COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL DIVISION

IN THE MATTER OF Petitions made pursuant to section 190 of the Companies (Winding Up Amendment) Act 2011

IN THE MATTER OF Petitions made pursuant to the Companies Act 1992 Chapter 308, the Companies (Winding Up Amendment) Act 2011 and the International Business Companies Act 2000, Chapter 309:

BETWEEN

2015/COM/Com/No.42

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

(In a representative capacity for and on behalf of the Government of the Commonwealth of The Bahamas, the Treasurer of the Commonwealth of The Bahamas, Bahamas Electricity Corporation, The National Insurance Board, The Water and Sewerage Corporation and the Gaming Board)

Petitioner

AND

1 Baha Mar Ltd.
2 Baha Mar Land Holdings Ltd.
3 Baha Mar Operating Company Ltd.
4 Riviera Golf Ventures Ltd.
5 Baha Mar Entertainment Ltd.
6 Cable Beach Resorts Ltd.
7 Baha Mar Enterprises Ltd.
8 Baha Mar Support Services Ltd.
9 Baha Mar Sales Company Ltd.
10 Baha Mar Leasing Company Ltd.
11 Baha Mar Properties Ltd.
12 BMP Golf Ltd.
13 BMP Three Ltd.
14 BML Properties Ltd.

Respondents

AND BETWEEN

2015 COM/com/No.0049

(1) THE NATIONAL INSURANCE BOARD OF THE COMMONWEALTH OF

THE BAHAMAS

Petitioner

AND

BAHA MAR LTD.

Respondent

2015 COM/com/No.0047

(2) THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS,

Petitioner

AND

BAHA MAR LAND HOLDINGS LTD.

Respondent

2015 COM/com/No.0052

(3) THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS,

Petitioner

AND

CABLE BEACH RESORTS LTD.

Respondent

2015 COM/com/No. 0050

(4) THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS,

Petitioner

AND

BAHA MAR PROPERTIES LTD.

Respondent

2015 COM/com/No. 0048

(5) THE WATER & SEWERAGE CORPORATION

Petitioner

AND

BMP GOLF LTD.

Respondent

2015 COM/com/No. 0051

(6) THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS,

Petitioner

AND

BMP THREE LTD.

Respondent

2015 COM/com/No. 0046

(7) THE GAMING BOARD

Petitioner

AND

BAHA MAR ENTERPRISES LTD.

Respondent

Before Hon. Justice Ian R. Winder

Appearances: Peter Knox QC with Wayne Munroe QC, Loren Klein, Hyacinth Smith and Darcel Williamson for the Attorney-General, the National Insurance Board, the Treasurer, the Water and Sewerage Corporation and the Bahamas Electricity Corporation

Wayne Munroe QC with Jayde Fowler for the Gaming Board

James Corbett QC with Maurice Glinton QC, Roy Sweeting, Darren Pickstock and Meryl Glinton for the Respondent Companies

Raynard Rigby with Meagan Taylor for Ernst & Young

Also in attendance (in a watching capacity)

Brian Simms QC with Sophia Rolle-Kapousouzoglou and Olivia Robinson-Moss for China Export Import Bank

Sean Moree with Timothy Eneas for CSA Bahamas Ltd.

31 July, 19, 20 and 21 August 2015

RULING

WINDER J

These are related actions involving applications for the appointment of joint provisional liquidators, the striking out of winding up petitions (and/or parts thereof) and for general directions.

Background

1. In July 2015 I heard an application by the Respondent companies in action 2015/COM/com/00039 ("the recognition proceedings") for the recognition of the primacy of Chapter 11 proceeding in the US Bankruptcy Court for the District of Delaware and for judicial assistance to stay the commencement and continuation of the actions of their creditors.

2. I repeat and adopt the historical background to this dispute contained in my written decision, in the recognition proceedings, dated 31 July 2015.

3. As reflected in that historical background, on 16 July 2015, whilst arguments were ongoing in the course of the recognition proceedings, the Attorney-General ("AG") filed a Petition for the domestic winding up of the Respondent companies. The Respondents say that the presentation was made without any warning. In the said Petition ("the original Petition") the AG purported to act in a representative capacity for the Government of the Commonwealth of The Bahamas, the Treasurer of the Commonwealth of The Bahamas, Bahamas

Electricity Corporation, The National Insurance Board, The Water and Sewerage Corporation and The Gaming Board of The Bahamas. Additionally, the AG casts the original Petition against all of the Respondents.

4. The original Petition was settled, in part, as follows:

> **TO THE SUPREME COURT**
> The Humble Petition of the Attorney-General of the Commonwealth of The Bahamas (in a Representative Capacity for the Government of The Commonwealth of The Bahamas, the Treasurer of the Commonwealth of The Bahamas, the Bahamas Electricity Corporation, the National Insurance Board, the Gaming Board of The Bahamas and the Water and Sewerage Corporation (together hereafter referred to as "the Petitioners") of the Paul L. Adderley Building, No. 18 John F. Kennedy Drive, P.O. Box N-3007, Nassau, NP, The Bahamas shows that:
> 1 The Respondents were incorporated in The Bahamas. Details of the Respondents' dates of incorporation, registered office address and share capital position are set out below: ...
> 2 On June 29 2015, the Respondents, who are all involved in the construction, development, operation and/or promotion of the Baha Mar Resort in The Bahamas, filed for Chapter 11 Bankruptcy in the Court of Delaware, U.S.A. The Respondents did this without prior notice to the Petitioners.
> 3 The Respondents are incorporated and doing business in The Bahamas. They own, operate and have an interest in Bahamian assets and businesses, including much of the land comprising the Baha Mar Resort.
> 4 As at the date of this Petition, the Respondents (collectively) are indebted to the Petitioners in the sum of (at least) $58,845,313.17. References in this Petition to "the Respondents" may be references to all, one or any number of the Respondents. Details of each liability referred to in this Petition and the identity of the Respondents(s) liable to discharge that liability are appended hereto.
> 5 Sums due in respect of Business Licence Fees and Real Property Tax
> 5.1 As at the 3rd July, 2015, the Respondents are indebted to the Treasurer of the Commonwealth of The Bahamas in the amount of $3,342,459.70 in respect of Real Property Tax arrears.
> 5.2 Further, the Respondents owe business licence fees in the amount of $303,337.32 which represents the following:
> Wyndham Business Licence Fees $289,854.94
> Cable Beach Golf Course $13,482.38
> A total of $3,645,797.06 is due and owing in respect of the Business licence fees and real property taxes.
> 6 Sums due to the Department for Immigration
> 6.1 The Respondents are indebted to the Department of Immigration for non-payment of work permit fees. The amount outstanding for non-payment of work permit fees as at the 3rd July, 2015, totals $166,169.47.
> 7 Sums due to the Gaming Board of The Bahamas
> 7.1 The Respondents have outstanding payments due to the Gaming Board of the Bahamas. The amount of outstanding payments due and payable to the

Gaming Board total $11,218,630.72. This amount represent the following outstanding payments:

Crystal Palace Casino Winnings arrears	$9,418,630.72
Basic Taxes	$1,800,000.00

7.2 In addition, the Respondents are indebted to the Gaming Board of The Bahamas in the sum of $10,750,000 ("the Deferred Sum"). The timing of payment of this sum was deferred pursuant to terms agreed between the Respondents and the Gaming Board. However, on current facts, it seems highly unlikely that the Respondents will be in a position to fulfill their obligations under those terms and so the Gaming Board of The Bahamas reserves its rights in full in respect of the Deferred Sum.

8 Sums due to the Bahamas Electricity Corporation

8.1 The Respondents made application to be supplied with electricity for the Baha Mar Resort located at Cable Beach.

8.2 The Respondents are indebted to the Bahamas Electricity Corporation for non-payment of electricity bills in the amount of $26,329,953.85.

9 Sums due to the Ministry of Tourism

9.1 There is outstanding hotel guest tax due and owing by the Respondents to the Ministry of Tourism in the sum of $2,604,179.28.

9.2 The Respondents owe the Ministry of Tourism the total amount of $3,116,679.00. This outstanding amount represents outstanding hotel guest tax arrears for Melia Hotel for the period November and December 2014 in the amount of $351,102.72; Wyndham Hotel guest tax arrears in the amount of $2,253,076.58 for the period November 2011 – July 2014 and outstanding obligations for airlift subsidy totalling $512,500.00.

10 Sums due to the Water and Sewerage Corporation

10.1 The Respondents made application to the Water and Sewerage Corporation for water and the Respondents have arrears owed to the Water and Sewerage Corporation totalling the sum of B$3,086,806.04 as at 9 July 2015.

11 Sums due to the National Insurance Board of the Bahamas

11.1 The Respondents are also indebted to the National Insurance Board. The First Respondent has outstanding contributions due for April and May 2015 including interest to the National Insurance Board in the amount of $697,446.20, including interest as of the 26th June 2015.

11.2 In summary, the Respondents owe the Petitioners the sum of (at least) $58,845,313.17 (including the Deferred Sum). In addition, on 7th July, 2015 the Government of the Bahamas paid the wages of the Respondents' employees for the 2 week period ending 28th June 2015. The Government of the Bahamas reserves its position in relation to the Respondents' (or any of them) liability to the Government in respect of these payments and reserves the right to seek leave to amend this Petition to include this sum (together with any additional sums that the Government may be minded to pay).

12 It is Just and Equitable that the Respondents be wound up

12.1 The Government of the Bahamas and its various entities are parties affected both as (i) the second largest unsecured creditor as disclosed in the Consolidated List of Creditors holding 20 largest unsecured claims filed before the Bankruptcy Court for the District of Delaware (ii) because the Government of The Bahamas and its entities have provided an estimated 1.2 billion dollars' worth of concessions to the Respondents to facilitate the development. There is also a huge public interest in the project owing to the more than 2000 employees employed in the project and economic importance of the project to the Bahamas.

12.2 The Government has a major stake in the Baha Mar project and should the Order not be made the Government will suffer economically particularly with its credit rating which is under threat to being downgraded by Standard & Poors.
12.3 The Respondents are unable to pay their debts as they fall due.
12.4 The Respondents reportedly have unsecured debts of approximately $123 million, not including the amount claimed by the Contractor, the CCA. Further, the Respondents have approximately 2,400 employees. The Respondents have indicated that they intend to make redundancies in respect of almost their entire workforce. Based on current information, the Respondents do not have sufficient funding to compensate employees. Compensation payments can only be made if the Respondents are able to secure additional funding.
12.5 An Affidavit sworn by Antionette Bonamy, Director of Legal Affairs in support accompanies this Petition.
12.6 In all of the circumstances, it is clear that the Respondents are insolvent and are unable to pay their debts as they fall due.
12.7 Further, or in the alternative, it is just and equitable that the Respondents should be wound up.
Your Petitioner therefore humbly prays that:
(1) The 3rd, 6th, 7th, 11th, 12th, and 13th Respondents be wound up in accordance with the Companies (Winding Up Amendment Act).
(2) The 1st, 2nd, 4th, 5th, 8th, 9th, 10th and 14th Respondents be wound up in accordance with the International Business Companies Act.
(3) Messrs Prince Rahming, Gowon Bowe, and Garth Calow, all of PricewaterhouseCoopers Advisory (Bahamas) Limited be appointed as official liquidators of the Respondents, OR
(4) Such other order may be made as the Court thinks fit.

5. On the date of the presentation of the original Petition, 16 July 2015, the AG also issued a summons seeking the appointment of provisional liquidators in respect of all 14 Respondents.

6. On 28 July 2015 the 14 Respondents filed a Notice of Motion seeking to strike out the original Petition pursuant to the inherent jurisdiction of the Court and section 191(1)(a) of the Companies (Winding Up) Amendment Act, 2011 ("CWUA"). The grounds identified in the Notice of Motion were as follows:

1. The claim by the Attorney-General to be acting in a representative capacity on behalf of *the Government of the Commonwealth of The Bahamas, The Treasurer of the Commonwealth of The Bahamas, The Bahamas Electricity Corporation, The National Insurance Board, The Water and Sewerage Corporation,* and The Gaming Board of The Bahamas notwithstanding, the Attorney-General lacks standing under the Act to present a Winding-Up Petition in a representative or any other capacity and therefore lacks any cause of action as against the said Respondents or any of them.

2. The Purported Petitioner who has presented the said Petition is neither creditor nor claims to be a creditor by way of assignment or otherwise, to whom any of the said Respondents is indebted in law or in equity for any sum at all. Further, the Purported Petitioner is neither a contributory nor claims to be a contributory of any of the said Respondents. Therefore, the said Petition is incompetent for all purposes of the Act and cannot be sustained.
3. Other than the Government of the Commonwealth of The Bahamas (which is not a juridical person capable of suing or being sued by that name in private law), the other entities whom the Attorney-General purports to represent, each having such capacities in law, may be authorised by the Attorney-General to issue civil proceedings in his name if they are seeking a form of relief in public law asserting a public right; because the Attorney-General acts *ex officio* as guardian of the public interest, protector of public rights and forensic representative of the public at large. In the premises, the said Winding-Up Petition could not be presented in the representative capacity the Attorney-General is claimed to be acting, on just and equitable grounds or on grounds of alleged inability to pay debts when due.
4. The said Petition is not genuine it being used as basis upon which the Attorney-General seeks appointment of a Provisional Liquidator. However, *Ord. 4, r. 1 of The Companies Liquidation Rules, 2012* ("the CLR") provides for an application for appointment of a Provisional Liquidator by a creditor or contributory or regulator. The Purported Petitioner in this case not being (or claiming to be) either, the said Winding-Up Petition is not being presented *bona fides.*
5. The Petition fails to meet mandatory requirements of the Act and the CLR, in that:
   (a) to the extent it purports or is intended to be a Creditor's Petition within the meaning of *sect. 188(a)* of the Act and *Ord. 3, r. 3(1)* and *(2)* of the CLR, the said Petition is not verified by an Affidavit averring that the statements in the Petition are true, or are true to the best of the deponent's belief; and the omnibus form that it is presented in, fails to, *inter alia,* identify the creditor the Purported Petitioner represents to whom any one of the Respondents is indebted, specify which sum or the date when on which the debt fell due, specify the currency of the debt and the consideration for it; and
   (b) The said Petition is presented for improper purposes, constituting an abuse of process, in that the Purported Petitioner's espoused interest is not such as to form a proper basis in law for making a winding-up order.
6. The '*just and equitable*' basis asserted for presenting the said Petition cannot be said to equate to a public interest test because such a test is not currently a part of the law of The Bahamas.
7. It follows from grounds 1, 2, 3 and 4(a)-(b), 5, and 6 (each of which is itself a freestanding ground of failure) that the said Winding-Up Petition presented is fatally defective in law not the least because of its lack of specificity and non-compliance with requisite essential statutory provisions of the Act and the CLR.
8. The nature, extent and gravamen of the defects in the Winding-Up Petition are such that amendments (even if permitted) would not render it apt.

7. The matter came on for hearing on 31 July 2015 but was adjourned at the request of the AG. At that hearing the Court was advised of recent information, coming to the attention of the AG, as to the suitability of the then proposed liquidators as well as renewed hopes of a global settlement of the dispute between stakeholders.

8. On 7 August 2015, 7 Petitions ("the new Petitions") were presented by the government entities on whose behalf the AG had previously purported to act. Each new Petition relates to one of the Respondent Companies and is filed in the name of a single Petitioner. The AG says that such presentations were made without prejudice to the Attorney-General's position on the original Petition. Each of the new Petitions sought the winding up of one of the Respondents and for the appointment of joint official liquidators in respect of that company. It is necessary to set out the terms of the individual petitions in full:

9. In action 2015/COM/com/00046 the Gaming Board petitions for the winding up of Baha Mar Enterprises Ltd. The Petition is settled as follows:

> **TO THE SUPREME COURT**
>
> The humble Petition of The Gaming Board of The Bahamas (Centerville House, Collins Avenue PO Box N4565, Nassau, N.P., The Bahamas)(together hereafter referred to as "The Petitioner") shows that:
>
> 1. The Respondent was incorporated in The Bahamas on 30 September 2004 under the Companies Act 1992.
>
> 2. The Respondent's registered company number is 52204 C.
>
> 3. The Respondent's registered office address is at H J Corporate Services Limited of Ocean Centre, Montagu Foreshore, East Bay Street, PO Box SS-19084, Nassau, The Bahamas.
>
> 4. The nominal share capital of the Respondent is B$50,000.00 divided into 50,000 shares.
>
> 5. The Respondent carries on business in The Bahamas, and is involved in the business of the construction, development and promotion of the Baha Mar Resort in The Bahamas. The Respondent also managed the Crystal Palace Casino, Nassau from time to time.

6. On 29 June 2015 the Respondent, (who, together with Baha Mar Ltd, Baha Mar Land Holdings Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Baha Mar Support Services Ltd, Cable Beach Resorts Limited, Baha Mar Sales Company Ltd, Baha Mar Leasing Company Ltd, Baha Mar Properties Ltd, BMP Golf Ltd, BMP Three Ltd and BML Properties Ltd, is inter alia involved in the construction, development and promotion of the Baha Mar Resort in The Bahamas) filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District of Delaware, U.S.A, The Respondent did this without prior notice to the Petitioner or to the other creditor mentioned below.

7. As at the date of this Petition, the Respondent is indebted to the Petitioner and to the other creditor mentioned below in the total sum of (at least) B$21,968,733.92.

Sums due to the Water & Sewerage Corporation

8. The Respondent made an application to the Water & Sewerage Corporation for water to be supplied to the Baha Mar Resort.

9. The Respondent is indebted to the Water & Sewerage Corporation in the sum of B$103.20 in respect of water and sewerage charges and, despite demands, has failed to pay this sum.

Sums due to the Petitioner

10. The Respondent is indebted to The Gaming Board of The Bahamas ("The Gaming Board"). The amount of outstanding payments due and payable to The Gaming Board is B$11,218,630.72. This amount represents the following outstanding payments:

Crystal Palace Casino winnings arrears B$6,418,630.72

Basic taxes B$1,800,000.00

11. In addition, the Respondent is indebted to The Gaming Board in the sum of $10,750,000 ("the Deferred Sum"). The timing of the payment of this sum was deferred pursuant to terms agreed between the Government of The Bahamas and the Baha Mar Group of Companies. However, on current facts, it seems highly unlikely that the Respondent will be in a position to fulfill their obligations under those terms and so The Gaming Board reserves its rights in full in respect of the Deferred Sum.

12. To the extent that any of the sums referred to in paragraphs 10 and 11 above are not immediately payable by the Respondent, the Gaming Board of The Bahamas is a prospective or contingent creditor of the Respondent in respect of such sum(s).

13. For these reasons alone, it should be concluded that the Respondent is unable to pay its debts as they fall due and, further, that it would be just and equitable to wind it up.

14. Further, the Respondent has admitted in Chapter 11 proceedings in the United States of America that the value of its liabilities exceeds its assets, and so it is insolvent on a balance sheet basis. And for this reason too, it should be inferred that it is unable to pay its debts as they fall due.

15. The Petitioner proposes to appoint Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK for appointment as joint official liquidators.

16. An affidavit of Glen Laville on behalf of the Water & Sewerage Corporation accompanies this Petition.

17. An affidavit of Verdant R. Scott on behalf of The Gaming Board accompanies this Petition.

18. In all of the circumstances, it is clear that the Respondent is insolvent and is unable to pay its debts as they fall due.

10. In action 2015/COM/com/00047 the Treasurer petitions for the winding up of Baha Mar Land Holdings Ltd. The Petition is settled as follows:

TO THE SUPREME COURT

The Humble Petition of The Treasurer of the Commonwealth of The Bahamas, Public Treasury Building, 5th floor, North East Wing, East & North Streets, P.O. Box N-7524, Nassau, The Bahamas shows that:

1. The Respondent was incorporated in The Bahamas on 9 May 2006 under the International Business Companies Act, 2000, Chapter 309.

2. The Respondent's registered company number is 143583 B.

3. The Respondent's registered office address is at H & J Corporate Services Limited of Ocean Centre, Montagu Foreshore, East Bay Street, P.O. Box SS-19084, Nassau, The Bahamas.

4. The nominal share capital of the Respondent is US$50,000.00 divided into 50,000 shares.

5, The Respondent was incorporated and is doing business in The Bahamas and is involved in the business of the construction, development and promotion of the Baha Mar Resort in The Bahamas.

6. On 29 June, 2015 the Respondent who (together with Baha Mar Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Cable Beach Resorts Ltd, Baha Mar Enterprises Ltd, Baha Mar Support Services Ltd, Baha Mar Sales Company Ltd, Baha Mar Leasing Company Ltd, Baha Mar Properties Ltd, BMP Golf Ltd, BMP Three Ltd and BML Properties Ltd) is involved in the construction, development

and promotion of the Baha Mar Resort in The Bahamas, filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District of Delaware, U.S.A. The Respondent did this without prior notice to the Petitioner or to either of the other creditors mentioned below.

7. As at the date of this Petition, the Respondent is indebted to the Petitioner and to the two further creditors mentioned below in the total sum of (at least) B$3,331,757.21.

Sums due to the Water & Sewerage Corporation

8. The Respondent made an application to the Water & Sewerage Corporation for water to be supplied to the Baha Mar Resort.

9. The Respondent is indebted to the Water & Sewerage Corporation in the sum of B$1,672,410.74 in respect of water and sewerage charges.

Sums due to The Bahamas Electricity Corporation

10. The Respondent made an application to be supplied with electricity for the Baha Mar Resort located at Cable Beach.

11. The Respondent is indebted to The Bahamas Electricity Corporation for non-payment of electricity charges in the amount of B$539,415.38 as at 30 June, 2015 and, despite demands, has failed to pay this sum.

Sums due to the Petitioner

12. The Respondent is indebted to The Treasurer of the Commonwealth of The Bahamas in respect of sums due for real property tax in the sum of B$1,119,931.09 for the period as at 7 November, 2014.

13. For these reasons alone, it should be concluded that the Respondent is unable to pay its debts as they fall due; and further, that it would be just and equitable to wind it up.

14. Further the Respondent has admitted in Chapter 11 proceedings in the United States of America that the value of its liabilities exceeds its assets, and so it is insolvent on a balance sheet basis. And for this reason too, it should be inferred that it is unable to pay its debts as they fall due.

15. The Petitioner proposes to appoint Mr. Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, qualified insolvency practitioners, for appointment as official liquidators.

16. An Affidavit of Glen Laville on behalf of the Water & Sewerage Corporation accompanies this Petition.

17. An Affidavit of Kevin Basden on behalf of The Bahamas Electricity Corporation accompanies this Petition.

18. An Affidavit of John Rolle on behalf of The Treasurer of the Commonwealth of The Bahamas accompanies this Petition.

19. In all of the circumstances, the Respondent is insolvent and is unable to pay its debts as they fall due.

20. Further, or in the alternative, it is just and equitable that the Respondent shall be wound up.

11. In action 2015/COM/com/00048 the Water and Sewage Corporation petitions for the winding up of BMP Golf Ltd. The Petition is settled as follows:

TO THE SUPREME COURT

The Humble Petition of the Water & Sewerage Corporation of P.O. Box N-3905 Nassau, The Bahamas shows that:

1 The Respondent was incorporated in The Bahamas on 11 February 2005 under the Companies Act 1992, Chapter 308.

2 The Respondent's registered company number is 52639 C.

3 The Respondent's registered office address is at H & J Corporate Services Limited of Ocean Centre, Montagu Foreshore, East Bay Street, PO Box SS-19084, Nassau, The Bahamas.

4 The nominal share capital of the Respondent is US$50,000.00 divided into 50,000 shares.

5 The Respondent carries on business in The Bahamas and is involved in the business of construction, development and promotion of the Baha Mar Resort in The Bahamas.

6 On 29 June 2015 the Respondent, who (together with Baha Mar Ltd, Baha Mar Land Holdings Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Cable Beach Resorts Ltd, Baha Mar Enterprises Ltd, Baha Mar Support Services Ltd, Baha Mar Sales Company Ltd, Baha Mar Leasing Company Ltd, Baha Mar Properties Ltd, BMP Three Ltd and BML Properties Ltd), is involved in the construction, development and promotion of the Baha Mar Resort in The Bahamas filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District of Delaware, U.S.A. The Respondent did this without prior notice to the Petitioner.

Sums due to the Water & Sewerage Corporation

7 The Respondent made an application to the Water & Sewerage Corporation for water to be supplied to the Baha Mar Resort.

8 The Respondent is indebted to the Petitioner for the sum of (at least) B$14,908.10 in respect of water and sewerage charges and, despite demands, has failed to make payment.

9 For these reasons alone, it should be concluded that the Respondent is unable to pay its debts as they fall due and, further, that it would be just and equitable to wind it up.

10 Further, the Respondent has admitted in Chapter 11 proceedings in the United States of America that the value of its liabilities exceeds its assets, and so it is insolvent on a balance sheet basis. And for this reason too, it should be inferred that it is unable to pay its debts as they fall due.

11 The Petitioner proposes to appoint Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, qualified insolvency practitioners, for appointment as official liquidators.

12 An affidavit of Glen Laville on behalf of the Water & Sewerage Corporation accompanies this Petition.

13 In all of the circumstances, it is clear that the Respondent is insolvent and is unable to pay its debts as they fall due.

12. In action 2015/COM/com/00049 the National Insurance Board petitions for the winding up of Baha Mar Ltd. The Petition is settled as follows:

TO THE SUPREME COURT

The Humble Petition of The National Insurance Board, Jumbey Village, Baillou Hill Road, P.O. Box N-7508, Nassau, The Bahamas shows that:

1. The Respondent was incorporated in The Bahamas on 25 February 2010 under the International Business Companies Act 2000.
2. The Respondent's registered company number is 158906 B.
3. The Respondent's registered office address is at H J Corporate Services Limited of Ocean Centre, Montagu Foreshore, East Bay Street, PO Box SS-19084, Nassau, The Bahamas.
4. The nominal share capital of the Respondent is B$165,500.00 divided into two classes of shares. The Respondent has issued 1,550,000 common shares of par value US$0.01 each and preferred shares of US$1.00 each.
5. The Respondent carries on business in The Bahamas and is involved in the business of the construction, development and promotion of the Baha Mar Resort in The Bahamas.
6. On 29 June 2015 the Respondent, who (together with Baha Mar Land Holdings Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Cable Beach Resorts Ltd, Baha Mar Enterprises Ltd, Baha Mar Support Services Ltd, Baha Mar Sales Company Ltd, Baha Mar Leasing Company Ltd, Baha Mar Properties Ltd, BMP Golf Ltd, BMP Three Ltd and BML Properties Ltd) is involved in the construction, development and promotion of the Baha Mar Resort in The Bahamas filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District of Delaware, U.S.A. The Respondent did this without prior notice to the Petitioner or to any of the other creditors mentioned below.

7. As at the date of this Petition, the Respondent is currently indebted to the Petitioner and to the further creditors as set out below; and further, it has a prospective or contingent liability to the Gaming Board of The Bahamas and therefore the Government of the Commonwealth of The Bahamas of B$10,750,000.00.

Sums due to the Petitioner

8. The Respondent has outstanding national insurance contributions due for April and May 2015 in the sum of B$685,417.11 (including interest to 4 August 2015) and, has failed to pay this sum.

9. The Respoondent has not yet provided its Contribution Statements (C-10) for June 2015 on which payment should have been made by 15 July 2015.

Sums due to The Bahamas Electricity Corporation

10. The Respondent made an application to be supplied with electricity for the Baha Mar Resort located at Cable Beach.

11. The Respondent is indebted to The Bahamas Electricity Corporation for non-payment of electricity charges in the amount of B$5,429,248.93 and, has failed to pay this sum.

Sums due to the Treasurer

12. The Respondent is indebted to the Treasurer for outstanding airlift subsidies provided by the Ministry of Tourism in the sum of B$512,500.00.

13. The Respondent is also indebted to the Treasurer in respect of unpaid real property tax arrears for the period up to 7 November 2014 (plus the late statutory surcharge) in the sum of B$6,840.21.

14. As at the 3rd July, 2015, the Respondent is also indebted to the Treasurer in respect of unpaid real property tax arrears for the period up to 7 November 2014 (plus the late statutory surcharge) in the amount of B$809,712.32. The Respondent assumed liability for this sum from Baha Mar Land Company Ltd pursuant to the Amended and Restated Heads of Agreement dated 31 January 2011 and made between The Government of the Commonwealth of The Bahamas and the Respondent, and/or pursuant to a Novation and Amendment agreement dated 31 January 2011.

Sums due to the Water & Sewerage Corporation

15. Prior to 31 January 2011 Baha Mar Development Company Ltd was indebted to the Water & Sewerage Corporation in the sum of B$59,451.82. The Respondent assumed liability for this sum from Baha Mar Development Company Ltd pursuant to the Amended and Restated Heads of Agreement dated 31 January 2011 and made between The Government of the Commonwealth of The Bahamas and the Respondent, and pursuant to a Novation and Amendment agreement dated 31 January 2011 and made between, inter alia, the Respondent and Baha Mar Development Company Ltd. This sum remains unpaid.

Prospective liability for sums due to The Gaming Board of The Bahamas, and therefore to the Government

16. Baha Mar Enterprises Ltd owes a deferred sum to The Gaming Board of The Bahamas of $10,750,000.00 ("the Deferred Sum"). The due date for payment of the Deferred Sum was the opening date of the "New Casino"

pursuant to the terms of the Amended and Restated Heads of Agreement dated 31 January 2011 and made between the Government of the Commonwealth of The Bahamas and the Respondent ("the Heads of Agreement") and in related Letter Agreements.

17. Pursuant to clause 7.7 of the Heads of Agreement the Respondent covenanted with the Government of the Commonwealth of The Bahamas that it would pay the Deferred Sum when it became due or that it would procure that one of its affiliates pay it. So far as the Petitioner is aware, the New Casino has not yet opened.

18. Accordingly, the Respondent is also liable for the said debt, and the Government is a prospective or contingent creditor of the Respondent. The sums would be payable to the Gaming Board of The Bahamas and therefore to the Government.

Conclusion

19. For the above reasons, it should be concluded that the Respondent is unable to pay its debts as they fall due and, further, that it would be just and equitable to wind it up.

20. Further, the Respondent has admitted in Chapter 11 proceedings in the United States of America that both its liabilities and its assets exceed US$1bn (and it is therefore not clear whether its assets exceed its liabilities). But it should be concluded from the evidence filed on behalf of the Respondent in those proceedings that it is in any event unable to pay its debts as they fall due.

21. The Petitioner proposes to appoint Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr. Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, qualified insolvency practitioners, for appointment as official liquidators.

22. An affidavit of Cecile Williams-Bethel on behalf of the National Insurance Board accompanies this Petition.

23. An affidavit of Kevin Basden on behalf of The Bahamas Electricity Corporation accompanies this Petition.

24. An affidavit of John Rolle on behalf of The Treasurer of the Commonwealth of The Bahamas accompanies this Petition.

25. An affidavit of Verdant Scott on behalf of The Gaming Board of the Commonwealth of The Bahamas accompanies this Petition.

26. An affidavit of Glen Laville on behalf of the Water & Sewerage Corporation accompanies this Petition.

27. In all of the circumstances, it is clear that the Respondent is insolvent and is unable to pay its debts as they fall due.

28. Further, or in the alternative, it is just and equitable that the Respondent shall be wound up.

13. In action 2015/COM/com/00050 the Treasurer petitions for the winding up of Baha Mar Properties Ltd. The Petition is settled as follows:

TO THE SUPREME COURT

The Humble Petition of The Treasurer of the Commonwealth of The Bahamas, Public Treasury Building, 5th floor, North East Wing, East & North Streets, P.O. Box N-7524, Nassau, New Providence, The Bahamas, shows that:

1 The Respondent was incorporated in The Bahamas on 25 January 2005 under the Companies Act 1992, Chapter 308.

2 The Respondent's registered company number is 52568 C

3 The Respondent's registered office address is at H & J Corporate Services Limited, Ocean Centre, Montagu Foreshore, East Bay Street, P.O. Box SS-19084, Nassau, The Bahamas.

4 The nominal share capital of the Respondent is US$50,000.00 divided into 50,000 shares.

5 The Respondent carries on business in The Bahamas and is involved in the business of the construction, development and promotion of the Baha Mar Resort in The Bahamas.

6 On 29 June 2015 the Respondent, who (together with Baha Mar Ltd, Baha Mar Land Holdings Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Cable Beach Resorts Ltd, Baha Mar Enterprises Ltd, Baha Mar Support Services Ltd, Baha Mar Sales Company Ltd, Baha Mar Leasing Company Ltd, BMP Golf Ltd, BMP Three Ltd and BML Properties Ltd) is involved in the construction, development and promotion of the Baha Mar Resort in The Bahamas, filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District Delaware, U.S.A. The Respondent did this without prior notice to the Petitioner.

7 As at the date of this Petition, the Respondent is indebted to the Petitioner in the total sum of (at least) B$1,757,078.84.

Sums due to Petitioner

8 The Respondent is indebted to the Petitioner in the sum of B$1,405,976.12 in respect of real property tax arrears and, has failed to pay this sum.

9 The Respondent is indebted to the Petitioner in the sum of B$351,102.72. This amount represents outstanding hotel guest tax arrears for the Melia Hotel for the period November and December 2014.

10 To the extent that any of the sum (or any part thereof) referred to in paragraphs 8 and 9 above are not due and payable by the Respondent immediately, the Petitioner is a contingent or prospective creditor in respect of any such sum(s).

11 For these reasons alone, it should be concluded that the Respondent is unable to pay its debts as they fall due and, further, that it would be just and equitable to wind it up.

12 Further, the Respondent has admitted in Chapter 11 proceedings in the United States of America that the value of its liabilities exceeds its assets, and so it is insolvent on a balance sheet basis. And for this reason too, it should be inferred that it is unable to pay its debts as they fall due.

13 The Petitioner proposes to appoint Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, qualified insolvency practitioners, for appointment as official liquidators.

14 An affidavit of John Rolle on behalf of the Treasurer of the Commonwealth of The Bahamas accompanies this Petition.

15 In all of the circumstances, the Respondent is insolvent and is unable to pay its debts as they fall due.

14. In action 2015/COM/com/00051 the Treasurer petitions for the winding up of BMP Three Ltd. The Petition is settled as follows:

TO THE SUPREME COURT

The Humble Petition of The Treasurer of the Commonwealth of The Bahamas (of 5th Floor, North East Wing, Treasury Building, Corner East Street & North Place, PO Box N-7524, Nassau, New Providence, The Bahamas) shows that:

1 The Respondent was incorporated in The Bahamas on 11 February 2005 under the Companies Act 1992, Chapter 308.

2 The Respondent's registered company number is 52640 C.

3 The Respondent's registered office address is at H J Corporate Services Limited of Ocean Centre, Montagu Foreshore, East Bay Street, PO Box SS-19084, Nassau, The Bahamas.

4 The nominal share capital of the Respondent is US$50,000.00 divided into 50,000 shares.

5 The Respondent carries on business in The Bahamas and is involved in the business of the construction, development and promotion of the Baha Mar Resort in The Bahamas.

6 On 29 June 2015 the Respondent, who (together with Baha Mar Ltd, Baha Mar Land Holdings Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Cable Beach Resorts Ltd, Baha Mar Enterprises Ltd, Baha Mar Support Services Ltd, Baha Mar Sales Company Ltd,

Baha Mar Leasing Company Ltd, Baha Mar Properties Ltd, BMP Golf Ltd and BML Properties Ltd), is involved in the construction, development and promotion of the Baha Mar Resort in The Bahamas filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District of Delaware, U.S.A. The Respondent did this without prior notice to the Petitioner.

7 As at the date of this Petition, the Respondent is indebted to the Petitioner in the total sum of (at least) B$2,542,931.52.

Sums due to The Treasurer of the Commonwealth of The Bahamas

8 The Respondent owes the sum of B$2,253,076.56 to the Petitioner and has failed to pay this sum. This amount represents outstanding hotel guest tax arrears for the Wyndham Hotel for the period November 2011 to July 2014.

9 The Respondent is indebted to the Petitioner in the sum of B$289,854.94 in respect of sums due for Business Licence Fees in respect of the Wyndham Nassau Resort for the years 2011 to 2013.

10 For these reasons alone, it should be concluded that the Respondent is unable to pay its debts as they fall due and, further, that it would be just and equitable to wind it up.

11. Further, the Respondent has admitted in Chapter 11 proceedings in the United States of America that the value of its liabilities exceeds its assets, and so it is insolvent on a balance sheet basis. And for this reason too, it should be inferred that it is unable to pay its debts as they fall due.

12 The Petitioner proposes to appoint Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, qualified insolvency practitioners, for appointment as official liquidators.

13 An affidavit of John Rolle on behalf of The Treasurer of the Commonwealth of The Bahamas accompanies this Petition.

14 In all of the circumstances, it is clear that the Respondent is insolvent and is unable to pay its debts as they fall due.

15. In action 2015/COM/com/00052 the Treasurer petitions for the winding up of Cable Beach Resorts Ltd. The Petition is settled as follows:

TO THE SUPREME COURT

The Humble Petition of The Treasurer of the Commonwealth of The Bahamas, Public Treasury Building, 5th floor, North East Wing, East & North Streets, P.O. Box N-7524, Nassau, The Bahamas shows that:

1 The Respondent was incorporated in The Bahamas on 8 February 2005 under the Companies Act 1992, Chapter 308.

2 The Respondent's registered company number is 52625.

3 The Respondent's registered office address is at H & J Corporate Services Limited of Ocean Centre, Montagu Foreshore, East Bay Street, PO Box SS-19084, Nassau, The Bahamas.

4 The nominal share capital of the Respondent is US$50,000.00 divided into 50,000 shares.

5 The Respondent carries on business in The Bahamas and is involved in the business of the construction, development and promotion of the Baha Mar Resort in The Bahamas.

6 On 29 June 2015 the Respondent, who (together with Baha Mar Ltd, Baha Mar Land Holdings Ltd, Baha Mar Operating Company Ltd, Riviera Golf Ventures Ltd, Baha Mar Entertainment Ltd, Baha Mar Enterprises Ltd, Baha Mar Support Services Ltd, Baha Mar Sales Company Ltd, Baha Mar Leasing Company Ltd, Baha Mar Properties Ltd, BMP Golf Ltd, BMP Three Ltd and BML Properties Ltd), is involved in the construction, development and promotion of the Baha Mar Resort in The Bahamas, filed for Chapter 11 Bankruptcy in the Bankruptcy Court of the District of Delaware, U.S.A. The Respondent did this without prior notice to the Petitioner or to either of the other creditors mentioned below.

7 As at the date of this Petition, the Respondent is indebted to the Petitioner and to the two further creditors mentioned below in the total sum of (at least) B$22,458,795.80.

Sums due to The Water & Sewerage Corporation

8 The Respondent made an application to The Water & Sewerage Corporation for water to be supplied to the Baha Mar Resort.

9 The Respondent is indebted to The Water & Sewerage Corporation for the sum of B$1,339,932.18 in respect of water and sewerage charges.

Sums due to The Bahamas Electricity Corporation

10 The Respondent made an application to be supplied with electricity for the Baha Mar Resort located at Cable Beach.

11 The Respondent is indebted to The Bahamas Electricity Corporation for non-payment of electricity charges in the amount of B$21,105,381.24 as at July 2015 and has failed to pay this sum.

Sums due to the Petitioner

12 The Respondent is indebted to the Petitioner in respect of sums due for Business Licence Fees in respect of the Cable Beach Golf Course in the sum of B$13,482.38 for the years 2005 to 2011.

13 For these reasons alone, it should be concluded that the Respondent is unable to pay its debts as they fall due and, further, that it would be just and equitable to wind it up.

14 Further, the Respondent has admitted in Chapter 11 proceedings in the United States of America that the value of its liabilities exceeds its assets, and so it is insolvent on a balance sheet basis. And for this reason too, it should be inferred that it is unable to pay its debts as they fall due.

15 The Petitioner proposes to appoint Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, qualified insolvency practitioners, for appointment as official liquidator.

16 An affidavit of Glen Laville on behalf of the Water & Sewerage Corporation accompanies this Petition.

17 An affidavit of Kevin Basden on behalf of The Bahamas Electricity Corporation accompanies this Petition.

18 An affidavit of John Rolle on behalf of The Treasurer of the Commonwealth of The Bahamas accompanies this Petition.

19 In all of the circumstances, the Respondent is insolvent and is unable to pay its debts as they fall due.

20 Further, or in the alternative, it is just and equitable that the Respondent shall be wound up.

16. On 10 August 2015, the Respondents to the new Petitions issued a joint summons in the original Petition, for orders that the AG provide confirmation as to which parts of the original Petition and Summons were being pursued against them, having regard to the new Petitions, and for an order that the appointment of any provisional liquidator be subject to a consultation process.

17. The affidavits relied upon by the parties were the following:

By the Petitioners

a)	Affidavit of Antoinette Bonamy	16 July 2015
b)	Affidavit of Sandra Edgecombe	16 July 2015
c)	Affidavit of Verdant Scott	16 July 2015
d)	Affidavit of Cecile Green	16 July 2015
e)	Affidavit of Cecile Bethel	16 July 2015
f)	Affidavit of Prince Rahming	16 July 2015

g) Affidavit of Antoinette Bonamy	17 July 2015
h) Affidavit of Garth Calow	17 July 2015
i) Affidavit of Gowan Bowe	17 July 2015
j) Affidavit of John Rolle (3rd)	24 July 2015
k) Affidavit of (2nd) Antoinette Bonamy	24 July 2015
l) Affidavit of Verdant Scott (2)	07 August 2015
m) Affidavit of Glen Laville (5)	07 August 2015
n) Affidavit of John Rolle (5)	07 August 2015
o) Affidavit of Kevin Basden (3)	07 August 2015
p) Affidavit of Cecile Bethel	07 August 2015
q) Affidavit of Sir Balrton Bethel	13 August 2015
r) Affidavit of (4th) John Rolle (5)	18 August 2015
s) Affidavit of Ryan Albury (2)	18 August 2015
t) Affidavit of Celile Bethel	03 September 2015

For the Respondents

a) Affidavit of (1st) Patrick Ryan	28 July 2015
b) Affidavit of (2nd) Patrick Ryan	10 August 2015
c) Affidavit of (3rd) Patrick Ryan	13 August 2015
d) Affidavit of Lance Millage	12 August 2015
e) Affidavit of Mark Shinderman	17 August 2015
f) Affidavit of (4th) Patrick Ryan	18 August 2015
g) Affidavit of (2nd) Lance Millage	
h) Affidavit of (3rd) Lance Millage	02 September 2015

For Ernst & Young

a) Affidavit of Michelle Thompson	20 August 2015

18. It was common ground that, notwithstanding no new Notice of Motion was filed, the complaints made against the original Petition (so far as were relevant) would be levied against the new Petitions as well.

Issues

19. The Petitioners summarize their case in paragraph [1] of their reply submissions as follows:

    (1) The application for the appointment of provisional liquidators is urgent. All the Respondents (including in particular Baha Mar Limited, the parent of 12 of the others) are insolvent, work has stopped indefinitely on the Baha Mar project, and their relations with Exim Bank and China Construction have completely broken down. For these reasons alone, every day they continue under current management, without the appointment of provisional liquidators, the value of their assets and good will (and therefore of Baha Mar Limited's assets) will be dissipated without any prospect in the foreseeable future of earning any income. Further, in the meantime, and in further dissipation, they are incurring running costs and legal costs every day; and, as their own evidence acknowledges, they will have to deal with a vast number of claims that their creditors will make without any prospect in the foreseeable future of being able to pay them.

    (2) By contrast, if provisional liquidators are appointed now, all unsecured claims will be stayed for the benefit of all creditors; and there is a real prospect that a compromise can be reached between all creditors.... Further, it would manifestly be in the public interest to appoint provisional liquidators in order to achieve the same results...

    (3) In the case of seven of the Respondent companies, one or more of the Petitioners is indisputably a creditor. ...

    (4) The Respondents' application to strike out the original petition of the Attorney-General ('the original petition') is misconceived. Even if there

were defects in the original petition, they did not render it a nullity nor do they justify striking it out. ...

(5) Further, even if, contrary to the above, the original petition was a nullity or should be struck out, this is immaterial, because the Petitioners have issued new petitions and summonses based in all material respects on the same evidence as the original petition and summons...

20. The Respondents' legal case in respect of all the issues which are joined in this matter are set out in paragraph [44] of their written submissions as follows:

> 44. The Respondents contend for the following propositions of law:
>
> i. There has been failure to verify the Petition in accordance with applicable rules.
>
> ii. The Attorney General lacks relevant standing by which to present the Petition (the fact that, functionally, this appears to be conceded by the 7 August 2015 documents only makes this a stronger point).
>
> iii. The failure to allege any debts at all (against 7 of the Respondents) or else adequate details of debts not substantially disputed destroys the Petition as against those Respondents.
>
> iv. The 'Just and Equitable' ground invoked is not apt and must fail.
>
> v. The application to appoint [joint provisional liquidators] lacks the necessary *prima facie* case for making winding up orders against the Respondents.
>
> vi. The application to appoint [joint provisional liquidators] does not meet mandatory requirements, in terms of the provision of security.
>
> vii. The proposed draft Order is not fit for purpose, does not seem to have been shown to EY or any current proposed alternative [joint provisional liquidators], even assuming winding up orders were to be made.

21. The issues to be canvassed in this matter may be identified as follows:

a) The validity or otherwise of the original Petition.

b) The effect of the new Petitions on the original Petition.

c) Whether the Petitions ought to be permitted to assert a public interest and/or just and equitable ground as a basis for winding up the Respondents.

d) Whether the appointment of joint provisional liquidators are appropriate.

e) Whether the application to appoint joint provisional liquidators is an abuse and not made in good faith.

f) Whether the petitioners should be made to provide an undertaking if appointment was to be made.

g) The question of consultation as regards any appointment of joint provisional liquidators.

The validity of the original Petition

22. The attack on the original Petition is four-fold and may be identified as follows:

a) Order 24 rule 1(4) of the Company Liquidation Rules ("CLR") prohibits the presentation of single Petition against multiple Respondents.

b) There has been failure to verify the Petition in accordance with applicable rules.

c) The Attorney-General lacks relevant standing by which to present the Petition.

d) The failure to allege any debts at all (against 7 of the Respondents) or adequate details of debts not substantially disputed destroys the Petition as against those Respondents.

e) The Petitions identify debt claim in aggregate against all 14 Respondents rather that delineating the claim against each Respondent.

23. The Notice of Motion purports to seek relief pursuant to both the court's inherent jurisdiction and Section 191(1)(a) of the Company (Winding Up) Amendment Act, 2011 ("CWUA"). Section 191(1) of the CWUA provides:

> 191. Powers of the court.
>
> (1) Upon hearing the winding up petition the court may-
>
> (a) dismiss the petition;
>
> (b) adjourn the hearing conditionally or unconditionally;
>
> (c) make a provisional order; or
>
> (d) make any other order that it thinks fit,
>
> but the court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.

Section 191(1) sets out the possible outcomes of the hearing of a petition. It is not an avenue for interlocutory relief but for a final order to be made once all of the evidence is in place. As we are not at the stage of hearing of the petition it would not appear that Section 191(1) would be helpful to the Respondent's motion. I accept that there exists the power in the court to strike out woefully deficient and hopeless proceedings, proceedings which are laid in breach of the rules and proceedings which may be abusive of the Court's processes.

24. At the commencement of the hearing the AG conceded that the petition did not (and could not) allege any debt against the Respondents Baha Mar Operating Company Ltd., Rivera Golf Ventures Ltd., Baha Mar Entertainment Ltd., Baha Mar Support Services Ltd., Baha Mar Sales Company Ltd., Baha Mar Leasing Company Ltd. and BML Properties Ltd. Upon inquiry, the AG could not advance any reason as to why I ought not to strike out the petition as against these companies at the outset. I therefore ordered the original Petition struck out as against Baha Mar Operating Company Ltd., Rivera Golf Ventures Ltd., Baha Mar Entertainment Ltd., Baha Mar Support Services Ltd., Baha Mar Sales Company

Ltd., Baha Mar Leasing Company Ltd. and BML Properties Ltd. I reserved the question of costs for further submissions.

25. Mr. Corbett QC says, in relation to the original Petition, that "[i]t is beyond sensible argument that a winding up petition cannot be presented against more than one company. CLR Order 24 applies to applications to court (which the Original Petition is) under Part VII of the Companies Act (which relates to winding up). Order 24, r 1(4) says in terms: *A petition under this rule cannot relate to more than one company.* ...The point is reinforced by Order 24, r 1(5): the court shall not make any order for 2 or more petitions to be consolidated (thereby effectively turning them into one case)."

26. I agree.

27. Order 24 rules 1, 2, 3, 4 and 5 of the CLR provide as follows:

> **Originating applications (0.24, r.1)**
>
> 1. (1) Every originating application under Part VII of the Act shall be made by petition.
> (2) The general provisions of RSC Order 9 shall apply to every petition presented under these Rules.
> (3) Unless a specific form of petition is required by these Rules, CLR Form No. 2 shall be treated as the generally applicable form.
> ***(4) A petition under this rule cannot relate to more than one company.***
> ***(5) The court may hear two or more petitions at the same time, but it shall not make any order for two or more petitions to be consolidated.***
> (6) An office copy of every petition presented under these Rules shall be placed on the Register maintained by the Registrar pursuant to RSC Order 60.
>
> **Applications in existing proceedings (0.24, r.2)**
>
> 2. (1) Every application or appeal to the court made in connection with a proceeding which is already pending before the court shall be made by summons.
> (2) The general provisions of RSC Order 32 shall apply to every summons issued under these Rules.

Hearings (0.24, r.3)

3. (1) Every petition shall be heard in open court unless the court directs, for some special reason, that it should be heard in chambers.
(2) Every summons shall be heard in chambers unless- (a) the court has directed that it should be advertised, in which case it must be heard in open court; or (b) the court directs that it should be heard in open court.

Court files (0.24, r.4)

4. (1) A court file shall be established in respect of each winding up proceeding in accordance with RSC Order 60.
(2) The Registrar shall not permit the creation of more than one court file (or the allocation of more than one cause number) in respect of a liquidation proceeding or company in liquidation.
(3) The Registrar shall not permit any court file (and associated cause number) to relate to more than one company in liquidation.
(Emphasis Added)

28. The AG says that the rule is merely directory and not mandatory. Such a position is untenable as the rule could not be any clearer that a petition cannot relate to more than one company. Not only does the rule prohibit the petitioner from settling a petition against more than one company it restrains the Registrar and the Registry from opening a file relative to a petition so settled or allocating a number to such a petition. The Court is also prohibited, by the rules from consolidating two petitions.

29. I find that the original Petition, which seeks to wind up 7 companies (originally 14), is grossly irregular. Even if the rule was somehow directory, as the AG argues, and capable of being corrected by amendment, no such application for amendment has been advanced by the AG. Simply suggesting that the Court strike out all of the Respondents save for the first named Respondent without the formal application to show what could remain following an amendment is unacceptable. In the premises, and in light of the filing of the new Petitions, the original Petition cannot be maintained and must be struck out. I therefore strike out the original Petition in its entirety and order that the AG pay the costs of the original Petition to the Respondent Companies. Needless to say, the striking out of the original Petition means that the Summons filed on 16 July 2015 is likewise struck out.

30. Having struck out the original Petition, I need not make any determination as to the other complaints with respect to the original Petition. Additionally, the need to consider issues of overlap with respect to the new Petitions and the original Petition has been obviated.

Whether the new Petitions ought to be permitted to assert a public interest and/or just and equitable ground as a basis for winding up the Respondents

31. The specific prayer in the Respondent's Notice of Motion, at paragraph [6] prays for the striking out of the Petition on the ground that "[t]he just and equitable basis asserted for presenting the said Petition cannot be said to equate to a public interest test because such a test is not currently a part of the law of The Bahamas." The complaint was initially directed at the original Petition, which specifically identified "just and equitable as a ground for the winding up of the Respondent(s). The new Petitions, presented by the individual entities rather than the AG, are (in the main) not so bullish as to the just and equitable ground. They are primarily creditor's petitions but nonetheless say that it would be just and equitable to wind up the Respondent companies. No particulars are to be found in the Petition to outline the nature of the claim for just and equitable relief.

32. The kernel of the dispute is the Respondents' complaint that the claim for a just and equitable winding up alleged by the Petitioners is no more than a public interest ground and which they say, could not be the basis for a successful winding up under the just and equitable ground.

33. The Petitioners, notwithstanding the absence of particulars, say by way of affidavit, that they base the winding up of the Respondents, on just and equitable grounds, as a result of the following facts:

    a) the massive liabilities owed to a wide range of creditors;

b) the expressed averments of the Respondents that they cannot pay their ongoing expenses;

c) the critical importance of the project to the economy of The Bahamas;

d) huge financial concessions invested into the project in the expectation that it will be expeditiously completed;

e) the project is 98% completed; and

f) the intention of the Respondents to suspend the project indefinitely.

34. The evidence upon which the Petitioners ground their arguments is seen in the following:

a) Paragraph [7] of the Affidavit of Lance Millage filed on 12 August 2015: "The finished product is stated to cost in excess of $3.5 billion and will represent the largest ever foreign direct investment in the in The Bahamas. Of that figure, approximately $900 million in equity has been invested by Mr. Izmirlian and his family. This is substantially more than they were originally obligated to invest. The project will create approximately 5,000 full-time good quality jobs for The Bahamas. The Government has repeatedly acknowledged that the project is vital to the continued growth and further strengthening of the Bahamian economy."

b) Paragraph [59] of the Declaration of Thomas Dunlap Declaration of 29 June 2015: "Indeed once completed, Baha Mar will generate nearly 5,000 new jobs and have an annual payroll in excess of $130 million, representing 12% of the GDP of the Bahamas."

c) April 2013 Economic Impact Assessment and Cost Benefit Analysis of the Baha Mar Resort Development prepared Tourism Economics on behalf of Baha Mar: "On average from 2005 to 2012, Baha Mar has accounted for an estimated 3.2% of annual GDP; Once full operations are up and running, Baha Mar will account for 12.8% of annual GDP on average; The project has boosted average annual GDP growth in The Bahamas by 0.6% per year from 2005 to 2012; From 2013 to 2034, Baha Mar will increase average annual GDP growth by 0.5%."

d) April 2013 Economic Impact Assessment and Cost Benefit Analysis of the Baha Mar Resort Development prepared Tourism Economics on behalf of Baha Mar: (pg. 206); "Over a 20-year time horizon resort operations will generate: $52.1 billion in output (business sales); $32.4 billion in additional value added (contribution to GDP); $12.0 billion in additional income; On average, nearly 12,000 annual average jobs on an FTE basis."

e) April 2013 Economic Impact Assessment and Cost Benefit Analysis of the Baha Mar Resort Development prepared Tourism Economics on behalf of Baha Mar: (pg. 211) "Benefits to the government - A total of $5.5 billion (in $2013) will be generated in additional government revenue over the time horizon of the entire project. Key sources of revenue will include import duties on supplies used to support operations, occupancy tax revenues,

National Insurance, casino win tax revenues, and revenues generated by the departure tax on additional visitors to the Bahamas."

f) April 2013 Economic Impact Assessment and Cost Benefit Analysis of the Baha Mar Resort Development prepared Tourism Economics on behalf of Baha Mar: (pg. 212) Concessions from the government - "A total of $1.2 billion (in 2013) will be granted in concessions by the government over the time horizon of the entire project. The most significant concessions will be the 20-year exemption on real property tax, followed by the reduction on the statutory casino win tax of 50% for 21 years, and forgone import duties during the construction period. Other costs to the government will include a rebate of the annual license fee and annual contributions to a jointly funded marketing effort. Between 2005 and 2012, $152,308,028 in total concessions have been received by the Project from the Government of The Bahamas."

g) Paragraph [9] of the Second Affidavit of Sir Baltron Bethel of 13 August 2015: "The importance of prompt completion and opening of the Baha Mar resort cannot be overstated. ... [T]he Baha Mar project "has enormous economic and employment implications for The Bahamas." Those implications are summarized in the following excerpts from a July 2 Research Update issued by Standard & Poor's, when they placed The Bahamas' credit ratings on "CreditWatch" for possible downgrading, following the June 29 bankruptcy filings by the Respondents and the other Chapter 11 Debtors:

> [T]he Baha Mar developer's Chapter 11 reorganization filing could result in a prolonged delay in the opening of the $3.5 billion Baha Mar resort, the biggest in The Bahamas' history. A delay, in turn, could weaken the image of The Bahamas' tourism brand and lead to lower economic growth. The reorganization filing comes after disputes between the resort's developer, Baha Mar Ltd. (run by chairman and CEO Sarkis Izmirlian); its main lender, the Export-Import Bank of China; and the contractor, China Construction America. In our opinion, if the parties do not come to an agreement in the next several weeks, there are risks that not only will Baha Mar be unable to open in the near future, but that if and when it does open, it will not receive the amount of visitors it initially expected, thus tarnishing the reputation of The Bahamas' tourism industry, which represents more than 50% of The Bahamas' GDP. We also believe that the developer will be unable to continue employing the more than 2,000 workers already hired, let alone hire the additional 3,000 workers it planned to hire upon opening, if the dispute remains unresolved over the next couple of weeks. In our opinion, this may exacerbate the country's already-high unemployment rate, which was about 15.7% in November 2014, in a country with a population of about 370,000.
>
> * * * * The potential further delay in the opening of Baha Mar may also have negative implication on The Bahamas' external accounts, possibly limiting the boost that the tourism offering was expected to contribute to the country's exports. [Standard & Poor's Rating Services, Research Update, "The Commonwealth of The Bahamas 'BBB/A-2' Ratings Placed on CreditWatch Negative After Baha Mar Filed For Bankruptcy," July 2, 2015...

35. Section 186 of the CWUA provides

> 186. Circumstances in which a company may be wound up by the court.
> A company may be wound up by the court if-
> (a) ...
> (b) ...
> (c) the company is insolvent;
> (d) ...
> (e) ***the court is of the opinion that it just and equitable that the company should be wound up***; or

36. Unlike the insolvency ground, there is no definition of what ought to constitute circumstances for the court to be satisfied that it is just and equitable that the company should be wound up. The absence of a definition is not surprising as the leading case in this area of insolvency law appears to suggest that the categories of cases which fall to be classified under this head is never closed. The oft cited opinion of Lord Wilberforce in the English House of Lords Decision in ***Ebrahimi v Westbourne Galleries [1973] AC 360*** is found at page 379 of the judgment:

> "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so

that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

37. The Respondents say, relying on the decision of ***Georges CJ*** in ***Re Pub on the Mall Ltd. [1987] BHS J. No 141,*** that cases of just and equitable winding up ought to satisfy the elements identified by Lord Wilberforce in ***Ebrahimi***. In ***Re Pub on the Mall Ltd.*** the learned judge looked at ***Ebrahimi***, ***Yenide Tobacco Company Ltd. [1916] 2 Ch 426*** and ***Loch v John Blackwood Limited [1924] A.C. 783*** before observing that in each case "it was clearly envisaged (and in some case specifically stated) that the parties would have rights of active participation in the management of the company".

38. According to ***Brenda Hannigan*** in her text, ***Company Law*** at page 441, *"the courts have been reluctant to limit the just and equitable jurisdiction by categorizing the grounds on which the petition might be brought, however certain recognized categories have been developed over the years."* Prior to Ebrahimi, three traditional categories of just and equitable had developed: destruction of the basis of the association/deadlock (failure of quasi partners to agree); lack of probity (loss of confidence in the management of the company); and loss of substratum (main objective of the company cannot be attained). Ebrahimi represented the modern approach to the just and equitable jurisdiction.

39. The Petitioners rely principally on the decisions ***Re Ailee Development Corporation Limited (2008) SLR 97*** and ***Re Millennium Advanced Technology Ltd. [2004] EWHC 711 (Ch),*** which, they say, demonstrates that public interest has been held to be a relevant factor in considering the just and equitable ground for winding up. The Respondents say that both cases are unhelpful to the Petitioners' case.

40. In ***Millennium Advanced Technology Ltd.***, a not-for-profit company was incorporated to provide technology training for under-privileged persons with the assistance of grant money from the creditor, a local authority. Those grants were provided pursuant to general conditions, which required expenditure to be the subject of competitive tendering and reserved a right in the creditor to give a notice demanding repayment. Having received a complaint concerning a number of grant-funded transactions, the creditor suspended funding to the company. The creditor had not issued a notice under the general conditions and thus was a contingent creditor. The local authority issued a petition, in the light of evidence of the misappropriation of public funds, seeking the winding up of the company under s 122(1)(g) of the Insolvency Act 1986 on the principal basis that it was in the public interest that the company should be wound up. At the substantive hearing of the petition, the company applied, inter alia, for the petition to be struck out as an abuse of process on the basis that as a local authority, it could not petition to wind up a company protecting the public interest.

41. ***Judge Briggs QC*** (as he then was) found that Section 124 of the Insolvency Act 1986 did not afford locus standi to any creditor so that, once through the door of the court, it would be open to such a petitioner to seek to persuade the court to wind up a company upon any grounds that might make it appear that it would be just and reasonable so to do. However, as the petitioner had sufficient private interest in having the company wound up, the winding up order was granted on the basis of that private interest, not on the general public interest ground.

42. At paragraph 31 of the decision, ***Judge Briggs QC*** stated as follows:

> [31.] Attractively though this broad argument was presented, I have not been persuaded by it. In my judgment there is a consistent thread in the authorities on winding up petitions which affects all classes of potential petitioners, including for that matter the Secretary of State under Section 124A, and which may be summarised by the proposition that a petition is only properly presented <u>if it is bona fide in pursuit of some interest of the petitioner arising from his particular status as such</u>.
>
> [32.] In relation to contributories this is in my view best expressed by

Oliver J in *Re Chesterfield Catering* (above), where he said, at page 380F:

> "....it seems to me to be contrary to the principle of all the cases to suggest that, even allowing that there may be exceptions to the general rule, a petitioner can demonstrate his locus standi by pointing to some, private advantage which he may derive from the winding up and which is unconnected with his membership of the company."...
>
> [33.] In the case of the Secretary of State it is in my judgment obvious that Parliament has identified him as the guardian or promoter of the public interest, by making it a condition of his locus standi that it should appear to him "that it is expedient in the public interest that a company should be wound up". His petition is then in essence reliant upon the just and equitable ground, as that is separately stated in Section 124A(I), but it would be an improper petition if he had not duly satisfied himself as to the public interest in the manner required. (Emphasis added)

43. ***Re Millinium Advanced Technology Ltd.*** does not appear to be a case based upon a similar legislative regime as The Bahamas. Whilst section 122(g) of the UK Insolvency Act 1986 is *in pari materia* to our section 186(e) of the CWUA, there is no equivalent to section 124A of the UK Insolvency Act. Section 124A, so far as material, provides: *"(1) Where it appears to the Secretary of State ... that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court thinks it just and equitable for it to be so."* The Petitioners assert that section 124A merely limits the scope of who can bring the application for a just and equitable winding up based upon public interest and does not define it. I will accept that the UK Insolvency Act establishes a public interest test outside of the just and equitable ground set down by section 122(g). The test being a two-fold one: (1) the public interest appearing to the Secretary of State to require the winding up of the company; and, (2) it is just and equitable in the "mind" of the court to do so.

44. In ***Re Ailee Development Corporation Limited*** the Government of the Seychelles was a contributory and held 8.4% of the shares of the Ailee Corporation Limited, which was incorporated to own and operate a hotel resort in the Seychelles. The Government of the Seychelles had granted concessions and

had also guaranteed a loan from the International Finance Corporation to facilitate the development of the resort in return for the allotment of the shares. The hotel commenced operation and the company subsequently lost its license to operate the facility. The Government of the Seychelles issued a petition to wind up the company. The petition was said to have been brought by the Government of the Seychelles to recover *"the indirect investment of public funds in the shares"* and *"to protect the tourism industry and thereby the economy of the country, in its capacity as a sovereign entity."* The court granted the winding up order, which was confirmed by the Seychelles Court of Appeal. In doing so the court found that *"at the time of the presentation of the petition there was no reasonable hope that the company could pursue its main object as an hotelier, not merely due to the licence not being renewed by the SLA, but mainly due to its inability to find partner or investors who could invest with confidence, knowing the debt situation of the company. Hence the Court does not agree that it is a temporary setback."*

45. Whilst the Government of The Bahamas has made a considerable investment in the Baha Mar project, it is not a shareholder and as such plays no role in the management or ownership of the Project Company, unlike the Seychelles Government which held shares in the Ailee Development Corporation. Whilst the Baha Mar project here has been halted indefinitely, I am not satisfied that the substratum of the investment has been lost as in the context of the ***Ailee*** case where the hotel could no longer exist having been de-licensed. In fact, portions of the Baha Mar property continues to trade and operate at present. Even in the context of the Gaming Board's Petition, the gaming license may be in jeopardy but it remains extant.

46. According to ***Lord Wilberforce***, at page 379 of ***Ebrahimi***, the words just and equitable *"were a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are*

individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. ...just and equitable ...does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way."

47. I am not convinced that the just and equitable ground ought to be confined to cases of quasi partnerships, notwithstanding these occupy the bulk of cases involved. It should however be confined to insiders or persons associated with the company's very existence or *raison d'etre*. Only such persons should be allowed to demonstrate why it is unjust or inequitable that a company should continue to be in existence, whether a regulator, contributory, quasi partner or other interested person or body. As ***Millennium Advanced Technology Ltd.*** demonstrates, no stranger or person without a private interest could pray in aid, the relief of a just and equitable winding up.

48. Whilst the cases cited by the Petitioners are not on all fours, it does seem to me, nonetheless, that a ground for the winding up of a company under the just and equitable ground is at least arguable by the "Government of The Bahamas". At the very least, the "Government of The Bahamas" may be able to demonstrate a "private" interest, under the Amended and Restated Heads of Agreement ("the HOA") dated 31 January 2011 entered into with the project company, Baha Mar Ltd. It has already invested under $300 million (on the Respondents' evidence) in actual concessions in the project and a total of 1.3 billion over the long term (on the Petitioners' evidence). I also remind myself that this is an interlocutory application under the courts inherent jurisdiction, not the trying of the Petition, and therefore I ought not to consider the striking out of a claim in a Petition unless a clear cut case is made out.

49. What appears to me however is that the claim for a just and equitable winding up, as asserted here, must arise in the context of arrangements between the Government of The Bahamas and the parent company Baha Mar Ltd. These arrangements were reflected in the HOA. The new Petitioners, the Water and Sewage Corporation and the National Insurance Board, whilst government entities or affiliates, are not the Government of The Bahamas. In the context of those claims, which are essentially creditor's claims, the just and equitable ground advanced could not be suitable. The proper entity, upon which this claim for just and equitable relief could be laid against, on these facts as asserted here, would be Baha Mar Ltd., the contracting party as reflected in the HOA. To lay such claims against the "non-contracting" subsidiaries of Baha Mar Ltd. would be to the detriment of the long established doctrine of separate legal personality reflected in Section 24 of the ***Companies Act ("CA")***. None of the other Respondents made the deal under the HOA, for which the Petitioners pursuing them can raise to sustain a just and equitable winding up against them directly.

50. The Petitioner in the claim against Baha Mar Ltd. is the National Insurance Board. It could not advance a claim validly belonging to the Government of The Bahamas. I could not see how the National Insurance Board could assert a claim, on the public interest (just and equitable) facts being relied upon, for winding up Baha Mar Ltd. The National Insurance Board's claims are for unpaid contributions, period.

51. In the context of the Gaming Board, Mr. Munroe QC argues that it is just and equitable for Baha Mar Enterprises to be wound up given its insolvency and separately based on the effect of its current admitted debt and the effect of the provisions of the Gaming Act 2014. He says that the value of the casino licence is evidenced by the limiting of the grant of the casino licence by the HOA upon it. The Gaming Board too, was not a party to the HOA, which provided that no new casino license would be issued on the Island of New Providence to facilitate the

project and enhance the value of the casino. The Respondent Baha Mar Enterprises Ltd. was not a party to the HOA but the recipient of the gaming license by virtue of the HOA and has been operating as a licensee of the Gaming Board. Notwithstanding that the license is in jeopardy and has not been revoked it may not be appropriate to oust this petitioners claim to a just and equitable winding up in such a summary manner without allowing it to be developed at the hearing of the winding up petition.

52. The new Petitions do not cite particulars of the just and equitable ground in any detail whatsoever which essentially means that there is very little to be struck out. I order that the existing Petitions (save for the Gaming Board's) proceed as creditor's Petitions on the basis of the insolvency claims. I order the Gaming Board to provide particulars of its claim to a just and equitable winding up of Baha Mar Enterprises Ltd. within 14 days.

Appointment of Provisional Liquidators

53. The several summonses filed in the new Petitions for the appointment of joint provisional liquidators, which are typical in all cases, are settled in the following terms:

> LET ALL PARTIES concerned attend before a Judge in chambers on Wednesday the 19th day of August, A.D., 2015 at :00 o'clock in the fore-noon on the hearing of an application on behalf of the Applicant pursuant to section 199 of the Companies (Winding Up Amendment) Act 2011 and or under the inherent jurisdiction of the Court on the grounds that;
>
> 1. In all of the circumstances (and for the purposes of s.199(2)(b) of the Companies (Winding Up Amendment) Act 2011):
>
> a. it is in the public interest that an Order appointing Provisional Liquidators in respect of the Respondent be made; and/or
>
> b. the appointment of provisional liquidators is necessary to prevent the dissipation of the Respondent's assets in the Delaware Chapter 11 proceedings or through claims being brought against the Respondent in the Bahamas by creditors.

2. The intended purpose of the Provisional Liquidation will be (inter alia) to empower the Provisional Liquidators to engage with the major stakeholders and creditors in this matter, with the objective of formulating proposals for restructuring the Respondent's affairs and working with key interested parties to achieve the completion of the Baha Mar resort and to make it operational within the shortest practicable timescale.

3.. For the purposes of s. 199(2)(a) of the Companies (Winding Up Amendment) Act 2011 it is submitted that there is a prima facie case for making a winding up order in respect of the Respondent.

The Applicant seeks the following Orders:

1. Mr Edmund Rahming of KRyS Global, Caves Village, Building 6, Upstairs Office 1, West Bay St & Blake Road PO Box SP 64064, Nassau, The Bahamas and Mr Mark Nicholas Cropper and Mr. Alastair Beveridge both of AlixPartners Services UK LLP, 10 Fleet Place, London EC4M 7RB, UK, be appointed as Liquidators of the Respondent pursuant to Section 199 of the Companies (Winding Up) Amendment Act 2011.

2. The powers of the Provisional Liquidators be limited as this Honourable Court thinks fit.

3. The remuneration of the Provisional Liquidators be provided for.

4. The costs of and incidental to this Application be paid out of the assets of the Respondent.

5. AND any such further relief this Honourable Court may deem just.

54. The Petitioners have sought the appointment of provisional liquidators pursuant to section 199(1) of the CWUA. Section 199(1) and (2) provides for the appointment of a provisional liquidator as follows:

199. Provisional liquidator: appointment, powers and termination.

(1) Subject to this section and any Rules made under section 252, the court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or any relevant regulator on the grounds that

(a) there is a 'prima facie case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary-

(i) to prevent the dissipation or misuse of the company's assets,

(ii) to prevent the oppression of minority shareholders,

(iii) to prevent mismanagement or misconduct on the part of the company's directors, or

(iv) in the public interest. ...

55. The legal requirements necessary for the exercise of the courts discretion to appoint provisional liquidators are therefore: (1) the existence of a prima facie case for the making of a winding up order; and, (2) the existence of one or more of the necessities cited in section 199(2)(b)(i) to (iv). The Petitioner says that the appointment is necessary to prevent the dissipation of the company's assets (199(2)(b)(i)) and in the public interest (199(2)(b)(iv)).

Whether there is a prima facie case for the making of a winding up order

56. The Petitioners argue that, putting aside issues as to whether there are grounds for the "just and equitable" winding up, the Respondents are undoubtedly insolvent and there is a prima facie case for the making of a winding up order. Section 186 to 188 of the of the CWUA provides:

186. Circumstances in which a company may be wound up by the court.
A company may be wound up by the court if-
(a) ...
(b) ...
(c) the company is insolvent;
(d) ...
(e) the court is of the opinion that it just and equitable that the company should be wound up; or
(f) ...

187. Meaning of "insolvent".
A company is insolvent if-
(a) the company is unable to pay its debts as they fall due; or
(b) the value of the company's liabilities exceeds its assets.

188. Definition of inability to pay debts.
A company shall be deemed to be unable to pay its debts if-
(a) ...
(b) ...

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts.

57. The Respondents assert that the test to be utilized is that there is a "likelihood" that a winding up order will be made based upon the English Court of Appeal's decision in ***HMRC v. Rochdale Drinks Distributors Ltd [2011] EWCA Civ 1116***. In ***Rochdale Drinks,*** **Rimer LJ** stated at paragraph 76 – 77:

> [76] The appointment of a provisional liquidator to a trading company is, however, a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and its making requires the giving by the court of the most anxious consideration. In *Re Union Accident Insurance*, Plowman J explained the two-fold approach that he proposed to adopt. He said (see [1972] 1 All ER 1105 at 1110):
>
> > 'There are two matters though, which seem to be relevant for me to consider. The first is whether the department has made out a good prima facie case for a winding up at the hearing of the petition. Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time. If the department has not made out a good prima facie case for a winding-up order then clearly I think it would not be right to appoint a provisional liquidator. On the other hand, if the department has made out a good prima facie case for a winding-up order then the second matter for my consideration arises, namely, whether in the circumstances of this case it is right that a provisional liquidator should have been appointed ...'
>
> [77] With one qualification, I would respectfully regard that as a good working approach to the disposition of an application for the appointment of a provisional liquidator. The qualification is that I would, however, regard the continued use in this context of the phrase 'good prima facie case' as unsatisfactory. In *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 507, [1975] AC 396 at 404, Lord Diplock said of the phrase 'prima facie case' that it 'may in some contexts be an elusive concept', and Plowman J's chosen phrase also included a 'good', which may perhaps tend to increase the risk of elusiveness. Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is *likely* to obtain a winding-up order on the hearing of the petition.

58. The environment in which ***Rochdale Drinks*** and ***Union Accident Insurance*** was decided did not appear to include a statutory provision such as section 199(2) which speaks specifically to a prima facie standard. This is reflected in paragraph [75] of the ruling in ***Rochdale Drinks*** where ***Rimmer LJ*** stated:

> [75] The court's jurisdiction to appoint a provisional liquidator is conferred by s 135 of the Insolvency Act 1986. Section 135(1) provides that:
>
> 'Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally.'
>
> Section 135(2) provides that in England and Wales—
>
> '... the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed.'
>
> Section 135(4) provides that the provisional liquidator shall carry out such functions as the court may confer on him; and s 135(5) provides that his powers may be limited by the order appointing him. ***The power to appoint a provisional liquidator is, therefore, a broad and general one in the sense that, provided that the jurisdictional conditions in s 135(1) and (2) are met, the section imposes no limitations upon, nor does it prescribe, the criteria to be adopted by the court when considering an application for such an appointment*** (see *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at 1109, per Plowman J; and *Re Highfield Commodities Ltd* [1984] BCLC 623 at 633–634, [1985] 1 WLR 149 at 158–159 per Sir Robert Megarry V-C). (emphasis added)

59. The imposition of a higher standard of "likelihood of a winding up order being made", in light of the clear language of section 199(2)(a) (which requires only a prima facie case) could not be supported on the strength of the dicta in ***Rochdale Drinks***. Parliament is deemed to know the common law and as the CWUA is fairly recent, had the legislature intended a higher test of "likelihood" it would have so stated. I am satisfied that the appropriate standard is, as stated in section 199(2)(a), a prima facie case.

60. Counsel for the Respondents asserts that a winding up order is not likely to be made as the debts are disputed. On the evidence, notwithstanding the partial admissions of certain of the debts and/or silence as to others, in the recognition proceedings, the Affidavit of Patrick Ryan of 10 August 2015 denies and/or

disputes all of the claims. The affidavit however does not condescend to particulars.

61. The law is clear that there must not be any bona fide dispute as to the debts. Between these parties there are allegations of cross claims and disputes as regards the extent of some of the debts or whether other debts have become payable. For example, there is the claim by Baha Mar Ltd to be owed sums as a result of public infrastructure improvements and allegations that no real property taxes are due. However, where notwithstanding the cross claims and the disputes, the petitioner will nonetheless be a creditor the winding up could proceed. ***Rimmer LJ*** set out the legal position in ***Rochdale Drinks*** at paragraphs [78] – [80] as follows:

> [78] The first, and critical, question that I consider therefore fell to be considered by the judge was whether HMRC were likely to obtain a winding-up order on the hearing of their petition. RDD's suggested answer to that question was in the negative, on the basis that HMRC's debt was (i) disputed, and (ii) to the extent that it was admitted, was exceeded by RDD's counterclaim. There appears also to have been an issue before the judge as to RDD's solvency. Before coming to the facts, I should say something about the position that arises when a petitioning creditor's debt is the subject of dispute.
>
> [79] A well-settled rule of practice, which has long been familiar to users of the court's winding-up jurisdiction, is that a debt that is wholly disputed on substantial grounds cannot ordinarily found the basis for the making of a winding-up order. A petition based on a debt shown to be the subject of such a substantial dispute will ordinarily be dismissed. Perhaps more commonly, any such dispute as to the petition debt will be likely to provoke an early application by the company to restrain the advertisement of the petition and a successful application to that effect will be likely to result in the removal of the petition from the file (or, more colloquially, its striking out). In the present case, RDD's application of 18 March 2011 sought no such striking out: it sought no more than the discharge of the appointment of the provisional liquidator.
>
> [80] It perhaps hardly needs to be said that the rule does not, however, entitle a company to do no more than assert that it disputes the debt and then expect the petition to be struck out or, if the hearing is the substantive one, dismissed. It is not sufficient for the company merely to raise a cloud of objections. It has, in the old-fashioned phrase, to condescend to particulars by properly explaining the basis of the claimed dispute and showing that it is a substantial one. ***If, despite the company's***

protestations, the alleged dispute can be seen on the papers to be no dispute at all, or to be no dispute as to part of the debt, the petition will ordinarily be allowed to proceed. If, however, the dispute is shown to be one whose resolution will require the sort of investigation that is normally within the province of a conventional trial, the settled practice is for the petition to be struck out or dismissed so that the parties can contest their differences before whichever other forum may be appropriate. (emphasis added)

62. The rule exists to prohibit creditors from using the winding up mechanism for ulterior motives in forcing settlement of disputed debts. The rationale was expressed by ***Osadebay JA*** in the Bahamas Court of Appeal decision in ***Re China Emperor SCCivApp 61 of 2000*** at paragraphs [34] to [36]:

> [34.] It has been said so many times and in so many ways that it is an abuse of process to petition for the compulsory winding up of a company for the improper purposes of pressurizing a company to settle a disputed debt: Re London Wharfing and Warehousing Co. Ltd. (1865) 35 Beav 37; Cadiz Waterworks Co. V. Barnett 1874 LR 19 Eq. 182, Re a Company (No. 0012209 of 1991) [1992] 1WLR 351; Re Lympne Investments Ltd. [1972] 1 WLR 523.
>
> [35.] It is a reasonable excuse for a company on whom a statutory demand is served for the payment of a debt not to comply with the demand if the debt to which the demand refers is bona fide disputed: Re London and Paris Banking Corporation (1874) LR 19 Eq 444
>
> [36.] In Stonegate Securities Ltd v. Gregory [1980] 1 Ch. 576 Buckley L. J., (with whose opinion on the subject the rest of their Lordships did not disagree) said:
>
> > "If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed."

63. The evidence is support of the making out of a prima facie case for the insolvency of each of the 7 Respondents in favor of the Petitioner are the following:

64. Baha Mar Ltd.: On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the US Bankruptcy Court for the District of Delaware, that Baha Mar Ltd. has between 1,000 and 5,000 creditors. Baha Mar Ltd. estimated its assets to be in excess of $1 billion and its liabilities to exceed $1 billion. The National Insurance Board claims to be due the sum of $685,417.11. The petition also cites that it is aware of sums due to other creditors including the Treasurer (via Ministry of Tourism and Real Property Tax), Bahamas Electricity Corporation and the Water and Sewerage Corporation). There is a dispute as to whether deposits held by Bahamas Electricity Corporation ought to be set off against the sums due to Bahamas Electricity Corporation. There is also some dispute as regards the sums due to the Treasurer (as agent for the Government) and whether such amounts due ought to be set off by sums due from the Treasurer to Baha Mar Ltd. As regards the Real Property Tax arrears there is a dispute as to whether the sums are payable at present or form part of the concessions granted. On 28 August 2015, following the presentation of arguments before this court and whilst I adjourned to consider my decision, Baha Mar Ltd, through Counsel, paid into the National Insurance Board the sum of $685,417.11. in response the National Board, through an Affidavit of Cecile Bethel, lately filed, shows that there remains sums due to the National Insurance Board in a considerable sum in respect of outstanding contributions. It is not seriously disputed that Baha Mar Ltd is unable to pay these sums and those due to the other creditors.

65. BMP Golf Ltd. On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the Bankruptcy Court for the District of Delaware, that BMP Golf Ltd.'s creditors numbered between 1 and 49, that its estimated assets were between $10,000,001 and $50,000,000 and that its estimated liabilities exceeded $1,000,000,000. The Water & Sewerage Corporation claims to be due the sum of $14,908.10. It is not seriously disputed

that the sums are due and owing to the Water & Sewage Corporation and that BMP Golf Ltd. is unable to pay the same.

66. Baha Mar Land Holdings Ltd.: On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the US Bankruptcy Court for the District of Delaware, that Baha Mar Land Holdings Ltd.'s creditors numbered between 1 and 49, that its estimated assets were between $500,000,001 and $1,000,000,000 and that its estimated liabilities exceeded $1,000,000,000. The Treasurer claims to be due the sum of $1,119,931.09 arising from of outstanding Real Property Taxes. The Petitioner also cites that it is aware of sums due to other creditors including the Water and Sewerage Corporation (B$1,672,401.74), and the Bahamas Electricity Corporation (B$539,415.38). As regards the Real Property Tax there is a dispute as to whether the sums are payable at present or form part of the concessions granted. The Treasurer asserts that, at the very least it is a prospective or contingent creditor. It is not seriously disputed that the sums are due and owing to the Water & Sewerage Corporation and the Bahamas Electricity Corporation and that Baha Mar Land Holdings is unable to pay the same.

67. Baha Mar Properties Ltd.: On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the US Bankruptcy Court for the District of Delaware, that Baha Mar Properties Ltd.'s creditors numbered between 100 and 199 and that its estimated assets were between $50,000,001 and $100,000,000 and that its estimated liabilities exceeded $1,000,000,000. The Treasurer claims to be due the sums $1,405,976.12 in respect of Real Property Tax arrears and $351,102.72 arising from of outstanding Hotel Guest Taxes for the Melia Hotel. There is some dispute as to whether the real property taxes are part of the concessions granted under the Heads of Agreement but it is not seriously disputed that the other sums are due and owing to the Treasurer and that Baha Mar Properties Ltd. is unable to pay the same.

68. BMP Three Ltd.: On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the US Bankruptcy Court for the District of Delaware, that BMP Three Ltd.'s creditors numbered between 1 and 49 and that its estimated assets were between $10,000,001 and $50,000,000 and that its estimated liabilities exceeded $1,000,000,000. The Treasurer claims to be due the sum of $2,253,076.56 arising from of outstanding Hotel Guest Taxes for the Wyndham Hotel and another $289,854.94 in respect of sums due for Business License Fees for the Wyndham Nassau Resort. It is not seriously disputed that sums are due and owing to the Treasurer and that BMP Three Ltd is unable to pay the same.

69. Baha Mar Enterprises Ltd.: On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the US Bankruptcy Court for the District of Delaware, that Baha Mar Enterprises Ltd.'s creditors numbered between 1 and 49 and that its estimated assets were between $500,000,001 and $1,000,000,000 and that its estimated liabilities exceeded $1,000,000,000. The Gaming Board claims to be a creditor in respect of the total sum of $21,968,733.92 made up an outstanding amount of $11,218,630.72 and another deferred debt of $10,750,000. The balance of the total sum is said to be made up of current taxes and arrears outstanding with respect to the Crystal Palace Casino. It is accepted that the deferred sum is not due until the opening of the new casino however the Gaming Board maintains it has standing as a prospective creditor with respect to the $10,750,000 and a present creditor in respect of the other sums. There is however no doubt that some moneys are certainly due to the Gaming Board besides the deferred sum, and that Baha Mar Enterprises Ltd. is unable to pay the same.

70. Cable Beach Resorts: On 29 June 2015, Thomas Dunlap, the company's authorized agent declared in court proceedings in the US Bankruptcy Court for the District of Delaware, that Cable Beach Resorts Ltd.'s creditors numbered between 1 and 49 and that its estimated assets were between $100,000,001 and

$500,000,000 and that its estimated liabilities exceeded $1,000,000,000. The Treasurer claims to be due the sum of $13,482.38 arising from of outstanding Business License Fees. The Petition also cites that it is aware of sums due to other creditors including the Water and Sewerage Corporation ($1,339,932.18) and the Bahamas Electricity Corporation ($21,105,381). There is some dispute as to the actual sums due to BEC but it is not seriously disputed that the sums are due and owing to the Treasurer and the Water and Sewerage Corporation and that Cable Beach Resorts Ltd. is unable to pay the same or any of its other debts.

71. Baha Mar Ltd is the ultimate parent company of the other Respondents as well as other related companies. As indicated, the seven Respondents and the entire group to which they belong, submitted to the US Bankruptcy Court for the District of Delaware seeking protection on the basis that they were illiquid and unable to pay their debts as they fell due. They have admitted to a state of insolvency both before the US Bankruptcy Court in the District of Delaware and in the recognition proceedings before this court. In particular the following statements and or admissions were made:

    (a) Paragraph [8] of the Affidavit of Patrick Ryan filed on 30 June 2015 in the Recognition Proceedings: "Notwithstanding the fact that construction work has largely stopped on the development and the opening has been delayed, the Baha Mar Group has substantial ongoing expenses, including payroll obligations for its approximately Two Thousand employees, without any source of revenue. As a consequence, The Group has exhausted its cash reserves."

    (b) Paragraph [26] of the Written submissions of the Respondents in the Recognition proceedings: "The Group therefore found itself in a very serious liquidity crisis. It was already in default of its obligations to many of its creditors, including the Bank, and was exposed to a grave risk of foreclosure by the Bank and/or being wound up on the application of one or more of its creditors".

(c) Paragraph [29] of the Written submissions of the Respondents in the Recognition proceedings: "By the end of June 2015 ... *[t]he Group had no revenue source and no way to remedy its existing credit defaults or those invariably to come*." (emphasis added)

(d) Paragraph [31] of the Written submissions of the Respondents in the Recognition proceedings: "In the circumstances, the Group sought the safe harbor shelter of Chapter 11 proceedings in the State of Delaware ... for it to *emerge from insolvency* a stronger growing, profitable group of companies." (emphasis added)

(e) Paragraph [15] of the Affidavit of Whitney Thier, General Counsel for the Respondents filed on July 16 2015 the Recognition proceedings: "Without a tri-party agreement and with its cash exhausted and no other viable options for pursuing continued negotiations, the Applicants ... commenced the Chapter 11 cases."

(f) Paragraph 22 of the Affidavit of Lance Millage of 12 August 2015: By the end of June 2015, the Baha Mar Group was in an untenable position. It was running perilously low on cash. Work had entirely stopped on the project and an opening date was indefinitely delayed.

(g) Declaration of Thomas Dunlap in support of Chapter 11 Petitions at paragraphs [53] and [57]: "[53.] By the end of May 2015, it became clear to the Debtors that, without a negotiated resolution, they would run out of cash by the end of June 2015, if not sooner. Accordingly, the Debtors began contingency planning, including for a potential chapter 11 filing. Nevertheless, during such time, the Debtors continued to engage in constant negotiations with CEXIM Bank, CCA, and CSCEC in an effort to achieve a consensual resolution that would bring CCA back to work to finish the Project as soon as possible while providing the Debtors with the necessary liquidity. ... [57.] The Debtors still believe that a negotiated solution is possible among the existing parties to the Project that would lead to its completion and successful opening. Nevertheless, as a result of their strained liquidity, the

Debtors could not continue to operate in the ordinary course. The Debtors believe that chapter 11 is the best available means for preserving and maintaining the Project and then achieving their ultimate goal of becoming an operational word-class resort."

72. On the evidence, I am satisfied that a prima facie case has been made out that each of the Petitioners are creditors (as defined to include prospective or contingent creditors) of the relevant Respondent, that such Respondent is unable to pay their debts as they fall due and are insolvent. I should also state that had evidence required the meeting of the higher test of *"likelihood of a winding up order being made",* I am also satisfied that such standard has also been met on the evidence before me.

73. Having found that there is a prima facie case for the winding up the remaining six Respondents I must now consider whether any of the necessities enumerated under Section 199 (2)(b)(i)-(iv) exist. These are disjunctive and either of them would give the court jurisdiction to entertain the appointment of provisional liquidators. As indicated, the Petitioner says that the appointment is necessary to prevent the dissipation of the company's assets (199(2)(b)(i)) and is necessary in the public interest (199(2)(b)(iv)).

Whether the appointment is necessary for the prevention of the dissipation of the company's assets

74. The Petitioners say that the appointment of provisional liquidators is necessary to prevent dissipation of the companies' assets whilst the Respondents say that there is no evidence that the appointment of provisional liquidators is necessary to prevent dissipation of their assets.

75. Entering into provisional liquidation would prevent the dissipation of the Respondent's assets as a result of the automatic imposition of a stay in accordance with Section 193 of the CWUA. Section 193 provides as follows:

> 193 Avoidance of attachments and stay of proceedings
>
> (1) When a winding up order is made or provisional liquidator appointed, no suit action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with leave of the court and subject to such terms as the court may impose. ...

76. In addition to matters raised at paragraph 71 above, the Petitioners relied on the Respondent's own statements and/or admissions that a stay is necessary to prevent the dissipation of their assets:

a) Paragraph [14] and [15] of the Affidavit of Patrick Ryan on 30 June 2015 the Recognition proceedings: "[14] Enforcement of the automatic stay over the Debtors' creditors, many of which are not subject to the jurisdiction of the BCDD, is extremely important to the successful restructuring of the Debtors and the eventual completion of the Baha Mar project. Enforcement of the automatic stay will, among other things, prohibit the prosecution of claims against any or all of the Debtors in The Bahamas. Such claims, if allowed to proceed, might form the basis an application to have one or more of the Debtors wound up and destroy any possibility that the Baha Mar project will be completed. [15] As mentioned above, the Baha Mar Group has approximately Two Thousand employees in The Bahamas. If the present crisis cannot be resolved very soon, it is likely that a high percentage of those employees will have to be made redundant. The Group intends to continue paying the salaries of all employees and, if a mass layoff becomes necessary, to pay all of the laid off workers the compensation provided for in Section 26 of the Employment Act 2001.

b) Paragraph [17] and [18] of the Affidavit of Patrick Ryan on 30 June 2015 the Recognition proceedings: "[17] The value of the Baha Mar Group's assets exceed its debts. However, the Group is experiencing a serious liquidity crisis brought on by the impasse between the Group, the Contractor and the Bank, Enormous losses would be suffered by all the stakeholders if the Debtors (and therefore the Baha Mar Group as a whole) were not provided temporary protection by this Honourable Court. [18] Without the protection of a stay against its creditors, the Baha Mar Group and the Baha Mar project is at risk of being destroyed by a claim or series of claims for debts that the Group owes but cannot immediately pay."

77. The Petitioners also say *"work on the resort project has stopped and now shut down. There are no prospects of resumption of work in order for any revenue to come in and therefore each passing day the value of the Respondents assets inevitably diminishes. The appointment of provisional liquidators offers the possibility of a compromise with stakeholders and the completion of the project."* Further, they say that each day the insolvent companies are not brought under the supervision of the court in a provisional liquidation, the costs being incurred and unchecked in pursuing the Chapter 11 Bankruptcy reduces the available assets for its unsecured creditors on a whole and particularly the Bahamian creditors. Finally, they also say that, as the court has not recognized the primacy of the Chapter 11 proceedings it could not rely on such a stay to prevent a run on the company's assets.

78. It is clear that dissipation in section 199(2) is not used only in the context of a willful intent on the part of the company and its present management to dissipate its assets. ***In Re A Company (No 003102 of 25 1991), ex parte Nyckeln Finance Co Ltd [1991] BCLC 539***, ***Harman J*** stated at page 542:

> The jurisdiction to appoint a provisional liquidator ... is a matter which depends, as Mr Vos submits, upon jeopardy to the assets. If there is a risk of assets being dissipated – that is made away with other than by the rateable distribution amongst all the company's creditors at the date of presentation of the winding-up petition – there must be a good case for the court appointing its own officers, for that is what provisional liquidators are, to try and get in and secure the assets so that if, at the end of the day, the company is put into compulsory liquidation, as in this case at present appears reasonably likely, then there will be assets available and they will not have been dissipated. It is not a dissipation in the Mareva sense of simply deliberately making away with the assets but any serious risk that the assets may not continue to be available to the company.

79. ***Re A Company*** was approved in ***Rochdale Drinks,*** per ***Rimer LJ*** at paragraph 99, where he stated:

> "The usual basis on which such an appointment is sought is because of a risk of jeopardy to the company's assets, namely the risk of their

dissipation before the winding-up order is made, with the consequence that their collection and rateable distribution between the company's creditors will be frustrated. Such risk does not refer to (or only to) 'dissipation' in the sense in which that word is ordinarily used in the context of freezing orders, that is a deliberate making away with assets so as to frustrate the enforcement of a future judgment; it includes any serious risk that the assets may not continue to be available to the company (see Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd [1991] BCLC 539 at 542 per Haman J). I consider that Harman J probably had in mind the type of case in which, despite the presentation of a petition, an apparently insolvent and loss-making company simply continues to trade without obtaining an order under s.127 of the Insolvency Act 1986."

80. The Petitioners argue that they need not prove mismanagement or willful dissipation based upon the terms of the CWUA, as:

a) section 199(4), "which empowers the provisional liquidator to exercise a liquidator's powers to the extent necessary "to maintain the value of the assets" – i.e. not just to prevent deliberate dissipation"; and,

b) such a narrow construction of section 199(2) would make the inclusion of the "dissipation of assets" clause unnecessary since the other language in section 199(2), which authorises the appointment of a provisional liquidator to prevent "misuse" of the company's assets would cover the wanton dissipation of the company's assets.

81. I agree with the Petitioners' observation that "it would be surprising in an insolvency, if assets are going to be dissipated albeit without any deliberate intent, that the court could not appoint a provisional liquidator to protect the creditors' interests".

82. The Affidavits of Messrs. Millage (12 August 2015) and Shinderman (17 August 2015) seek to make the case that the Chapter 11 stay imposed by the US Bankruptcy Court provides the necessary protection for the Baha Mar companies against claims from creditors and therefore it is unnecessary for the court to

make the appointment to prevent a run on the companies' assets from creditors. The affidavits therefore impliedly accept the need to restrain creditors and that there will be a considerable amount of claims. The Respondents repeat in these proceedings the efforts foreshadowed in the recognition proceedings of creating a claim center to manage the claims, which are expected to be made. The Respondents nonetheless argue that there are no Bahamian-based creditors threatening action(s) in respect of which any stay is required.

83. On the evidence, Baha Mar Ltd., (the project company) as well as the other 6 Respondents is insolvent. The number of debtors of the individual Respondents varies, but of the entire group that number has been described as legion. The Respondents cannot continue to trade unsupervised where there are no discernible prospects of the project being completed in the absence of new financing which they says they are unable to access.

84. In July 2015, in the recognition proceedings, I was advised that there was an immediate and urgent need to impose a stay to prevent a run on the companies, which would have the effect of destroying the project. The Petitioners, having commenced a domestic insolvency, say that the need, which the Respondents had earlier identified, to restrain creditors, remains and that the provisional liquidation will provide the needed stay and prevent a run on the companies. The Respondents now say that the stay is not necessary as the Chapter 11 stay is having effect. The Respondents cannot reasonably resile from their position where there has been no improvement in their circumstances but rather a worsening thereof. At paragraph 63 of my 31 July 2015 ruling in the recognition proceedings, I found that *"the only insolvency proceedings, which can give true effect to the principle of modified universality, would be a unitary insolvency proceedings in The Bahamas. .....I would not accord recognition to the Applicants or primacy to the Chapter 11 Bankruptcy proceedings underway in the District of Delaware."* Having regard to my ruling in the recognition proceedings, I

could hardly accept that reliance in the Chapter 11 stay would be an appropriate state of affairs. Such a position would be inconsistent.

85. I find that it is necessary that a provisional liquidator be appointed to preserve the assets whilst the domestic insolvency takes its course. The groups 2,000 plus employees are being paid by a third party (albeit on claims of set off) and its debts are rising daily which means that its assets are diminishing with each day whilst the Respondents pursue expensive litigation in The Bahamas, the United States of America and England. With no source of income and admittedly no liquidity, it cannot continue to meander and consume its available assets to the detriment of its unsecured creditors and must be brought under the supervision of the court even if only provisionally until the Petition can been heard.

86. In all the circumstances I find that the appointment of provisional liquidators are necessary to prevent the dissipation of the assets of the company and secure the assets so that if, at the end of the day, the Respondents are put into compulsory liquidation, as in this case at present appears reasonably likely, then there will be assets available and they will not have been dissipated.

Whether the appointment is necessary in the public interest

87. As indicated, any one of the necessary elements listed in section 199(2)(b)(i) to 199(2)(b)(iv) are needed to satisfy the statutory requirement to invoke the courts discretion. Nonetheless, the Petitioners also argue that the appointment of the provisional liquidator is necessary in the public interest.

88. The Respondents say that the appointment of the provisional liquidator "can only be by reference to, and furtherance of, the Petition. A failure of the public interest aspect of the "just and equitable" ground of the Petition .... must spell the end to any "public interest" basis to the application to appoint [joint provisional

liquidators]. Otherwise a public interest basis for a petition will have been introduced – impermissibly – by the back door."

89. The Petitioners say "they are entitled to apply for the appointment of a provisional liquidator on any of the grounds set out in s.199, including the public interest ground. It is well-established, as noted in the Grand Bahama case, that the public interest can be taken into account in considering whether to stay an existing winding up order made at the instance of creditors, and so there is no reason why creditors seeking a provisional liquidation should not likewise be entitled to invoke the public interest as a matter to be taken into account. Further, it is notable that the words of that provision do not limit the ability to appoint a provisional liquidator "in the public interest" to the case of a regulator petitioning under s.186(f), but leave it open to a creditor to apply on this ground as well. Further, there is good reason for this. If, after all, it is in the public interest to appoint a provisional liquidator at the instance of a creditor (whether a private or public entity), why should the statute prohibit that?"

90. The Grand Bahama case referred to by the Petitioners above was the case of ***Re Grand Bahamas Petroleum [1979-1980] LRB 225.*** In that case, the Grand Bahama Petroleum Co Ltd. was placed into liquidation on 7 December 1978 upon the application of National Oil. New England Petroleum beneficially owned the company. In September 1979 an arrangement was made whereby Chartered Company of Florida would secure the debt obligations of the company and pay all of the secured and unsecured creditors of the company in full. New England Petroleum approached the Supreme Court for a permanent stay of the liquidation proceedings. In granting the permanent stay, ***daCosta J*** found that the grant of the stay was *"in the public interest as it ensures that the refinery at Borco with the massive financial support of Charter Co. behind its operations will continue to operate with corresponding economic benefit to the Commonwealth of the Bahamas."* The Grand Bahama case was not a provisional liquidation but rather

an application for a permanent stay of a winding up order and as such I did not find it particularly helpful in interpreting section 199(2) of the CWUA.

91. The Petitioners say that the appointment of provisional liquidators should be made in the public interest because of:
    a) the effect of the project on the GDP of the Bahamas said to be in the region of some 12%;
    b) the effect of the failure of the project on the sovereign credit rating of the Commonwealth of The Bahamas and the placement of the Bahamas on Credit Watch as a result of the Respondents' insolvency
    c) The large expenditure of public funds on the project in concessions already realized and to concessions promised;
    d) The large number of local unsecured creditors of the Respondents;
    e) The $600 million costs associated with completion but no finances available and the Respondents have no cash;
    f) The Respondents are in default of its arrangements with its financier;
    g) The Respondents are in no position to complete construction and open the resort in the foreseeable future. Respondents have told the hotel operators to cancel room reservations.
    h) The Respondents propose to shut the resort complex down and retain only a skeleton non-management crew for maintenance purposes only; and,

92. The Respondents argument that the public interest element is referable to the just and equitable claim in the Petition appears, at first blush, to be inconsistent in light of their earlier claim that winding up on a just and equitable basis excludes a public interest claim in The Bahamas. I do however find that there is some merit in the general argument that the public interest referred in Section 199(2)(b)(iv) must relate to the basis upon which you are seeking to wind up the company.

93. It is true that unlike section 186(e) of the ***CWUA*** setting out the just and equitable ground, there is a specific reference to "public interest" in section 199(2)(b)(iv) of the ***CWUA.*** Additionally, the language in the section does not limit the ability of any applicant, whether contributors, creditor or regulator to assert any of the 4 requirements listed in section 199(2)(b)(i) -(iv). Specifically, it does not say that only the regulator may advance a public interest need for the appointment of a provisional liquidator, which suggests that the ground is available to all applicants. Notwithstanding the appearance of an unrestrictive right to rely on any of the 4 requirements, it is difficult to see how a petitioner other than a regulator could advance a claim that provisional liquidators be appointed on the basis that it is necessary in the public interest.

94. Such a view, as to the limits of the public interest basis in section 199(2)(b)(iv), is supported by the fact that the first hurdle to cross in applying for the provisional liquidator's appointment is the applicant being able to demonstrate the existence of a prima facie case that a winding up order will be made. This appears to relate the application directly to the petition filed by the applicant. By analogy, and to make the point, a creditor petitioning for a winding up on the basis of insolvency could hardly justify a need to appoint a provisional liquidator under 199(2)(b)(ii) on the basis of a need to protect a minority shareholder from oppression. This should be so even if the minority shareholder is being oppressed and in need of protection. Ultimately, in my view, it is a matter of standing.

95. Having regard to the public interest identified above there is undoubtedly a considerable public interest factor associated with the Respondents. Save in the context of the Gaming Board and notwithstanding the Petitioners are public related entities; the claims asserted in the Petitions are no more than debtor claims. As the Gaming Board has confirmed that it is not petitioning as a regulator, I find therefore that these Petitioners are precluded from asserting a claim for a need to appoint provisional liquidators in the public interest. I am

therefore not satisfied that the Petitioners have demonstrated a need to appoint provisional liquidators in the public interest.

96. As indicated, having found that there is a need to appoint provisional liquidators to prevent the dissipation of the assets of each of the Respondents, the Petitioners need not have been successful under the ground of necessary public interest.

Whether the Court should exercise its discretion to appoint joint provisional liquidators

97. I accept that notwithstanding I may be satisfied that the circumstances under Section 199(2) exist, I must still exercise my discretion as to whether in all the circumstances it is appropriate to make (or not to make) the appointment.

98. In support of their request that I exercise this discretion in their favor, the Petitioners say, at paragraph 51 and 52 of their submissions, that:

> [51 [I]t is self-evident that there has been and will continue to be dissipation of the Respondents' assets, which necessitates the appointment of provisional liquidators. ... [T]he project has stalled indefinitely, the Respondents' relations with China Exim and China Construction have broken down, and they are now locked in litigation in the United States, England, and The Bahamas. Further, there is no prospect in the foreseeable future, if at all, of the expected income from the project coming in. All this of itself will dissipate the value of the Respondents' (and therefore Baha Mar Limited's) assets and goodwill. Further, in the meantime, the Respondents are inevitably incurring very substantial running costs including (presumably) legal costs in the Bahamas, the United States and England, which further eats into the value of their assets, and reduces the amount available for distribution to the unsecured creditors. And finally, as their own evidence acknowledges, without a stay that is effective in the Bahamas, creditors will bring a vast amount of fragmented claims against them, thus involving them in further substantial litigation expenditure.
>
> [52.] [I]f provisional liquidators are appointed, (a) unsecured creditors' claims will be stayed, thus saving the expenditure of dealing with their

claims, (b) a compromise can be reached with them (thus preventing the dissipation of the companies' assets from such claims being made) and (c) there is at least a real prospect that the project can be completed within a reasonable time, thus preventing the dissipation of assets through non-completion and the continued running up of costs without any prospect of income being earned in the foreseeable future. In particular, the provisional liquidators will be able to negotiate with China Exim and China Construction without the current antagonism, and if that fails to produce any result, they will be able to pursue alternative solutions and sources of finance, to enable the project to be completed and the resort to be opened, and income to be earned.

99. In opposition, the Respondents say essentially that the desire to appoint provisional liquidators is misconceived as:

a) There is no power to appoint a provisional liquidator for the purpose of furthering or bringing about such a compromise.

b) Only a contributory may seek to bring about a compromise.

c) The application to appoint provisional liquidators is an abuse as the Petitioners are biased against the companies and are pursuing the winding up for this improper motive.

100. Having regard to the submission, it is necessary therefore to consider the nature and scope of the powers of the provisional liquidator. There is no direct definition of what a provisional liquidator is, but section 183 provides: "In this Part – "official liquidator" means the liquidator of a company which is being wound up by order of the court or under the supervision of the court and includes a provisional liquidator". Section 199(4) provides: *"A provisional liquidator has the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he was appointed and the court may limit the powers of a provisional liquidator in such manner and at such times as it considers fit."*

101. Section 205 goes on identify the duties of the official liquidator and states:

205. Duties, functions and powers of official liquidators.

(2) The duties and functions of an official liquidator include-

(a) collecting, realizing and distributing the assets of the company to its creditors and, if there is a surplus, to the persons entitled to such assets in accordance with this Act; and

(b) investigating and reporting to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

(3) The liquidator shall, subject to this Act and the Rules, use his own discretion in undertaking his duties and a liquidator also has the other duties imposed by this Act and the Rules and such duties as may be imposed by the court.

(4) The official liquidator has the powers necessary to carry out the duties and functions of a liquidator under this Act and may-

(a) ***with the sanction of the court, exercise any of the powers specified in Part I of the Fourth Schedule***; and

(b) ***with or without that sanction, exercise any of the general powers specified in Part II of the Fourth Schedule***. (emphasis added)

102. Parts I and II of the Fourth Schedule, so far as is relevant provides as follows:

FOURTH SCHEDULE
(Section 205(3))
Powers of liquidators
Part 1-Powers exercisable with sanction

1. ...
2. ...
3. Power to dispose of any property of the company to a person who is or was related to the company.
4. Power to pay any class of creditors in full.
5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
6. Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.
7. ...
8. ...
9. The power to raise or borrow money and grant securities therefor over the property of the company. ...

Part II-Powers exercisable without sanction

1. The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he considers necessary.

2. The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.
3. The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and ratably with the other separate creditors.
4. The power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect in respect of the company's liability as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business.
5. The power to promote a scheme of arrangement pursuant to section 158.
6. The power to convene meetings of creditors and contributories.
7. The power to engage staff (whether or not as employees of the company) to assist him in the performance of his functions.
8. The power to engage counsel and attorneys and other professionally qualified persons to assist him in the performance of his functions.
9. The power to do all other things incidental to the exercise of his powers.".

103. The Respondents say at paragraphs 6-9 of their written submissions that:

> [6.] The Bahamas lacks any basis by which the appointment of a provisional liquidator can be instigated by a creditor in order to further or bring about a compromise or arrangement with creditors. Section 199(3)(b) of Companies (Winding Up Amendment) Act 2011 ("Companies Law") provides for the *company alone* to base a provisional liquidation application on an intended presentation of compromise or arrangement.
> [7.] The entire application is based on the false premise of JPL's being able to pursue (per the draft Order of appointment) a "scheme of arrangement".
> [8.] A "Scheme of Arrangement" is a term of art. It relates to a statutory framework – that does not exist in the Bahamas - whereby a court-sanctioned compromise with creditors need not have the support of all creditors. Schedule 4, Part II at Paragraph 5 does not provide for a Scheme of Arrangement. Bermudian examples are relied on by the Petitioner but the Petitioner simply ignores the differentiating fact that the Bermuda statutory provision expressly allows for Schemes of Arrangement. ...
> [9.] It is nowhere near enough for the Petitioner merely to assert that that there is "no reason" to stop it from "instigating" this. The statute makes no provision for it to instigate any such thing: s. 199(3). Quite the opposite. It is to be presumed that the omission of such a provision by the legislature was intentional.

104. Section 199(3) of the CWUA, upon which the Respondents rely provides that *"An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that – (a) the company is or is likely to become unable to pay its debts within the meaning of section 188; and (b) the company intends to present a compromise or arrangement to its creditors."* The Respondents seek to compare this provision with Section 199(2), which provides the means by which regulators, creditors and contributories can move the court for the appointment of a provisional liquidator. They say that in Section 199(2) there is no mention of presenting a compromise or arrangement as one of the grounds for appointing a provisional liquidator.

105. The Petitioners assert that reliance on section 199(3) "is plainly wrong, because it ignores (a) the definition of official liquidator in s.183, (b) s.199(4), (c) s.205, and (d) schedule 4 of the Act, which provide, in short, that a provisional liquidator does have power to present a compromise or scheme of arrangement with creditors, or a scheme of arrangement pursuant to s.158 of the Companies Law to the extent necessary to preserve assets (as would be the case here) or to carry out the functions for which he was appointed. ... In the circumstances, it is respectfully submitted that a provisional liquidator has all the powers of a liquidator, including the power with sanction, to make compromises with creditors, and the power, without sanction, to promote any scheme of arrangement for the reorganization or reconstruction of a company, to the extent necessary to maintain the value of the company's assets." Further they say, "As long as it is necessary to maintain the value of the company's assets, or to carry out the functions for which he was appointed a provisional liquidator is perfectly entitled to present a scheme of arrangement or a compromise, and a creditor is perfectly entitled, for this purpose, to seek his appointment to make or to promote one."

106. It is difficult to see Section 199(3) as anything other than the basis upon which a provisional liquidator will be appointed on behalf of the company itself. It has no

impact on the circumstances upon which the creditor, the contributory or the regulator may approach the court for the appointment of a provisional liquidator. If the Respondents are correct, by analogy the provisional liquidator appointed on the company's application would be unable to assess powers preventing the dissipation of companies' assets or preventing mismanaging of companies assets since these are matters which the 199(2) liquidator is concerned with and not the 199(3) liquidator. In fact I think the provision should be construed no more than the context in which the company will be permitted to move for the appointment of a provisional liquidator, i.e. where is it is insolvent and intends to present a compromise or arrangement to its creditors.

107. It should be noted that Section 199(3) does not speak to compelling the creditors to accept the compromise or arrangement presented. It is merely the process by which the Court will permit the company to enter provisional liquidation and access the stay provisions of the Act whilst it seeks to present the compromise or arrangement to its creditors. Section 199(3) speaks to compromise and arrangements with <u>creditors</u> not contributories. It also does not speak of any scheme of arrangement with contributories and therefore it is not the "scheme of arrangement pursuant to section 158" described in Part II of the 4th schedule. Section 158 of the Companies Act ("CA") provides:--

> 158. (1) In this section "arrangement" means —
> (a) a reorganisation or reconstruction of a company;
> (b) a separation of two or more business carried on by a company;
> (c) any combination of any of the circumstances specified in paragraphs (a) and (b).
> (2) If the directors of a company determine that it is in the best interests of the company or the creditors or members thereof, the directors of the company may by a resolution of directors, approve a plan of arrangement that contains the details of the proposed arrangement.
> (3) Upon approval of the plan of arrangement by the members, the company shall make application to the court for approval of the proposed arrangement.
> (4) The court may, upon an application made to it under subsection (3), make an interim or final order that is not subject to an appeal unless a question of law is involved, in which case notice of appeal shall be given within twenty days immediately following the date of the order and in making the order the court may —
> (a) determine what notice, if any, of the proposed arrangement is to

be given to any person;

(b) determine whether approval of the proposed arrangement by any person should be obtained and the manner of obtaining the approval;

(c) determine whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of his shares, debt obligations or other securities under section159;

(d) conduct a hearing and permit any interested persons to appear; and

(e) approve or reject the plan of arrangement as proposed or with such amendments as it may direct.

(5) Where the court makes an order approving a plan of arrangement, the directors of the company, if they are still desirous of executing the plan, shall confirm the plan of arrangement as approved by the court whether or not the court has directed any amendments to be made thereto.

(6) The directors of the company, upon confirming the plan of arrangement, shall —

(a) give notice to the persons to whom the order of the court requires notice to be given; and

(b) submit the plan of arrangement to those persons for such approval, if any, as the order of the court requires.

(7) After the plan of arrangement has been approved by those persons by whom the order of the court may require approval, articles of arrangement shall be executed by the company and shall contain —

(a) the plan of arrangement;

(b) the order of the court approving the plan of arrangement; and

(c) the manner in which the plan of arrangement was approved, if approval was required by the order of the court.

(8) The articles of arrangement shall be submitted to the Registrar who shall retain and register them in the register of companies.

(9) Upon registration of the articles of arrangement, the Registrar shall issue a certificate under his hand and seal, certifying that the articles of arrangement have been registered.

(10) A certificate of arrangement issued by the Registrar shall be prima facie evidence of compliance with all requirements of this Act in respect of the arrangement.

(11) An arrangement shall be effective on the date the articles of arrangement are registered by the Registrar or on such date subsequent thereto not exceeding thirty days, as is stated in the articles of arrangement.

108. It is true that the words "scheme of arrangement" are not to be found in section 158 of the CA. The term "plan of arrangement" is however used to describe the details of a proposed arrangement as defined by section 158 (1) of the CA. Arrangement there means "reorganization or reconstruction of the company and/or separation of two or more businesses carried on by the company. The

Oxford dictionary defines scheme as "a large-scale systematic plan or arrangement for attaining some particular object or putting a particular idea into effect". It cites the synonyms of scheme to include, "plan, project, plan of action and strategy". The word scheme is not to be found anywhere in the current CA. I find that notwithstanding the use of two different words that the *scheme* of arrangement being referred to in section 5 of Part II of the Schedule refers to a *plan* of arrangement as contemplated by section 158. It seems clear to me however, that the power is limited to the promotion of the scheme of arrangement. It does not empower the provisional liquidator to compel the acceptance of the scheme by stakeholders.

109. I do not accept the Respondents argument that since Section 199(3) gives the insolvent company a power, ex parte, to apply for the appointment of a provisional liquidator on the limited basis that it intends to present a compromise or arrangement to its creditors, it follows that a creditor or contributory has no right under section 199(2) to ask the court to empower the provisional liquidator to seek a compromise or arrangement as part of its plan to prevent dissipation of the company's assets. Sections 5 and 6 of Part I of the 4th Schedule give the liquidator the power to compromise debts and liabilities and to make compromises and arrangements with creditors.

110. It is important to distinguish between a power, which the provisional liquidator might possess, and a basis for the appointment. It seems to me that section 199(2) and 199(3) deal only with the requirements that the Court must satisfy itself exists before the appointment may be made. These are the basis (or purpose) of the appointment. The Summons seeking the appointment of the provisional liquidator cites two basis: (1) the appointment is necessary for the prevention of dissipation of the assets of the company; and (2) the appointment is necessary in the interest of the public. Each of these is a recognizable basis under the CWUA but as I have already identified it is only the need to prevent the

dissipation of the assets of the company, which I find to be particularly relevant for these purposes.

111. The Summons also speak to empowering "the Provisional Liquidators to engage with the major stakeholders and creditors in this matter, with the objective of formulating proposals for restructuring the Respondents' affairs and working with key interested parties to achieve the completion of the Baha Mar resort and to make it operational within the shortest practicable timescale." Whist this is not a proper basis for which the appointment may be made it may be a power, which the official liquidator (and by extension the provisional liquidator) may possess in accordance with the 4th Schedule. Questions as to what powers a provisional liquidator should have or whether he could (or should) promote a compromise with creditors or a scheme of arrangement within the meaning of section 158 are matters for the court to consider in delineating the power which the provisional liquidator should have in light of the basis upon which he was appointed. Such a power would therefore only be given to the provisional liquidator if it furthers the prevention of the dissipation of the assets of the Respondents.

112. Having denied the Petitioners the benefit of the private interest claims attributable to the Government of The Bahamas under the just and equitable ground it would seem inappropriate to saddle them with the Respondents' allegations of bias and improper motives by senior government officials. I am not satisfied on the evidence that there is any abuse or improper motive for the winding up of the Respondents or the appointment of provisional liquidators. In ***Millennium Advanced Technology Ltd.***, ***Judge Briggs,*** ruled that, "a petition, if it was not to be an abuse of process, had to be presented in bona fides pursuit of some interest of the petitioner arising from his particular status as such." The court also ruled that "[t]he creditor had sufficiently demonstrated itself to be a contingent or prospective creditor and, as such, had a private interest in the matter. Accordingly, while it might not have been the creditor's principal motive for petitioning, it could not be said that a winding up would not to a material extent

serve the private interest of the creditor. Accordingly, the assertion of public interest reasons for the winding up of the company did not deprive the creditor of locus standi or render the proceedings as a whole an abuse of process."

113. The fact that the Petitioners here entertain the hope that insolvency could be abated prior to a full winding up is immaterial if the Court is satisfied that the proper basis to make the order exists. The Petitioners do not say that they will not proceed to have its winding up Petitions heard but rather they hope, perhaps over optimistically, that the insolvency could be abated during the provisional liquidation. One would expect that all creditors and contributories would entertain a similar wish. It fact, built into the process at Section 199(6) is the power to abort the decent into full liquidation. Further, when the company enters into provisional liquidation in accordance with section 199(3) it too hopes that the arrangement presented to its creditors could result in its emergence from the provisional liquidation, without a winding up order being made.

114. In all the circumstances therefore, I find that it would be an appropriate exercise of my discretion to make the appointment of provisional liquidators. As to the question of compelling stakeholders (creditors and contributories) to accept a compromise. Even if the power exists to impose a compromise upon stakeholders, I am not convinced that such a power ought to be exercisable in the absence of an agreement between all stakeholders impacted, in the absence of a winding up order. I am satisfied nonetheless that the facts of this case warrant the empowering of provisional liquidators to promote a scheme/plan of compromise between all stakeholders which could result in the reversal of the company's insolvent status. Such a solution would surely result in the prevention of the dissipation of the assets of the Respondents.

115. Provisional liquidation under the CWUA was not intended for the long-term management of an asset, such as the Baha Mar project to completion or for the raising of the levels of capital required for its completion. Provisional liquidation is

an interim measure whilst the process to liquidation proceeds. The role of the provisional liquidator is preservative and conservative in the nature of a caretaker doing what is necessary to ensure the assets of the company are not dissipated. Even the language of section 199(1) of the CWUA dealing with appointment suggests as much: ***"the court may appoint a liquidator provisionally"***. The plain dictionary meaning of provisionally is "subject to further confirmation or "for the time being. Its synonyms are temporarily, short-term, pro tem and for the interim. Whilst the provisional liquidator has the powers of the liquidator (subject to any limitation imposed by the court) his office is not expected to endure nor is he expected to do any "heavy lifting" unless absolutely necessary. As he is subject to confirmation, the heavy lifting is to be left to the liquidator if, in fact, one is ultimately appointed.

116. Similar observations were made by ***Etherton J*** in the case of ***Ahsborder BV and others v Green Gas Power Ltd [2005] EWHC 1031*** at paragraph 86 where he stated: *"Provisional liquidators are, as the name indicates, appointed provisionally, pending the hearing of the winding up petition. Their appointment, as in the present case, is usually to preserve assets pending the hearing of the winding up petition. They are not liquidators following a winding up order, seeking to realise the assets of the company for the best value they can reasonably obtain."*

Undertaking

117. At the hearing of the various applications, the Respondents conceded that the new Petitions did not require the undertaking previously sought in their Summons. This complaint was effectively abandoned by the Respondents.

Consultation

118. The Respondents have sought an order that they be consulted prior to the proposing of candidate(s) for the role of provisional liquidators. Not surprisingly, no authority has been advanced for the proposition. The proposed liquidators have been changed on two occasions since the original proffer. The "musical chairs" as described by Mr. Glinton QC is an understandable cause for angst by the Respondent, however while the input of the company or any interested party is vital to ensure the suitability of the candidate(s), it could become an unworkable arrangement to require consultation. I accept that it is also vital that sufficient time be given so as to ensure adequate checks and inquiries could be conducted by the company and interested parties as to the suitability of the candidate(s) for the appointment. The CLR affords the company 4 days notification with respect to an application for the appointment of a provisional liquidator. In this matter, the names of the proposed liquidators, in the case of the Ernst and Young candidates have been shared since July 31, 2015. In the case of the candidates from KRys Global and AlixPartners those names have been shared since 7 August 2015. In either case, considerably more time than ordinarily required under the rules has been provided to permit adequate representations to be made by all sides as to suitability.

Conclusion

119. It is extremely regrettable that the parties have not found a way to resolve this dispute given what is at stake for all parties and the numerous opportunities afforded for a resolution to happen. It is well known to all that everyone ordinarily takes a loss in insolvency proceedings whether judicially managed in this jurisdiction or by the courts of our friends to the North.

120. I propose to appoint provisional liquidators with considerably limited powers. Whilst I will permit the promotion of a scheme of arrangement and/or

compromise with all stakeholders (contributories and creditors). The provisional liquidators' powers will be limited to such powers as may be necessary for the prevention of the dissipation of the assets of the Respondents and preserving them pending the hearing of the Petition to wind up the Respondents. I am ever cognizant of the professional expenses associated with liquidations and will ensure that this provisional liquidation will run a very short course. It will be case managed to ensure that steps taken to progress the hearing of the Petition.

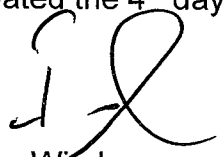
121. Any amendments required to be made by the Petitioners arising from this decision are to be made within 14 days from the date of this decision and the Respondents have 14 days thereafter to respond to the new Petitions.

122. I will also give directions for the Petitions to be advertised within 7 days of the filing of the Amended Petition.

123. I will fix the date for the hearing of the Petitions to 2 November 2015.

124. I will hear the parties as to the provisional liquidators to be appointed and form of the order, inclusive of costs.

Dated the 4th day of September 2015



Ian Winder
Justice