IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 138 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF TRINA SOLAR LIMITED

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL COSTS DECISION

Introduction

1. This is my judgment on the summons dated 11 August 2017 (the ***Costs Order Leave Summons***) issued by Trina Solar Limited (the ***Company***) seeking leave to appeal to the Court of Appeal paragraph 2 of my order dated 8 August 2017 (the ***Costs Order)*** ordering that the Company pay the costs of Maso Capital Investments Limited and Blackwell Partners LLC – Series A (the ***Petitioners***) on the standard basis (to be taxed if not agreed) of both a winding up petition presented by the Petitioners on 7 July 2017 ***(Petition)*** and the Company's summons to strike out the Petition dated 10 July 2017 (the ***Strike Out Application***).

2. The reasons for my decision were set out in my judgment dated 25 August 2017 (the ***Judgment***) (the Judgment had in fact been issued, circulated and approved by 4 August and the Costs Order Leave Summons was issued a week later).

3. The Company is seeking leave to appeal my costs order. This was made after the Company had paid the petition debt and my decision that in consequence the Petition should be struck out (or dismissed – dismissal is probably the better description). The usual order in such circumstances is that the company should pay the petitioner's costs of the petition (and any interim application unless there is good reason to the contrary) (see French *Applications to Wind up Companies* (3rd ed., 2015) at paragraph 5.192 and the authorities there cited).

In the present case, the question arose as to whether the Company had been entitled to an order striking out the Petition (on the basis of the grounds on which it had sought such an order). If it had been, then it would be able to say that from a costs perspective it should be treated as having succeeded and therefore that it should be paid its costs of the Strike Out Application. If it was entitled to have the Petition struck out, then it should also have its costs of the Petition. So it was necessary to consider whether the Strike Out Application would have succeeded even if the petition debt had not been paid in order to make a proper assessment of the how the costs of both the Strike Out Application and the Petition should be dealt with (while it was arguable that since the petition debt had been paid and this was the reason why the Petition was being struck out – or dismissed – the normal costs order on the Petition should follow I considered that the better and proper approach was to decide the question of costs on the basis I have just described).

4. Part of the basis for my decision on costs was an analysis of whether the Petitioners had been ***entitled*** to present the Petition (and to the dismissal of the Strike Out Application). Part of the basis for my decision on costs was an assessment of whether the Petitioners had been ***justified*** (and whether they had behaved reasonably) in presenting the Petition (and opposing the Strike Out Application). I concluded that the Petitioners had been so entitled (but that since the petition debt had been paid the Petition should be struck out or dismissed). I also concluded that the Petitioners' action was justified and that the Company's conduct had been sufficiently culpable to justify an order for costs against them.

5. Ms Newman Q.C. on behalf of the Company seeks leave to challenge both aspects of my decision. In substance her argument is that she was entitled to succeed on the Strike Out Application and that I should have struck out the Petition on the basis claimed by the Company. The Company would then have succeeded and have been entitled to costs. I have carefully read her written submissions (both her original submissions and her reply submissions) as well as the written submissions of Mr Levy Q.C. on behalf of the Petitioners and have concluded that Ms Newman has been unable to establish that the appeal has a real prospect of success. I bear in mind that the Company seeks leave to appeal a costs order and that, as Mr Levy points out, in order to succeed in an appeal of a costs order the appellant must satisfy a high threshold (that the decision is wrong in principle; involves taking into account a matter which

should not or failing to take into account a matter which should have been taken into account or is plainly unsustainable). It will be for Ms Newman to apply to the Court of Appeal and for the Court of Appeal to consider whether there is a real prospect that this threshold can been met in this case.

6. Mr Levy Q.C. submitted that the Company's proposed appeal was an attempt to revisit the exercise of my discretion to award costs and was bound to fail since the Company had failed to demonstrate that the Court of Appeal should interfere with my exercise of discretion. Mr Levy submitted that the Grand Court's discretion to award costs was wide and unfettered and would only be interfered with in limited circumstances which did not exist in the present case. He supported the result and the reasoning set out in my Judgment and submitted that the Company had failed to demonstrate that there was a real prospect of the Court of Appeal coming to a different conclusion which will materially affect the outcome of the case; that the appeal was of general importance or that there would be no adverse consequences that would result from the appeal. He also challenged the account events and sought to correct the chronology contained in Ms Newman's initial skeleton

Procedural history

7. I should mention briefly the procedural history of the Costs Order Leave Summons. I was notified of this summons on 8 September 2017 when the Company's attorneys Harneys Westwood & Riegels (***Harneys***) wrote to the Court and explained that the parties had agreed that the Costs Order Leave Summons should be dealt with on the papers and that, if I was content to proceed on this basis, Harneys would seek to agree a timetable with the Petitioners' attorneys Walkers for the sequential exchange of skeleton arguments. On 13 September 2017 I was informed that the attorneys had agreed the following timetable for the exchange of written submissions: Harneys to provide written submissions by 5pm on Tuesday, 19 September 2017; Walkers to provide written submissions by 5pm on Tuesday, 26 September 2017 and Harneys to provide reply submissions (if any) by 5pm on Thursday, 28 September 2017. Subsequently, Harneys requested, and I agreed to grant, an extension of time for the filing of their reply submissions until 5pm Cayman time on 9 October 2017.

The background in brief

8. The detailed facts and the background are set out in the Judgment and I do not propose to review these in any detail here. Instead I shall just provide an overview of the context in which the Petition was presented and the Strike Out Application came to be made and outline the basis for my decision on costs.

9. The Petition was presented and the Strike Out Application was issued in the context of and they both relate to another interlocutory application made in connection with the petition presented on 9 May 2017 by the Company under section 238 of the Companies Law (2016 Revision) (the ***Companies Law***) seeking a determination by the Court of the fair value of the Petitioners' shares.

10. The other interlocutory application was a summons (the ***Set Aside Application***) issued on 7 July 2017 seeking an order setting aside an earlier consent order, dated 21 June 2017 (the ***Consent Order***), which Consent Order required the Company to pay interim payments to the Petitioners by no later than 5 July 2017.

11. The precise sequence of events from the time at which the Company notified the Petitioners on 4 July that it was not intending to make the interim payments on 5 July to the time at which the Petition was presented and served on the Company and Harneys (and the reasonableness of the parties' conduct during this period) were hotly contested (and made more complicated by the fact that the attorneys involved were both in Cayman and Hong Kong and therefore operating in very different time zones). I set out in paragraph 9 of the Judgment the sequence of events from Harneys' letter of 6 July in which they set out the details of why they considered the Consent Order to be defective. But it is convenient for current purposes to outline in one place all the main events from 4 July. They were as follows:

    (a). on Tuesday 4 July 2017 Harneys wrote to Walkers stating that "*due to issues with the internal procedures for making such a large and unusual payment [that is the interim payments]9in the context of normal business of the Company) the payment deadline [of 5 July] has become unrealistic. This issue was not anticipated at the time the Consent Order was agreed.*"

    (b). on the same day (4 July) Walkers wrote to Harneys requesting further information as to the reasons for the requested extension.

(c). on Wednesday 5 July (Walkers say, having received no response) Walkers wrote again to follow-up on their letter of 4 July.

(d). on Thursday 6 July Walkers sent a letter demanding payment of the interim payments by 5pm (Hong Kong time) on 7 July. Walkers say that they only received Harneys' letter of 6 July after sending their letter of demand.

(e). on Friday 7 July (using Cayman time):

(i). early in the morning Walkers wrote to Harneys denying that the Consent Order was invalid and stating that should the Company fail to reconsider applying to set aside the Consent Order "*it does so entirely at its own risk as to the consequences that may follow.*"

(ii). at 10.19am the Petition was filed at Court by Walkers.

(iii). at 12.37pm Harneys sent to Walkers by email the Set Aside Application with the evidence in support.

(iv). at 4.50pm the Court issued the Petition and at 5.03pm Walkers attempted to serve the Petition on Harneys at their Cayman offices but the offices were closed. Therefore copies were sent by email to Harneys the first of which was sent at 6.31pm. The Petition relied on the Company's non-payment of the interim payments under the Consent Order as evidence of the Company being unable to pay its debts for the purposes of section 92 of the Companies Law.

(f). on Saturday 8 July at 2.28pm Cayman time Harneys wrote to Walkers stating that Walkers were on notice before the Petition had been filed that the basis on which the interim payments were said to be owing had been challenged and was in dispute and that there was no evidence to justify the Petitioners' allegation that the Company was insolvent. Accordingly Harneys invited Walkers to confirm before 10am on Monday 19 July that the Petition would be withdrawn.

(g). on Monday 10 July, having received no response from Walkers Harneys filed the Strike Out Application.

12. Accordingly, the Set Aside Application was made after the Company had unsuccessfully sought from the Petitioners an extension of time and variation of the Consent Order to defer the time at which interim payments had to be made, after the date on which the interim payments were required to be made under the Consent Order and after a demand for payment had been sent by Walkers to Harneys.

13. The Company had not initially, when making its request for an extension of time, asserted that the Consent Order was invalid. The Company did so subsequently after its extension request had not been granted. The Petitioners were however aware of the Company's claim that the Consent Order was invalid before the Petition was issued.

14. In any event, following the Company informing the Petitioners that it would not be making, and its failure to make, the interim payments in accordance with the Consent Order matters moved rapidly. Both parties took steps to bring the dispute before the Court. It became clear to the Company that the Petitioners were not going to forbear and would take steps to enforce the Consent Order or bring proceedings in consequence of the Company's default and failure to pay. The Petitioners did indeed do so by issuing the Petition and the Company's response was, after having issued the Set Aside Application on the same day as the Petition had been issued, to issue the Strike Out Application.

15. The Set Aside Application and the Strike Out Application were listed to be heard on 17 and 18 July. By agreement, and in my view correctly, the Set Aside Application was heard first on 17 July and I handed down my decision on the morning of 18 July dismissing the Set Aside Application and refusing to grant the relief sought. I held that the Consent Order had been and remained effective and in force (the order dismissing the Set Aside Application and confirming the validity of the Consent Order was dated 19 July 2017).

16. Following the handing down of my decision on the Set Aside Application Ms Newman Q.C. indicated that that the Company intended to make the interim payments by 26 July 2017. The Strike Out Application was then heard on 18 July. I reserved judgment. Subsequently the Company and the Petitioners agreed to amend the Consent Order to provide that the interim payments must be made by 5pm on 28

July and I indicated that it seemed to me right to delay handing down my judgment on the Strike Out Application until after 28 July since it was important to know whether the debt on which the Petition had been based had in fact been paid.

The grounds of appeal

17. The Company filed with the Costs Order Leave Summons a draft notice of appeal setting out the grounds for its appeal. Ms Newman Q.C. in her (initial) skeleton argument summarised the grounds as follows. The Company asserts that there is a real prospect of the Court of Appeal coming to a different conclusion on the Costs Order because the Court of Appeal may conclude (either separately on each point or cumulatively) that:

    (a). the Petitioners did not have standing to file the Petition.

    (b). there was no evidence from which it could be properly inferred that the Company was unable to pay its debts.

    (c). alternative remedies should have been pursued by the Petitioners instead of filing a winding-up petition;

    (d). the Petitioners presented the Petition for an improper purpose; and/or

    (e). the Company was not in default of its payment obligation to the Petitioners.

The basis of my decision

18. The Petition was based on the Company's alleged failure to make payments to the Petitioners on the date set out and in accordance with the Consent Order. On the same day as the Petition had been presented the Company had filed an application for a declaration that the Consent Order was invalid. It had subsequently filed the Strike Out Application. I heard the Strike Out Application on the day after hearing the Set Aside Application. Before commencing the hearing of the Strike Out Application I gave judgment on the Set Aside Application and dismissed that application. The Company then said

that it intended to pay the payments due under the Consent Order within eight days (and after the hearing the Company and the Petitioners agreed to incorporate this agreement into an amended Consent Order). I reserved judgment on the Strike Out Application and waited to see whether payment was indeed made by the Company. Following confirmation that such payment had been made I handed down my judgment on the Strike Out Application. I decided that since the Petitioners, following payment of the petition debt, no longer had standing to present the Petition, since the Petition had not been, and in my view did not need to be, advertised and since I was able to deal with the outstanding issue of costs, I should without further delay strike out (or dismiss) the Petition so that no further steps in (including the hearing of) the Petition would be needed (if a petitioner's costs are not otherwise dealt with the petition may still be heard even after payment of the petition debt for the purpose of making a costs order).

19. One of the grounds on which the Company had sought to strike out the Petition was that the petition debt was bona fide disputed on substantial grounds. But I had already been able to deal with and dispose of that issue by the time that the Strike Out Application was heard. The Court is able to decide a dispute as to the petition debt in the course of proceedings on the petition in exceptional circumstances where the issues in dispute can properly be resolved in the petition without the need for separate proceedings. But here those separate proceedings had been commenced by the Company and had been heard and disposed of. Therefore by the time of the hearing of the Strike Out Application that ground had fallen away.

20. Having decided that the Petition could and should not proceed following payment of the petition debt I dealt with the issue of costs. The key questions to my mind (for the reasons I have explained above) were whether the Petitioners had been entitled to present the Petition and to a dismissal of the Strike Out Application and whether they had behaved reasonably in presenting the Petition (or whether their behaviour was less culpable than that of the Company). I decided that the Petitioners were entitled to their costs of both the Petition and the Strike Out Application because I considered that the Petitioners had been entitled to present the Petition (they had standing to do so), that the Company had not been entitled to have the Petition struck out on the grounds it had relied on (primarily that the Petition was an abuse of process because it had been presented in bad faith,

without any evidence of or belief in the Company being unable to pay its debts; the Petitioners' debt was bona fide disputed on substantial grounds and the Petitioners' had failed to pursue alternative remedies available to them, including failing to accept an undertaking offered by the Company) and because in my view the Company's conduct had made the presentation of the Petition justifiable and reasonable. In essence the Company had brought the Petition on itself by failing to pay an agreed liability incorporated into an order of the Court without proper justification. Indeed it appeared that the Company had sought belatedly to extricate itself from the liability (to pay interim payments) which it had unarguably agreed to pay because of its internal governance problems (the Company had failed to obtain the support or consent or certain key shareholders). In order to try to do so it had constructed a legal argument that the Consent Order which it had agreed to was made without jurisdiction and that there had been no concurrent agreement by it to make the interim payments. I had already held that this argument failed and was without foundation. Therefore the position was that at the date of the presentation of the Petition the Company had been in default of a binding liability and had failed to offer a good reason for its default. By the date of the hearing of the Strike Out Application it had been established that the Petitioners' debt was valid and could not be bona fide disputed on substantial grounds the Company had been relying on a legally unsound and commercially unattractive defence. It is true that I had decided not to award the Petitioners their costs of the Set Aside Application on an indemnity basis as on balance that appeared to me to be too harsh a response to the Company's conduct (it was a fine balance and it was open to me to make an award of indemnity costs in the circumstances – see paragraph 28 of the Judgment). But that costs decision does not take away from my view that the Company had not had a proper basis for refusing to pay the interim payments or for making the Strike Out Application.

The reasons for rejecting the grounds of appeal

21. As I have already noted, the Company has put forward five grounds of appeal in its draft Notice of Appeal. I propose to comment on each of these grounds and explain briefly why I do not consider that they establish that the appeal has a real prospect of success:

    (a). the first ground: error in finding that the Petitioners had standing to petition.

In her skeleton argument Ms Newman Q.C. argues that since the Company was disputing its liability to make the interim payments under the Consent Order at the time of the presentation of the Petition it follows that the Petitioners did not have standing to present the Petition. I disagree. It is clear that it is for the Court to determine the question of whether the petition debt is properly disputed bona fide on substantial grounds. The Court may, as I have already mentioned, in some circumstances decide in the course of proceedings on the petition whether the Company has a liability to the petitioner. If it does so in favour of the petitioner, it will follow that the debt was not disputed on substantial grounds as at the date of the petition and the court may, depending on whether there are other issues in the case, then make a winding up order. The same analysis applies in the present case. The issue, as I have explained, of the Company's liability under the Consent Order was decided, albeit in other proceedings commenced by the Company, and the Company had been held to be liable to pay the petition debt (while the Petition was pending and before the effective hearing of the Petition). It had been determined that the Company had no basis for disputing its liability to pay the interim payments – at any time, both before and at the time of the presentation of the Petition. Furthermore, the fact that there has to be and has been a hearing (with appearances by counsel) in order to decide the question of the Company's liability (and whether there is a bona fide dispute on substantial grounds) does not, obviously, establish that the Company was entitled to maintain its challenge to the Petitioners' demand for payment of the interim payments. It was not so entitled because there was no basis in law for its challenge.

(b). the second ground: error in finding that there was evidence of insolvency.

Ms Newman Q.C. argues that I had concluded that the Company was unable to pay its debts based only on the Company's failure to make the interim payments as required by the Consent Order. She submits that I wrongly drew an inference of insolvency from (in reliance on) the non-payment. In the absence of other evidence of inability to pay debts, an unpaid statutory demand and a longer delay between the date

of default and the presentation of the Petition such an inference could not on the evidence be made and should not be made where the Company had given a reason for not paying, namely that it disputed its liability under the Consent Order.

It is clear that a failure to pay a single debt can be sufficient to establish that a company is unable to pay its debts (on the cash flow test which applies in this jurisdiction). The principle is usually formulated as covering "undisputed" debts but this only excludes debts which are disputed on substantial grounds. Furthermore, there is no need for a statutory demand. The position is clearly and in my view correctly summarised in French *Applications to Wind up Companies* at paragraphs 7.272 – 7.273 as follows:

> "*7.272 The non-payment of a single undisputed debt may be sufficient to satisfy the court [under the English cash flow test for inability to pay debts] that a company is unable to pay its debts as they fall due even if no statutory demand has been served for the debt. The possibility that the company just does not want to pay the debt is ignored.*
>
> *7.273. A debt is "undisputed" unless there is a dispute on a substantial ground: "It is not enough if a thoroughly bad reason is put forward honestly" [quoting from Taylors Industrial Flooring v M and H Plant Hire [1990] BCLC 216 per Dillon LJ at p220].... normally it must be shown that a demand has been made for payment of the debt [although there is authority that a demand is not always required]. It must be shown that the company was notified of the amount of the debt and given an opportunity to pay it.*"

In the present case I had decided the issue of whether the liability to pay the interim payments could be and was disputed on substantial grounds and held that it was not. It was therefore not a disputed debt for these purposes. It does not matter that the Company honestly believed that it had a chance of succeeding on the Set Aside Application. The Set Aside Application was bad in law and a bad reason for disputing the debt. The default in payment of the interim payments could therefore be and in my view in the context of this case was sufficient to satisfy the inability to pay its debts test and establish the Court's jurisdiction to make a winding up order (as French also notes, at paragraph 7.276, establishing that the court has jurisdiction to

make a winding up order is comparatively straightforward). The Company was therefore not entitled to have the Petition struck out on the basis that the Petition was bound to fail because there was no basis for establishing the Company's inability to pay its debts. Ms Newman has consistently argued that the Company should have been given more time to pay and that the Petitioners should have waited, before presenting the Petition, until the conclusion of the Set Aside Application. I disagree for the reasons I explained in the Judgment and above. The Company chose to mount a risky and debatable challenge to the Consent Order and failed. Its failure confirmed that it was liable for and unable to dispute the petition debt. In deciding to default on its Court order confirmed payment obligations and risk an unsuccessful challenge to the Consent Order it was at (and in my view should be treated as having accepted the) risk of having a petition presented against it based on the default and as to the costs of both the Set Aside Application and of the Petition if following the failure of the Set Aside Application it was required to make the interim payments.

Ms Newman Q.C. submits that the conduct of the parties in the present case can plainly be distinguished from the conduct of the parties in *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 (which I discuss in various passages within the Judgment but in particular at paragraphs 25-28). The circumstances of that case were different (although there was a question whether the demand made constituted a proper statutory demand) but the underlying principle, which is the one I have outlined above, nonetheless applies in this case. *Cornhill Insurance* is just one example of the application of that principle. It is right to say that in this case (see paragraph 24 of the Judgment) the Petitioners only gave the Company a short period of time between the date on which the interim payments had to be made under the Consent Order and the date on which the Petition was presented. In some cases that may well be too short a period and be evidence of unreasonable conduct. I concluded however that in the context of this case that was not so. The Petitioners conduct seemed to me to be justifiable and not unreasonable in the circumstances for the reasons I have explained (in particular because the failure to pay sums required to be paid by a court order can properly be treated as a

serious default requiring a clear and strong justification).

(c). third ground: error in failing to consider whether alternative remedies were available.

Ms Newman argues that I failed to give proper consideration to the availability to the Petitioners of alternative remedies and that the existence of such alternative remedies justified the striking out of the Petition. She says that there is a prima facie case of such a failure because I failed to provide any analysis supporting my conclusion that the Petitioners did not behave unreasonably by failing to exercise the alternative remedies available to them .

I consider that it is plain from the Judgment that I did consider in detail whether the Petitioners' conduct was unreasonable and whether in light of the alternative remedies that were or might have been available to them, their failure to pursue them required or justified the striking out of the Petition. I deal with the reasonableness issue in various contexts and the alternative remedies point at paragraph 30 of the Judgment where I refer to and said that I agreed with the detailed submissions of Mr Levy on the issue. I had carefully summarised Mr Levy's submissions on this point at paragraph 14(i) of the Judgment and I think that it was clear why (and why I considered that) the other remedies identified were considered not to offer the Petitioners a reasonable or more appropriate alternative way of dealing with and responding to the Company's failure to comply with the Consent Order.

(d). fourth ground: error in failing to find that the Petition was presented for an improper purpose.

Ms Newman Q.C. relies on the judgment of Lord Millett in *CVC/Opportunity Equity Partners Ltd v Demarco Almeida 2002* CILR 77 and the principle set out therein that a petitioner may be restrained from bringing winding up proceedings where they are brought for an improper purpose and simply to bring pressure on the company concerned to give in to the petitioner's demands "however

unreasonable" rather than suffer the losses consequent upon the presentation of a petition.

In many respects this ground is just a restatement of Ms Newman Q.C.'s submission that the Petitioners behaved unreasonably in presenting the Petition rather than taking an alternative path (she relies in her skeleton on a range of points which she argues elsewhere establish the unreasonableness of the Petitioners' conduct such as the availability of alternative more appropriate remedies, the fact that the Petitioners had prior notice of the Company's challenge to the Consent Order, the failure of the Petitioners to issue a statutory demand, the fact that there was only thirty six hours between the date of default and the presentation of the Petition, and the opportunity for the Petitioners to accept the Company's undertaking). I have already explained why I rejected this submission.

But Ms Newman Q.C. also relies on the assertion that it was obvious that the Petitioners did not want a winding up order to be made. She argues that the presentation of the Petition was coercive – the Petitioners were using the Petition improperly to force the Company to pay the interim payments and did not want a winding up order to be made. In the Judgment (at paragraph 32) I said that the Petitioners could not be sure at the time of the presentation of the Petition of the (real) reasons behind the failure to make the interim payments and were entitled to conclude that financial difficulties could not be ruled out. Nor had the Company proved that the Petitioners did not wish to proceed to a hearing of the Petition and the Court to make a winding up order.

It appears that Ms Newman Q.C. also relies on the fact that the Petition was presented in the context of a section 238 proceeding. The point can best be put I think as follows. In the context of a section 238 petition, a dissenting shareholder cannot conceivably wish to wind up the company and demonstrate that it was unable to pay its debts because that would undermine its case and result in a stay of the section 238 proceedings. But I do not consider that this argument is right, at least to the extent that it relies on an inference based on the

petition being presented in the context of a section 238 proceeding. It cannot in my view be inferred that the Petitioners did not genuinely seek a winding up order (and that the Petition was presented for an improper purposes) merely because the Petition is presented in the context of a section 238 proceeding. This Court has appointed provisional liquidators in a section 238 case (see *Bona Film Group Limited,* unreported, 13 March 2017) and since a winding up order can be made in respect of a solvent company which is only cash flow insolvent there is no necessary contradiction between a dissenting shareholder seeking a winding up order and seeking a substantial payment for the fair value of his shares (dissenting shareholders will be creditors in respect of the interim payments owed to them and the sum determined by the Court to represent the fair value of their shares).

(e). fifth ground: wrong to conclude that the Company was in default of the Consent Order as varied.

Ms Newman Q.C. notes that, as I have explained above, following the hearing on 18 July of the Strike Out Application the Consent Order was varied (by consent) to provide a new date for the making of the interim payments. I noted when approving the variations to the Consent Order that *"the effect of varying the Consent Order ... [was such that] after the new order is issued ... the [Company] is not in breach of or default under the Consent Order unless and until it fails to make the payments on 28 July."* Ms Newman now (for the first time) argues that the "inescapable" consequence of my "finding" was that since the interim payments were not owing at the time that the Consent Order was varied the Petitioners did not have (perhaps no longer had is better) standing to present or maintain the Petition and that the parties agreement to vary the Consent Order entitled the Company to have the Petition dismissed with costs.

I am not persuaded. I do not agree that by agreeing to vary the Consent Order the Petitioners were giving up the right, in the event that the Company again failed to comply with its agreement to pay the interim payments, to rely on the earlier default for the purposes of the Petition. There was no waiver of the earlier default such that had the Company failed to pay the Petitioners would have been required to issue a fresh

demand and start the winding up process all over again. This was and cannot be what was intended. Nor was that what my statement on the effect of the proposed variation to the Consent Order meant or implied. The Petitioners were simply incorporating into a consent order the Company's new promise to pay and I was noting that it would only be in the event of a breach of that new promise that the proceedings in the Petition and for a winding up order could properly continue.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
1 December 2017