFN Group.

67. For all the foregoing reasons, I grant the petition to wind up on the basis that it is just and equitable to do so.

68. In passing and in conclusion, I note that there is no proposal on behalf of the shareholders of GFN, that I might appoint inspectors (as a less drastic measure than winding up) to look into GFN's affairs for the sake of the creditors of the Petitioner and to report to the Court. See section 64 of the Law and for an example of an exercise of the power at the request of shareholders: ***In Re Fortuna Development Corporation*** ***2004-05 CILR 197.***

69. While I express no view whatsoever here as to how such a proposal would have been received, I feel obliged to note, in the circumstances of this case, that that is the very least the Court and concerned creditors might expect by way of a response from shareholders who have a bona fide interest in establishing the true status of these complex inter-company transactions, which are now, to state the case mildly, shown to be seriously in question.



Hon. Anthony Smellie
Chief Justice

January 15 2009