



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NOS: FSD 24 OF 2021 (RPJ)

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF BAF LATAM CREDIT FUND**

APPEARANCES: Mr Tom Smith QC, appeared for the Petitioners and for BNP Paribas Security Services Luxembourg

Mr Niall Hanna and Mr Neil Lupton on behalf of the Petitioners and for BNP Paribas Security Services Luxembourg

Mr Manning and Mr Khanbhai of Campbells appeared on behalf of the Fund

BEFORE: The Hon. Raj Parker

HEARD: 5 March 2021

Draft Judgment Circulated: 12 March 2021

Judgment Delivered: 16 March 2021

Headnote

Winding up petition-just and equitable-contributory-substitution for another entity-error-jurisdiction-ss 92 and 94 Companies Act 2021-Companies Winding Up Rules (2018 Revision)-Court's inherent jurisdiction to regulate procedure-discretion.

Introduction

1. BAF Latam Credit Fund (**'the fund'**) seeks the dismissal of winding up proceedings issued by Petition on 27 January 2021 on the basis that the Petitioners do not have standing.
2. The Petitioners, the Apollo vehicles, (**'Apollo'**), who are majority beneficial shareholders of approximately 59% of the shares in the fund, by cross-application seek the substitution of BNP Paribas Securities Services Luxembourg (**'the custodian'**) which is the legal holder of the same shares as the petitioner and consequential amendments to be made to the Petition. The Petition seeks an order that the fund be wound up on the just and equitable ground based on, *inter alia*, the Petitioners' loss of trust and confidence in the management of the fund.



3. The fund was incorporated in the Cayman Islands on 29 May 2014 as an exempted company with limited liability. Since 14 July 2014 it has been registered as a mutual fund with the Cayman Islands Monetary Authority. The fund's investment activities concern entry into loan arrangements with borrowers in accordance with its investment objectives and strategies. The fund specialises in credit investments in Latin America. It is managed by its investment manager, BAF Capital S.A ('the IM'). The fund's board of directors comprises three independent directors and two directors affiliated with the IM.
4. The Petitioners, as majority investors, have concerns as to the management of the fund and the way in which it is being operated and ask that independent officeholders from KPMG be appointed upon its winding up. The fund opposes the Petition and seeks to have it immediately struck out because the Petitioners have no standing.
5. Mr Guy Manning appeared for the fund. Mr Tom Smith QC appeared for the Petitioners and for the custodian, which is proposed to be substituted as the Petitioner.

Fund's submissions

6. Mr Manning argued that the Petition was issued in the name of the beneficial holders of the shares and not the registered legal owner. They were not contributories entitled to bring the Petition and had no standing. He argued that beneficiaries of a trust of shares are not contributories under common law and a company is not obliged to recognise a trust affecting its shares¹. The Petitioners are indisputably not contributories.
7. By sections 92(e) and 94(1) of the Companies Act (2021 Revision) ('the Act'), a company may be wound up if the Court is of the opinion that it is just and equitable, only on the presentation of a winding up petition by (i) the company, (ii) a creditor, (iii) a contributory, or (iv) the Cayman Islands Monetary Authority.
8. Pursuant to section 94(3)(b) of the Act, no contributory may present a winding up petition unless (among other things) the contributory has been a registered shareholder of the company for a period of at least six months immediately preceding the presentation of the petition.
9. As to the application to substitute the custodian, he relied on *China Shanshui*² (decided in 2015) in which the Court held that the board of a company had no authority to present a winding up petition, without the authorisation of an EGM of the shareholders, for the purposes of later seeking the appointment of provisional liquidators to restructure the company's indebtedness. The petition was dismissed by Mangatal J.
10. Mangatal J was asked by the company³ to consider whether substitution of a creditor could be made. Because the Companies Winding Up Rules ('CWR') dealt only with creditor's petitions and creditors in relation to substitution⁴, Mangatal J indicated that she was unable to say whether, *if* such an application was made, the Court had an inherent power to substitute a creditor on a company's petition.

¹ *Hannoun v R Limited* [2009] CILR 124 and *Svanstrom v Jonasson* [1997] CILR 192

² [2015] 2 CILR 255 *Mangatal J*

³ *China Shanshui* *ibid* § 83

⁴ *The CWR at the time (then 2008) included a rule in relation to ordering substitution on a creditor's petition, but not in relation to a company or contributory's petition.*



11. As to the principal authority Mr Smith QC relied upon (the decision of Segal J in *Natural Dairy*⁵ (decided on 2 March 2017)), Mr Manning sought to distinguish it, or in the alternative submitted that it was wrongly decided.
12. In *Natural Dairy*, the Court held that it did have jurisdiction to make an order for substitution on a contributory's petition even though there was no express power in the CWR, as there was an inherent power for the Court to do so⁶.
13. Mr Manning pointed to the fact that Segal J seemed to have placed significant weight on the fact that the company had delayed in raising the standing point and that joint provisional liquidators had already been appointed and would in any event be appointed even if discharged⁷.
14. He referred to the subsequent work of the Insolvency Rules Committee ('IRC') which proposed amendments to the CWR, which were passed into law and gazetted in December 2017, and which came into force in February 2018. The position in relation to a company's petition was changed so that a new power was introduced to order substitution on a company's petition. No such rule was made in relation to a contributory's petition.
15. Segal J in *Natural Dairy* had said that there was no basis for concluding that there was a decision to disallow substitution by a contributory. He submitted that the IRC clearly decided to allow substitution on a company's petition, but *not* to allow substitution by a contributory, so Segal J's reasoning should no longer apply.
16. Given that reconsideration of the rules followed the decisions in *China Shanshui* and *Natural Dairy*, it is to be inferred, he submitted that the Court no longer has an inherent jurisdiction to order substitution on a contributory's petition, if it ever did have such jurisdiction. The IRC had decided not to introduce the power.
17. Furthermore the Petitioners, because they have no standing to present the Petition, must also lack standing to make any application to substitute the custodian and there is no jurisdiction to allow that to happen on a contributory's petition in any event.
18. He pointed to the lack of any sworn evidence from any officer of the custodian in support of the substitution application, or any allegation made by it as to the alleged loss of trust and confidence as set out in the Petition, which is referred to only as 'Apollo's' loss of trust and confidence.
19. Moreover, he submitted that the nature of a contributory's petition is personal to the contributory and so an amended petition presented by the custodian would itself be defective and be liable to be struck out. What is at issue is how the contributory has personally been affected in its relationship with the company or with other contributories⁸. The custodian has not been so personally affected and is not the proper entity to bring the complaints made in the Petition.
20. He submitted that the Petition had been presented aggressively and precipitously, and without proper thought, and as a matter of discretion the fund is entitled to an order striking the Petition out.

⁵ (unreported 2 March 2017) Segal J

⁶ *Natural Dairy* *ibid.* § 8(k)

⁷ *Natural Dairy* *ibid.* §9(g)

⁸ *Ebrahimi v Westbourne Galleries* [1973] AC 360 at p 375 per Lord Wilberforce



21. This would not preclude a fresh petition being presented by a person entitled to present it, if so advised. He pointed to the substantive response to the Petitioners' allegations set out by the fund in a detailed letter dated 1 February 2021 which would have to be carefully reviewed before such a step was taken.
22. He referred the Court to correspondence on the 3rd and 5th of February 2021, in which the fund's then attorneys pointed out that the Petitioners lacked standing and enclosed a draft consent order for the dismissal of the Petition and its removal from the register of writs indicating that an application for such relief would be made if a consent order was not signed.
23. Had the Petitioners agreed to dismissal by consent a fresh petition could have been presented by a person having standing to do so, but the Petitioners have declined to take that approach.
24. He submits that instead, the Petitioners then 'dug in their heels' as is evidenced by letters dated the 7th, 8th and 10th of February 2021, where Apollo indicated that BNP had confirmed in principle that it would be substituted as Petitioner and that the Petitioners rather than the custodian would make an application to that effect.
25. He argued that dismissal is the simplest, most cost-effective and pragmatic way forward and does not prevent the custodian from presenting a fresh petition, if so advised.
26. He argued that Apollo does not adduce any evidence of prejudice if the Petition is dismissed.
27. He submits that this is not a case where the Court needs to consider the well known protection afforded by section 99 of the Companies Act, which provides that any disposition of property of the company between commencement of the winding up (the date of presentation of the winding up petition) and any subsequent order winding up the company is void, unless the Court orders otherwise. There is no question over the solvency of the fund and no need to protect creditors, nor is there any allegation made about the risk of an unjustified dissipation of assets.

Petitioners' submissions

28. Mr Smith QC accepted that the Petition was presented by the wrong persons in error. It was issued in the names of the beneficial holders of the subject shares rather than the legal holder. The shares are held through a custodian arrangement whereby the custodian acts for Apollo and is the legal owner and is recorded on the funds register of members, whereas Apollo is the beneficial owner of the shares of the fund.
29. Immediately upon being made aware of the error by the fund, the Petitioners took steps to rectify the position by having the Petition amended to substitute the legal holder of the shares (the custodian) as petitioner⁹.
30. The error was not deliberate. It should be common ground that this Court has jurisdiction to permit the substitution of a petitioner on a winding up petition where the original petition contained an error in the identity of the petitioner. Instead the fund is attempting to opportunistically exploit a genuine mistake which ought to have been dealt with by consent between the parties. This calls into question the motivations of the board.
31. Furthermore, the substantive relief sought by the Petition has the support of the majority of the fund's investors and is opposed only by the fund. The reality is that the case will proceed

⁹ Posch 2 § 9



whether following a dismissal and re-issuance, or whether following substitution and amendment of the Petition.

32. The dismissal and reissuance of the Petition would serve no useful purpose other than occasioning costs, expense and delay which could well result in prejudice to the fund's investors.

Decision

Jurisdiction

Nullity

33. I have decided that the decision of Segal J in *Natural Dairy* is clearly right and I will respectfully follow it.
34. If a petitioner lacks standing to present a petition as a contributory under section 94 (3)(b) of the Companies Act, due to an inadvertent error, as was the case in *Natural Dairy*, and is the case here, that is not necessarily fatal to the petition so that it should inevitably be struck out, or be struck out in the Court's discretion due to the lack of standing.
35. Such an error does not render the petition a nullity¹⁰ and the Court has an inherent jurisdiction to regulate its own procedure in these circumstances. I agree with Segal J's reasoning that by analogy with creditors' winding up petitions where a creditor is found not to have standing because it is not truly a creditor that does not render the petition a nullity and another creditor can be substituted. Indeed Mr Manning fairly accepted that the Petition in this case was not a nullity.
36. It follows that if a petition which has mistakenly been issued in the name of an incorrect party (because it is not a contributory) is not as a matter of law a nullity, then this Court under its inherent jurisdiction should permit a substitution of a contributory in order to rectify the position, unless there are good reasons not to do so.
37. In this case the application is made by the beneficial owners of the shares to substitute the legal owner, where the legal owner acts as custodian and has consented to be substituted.
38. Since the Court is seized of the matter it has the power under its inherent jurisdiction to regulate the proceedings. In the exercise of that jurisdiction the person making the application for his own substitution does not have to have had standing to have presented the Petition in the first place, as it is the Court which exercises the jurisdiction.

Contributories petitions and substitution

39. The revisions made to the CWR by the IRC in December 2017 do not affect the position as decided in *Natural Dairy* that there is no reason in principle or policy for concluding that there has been a decision to preclude or prevent substitution in the case of a contributory's petition. As Segal J observed, there is no sensible reason to think that it was intended that this Court should not have a power to substitute on a contributory's petition.

¹⁰ *Natural Dairy* *ibid.* §7



40. I note, in addition, that such a power is expressly provided for under the English Insolvency Rules¹¹. If a contributory brings a petition alleging a lack of trust and confidence in the management of the company, there is no reason in principle why another contributory who is in the same position, should not be allowed to be substituted.
41. There is no basis to infer that the IRC intended to overturn the position left by *Natural Dairy* as to the Court's inherent jurisdiction in relation to substitution in a contributory petition.
42. The power was retained on creditor petitions and introduced on company petitions. If the intention was to change the position in relation to contributory petitions as a result of the decision in *Natural Dairy* it could have been dealt with expressly by a rule change, but it was not. I do not infer from the absence of any rule change that the intention was to overturn the jurisdiction of the Court to permit substitution in contributory petitions.
43. It may be the case, as Segal J observed, that the reason why substitution on a contributory's petition, as opposed to a creditor's petition, is not dealt with in the CWR is because the need for substitution is likely to be a less frequent event in practice where creditors can be 'paid off' by a company.
44. It does not follow that there is no inherent jurisdiction, when the need arises, to allow a substitution in relation to a contributory's petition and I respectfully adopt Segal J's reasoning and view that it is a useful power in appropriate circumstances to facilitate the efficient and cost effective management of proceedings¹².

Discretion

45. I have come to the clear view that the Court should order substitution of the Petitioners and amendment of the Petition¹³ rather than dismissing the Petition and requiring the presentation of a new petition by the custodian.
46. It is clear that if the Petition was dismissed Apollo would simply instruct the custodian to present another petition in substantially the same form with the same complaints. Mr Smith QC made it clear that the fund's substantive response by letter of the 1st of February 2021 (which came shortly after the issue of the Petition on 27 January 2021) did not alter his clients' concerns, or the case that is sought to be brought and determined in these proceedings.
47. I am satisfied that the custodian has consented to being substituted as petitioner¹⁴ and through Mr Smith QC does so again. There is no dispute that the custodian is the legal owner of the shares and no dispute that it has standing to present and prosecute the Petition.
48. Having reviewed the consequential amendments to the Petition it appears they do not affect the substance of the allegations and any points that the fund wishes to take on the merits and in relation to the custodian are open to it. They are merely consequential amendments which reflect the proposed substitution.
49. In my view it would be wasteful and would achieve no useful benefit to dismiss the Petition.

¹¹ Rule 7.17 of the Insolvency Rules 2016 and rule 4.19 of the Insolvency Rules 1986

¹² *Natural Dairy* *ibid.* §8 (I)

¹³ Under Order 24 rule 1 CWR and Order 20 rules 5(1) and 7 of the Grand Court Rules

¹⁴ BNP letter dated 10 February 2021



50. Conversely, if the Petition were dismissed, there is potential prejudice to Apollo because of section 99 of the Companies Act. Although there is no evidence before the Court as to risk of dissipation or what disposition of property may have been sought to be effected in the period since the presentation of the Petition, section 99 is available to protect the interests of members and shareholders who are petitioning on a just and equitable basis, as much as creditors in an insolvency. It would, in my view, be unjust to deprive Apollo of this potential protection as the majority shareholder in the fund.
51. As to the nature of the error, it is obviously important that that the presentation of winding up petitions, with the serious consequences they carry, require care and attention to be paid. That care and attention is important when the decision has been made, after due consideration, to commence winding up proceedings by presenting a petition.
52. The care and attention does not just extend to the substance of the allegations made and relief sought, but also as to the standing of the petitioner and with the compliance processes. The CWR are to be complied with and if they are not, a good explanation needs to be given as well as an examination of the consequences to the parties and to the efficient and fair disposition of the proceedings as a result of the breach.
53. It is clear that in this case the requisite checks and verification should have been made and were not made. In this regard the error was in my view serious.
54. However, in all the circumstances, I regard it as unfortunate, as the point was simply overlooked as a result of the failure to appreciate the consequences of the custodian arrangement. It is clear from the evidence that the error may be explained on the basis that from a commercial and economic perspective the Apollo vehicles are the shareholders, albeit they are not the legal owners of the shares because of the custodian arrangement¹⁵.
55. The error was not deliberate and no advantage was sought or obtained by the Petitioners in consequence. Once the error had been pointed out, Apollo acted promptly to attempt to remedy the issue.
56. I have decided that in all the circumstances, including the fact that the substantive relief sought by the Petition has the support of the majority of the fund's investors and is opposed only by the fund, the error should now be corrected.
57. I will allow the substitution and amendment applications and dismiss the application to strike out.
58. If the costs consequences of this decision are an issue between the parties I will deal with costs on the basis of short written submissions.

HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

¹⁵ *Posch 3 §7*