

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 186 OF 2016 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

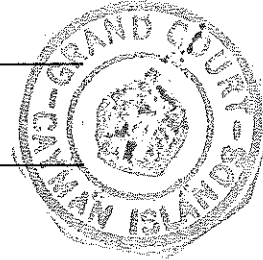
AND

IN THE MATTER OF NATURAL DAIRY (NZ) HOLDINGS LIMITED

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JUDGMENT

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**Appearances:**

**Mr. Chris Levers and Ms Jessica Bush of Mourant Ozannes on behalf of the Company**

**Ms. Katie Pearson and Ms Gemma Lardner of Harneys on behalf of the Petitioner**

1. This is my outline judgment on the summons (the *Dismissal Summons*) of Natural Dairy (NZ) Holdings Limited (the *Company*) dated 26 January 2017 seeking, *inter alia*, an order that the winding-up petition (the *Petition*) issued by Xiamen Hengxing Group Co Ltd (the *Petitioner*) be dismissed. I have not yet had an opportunity to prepare a full judgment but wish, in view of the urgency of this matter, to provide the parties with a note and outline of my decision as soon as possible. If either of the parties wish me to prepare and deliver a full judgment I shall be happy to do so.
2. Mr. Levers on behalf of the Company submitted as follows:
  - (a). the Petitioner had failed to comply with the statutory requirements contained in section 94(3)(b) of the Companies Law (2016 Revision) (the *Companies Law*).
  - (b). as a result the Petition was a nullity. The Court should declare the Petition to be a nullity and grant consequential relief including an order discharging the

appointment of the joint provisional liquidators (the *JPLs*), who I had appointed on 22 December 2016.

(c). even if the Petition was not a nullity, it should still be struck out and dismissed in view of the failure to comply with the statutory requirements contained in section 94(3)(b) of the Companies Law:

(i). Mr. Levers noted that while the Petitioner had filed evidence purporting to show that Sky Upright Enterprises Limited (*Sky Upright*) and Mr Zhan King (*Mr King*) were both contributories who were willing and able to be substituted as petitioners no summons had been issued or was before the Court seeking a substitution of other contributories as petitioners;

(ii). in any event the Court had no jurisdiction to make an order for substitution on a contributories petition; and

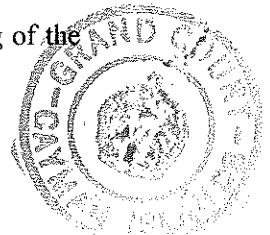
(iii). and even if it did, the Court should not make a substitution order in the present case.

3. Ms Pearson on behalf of the Petitioner submitted as follows:

(a). the Petitioner had standing to present the Petition and had not failed to comply with the statutory requirements in section 94(3)(b) of the Companies Law.

(b). even if the Petitioner did not have standing and the Petition had been presented in circumstances where the requirements of section 94(3)(b) had not been satisfied, the Petition was not a nullity.

(c). while the Court had a discretion to strike out or dismiss the Petition, it should not do so here. This was because the Court had the power to substitute Sky Upright and Mr King (the *Supporting Petitioners*) and in the circumstances of this case should do so. Ms Pearson accepted that the Court was likely to make an order for substitution conditional on the filing of the



necessary application seeking a substitution order by the Supporting Petitioners.

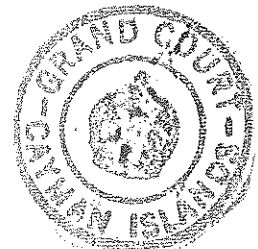
- (d). if the Court is not prepared to order that the Supporting Petitioners be substituted as petitioners, the Court should grant permission to the Petitioner to amend the Petition to refer to and rely on its asserted claims and rights against the Company as a creditor.

4. Accordingly the following issues arise:

- (a). did the Petitioner have standing to present the Petition and were the requirements of section 94(3)(b) of the Companies Law satisfied (the *Section 94(3)(b) Point*)?
- (b). if not, was the Petition a nullity (the *Nullity Point*)?
- (c). if not, does the Court have the power to substitute the Supporting Petitioners as petitioners (the *Jurisdiction to Order a Substitution Point*)?
- (d). if the Court does have such a power, should it do so and on what terms (the *Exercise of the Discretion to Substitute Point*)?
- (e). if the Court does not have the power to substitute the Supporting Petitioners as petitioners, does it have the power to amend the Petition to allow the Petitioner to rely on its rights and position as a creditor of the Company (the *Power to Amend Point*)?
- (f). what order as to the costs of the Dismissal Summons should the Court make (the *Costs Point*)?

5. For the reasons summarised below I have reached the following conclusions on each of these issues:

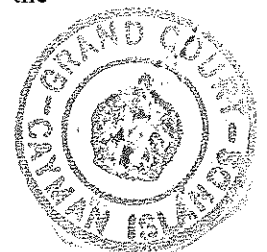
- (a). the Section 94(3)(b) Point: the Petitioner did not have standing to present the Petition.



- (b). the Nullity Point: the Petition was not a nullity.
- (c). the Jurisdiction to Order a Substitution Point: the Grand Court does have an inherent jurisdiction to order the substitution of a petitioner on a contributory's petition.
- (d). the Exercise of the Discretion to Substitute Point: the Supporting Petitioners should be substituted as petitioners provided that they file a summons for substitution and for the necessary and appropriate consequential relief before 5pm Cayman time on Monday 27 February.
- (e). The Power to Amend Point: since this does not arise and need to be dealt with, I do not consider the point further.
- (f). the Costs Point: I order that the Petitioner pay the Company's costs of the Dismissal Summons on the standard basis.

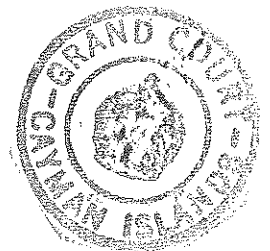
6. As regards the Section 94(3)(b) Point:

- (a). the evidence regarding the manner in which the Petitioner has held its shares in the Company is incomplete and unsatisfactory.
- (b). Mr. Lap, in his Fourth Affidavit, says that the Petitioner acquired in December 2009 bonds (bond C) issued by the Company in the amount of HK \$300,000,000 and that these bonds were held by a nominee for the Petitioner, namely ICBC (Asia) Nominee Limited (*ICBC*). In or about November 2010, the Petitioner instructed ICBC to convert the bond C into shares in the Company, which it did. Mr Lap says that the Petitioner "understood that it held 300,000,000 shares in the Company" (the *Shares*). Subsequently, in January 2012 the Petitioner (in Mr Lap's words) "took over the management of the Shares from ICBC" and on 30 January share certificates were issued to the Petitioner in its own name (the *Share Certificates*). Mr Lap says that the Petitioner has been able to locate, and has exhibited copies of, Share Certificates relating to 250,848,000 of the Shares. Presumably the Petitioner was registered and recorded on the



register of members on and from 30 January 2012 although there is no evidence on this.

- (c). Then, again using Mr Lap's words "In 2014, the Petitioner asked that ICBC take over management of the Shares once again for administrative reasons. We understood that [the Petitioner] would still be the shareholder of the Company and did not appreciate that this affected the Petitioner's status as member of the Company."
- (d). Mr. Lap also says in his Fourth Affidavit that the Petitioner had "never seen a copy of the register of members for the Company" and was unaware that it did not appear on it.
- (e). The Company's evidence, in the First Affidavit of Wong Man Ting, refers to the "... the Company's register of members held by its share registrar Computershare Hong Kong Investor Services Limited" (*Computershare*) and a copy of the register as at 31 December 2016 is exhibited which shows that the Petitioner is not recorded or registered as a member but ICBC is. The Petition was, of course, presented before that date, on 16 November, so that the copy of the share register filed by the Company is not evidence of the position at the date of the presentation of the Petition. Having said that, the Petitioner has not argued that it was registered in the members' register on the date on which the Petition was issued.
- (f). I assume, based on the Company's evidence, that the register of members is kept in Hong Kong (with and through Computershare) in accordance with section 44(1) of the Companies Law. Since the Company is an exempted company there is no right for a member to inspect the register (see section 44(2) of the Companies Law).
- (g). the Company pointed out to the Petitioner for the first time that it was not registered as a member by a letter from its attorneys, Mourant Ozannes, dated 24 January 2017 (in which Mourant Ozannes invited the Petitioner to confirm by noon on 25 January that it would agree to the dismissal of the Petition).



(h). accordingly the position appears to be that while the Petitioner is likely to have been registered as a member during the period from 30 January 2012 until 2014, it ceased to be registered from a date in 2014 so that at the time of the presentation of the Petition the Petitioner was not registered. Rather its nominee ICBC was registered in the members' register and the Petitioner only held a beneficial interest in the Shares.

(i). the authorities establish that a beneficial owner of a share is not a contributory (see *Hannoum v R Limited and Banque SYZ Company Limited* [2009] CILR 124 and *Kelly v Mawson* (1982) 6 ACLR 667).

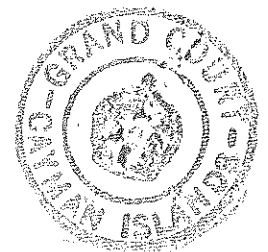
(j). the Petitioner is probably nonetheless a contributory as a past member but even if that were so the requirements of section 94(3)(b) of the Companies Law still need to be satisfied. That section states that:

*a contributory is not entitled to present a winding-up petition unless .. the shares in respect of which he is a contributory, or some of them, either were-*

*(i) originally allotted to him, or have been held by him, and registered in his name for a period of at least six months immediately preceding the presentation of the petition ...*

(k). the Petitioner did not argue, and on the evidence filed it appeared not to be open to the Petitioner to argue, that it was the original allottee of the Shares. The Shares appear to have been allotted to ICBC (since the bonds were held by ICBC, it and not the Petitioner appears to have acquired, on the exercise of the right to convert the bonds, the unconditional right to be included in the Company's register of members).

(l). Ms Pearson did argue that section 94(3)(b) should be interpreted purposively so as to limit its application to those cases that were within the mischief of the section, namely to prevent vulture funds or other parties acquiring shares with a view to presenting a petition immediately or shortly after the acquisition. She also invited me to follow the wide approach taken in a number of cases dealing with the meaning of members in the context of members' schemes of arrangement. However, I am not persuaded that either



of these approaches is justified and permits me to depart from what seems to me to be the settled approach requiring petitioners to be registered members.

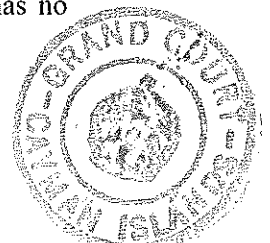
- (m). accordingly, it seems to me that the Petitioner is unable to satisfy the requirements of section 94(3)(b) and did not have standing to present the Petition at the time when the Petition was presented.

7. As regards the Nullity Point:

- (a). Mr Levers submits that since the Petition was issued in breach of section 94(3)(b) it is a nullity and void (so that, citing Lord Denning in *MacFoy v United Africa Co Ltd* [1961] 3 WLR 1405 at 160, everything done in support of the Petition is bad and incurably bad including the appointment of the JPLs).
- (b). he relies primarily on *Re Pritchard* [1963] Ch 502 and the classes of nullity identified in that case by Upjohn LJ. He said this:

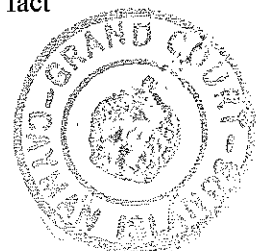
*The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see eg, Whitehead v Whitehead (otherwise Vasbor); (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see eg, Finnegan v Cementation Co Ltd.*

- (c). Mr Levers relies on Lord Justice Upjohn's third category. He submits that presenting a winding-up petition in circumstances where the requirements of section 94(3)(b) of the Companies Law are not satisfied involves a failure to comply with a statutory requirement of the kind referred to by Lord Justice Upjohn.
- (d). he also argues that while the problem identified in and the effect of *Re Pritchard* were avoided by the introduction of Order 2, r.1 of the Grand Court Rules (which are in the same terms as O.2, r.1 of the Rules of the Supreme Court formerly in force in England and Wales), O.2, r.1 has no



application to winding-up proceedings and the present case - see Order 1, r.4 of the Companies Winding Up Rules (*CWR*), Order 1, r.2(4) of the Grand Court Rules and the discussion of the point in the judgment of Chadwick P in *HSH Cayman I GP Limited* [2010] (1) CILR 114 at 9-12.

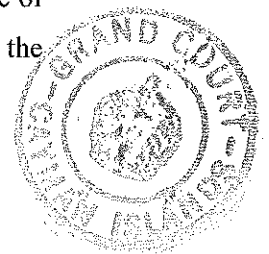
- (e). while I accept (following *HSH Cayman I GP Limited*) that reliance cannot be placed on Order 2, r.1 of the Grand Court Rules the question remains whether the failure in this case is of a kind that results in the Petition being a nullity. Mr Levers is unable to cite any authority which establishes that the presentation of a winding-up petition in circumstances where the requirements of section 94(3)(b) are not satisfied results in the petition being treated as a nullity and is within the principle contained in, and an example of case falling within, Lord Justice Upjohn's third category.
- (f). indeed all of the authorities cited to me, including at least once case relied on by Mr Levers, at least assume that a petition presented in these circumstances is not a nullity.
- (g). For example, *Re Pimlico Capital Ltd, TFB Mortgages Ltd v Pimlico Capital Ltd* [2002] EWHC 878 (Ch). In this case reliance was placed on the English equivalent of section 94(3)(b) (being section 124(2) of the Insolvency Act 1986). TFB Mortgages (*TFB*) had presented a contributories petition against Pimlico and Pimlico argued that that TFB was not a shareholder and therefore "could not meet the threshold [set by section 124(2)]" (paragraph 23 of the judgment). Lawrence Collins J found that TFB had indeed failed to comply with the requirements of section 124(2) because TFB had never been a registered shareholder and that TFB should be struck out as the petitioner (he then went on to decide that another shareholder should be substituted as petitioner, an aspect of the decision I shall return to shortly). There was no suggestion in the case, either from Pimlico or from the learned judge, that the effect of a failure to comply with section 124(2) was to make the petition a nullity. Mr Levers says that the nullity point was never argued and therefore the case is not authority for the proposition that a failure to comply with section 94(3)(b) does not result in the petition being a nullity. It is clearly right that the point was not specifically addressed but the fact





that it was not raised (either by counsel for Pimlico or the learned judge) strongly suggests that it was not regarded as a good or runnable argument.

- (h). Mr Levers also relies on *Re Quickdome* (1988) 4 BCC 296. But this was another case in which a contributory was held to have no standing to petition for winding-up because no shares had been registered in her name but the nullity point was not raised. The petition was struck out but was not declared to be void and a nullity.
- (i). as a matter of principle, I accept that there clearly are cases in which proceedings issued without complying with a statutory requirement can result in the proceedings being a nullity. But I do not consider that a petition presented without compliance with section 94(3)(b) is one of them. *Re Pritchard* was a different kind of case where there was a fundamental failure affecting the process by which the proceedings were issued – they were issued in the wrong court registry. I have also considered the English Court of Appeal's decision in *Finnegan v Cementation Co Ltd* [1953] 1 Q.B. 688 which is cited by Lord Justice Upjohn as authority for and an example of his third category but it seems to me that this case is distinguishable. In this case the action was commenced in due time, but it was in the wrong form since the plaintiff sued in the wrong capacity. She did not have title to sue so that her writ had to be set aside. I can see that there is some force in the argument that a person who issues a winding-up petition when not a contributory is similarly to be regarded as issuing proceedings when having no capacity or not being authorised to do so and that section 94(3)(b) establishes a jurisdictional condition (and not merely a procedural requirement) which must be satisfied in order for a petitioner to have the right to petition. However that is not the way in which the section has been read and interpreted and it seems to me that, having regard to the modern practice of limiting cases in which proceedings are treated as a nullity (and I note the reluctance of members of the Court of Appeal in *Finnegan* to reach the decision they did which they considered was required by earlier authority), it would be wrong to extend the rule to this type of case.
- (j). I would also note that in the context of creditors' petitions where the issue of the standing of the petitioner as a creditor is challenged, for example on the



basis that the debt on which the petition is based is bona fide disputed, it has never been suggested that the petition is a nullity (although I recognise that there is, of course, some debate as to the extent to which the applicable rules are rules of law or practice). In these cases the petitioner is held not to have standing to present the petition; nonetheless the petition is not treated as a nullity. So for example in *Stonegate Securities Ltd v Gregory* [1980] Ch 576 (petition founded on a debt which is disputed in good faith and on substantial grounds) (Buckley LJ) said:

*In my opinion a petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224 (1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings.*

8. As regards the Jurisdiction to Order a Substitution Point:

- (a). Mr Levers submits that there is no jurisdiction under the CWR to substitute a petitioner in the case of a contributory's petition and that the Court does not have inherent jurisdiction to order such a substitution.
- (b). Mr Levers relies on the fact that the only reference to substitution in the CWR comes under Order 3 Part II, which is explicitly confined to creditors' petitions, and provides as follows:

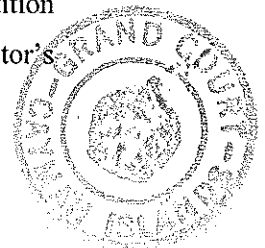
***Substitution of Petitioner (O.3. r.10)***

*(1) This Rule applies where a creditor petitions and is subsequently found not to have been entitled to do so or where the petitioner –*

- (a) fails to advertise his petition;*  
*(b) consents to his petition being withdrawn;*  
*(c) fails to appear on the hearing of his petition;*  
*(d) allows his petition to be adjourned or dismissed; or*  
*(e) appears, but does not apply for an order in terms of the prayer of his petition.*

*(2) The Court may, on such terms as it thinks just, substitute as petitioner any creditor who in its opinion would have a right to present a petition and who is desirous of doing so.*

- (c). There is no inherent jurisdiction, Mr Levers says, because the CWR's failure to make provision for substitution in the context of a contributory's petition must be taken to be a deliberate choice to confine substitution to a creditor's



petition so that the use of the Court's inherent jurisdiction to permit a substitution in the case of a contributory's petition would be inconsistent with the CWR and therefore impermissible. He relied on the decision of the Cayman Court of Appeal in *HSH Cayman I GP Limited* (discussed above) for the proposition that the Grand Court is only entitled to invoke the inherent jurisdiction (to fill a lacuna left by the CWR) where doing so would be consistent with the scheme established by the CWR.

- (d). Ms Pearson submits that the Court does have inherent jurisdiction to make an order for substitution on a contributory's petition. She submits that the Grand Court has the inherent power, in proceedings governed by the CWR, to control its own process and that this power can be exercised to supplement the CWR in a way that is not inconsistent with their overall scheme. She points out that the inherent jurisdiction has been used to permit amendments to petitions, order security for costs and make representative orders. In her submission it does not follow from the fact that the CWR are silent as to a particular power that the granting of such a power to the Court has been considered and rejected by the legislature. She too relied on the Cayman Court of Appeal's judgment in *HSH Cayman I GP Limited*.
- (e). Ms Pearson also relied on the fact that despite the lack of any specific provision authorising it to do so, it was the practice of the Grand Court prior to the introduction of the CWR to allow substitution on a contributory's petition. She referred (in addition to the English case of *Re Pimlico* mentioned above) to and relied on *RCB and Six Others v Thai Asia Fund Limited* 1996 CILR 9 (*RCB v Thai*) in which Smellie J (as he then was) dealt with an application by the respondent to strike out a contributory's petition as an abuse of process. She submits that although it does not form the crux of the judgment, it is clear that substitution on a contributory's petition had clearly been allowed by Smellie J on an earlier application. Smellie J decided that the Grand Court had jurisdiction to strike out the petition either under Order 18, r.19 of the Grand Court Rules (as then drafted) or under its inherent jurisdiction.
- (f). *RCB v Thai* was decided in December 1995. This was obviously before the introduction of the CWR in 2009. To be sure that the rules that were in force



at that time were clearly understood and that there was no dispute between the parties on the point I requested at the end of the hearing that Harneys and Mourant Ozannes agree and file a note (the *Joint Note*) on the state of the law applicable to winding-up proceedings in the Cayman Islands prior to the introduction of the CWR, which they did and for which I am most grateful.

(g). In the Joint Note Harneys and Mourant Ozannes noted that:

(i). *At the time that RCB v Thai was decided (i.e. December 1995), by virtue of Order 102, Rule 17 of the GCR, 1995 Revision, the English the Insolvency Rules 1986 (SI 1986/1925) (IR) IR applied as follows:*

*'Unless and until any rules are made under Section 173 of the [Companies Law (1995 Revision)], all applications to the Court made pursuant to Sections 48, 78, and Part V of the Law and all proceedings concerning or arising out of the liquidation of any company shall, so far as practicable, be made in accordance with the Insolvency Rules 1986 (SI 1986/1925), insofar as such rules are not inconsistent with the Law or such other rules as may be applied to the proceeding in question.*

(ii). *In turn, the IR contained the following relevant provisions:*

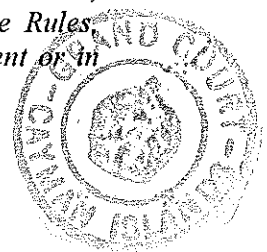
*IR rule 7.51: 'Except so far as inconsistent with the Insolvency Rules, the Rules of the Supreme Court and the practice of the High Court apply to insolvency proceedings in the High Court, and the County Court Rules and the practice of the county court apply to insolvency proceedings in a county court in either case with any necessary modifications'; and*

*IR rule 7.55: 'No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court!'*

(iii). *Further, as recognised in [HSH Cayman I GP Limited], prior to the introduction of the CWR, the Grand Court Rules (GCR) also applied to insolvency proceedings as their application was not excluded. As such, the Grand Court had recourse to Order 2 rule 1 of GCR as well.*

*0. 2, r. 1(1) provides:*

*"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules whether in respect of time, place, manner, form or content or in*

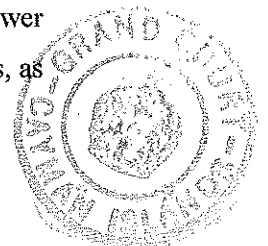


*any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein ..."*

- (h). Accordingly, at the time of Smellie J's decision in *RCB v Thai* Order 2 rule 1 did apply and the Grand Court Rules more generally (save where excluded) including the rules regulating amendments applied to winding-up proceedings in general and a contributory's petition in particular. To that extent the applicable procedural law was different from that which applies now and the precise basis on which the decision to substitute was made is not available I am unable to place great weight on this decision.
- (i). Ms Pearson in addition relied on the judgment of Henderson J in the *Hannoun* case (see above) in which he said:

*"A winding-up order is discretionary. If, for some reason, the petitioner can no longer maintain the action, the court is at liberty to substitute the name of another creditor or contributory as petitioner. These considerations serve to illustrate the distinct nature of winding up proceedings which, although brought in the name of a single petitioner, are really being advanced in the interest of the creditors or contributories as a whole."*

- (j). Ms Pearson also relied on the dicta of Jones J in *HSH Cayman I GP Limited* [2010] (1) CILR 148 regarding the nature and scope of the Court's inherent power (this being a case in which Jones J held that the proposition that the Grand Court did not have an inherent power to permit an amendment to a winding-up petition was unarguable).
- (k). Taking all these arguments and authorities into account, it seems to me that the Grand Court does have an inherent power to order the substitution of a contributory in the case of a contributory's petition. Doing so is not inconsistent with the scheme or requirements of the CWR. It is true that the CWR (and the Insolvency Rules) do not make provision for such a substitution but there is no basis for concluding that the omission was the result of a decision to preclude or prevent substitution. There is no reason in principle or policy for doing so. It seems to me to be more likely that the omission was the result of there being less of a need for and fewer substitutions in the case of contributories' petitions. In creditors' petitions, as



is noted in Derek French's excellent volume *Applications to Wind Up Companies* (3<sup>rd</sup> edition 2015, page 251) prior to the introduction in 1893 of the statutory power to substitute in the case of a creditor's petition:

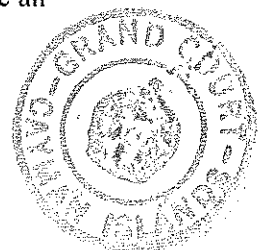
"a petitioning creditor was said to be *dominus litus* and entitled to ask for the petition to be dismissed at the hearing despite other creditors appearing to support it. The company could for a protracted period avoid winding up by paying petitioning creditors one by one."

Clearly this problem does not arise in the same way in cases involving a contributory's petition. Contributories cannot just be paid off and by virtue of being shareholders have a longer term and different relationship with the company than creditors. Nor does a contributory's petition give rise to the same issue as arises in the case of a creditor's petition based on inability to pay debts and insolvency where there is a need to maintain the original petition date for the purpose of fixing and triggering the time period for reviewing antecedent transactions. So in many cases of petitions by contributories substitution may not be a substantial practical benefit and a new petition presented by another contributory may be sufficient. But the fact that there were reasons why substitutions were frequently needed in cases of creditors' petitions and that substitutions were often not needed in the case of contributories' petitions does not require the Court to conclude that they are never permissible.

- (l). The power to substitute a new petitioner (and order the making of consequential amendments to the petition) seems to me to be within the scope of the Court's inherent power to regulate its own procedures and a necessary and useful power, in appropriate circumstances, to facilitate the efficient and cost-effective management of the proceedings (in a just, economical and efficient manner). There is nothing in the CWR with which such a power is inconsistent.

9. As regards the Exercise of the Discretion to Substitute Point:

- (a). Having decided that there is jurisdiction to order the substitution of contributories the question arises as to whether I should in this case make an



order substituting the Supporting Petitioners and ordering the necessary consequential relief including amendments to the Petition.

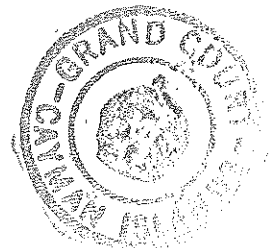
(b). Ms Pearson refers to the judgment in *HSH Cayman I GP Limited* 2010 (1) CILR 114 in which the Cayman Court of Appeal considered whether Foster, Ag. J, had erred in exercising his discretion under the Court's inherent jurisdiction to waive strict compliance with the CWR. It was argued that the acting judge had failed to consider why in that case there had been non-compliance with the CWR and whether the failures had caused any prejudice to any interested parties. The Court of Appeal held that the acting judge had fallen into error. The correct approach in a case in which a party seeks to be relieved from failure to comply with procedural rules was that the party must provide some reason why the Court should exercise its discretion in his favour. The rules must generally be obeyed and there must be some good reason why the Court should grant relief from a failure to do so. In that case there had been a "cavalier disregard [by the petitioner] of its obligations under the [CWR]."

(c). Ms Pearson submitted that:

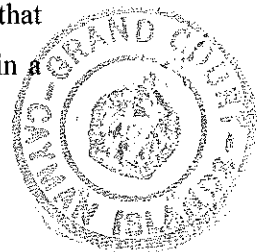
53. *As required by the Court of Appeal in HSH Cayman (CA), the Petitioner has explained why there has been noncompliance with the provisions of the Companies Law. The Petitioner has made an innocent mistake, which was understandable in the circumstances and exacerbated by the inaccurate reporting of the Company, who also failed to identify the mistake until more than 2 months after being served with the Petition.*

54. *There is no prejudice to the Company. The Petition is supported by a substantial number of shareholders (indeed, by the majority of independent shareholders), any one of which can be substituted as petitioner, and two of which have expressed their willingness to be so substituted. The Company has accepted, and the Court has found, that there is a prima facie case for winding up. The identity of the Petitioner is not material to that finding.*

55. *On the other hand, given the serious findings on which the Court's decision to appoint JPLs was based, it is clearly in the interests of the Company's creditors and contributories as a whole that the provisional liquidation should continue to prevent the further dissipation of the Company's assets.*



- (d). Mr Levers submitted that in all the circumstances it would be wrong to permit the requested substitution. The Petitioner had been seriously at fault in failing to verify its status as a registered member of the Company and there was no adequate excuse for such a failure. Furthermore he noted that the Petitioner was aware of statements made by the Company referring to the Petitioner as a beneficial owner of the Shares and that Mr Lap, in the exhibit to his first affidavit, had replicated a table from the Company's 2014 annual report but removed a column which had been included in the original in which the Petitioner was identified as a beneficial owner of the Shares. He also relied on the considerable prejudice which the Company had suffered in having to deal with and respond to an improperly presented petition and also to the effects (legal and commercial) of what he argued was the improper appointment of the JPLs.
- (e). I have carefully considered all these matters and arguments and concluded that on balance it is appropriate to permit the Supporting Petitioners to be substituted provided that the Petitioner and they make and lodge with the Court before 5pm Cayman time on Monday 27 February an application for substitution seeking the necessary orders and consequential relief and provide an undertaking in the same terms as was provided by the Petitioner with respect to the appointment of the JPLs. The consequential relief will need to include an application for the Supporting Petitioners to take over and be substituted as applicants in the application for the appointment of the JPLs.
- (f). I must say that I treat as serious the Petitioner's failure to verify in advance of presenting the Petition its (and Mr Lap's failure before swearing his first affidavit to check the Petitioner's) status as a registered member and to establish that the Petitioner had standing to present the Petition. The Petitioner appears to have been aware of the references to it being a beneficial owner and even if, as is suggested, the Petitioner's management did not appreciate the legal significance of this they had the opportunity to obtain and should have obtained legal advice on the issue. However, I note the evidence filed on behalf of the Petitioner to the effect that the error was not deliberate and was based on a genuine misunderstanding and to some extent on confusions caused by documents prepared by the Company. I also accept that it was probably not easy in the circumstances for the Petitioner to obtain a





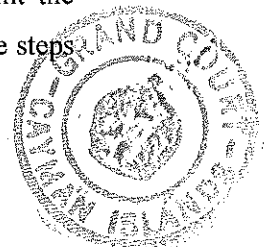
copy of the Company's register (and of course the Petitioner may well not have been entitled to inspect the register in Hong Kong). I also take into account the fact that the Petitioner has been a beneficial owner of the Shares since 2010 and was for approximately two years probably a registered member of the Company.

- (g). I have taken into account the impact on of the Petition on and prejudice to the Company. I note that the Company took until 24 January to raise the issue with the Petitioner and could, had it taken the trouble to check its own register of members, have raised the issue immediately after service of the Petition. So the Company cannot seriously complain of the effects of the Petition and the appointment of the JPLs on its position as regards actions taken and orders made before that date. Furthermore, the evidence relied on by the Petitioner in its application for the appointment of the JPLs remains unaffected by the issue over its standing and it is clear that the grounds on which I concluded that a winding-up order was likely to be made and that it was appropriate to appoint provisional liquidators continue to exist. The Company has not sought to argue to the contrary. It seems to me that even if I were to strike out the Petition and leave the Supporting Petitioners to present a new petition, the JPLs appointment would have been valid and effective pending an order to discharge their appointment and I would have then needed to, and would have, made a new order appointing them with their appointment to take effect immediately following their discharge. By permitting the substitution of the Supporting Petitioners I am simply avoiding the need for a new appointment of the JPLs and the possible practical problems that might arise for the JPLs in explaining to third parties what the effect was of their discharge and new appointment.

10. In these circumstances I do not need, and propose not, to deal with the Power to Amend Point.

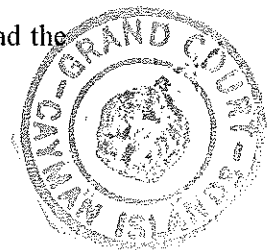
11. As regards the Costs Point:

- (a). I have held that the Petitioner did not have standing to present the Petition but that the Court has and will exercise an inherent jurisdiction to permit the Supporting Petitioners to be substituted as petitioners, provided that the steps



I have outlined above are taken before 5pm Cayman time on Monday 27 February (or such other time as I may direct).

- (b). in his written submissions before the hearing of the Dismissal Summons, Mr Levers requested the Court to order that the Company's costs in connection with the Dismissal Summons be paid by the Petitioner on an indemnity basis and that the costs are taxed forthwith. After circulation of the draft of this judgment the Petitioner requested that it, and I ordered that the Petitioner, be permitted to file written submissions on the Costs Point which it did. Ms Pearson argued that the Court should order that since it had succeeded on the Jurisdiction to Order a Substitution Point and the Exercise of the Discretion to Substitute points costs should be awarded in its favour or, in the alternative, that no order be made as to costs.
- (c). I have decided that in the circumstances the Petitioner should pay the costs of the Company in relation to the Dismissal Summons on the standard basis and that taxation should not be expedited.
- (d). while the hearing of the Dismissal Summons dealt both on the one hand with the Section 94(3)(b) Point and on the other hand the Jurisdiction to Order a Substitution Point and the Exercise of the Discretion to Substitute points, and I held in favour of the Petitioner on the last two issues, all the issues arising on the Dismissal Summons related to or resulted from the Petitioner's lack of standing and the first issue, on which I held in favour of the Company. Furthermore and importantly, while the Petitioner's failure (explained above) was not so serious as to preclude the granting of relief and the substitution of other contributories (or an indemnity costs order), I do regard its failure to check and verify that it had standing to petition as serious and consider that it must accept the costs consequences of such a failure.
- (e). the Company has asked for an order that the Petitioner pay its costs on an indemnity basis (the Company was seeking its costs not only in relation to the Dismissal Summons but also of the Petition which, of course, it argued was a nullity or should be struck out). On balance I do not think that an order for indemnity costs is appropriate. This is in part because the Company had the



ability to raise the issue immediately on being served with the Petition so that it could have been dealt with at the first hearing of the Petition. It is also in part because the evidence suggests a genuine misunderstanding on the part of the Petitioner rather than deliberate wrongdoing.

- (f). nor do I consider that taxation should be expedited. The Petitioner will even after substitution remain entitled, if a winding-up order is made, to its costs of presenting the petition and, possibly, its participation in other applications and should not be deprived of the right and opportunity to set-off its liability under this costs order against other costs orders made in its favour.

Dated this 2<sup>nd</sup> March 2017



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**THE HON. JUSTICE SEGAL  
JUDGE OF THE GRAND COURT**

