

MARCH 2013

## BRITISH VIRGIN ISLANDS COURT OF APPEAL

**Somers Dublin Ltd. A/C KBCS et al -v-  
Monarch Ponte Fund Limited Civil Appeal  
HCVAP2011/040**

BVI COMPANY - MUTUAL FUND - REDEEMED  
MEMBERS OF FUND IN LIQUIDATION CLAIMING  
REDEMPTION PROCEEDS IN PRIORITY TO CLAIMS  
OF CONTINUING MEMBERS - WHETHER JUDGE  
RIGHT TO ORDER LIQUIDATOR TO DISTRIBUTE  
PRO RATA BETWEEN CONTINUING MEMBERS  
AND REDEEMED MEMBERS

The central issue in this Appeal was, does an unpaid redeemed member of a BVI company in liquidation: (a) rank as a deferred creditor with higher priority than an ordinary unredeemed member; (b) have the same priority as an ordinary unredeemed member; (c) have the same priority as other creditors; or (d) fall into a "black hole" and have no claim at all (as argued by counsel for the continuing members at trial).

Applying *Westford Special Situations Fund Ltd. -v- Barfield Nominees Limited et al Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010* (delivered 28 March 2011, unreported) and *Kenneth M. Krys et al -v- Stichting Shell Pensioenfonds Territory of the Virgin Islands High Court Civil Appeal No. 36 of 2011* (delivered 17 September 2012, unreported), the Court held that a redeemed member is a creditor in respect of his unpaid redemption payment. It found that the purpose of Section 197 of the *Insolvency Act, 2003* was to subordinate the former members' claims (along with other claims arising out of membership) as creditor to that of ordinary unsecured (and usually external) creditors. The Court found that the Judge below was wrong to have held that the redeemed members in their character as such should rank equally with the continuing members claiming a return on their capital and that redeemed members were not deferred creditors and as such entitled to have their claims against the Company satisfied in priority to any claim by the continuing members.

The Court further held that the Learned Trial Judge, by his use of the expression "return of their capital contributions" in dealing with distributions to members, fell into error in describing the mode of distribution. Share capital is now an obsolete concept for BVI companies. The *BVI Business Companies Act, 2004* removes the concept altogether, even with respect to par value shares. The starting point of returning "paid up share capital" to members in liquidation is therefore flawed. The Court felt that the fact that the Memorandum and Articles of Monarch Pointe referred to "capital" and "surplus" was no more than a hangover due to the fact that the company was first incorporated under the *International Business Companies Ordinance*. The mode of distribution depends ultimately on the Memorandum and Articles of a company, but Section 34(1)(c) of the *BVI Business Companies Act, 2004* provides a default position. It provides that in the absence of anything to the contrary, a share confers "the right to an equal share in the distribution of the surplus assets of the company". There being nothing to the contrary in the Memorandum and Articles in the present case, each share carries an equal right to share in any surplus.

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