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CLAIMING A POUND OF FLESH AS A CONTINGENT OR PROSPECTIVE CREDITOR UNDER THE COMPANIES ACT[1]

This article examines the concepts of a "contingent" creditor and a "prospective" creditor in the Companies Act and the Companies (Winding Up) Rules 1969 in the light of existing case authority. In the process it attempts to define the outer boundaries of these concepts. Some practical considerations and problems in making a claim against a company as a contingent or prospective creditor are also examined. Particular attention is paid to the problem of proving non-contractual claims for unliquidated damages in the winding up of an insolvent company.

I. INTRODUCTION

ONE often assumes the term "creditor" to be fairly clear in meaning. After all, any English dictionary worth the paper it is printed on, ought to provide a definition for the word. It is, therefore, not surprising that the draftsmen of the Companies Act,[2] which is peppered intermittently with the term, did not even think it necessary to provide a definition for the term in the Act. Even so, disputes have arisen as to whether a particular party to the proceedings is a creditor in the eyes of the law. As such, there are now several reported decisions on this point[3] and the primary focus of this paper

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[2] Cap 50, 1990 Rev Ed.

[3] See, *eg, In re Vron Colliery Company* (1882) 20 Ch D 442; *In re The Catholic Publishing and Bookselling Company, Limited* (1864) 2 De G J & S 116; *In re Pen-Y-Van Colliery Company* (1877) 6 Ch D 477; *In re Milford Docks Company* (1883) 23 Ch D 292; *In re Combined Weighing andAdvertising Machine Company* (1889) 43 Ch D 99; *Re The United Club and Hotel Company Limited* (1889) 60 LT 665; *In re W Powell & Sons* [1892] WN 94; *Pritchett* v *English and Colonial Syndicate* [1899] 2 QB 428; *In re Melbourne Brewery and Distillery* [1901] 1 Ch453; *In re The Acetylene Gas Company of Australasia, Limited* (1901) 1 SR (NSW) Eq 102; *In re Russian and English Bank* [1932] 1 Ch 663; *In re Russian Bankfor Foreign Trade* [1933] 1 Ch 745; *Re North Bucks Furniture Depositories, Ltd* [1939] 2 All ER 549; *In re MB Coogan Limited* [1953] NZLR 582; *In re Tweeds Garage Ltd* [1962] 1 Ch 406; *Mann* v *Goldstein* [1968] 1 WLR 1091; *In re Harvest Lane Motor*

will not be on the meaning of the term "creditor". The issue of whether contingent creditors and prospective creditors are "creditors" in the context of the Companies Act and the Companies (Winding Up) Rules, 1969[4] however, will receive some attention.

While an assumption that the term "creditor" requires no statutory definition may be understandable and, hence, forgivable, the same cannot be said for the failure to provide a definition in the Companies Act for the terms "contingent creditor" and "prospective creditor". The primary focus of this paper will be an examination of the legal impact of these terms in the context of the law relating to companies incorporated in Singapore and some of the judicial pronouncements thus far on what these terms encompass. In the process, this paper hopes to highlight some problems which still beset the interpretation of these terms and to suggest some possible solutions to these problems. It will also address some of the practical problems faced and some of the advantages enjoyed by a contingent or prospective creditor of an insolvent company. Although some of these are not peculiar to contingent and prospective creditors alone but are applicable to creditors in general, they will, nonetheless, be addressed to give a better sense of the strengths and weaknesses of a contingent or prospective creditor's position when making claims against their debtor companies.

II. The Legal Significance of a Contingent or Prospective Creditor

The concept of a contingent or prospective creditor is recognised in at least five sections in the Companies Act. First, section 253(l)(b) states that a petition to wind up a company may be presented by a contingent or prospective creditor of the company. Secondly, a similar provision was subsequently adopted in section 227B(1) to allow a contingent or prospective creditor of a company to petition for a court order to place the company under judicial management. Thirdly, section 254(2)(c) directs the court to take into account the contingent and prospective liabilities of a company when determining if it is unable to pay its debts so as to justify the making of a winding up order against the company. Fourthly, section 321 (1) provides that in every winding up, subject in the case of insolvent companies to the application of the law relating to bankruptcy, all debts payable on a

Bodies Ltd [1969] 1 Ch 457; *L & D Audio Acoustics Pty Ltd* v *Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR180. See also, in the context of a scheme of arrangement, *Sovereign Life Assurance Company* v *Dodd* [1892] 2 QB 573; *In re Midland Coal, Coke and Iron Company* [1895] 1 Ch 267; *Re Southern Australia Perpetual Forests Ltd* [1971] VR 475; *Trocko* v *Renlita Products Pty Ltd* (1973) 5 SASR 207; *Re Glendale Land Development Ltd (In Liquidation)* (1982) 7 ACLR 171.

[4] Cap 50, R1, 1990 Ed (GN S 184/69).

contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible in proof against the company. The subsection goes on to provide that where the value of such debts or claims are subject to any contingency, or sound only in damages, or for some other reason does not bear a certain value, then a just estimate of them is to be made. Subsection (2) of the same section further provides that subject to the statutorily preferred debts listed in section 328 of the Companies Act, in the case of a winding up of an insolvent company, the law relating to bankruptcy is to apply *mutatis mutandis* with regard to the respective rights of secured and unsecured creditors, the debts provable and the valuation of annuities and future and contingent liabilities. Finally, under section 73(2)(a) of the Companies Act, every creditor of a company who is entitled to prove his debt on its winding up (which would, in the ordinary case, include a contingent and prospective creditor) will be entitled to object to any capital reduction proposed by the company which involves a diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital or in any other case where the court so directs. Contingent debts and unascertained debts are also recognised in section 73(2)(c) of the Act. It should also be noted that rule 88 of the Companies (Winding Up) Rules, 1969 recognises that a prospective creditor of a company may prove his debt in the company's winding up although a rebate of interest is to be taken into account in the computation of the amount provable.

In the light of the foregoing provisions, it is unfortunate that the Companies Act provides no definition of the terms "contingent creditor" and "prospective creditor", considering that the vast majority of winding up petitions presented to the court are initiated by a company's creditors. Fortunately, however, case law from other common law jurisdictions have attempted to shed some light on the meaning of these terms. Closer to home, the Singapore High Court[5] recently endorsed some of the pronouncements of the foreign courts. The scope of this decision and its contribution to the development of the law in Singapore will be analysed.

III. MEANING OF "CONTINGENT LIABILITY", "CONTINGENT CREDITOR" AND "PROSPECTIVE CREDITOR"

A. *Interpretation of "Contingent Liability"*

Lest there be any doubt, it should be noted at this juncture that there is case authority to suggest that a reference to the contingent or prospective debts or liabilities of a company is similar to a reference to the debts and

[5] *Re People's Parkway Development Pte Ltd* [1992] 1 SLR 413.

liabilities owed to a contingent or prospective creditor respectively so that the two are simply two sides of the same coin.[6] It is pertinent to note that a contingent liability has been defined by Lord Reid as:

> a liability which, by reason of something done by the person bound, will necessarily arise or come into being if one or more of certain events occur or do not occur.... "[C]ontingent liabilities",... must mean sums which will only become payable if certain things happen, and which otherwise will never become payable.... I agree with the respondents' argument to this extent, that this class can only include liabilities which in law *must* arise if one or more things happen, and cannot be extended to include everything that a prudent business man would think it proper to provide against. That is the distinction I have tried to explain. But I cannot agree with the respondents' further argument that there must be an existing obligation.... The essence of a contingent liability must surely be that it may never become an existing liability because the event on which it depends may never happen.[7]

Lord Guest was of a similar view when he said that:

> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.[8]

Although these statements were made in reference to the use of the term "contingent liability" in section 50 of the English Finance Act of 1940, they are, nonetheless, useful guides as to what the same term could mean in the Companies Act.

B. *Interpretation of "Contingent Creditor"*

Mellish LJ in *Ex parte Ruffle*[9] stated that a contingent debt referred to a case where there was a doubt if there would be any debt at all. Hence, in another case, a debt that was perfectly certain to accrue although accruing only in the future was held not to be a contingent debt.[10] These cases, although dealing with the meaning of a contingent debt help to shed some light on who the law would recognise as a contingent creditor.

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6 *In re British Equitable Bond and Mortgage Corporation Ltd* [1910] 1 Ch 574.
7 *Winter* v *Inland Revenue Commissioners* [1963] AC 235 at 249 and 251 (emphasis added).
8 *Ibid,* at 262.
9 (1873) LR 8 Ch App 997 at 1001.
10 *Re Palace Billiard Rooms Limited and Reduced* (1911) 2 SLT 324.

Perhaps the classic and oft-quoted definition of a contingent creditor is that given by Pennycuick J in the case of *Re William Hockley, Ltd* where he said:

> The expression 'contingent creditor' is not defined in the Companies Act, 1948, but must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date.[11]

There it was held that payment of a judgment debt by a judgment debtor to the sheriff extinguished the debt so as to disentitle the judgment creditor from presenting a winding up petition against the judgment debtor or making any claim for the costs of the petition in the capacity of a contingent creditor. Pennycuick J's definition of a contingent creditor has since been refined by subsequent judicial pronouncements. For instance, it has been rightly pointed out that this definition is not purely a definition of the term "contingent creditor" but is more a general definition for the terms "contingent creditor" and "prospective creditor" collectively.[12] It has also been said that the definition is not exhaustive.[13] There is also judicial clarification that a contingent liability can still exist notwithstanding that the contingent event upon which the liability depends may be complex or that the amount payable upon the contingency may not be ascertained with precision.[14] More recently, in *Stonegate Securities Ltd* v *Gregory,* Buckley LJ held that "the expression 'contingent creditor' means a creditor in respect of a debt which will only become due in an event which may or may not occur...."[15]

This statement was made in the course of interpreting section 224(1)(c) of the English Companies Act of 1948 which is almost identical to and not materially different from section 253(2)(c) of the Singapore Companies Act.

Hence a guarantor of a company's debt who has been called upon by the creditor to pay on the guarantee has been held in the case of *Re Fitness Centre (South East) Ltd*[16] to be a contingent creditor of the company for

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[11] [1962] 2 A11 ER 111 at 113.

[12] *Community Development Pty Ltd* v *Engwirda Construction Company* (1966) 120 CLR 455 at 459, *per* Kitto J.

[13] *Re Gasboume Pty Ltd* [1984] ACLR 618 at 650, *per* Nicholson J with whom Tadgell J agreed in *Federal Commissioner of Taxation* v *Gosstray* [1986] VR 876.

[14] *Community Development Pty Ltd* v *Engwirda Construction Company* (1966) 120 CLR 455 at 459 and 460, *per* Kitto J.

[15] [1980] 1 Ch 576 at 579.

[16] *Re Fitness Centre (South East) Ltd* [1986] BCLC 518 at 520.

the purposes of *presenting* a winding up petition. However, the case suggests that in order to proceed with the hearing of the petition, the guarantor would have to show that he had discharged, not merely a part, but the whole of the company's indebtedness which is the subject of the guarantee.[17] The reasoning behind this ruling is that until the primary debt has been discharged by the guarantor, the creditor is technically the party entitled to submit proof of the debt in the company's winding up and the guarantor would be debarred by the well established rule against double proof from making a claim against the company.[18] In a recent case, *Re Butterworth Products & Industries Sdn Bhd,*[19] a Malaysian court held that a finance company which had given a loan on the security of a guarantee was a contingent creditor of the guarantor (a company which had gone into liquidation). In that case, a demand had been made on the guarantor although no legal action had been commenced to enforce the guarantee. This, the court held, was sufficient to establish a pecuniary claim against

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[17] [1986] BCLC 518 at 521.

[18] See *In re Fenton Textile Association Ltd* [1931] 1 Ch 85. So long as any liabilities of the guarantor to the creditor remain, the creditor is entitled to prove the full amount of the debt due to him and the guarantor's proof is to be excluded. It is only when the guarantor has discharged fully the debt that he is subrogated to the right of the creditor: *In re Sass* [1896] 2 QB 12. (See also *In re Oriental Commercial Bank* LR 7 Ch 99 at 102 which involved contingent liabilities of parties to bills of exchange.) A distinction is made between cases where the guarantor guarantees only part of a debt and cases where he has guaranteed the whole debt but his liability is made subject to a maximum limit which is less than the whole debt. In the former case, payment of the guaranteed amount to the creditor entitles the guarantor to prove in the debtor company's liquidation for the full sum he has paid to the creditor, leaving the creditor to prove for the balance. In the latter case, so long as part of the debt remains unpaid, the guarantor may not prove in the debtor company's liquidation for the sum he has paid to the creditor until the creditor has been paid in full, notwithstanding that he has paid to the creditor to the extent of the limit to his liability agreed upon under the guarantee. In such cases, the creditor may still prove for the full sum of the debt to the exclusion of the guarantor's proof. (See *In re Sass, supra* and *Ellis* v *Emmanuel* (1876) 1 Ex D 157.) The rule against double proof, however, appears to take a back seat when the court has to determine if a payment by an insolvent person to a creditor for the benefit of a guarantor of the debt amounts to a preference given to a "creditor" (albeit, only a contingent one) and hence a fraudulent preference under the bankruptcy legislation. In this respect see *Re Lynch* (1937) 9 ABC 210; *Re JF Aylmer (Manildra) Pty Ltd* (1967) 87 WN (Pt 1) (NSW) 409; *In re Blackpool Motor Car Company, Limited* [*1901*] 1 Ch 77; *In re Paine, Ex pane Read* [1897] 1 QB 122 (*cf Re Mills, Ex pane The Official Receiver* (1888) 58 LT 871; *Re Warren, Ex pane The Trustee* [1900] 2 QB 138.) The problem no longer arises in England nor in Singapore as under the existing bankruptcy legislation, fraudulent preferences would now expressly include payments to a creditor with a view to preferring a surety or guarantor of the debt: s 340, Insolvency Act c 45 (England); s 53, Bankruptcy Act (Cap 20, 1985 Rev Ed).

[19] [1992] 1 MLJ 429.

the guarantor and to make the finance company a contingent creditor of the guarantor.[20]

It is unclear if a guarantor upon whom no demand to pay on the guarantee has been made would be considered a "contingent creditor" for the purposes of presenting a winding up petition under section 253 of the Companies Act. Although the existing authorities appear to suggest even such a guarantor would be considered a "contingent creditor" in many instances, these cases were not concerned with the guarantor's *locus standi* to present a winding up petition.[21] As a general rule, a guarantor's liability arises upon the default of the primary debtor and no demand on the guarantor need be served by the creditor[22] unless this is expressly made a condition precedent to the guarantor's liability.[23] In any event, regardless whether a demand is required to be served on the guarantor under the terms of the guarantee, the guarantor is still very likely to be deemed by the court to be a contingent creditor of the primary debtor. While it may be true that such a guarantor may not be entitled to prove in the winding up of the debtor until he has paid off the guaranteed debt and discharged the debtor from his creditor, the motivation behind the presentation of the winding up petition may not be to prove in the winding up but to preserve the assets of the company from further dissipation. By doing so, the guarantor would merely be protecting himself against his secondary liability to the creditor.[24]

At this juncture, one should note that Pennycuick J's definition in *Re William Hockley, Ltd*[25] imports a requirement that there be first an existing obligation between the purported contingent creditor and the contingent debtor. This requirement was further taken up in the case of *Winter* v *Inland Revenue Commissioners* by Lord Hodson, who offered further guidelines as follows:

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[20] It should be noted that in both cases, a demand had already been made on the guarantor under the guarantee. The sum claimed under the guarantee was therefore in both cases an ascertained amount. Where no demand has been made, what would eventually be due on the guarantee would be impossible to ascertain since this would depend on the extent to which the primary debtor discharges his obligations under the guaranteed debt.

[21] *Re Lynch* (1937) 9 ABC 210; *Re JF Aylmer (Manildra) Pty Ltd* (1967) 87 WN (Pt I) (NSW) 409; *In re Blackpool Motor Car Company, Limited* [1901] 1 Ch 77; *In re Paine, Ex pane Read* [1897] 1 QB 122.

[22] *Hitchcock* v *Humfrey* (1843) 5 Man & G 559; *Moschi* v *Lep Air Services* [1973] AC 331; *Kwong Yik Bank* v *Transbuilder* [1989] 2 MLJ 301; *Re Tosrin, Ex parte Equity Finance* [1989] 3 MLJ 428.

[23] *Mbf Finance v Hasmat Properties* [1990] 1 MLJ 180.

[24] Allowing guarantors to petition for the winding up the debtor company in such situations would be consistent with the rule in s 257 of the Companies Act. This suggests that the fact that there is no prospect of a distribution on the winding up (*eg,* a case where the company has no assets) is not to be considered a bar to the winding up of a company.

[25] [1962] 2 All ER 111 at 113.

> One must start with the word "liability" which prima facie connotes legal liability. When one adds to it the adjective "contingent" one is not entitled to sail into uncharted sea and to take into account not only contingent liabilities but all other kinds of liabilities which may be prospective or foreseeable as likely to be incurred. There can be no true contingent liability unless there is an *existing obligation* under which a payment will become due on the happening of a future unascertained event or events. *There must always be an underlying obligation.*[26] (Emphasis added.)

There is, however, some authority to suggest that the presence of an existing obligation may not strictly be a prerequisite to the establishment of a contingent liability.[27] Hence, it has been held by Nicholson J in *Re Gasbourne Pty, Ltd* that a person with an arguable claim against a company will qualify as a "contingent creditor" and that it is not the role of the court hearing a winding up petition to adjudicate on the validity of this claim.[28] Nicholson J went so far as to hold that a party who may be successful in pending legal proceedings against a company will be a contingent creditor of the company as to the costs incurred in the proceedings. He also held that a person whose right to an indemnity from a company is dependent on the outcome of a pending court proceeding will be a contingent creditor of the company.[29]

There is further case authority to the effect that a person who has commenced an action against a company for damages arising from the alleged negligence of the company is a contingent creditor even though the court has not arrived at any judgment against the company. This is the case of *In re Harvest Lane Motor Bodies Ltd*[30] which involved a company which had been struck off the register of companies by the Registrar of Companies. An application was then made to court by the administratrix of the estate of a person who had been killed in a road accident which was alleged to be caused by the negligence of a company, its servants or

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[26] [1963] AC 235 at 257. Again, although Lord Hodson was concerned with the meaning of the term "contingent liability" under s 50 of the Finance Act 1950, his statement is helpful in the identification of the "contingent creditor".

[27] See, for instance, *Winter* v *Inland Revenue Commissioners* [1963] AC 235 at 249 (*per* Lord Reid, *supra,* note 7) and 253 (*per* Lord Birkett), although, as pointed out earlier, this case involved an interpretation of the term "contingent liability" in the context of s 50 of the Finance Act 1950. (The reader will recall that Lord Hodson, on the other hand, supported the view that a contingent liability can only draw life from an existing legal obligation [1963] AC 235 at 257.)

[28] [1984] 8 ACLR 618 at 650.

[29] *Ibid,* at 652.

[30] [1969] 1 Ch 457.

agents, to have the company restored to the register of companies. This was to enable the estate to commence proceedings against the company to claim damages under the Fatal Accident Acts and the Law Reform (Miscellaneous Provisions) Act 1934. The application was made under section 353(6) of the English Companies Act 1948. This provision is similar in intent, although not in wording, to section 344(5) of the Singapore Companies Act. The court noted that such an application under section 353(6) could only be made by the company, any member or any creditor of the company.[31] As the applicant was not a member of the company, it was necessary for the court to determine if the applicant was a "creditor" of the company. Megarry J applied a purposive approach in the interpretation of section 353(6) and held that the word "creditor" in the section had to be read widely to include contingent and prospective creditors as well. He went on to hold that the applicant having commenced action in the courts against the company before it was struck off the register in respect of the alleged negligence of the company, was a contingent creditor of the company and therefore had the *locus standi* to make the application.

Megarry J was clearly influenced by the fact that had he not restored the company to the register, the applicant would have had no avenue of redress against the company. It is submitted that this is a hard case that has resulted in bad law. In the ordinary case, the natural avenue of redress would have been an application under a provision like section 343 of the Singapore Companies Act.[32] Megarry J did consider this alternative which presented itself in the form of section 352 of the English Companies Act 1948. However, in both the Singapore section 343 and the English section 352, any application made under the section for an order to declare any dissolution of a company void had to be made within 2 years of the dissolution.[33] In the case before Megarry J, the application was made more than 2 years after the company was struck off the register of companies so that redress under this section was unavailable.

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[31] It should be noted that under s 344(5) of the Singapore Companies Act, there is no such limitation and anyone who is aggrieved by the striking off of the name of the company from the register of companies may make an application under the section.

[32] Although it would appear from their wording that s 343 of the Companies Act applied only to cases where a company was dissolved after being formally wound up and s 344(5) applied to cases where a company was struck off the register by the Registrar on the ground that it was a defunct company, the trend of case authorities in England suggests that a person may apply to resurrect a company using either section regardless of the way it came to be deregistered in the first place, so long as he falls within one of the categories of persons stated in the sections to have *locus standi* to make the application. See, for instance, *Re Belmont & Co Ltd* [1950] Ch 10 and *Re Test Holdings (Clifton) Ltd* [1970] Ch 285.

[33] The claim in the *Harvest Lane* case would no longer face such a problem today. The present English equivalent of s 343 of the Singapore Companies Act, namely, s 651 of the Companies Act 1985 (as amended by the English Companies Act 1989) allows applications for the

It is submitted that the local courts ought not to follow Megarry J's decision. Apart from the fact that section 344(5) of the Singapore Companies Act is not subject to the same constraints as section 353(6) of the English Companies Act 1948, Megarry J's judgment would make it too easy for anyone to establish himself as a contingent creditor of a company should this be to his convenience. Whereas it may be correct to read the word "creditor" in section 353(6) of the English Act widely, nevertheless, a person who has merely commenced legal action against a company should not be deemed a contingent creditor of the company. Even on the facts of the case before Megarry J, such a stand would not have been harsh on the applicant considering that she could have sought redress under section 352 of the English Companies Act 1948 had she not taken so long to bring the matter to court. In essence, any hardship she would have faced would have been brought upon by herself.[34]

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restoration of a company to the register to be made at any time (thereby suspending the two-year time bar), if the purpose of the application is to bring proceedings against the company for damages for personal injuries or for damages under the English Fatal Accidents Act 1976.

[34] Admittedly persons who do not discover injuries they sustain for which a company is responsible until more than two years after the company has been dissolved deserve greater sympathy. However, in such cases, even Megarry J's wide reading of the term "creditor" in the case of *In re Harvest Lane Motor Bodies Ltd* would be of no assistance in an application to revive a company since that decision turned on the finding that the applicant in that case was a "contingent creditor" by virtue of the fact that she had commenced an action in the courts against the company before it was dissolved. In any event, this is not really a problem in Singapore since s 344(5) of the Companies Act allows "any person" aggrieved by the name of a company being struck off the register to apply to court to have the company restored to the register. The section provides for a very generous time frame within which the application may be made, namely, within 15 years after the name of the company is struck off the register. In *Bradley* v *Eagle Star Insurance Co* [1989] AC 1957, the House of Lords interpreted the Third Parties (Rights against Insurers) Act 1930 as requiring the liability of the company to the claimant to be first established before any compensation may be sought by the claimant from the company's insurers notwithstanding that the Act expressly states that the company's rights against its insurers vest on the claimant in the event of a winding up order being made against the company or a resolution to wind up the company being passed (among other things). This problem has since been rectified by provisions in the English Companies Act 1989. In Singapore, however, it is likely that the ruling in *Bradley's* case will still apply. S 10 of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 1985 Rev Ed) is almost identical to (and not materially different from) s 1 of the Third Parties (Rights against Insurers) Act 1930. So is s 19 of the Workmen's Compensation Act (Cap 354, 1985 Rev Ed). The primary ground for the failure of the claimant's action in *Bradley's* case was that the insurer was only liable to indemnify the insured to the extent that the insured's liability to the claimant had been established. This was no longer possible in *Bradley's* case as the company had by then been wound up and dissolved. The reasoning behind the judgment is therefore likely to be applicable to any interpretation of s 10 of the Motor Vehicles (Third-Party Risks and Compensation) Act and s 19 of the Workmen's Compensation Act. In such cases therefore,

Nonetheless, the weight of authorities would seem to favour the view that to be a "contingent debtor", a person must be under a present and definite obligation to make payment at a future point in time when a specified event occurs, should it occur.[35] One can easily identify with Tadgell J's view that:

> An attempt to formulate a universally applicable definition of a contingent debt or of a contingent creditor is difficult, and probably not very useful having regard to the variety of contingent claims that may properly be the subject of proof. A contingent creditor, like an elephant, is rather easier to recognize than to define.[36]

Such flowery phrases are however, of no help to the creditor who needs to ascertain if he is suitably qualified to present a winding up petition as a contingent creditor. Hence even if no exhaustive definition of a contingent creditor is possible, some guidelines ought to be formulated to assist in the identification of such a creature. As a first step towards the formulation of such guidelines, it is submitted that Nicholson J's interpretation of a "contingent creditor" is much too wide. Driven to its logical conclusion, anyone could qualify as a contingent creditor as some convenient, even fanciful, contingency could conceivably be dreamt up. Some limits to the definition of a "contingent creditor" obviously need to be set. What is sadly lacking is a test for the "remoteness" of the contingency. Thus far, the courts have not been very helpful in this respect, decisions being made hitherto on an *ad hoc* basis. The only test that is sometimes referred to is the need for an "existing obligation". This test is unfortunately not very helpful unless the nature of the obligation is defined. Providing such a definition, however, does not promise to be an easy task.

Despite the problems with the "existing obligation" test, it is not altogether useless. First, it is submitted that to qualify as a contingent creditor of a company under the test, the company must have a presently existing obligation to pay the person claiming to be its contingent creditor a sum of money (which need not be ascertained) on the happening of a contingent event. This must be distinguished from cases where the "existing obligation" relied upon, only arises *simultaneously* with the occurrence of

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the courts' ability to resurrect the insured company may remain of critical importance to any tort claimant seeking to commence an action against the company's insurers by relying on any of these statutory provisions.

[35] *Community Development Pty Ltd* v *Engwirda Construction Company* (1966) 120 CLR 455; *Re SBA Properties, Ltd* [1967] 2 All ER 615; *Federal Commissioner of Taxation* v *Gosstray* [1986] VR 876.

[36] *Federal Commissioner of Taxation* v *Gosstray* [1986] VR 876 at 878.

the contingent event. Hence, it has been held that a tax which could not have been exacted or imposed on a person before his bankruptcy (because the Act which authorised the imposition of the tax was enacted only thereafter) cannot be a contingent debt provable in the bankruptcy.[37] It would, therefore, not be possible to argue in such a case, that although the Act was not passed before the bankruptcy, there was always the possibility that it would be passed and hence the liability to pay such a tax was based on the contingency of the Act being passed.

Secondly, it is submitted that a contingent event should not be equated with any event that could possibly happen in the course of life. In other words, certain limits must be recognised on the kinds of contingent events that will suffice to trigger off a contingent obligation. Hence, the requirement called for in certain cases for an "existing obligation" should be read to mean that there must be an *independent* existing obligation from which the contingent liability draws its life. While such an obligation may not be confined to contractual obligations, it is submitted that the off-chance of a pending litigation being decided in favour of any party to the proceedings should not qualify as a contingent event. This was the stand taken by a Malaysian High Court in *Morgan Guaranty Trust Co of New York* v *Lian Seng Properties Sdn Bhd.*[38] There it was held that a petitioner in a winding up action whose claim to being a creditor of the company was based on a debt which was then the subject of a pending litigation in the Singapore High Court, would not qualify as a contingent creditor to present a winding up petition. The position would have been different if judgment had already been obtained in the petitioner's favour, even if the amount of damages to be awarded to the petitioner remained to be assessed.[39]

C. *Interpretation of "Prospective Creditor"*

Perhaps the clearest definition of the term "prospective creditor" which has come from the courts is that given by Buckley LJ in *Stonegate Securities Ltd* v *Gregory* where he said:

> a 'prospective creditor' is a creditor in respect of a debt which will *certainly* become due in the future, either on some date which has

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[37] *Federal Commissioner of Taxation* v *Gosstray* [1986] VR 876.

[38] [1990] 1 MLJ 282.

[39] In *Re A Company* [1974] 1 All ER 256, judgment was obtained against a company with damages to be assessed, by a person who subsequently petitioned for the winding up of the company. It was conceded by the company that the petitioner was a contingent or prospective creditor even though it had applied for the petitioner's judgment to be set aside.

> been already determined or on some date determinable by reference to future events.[40]

This term should therefore be wide enough to cover both the case where a debt is already in existence but is payable only in the future and the case where there is no presently existing debt although a debt is certain to materialise in the future. A clear example would be an unmatured bill of exchange.

Hence, a prospective creditor is different from a contingent creditor primarily because the debt of a prospective creditor is certain to be due some time in the future, although the exact time of this taking place may not be ascertainable with any degree of precision. The time the debt falls due may be dependent on the happening of an event which, unlike the contingent event attached to a contingent creditor's debt, is certain to occur. The contingent creditor's debt may or may not materialise at all since it is dependent on the occurrence of an event which may not take place. It is therefore not surprising that the term "prospective creditor" has posed fewer problems to the courts than the term "contingent creditor" resulting in fewer judicial pronouncements on the meaning of the term "prospective creditor" than of the term "contingent creditor".

A few examples will suffice to illustrate the courts' attitude in this area of the law. In *Holt Southey Ltd* v *Catnic Components Ltd,*[41] it was held that a person who had sold and delivered goods on credit to a company is a prospective creditor of the company and is consequently entitled to present a winding up petition against the company. In a second example, *Ganda Holdings Bhd* v *Pamaron Holdings Sdn Bhd,*[42] the defendant had obtained an order for specific performance against the plaintiff, which required the plaintiff to complete an agreement to purchase certain shares from the defendant. The order required the plaintiff to pay the agreed purchase price to the defendant by a specified date, failing which the defendant was to be entitled to damages from the plaintiff to an amount to be subsequently assessed by the court. The plaintiff failed to make the necessary payment by the date specified. In the circumstances, the court held that the defendant became entitled to be paid damages by the plaintiff under the court order. Although the amount of damages had not been ascertained, the court was of the opinion that the defendant had by the plaintiff's default, become a prospective creditor of the plaintiff and was hence qualified to present a winding up petition against the plaintiff.

In both cases, a debt was already established although not then

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[40] [1980] 1 Ch 576 at 579. (Emphasis added.)
[41] [1978] 1 WLR 630.
[42] [1989] 2 MLJ 346.

presently payable, in the former case because the time for payment had not arrived and in the latter case because the sum payable had not been ascertained. It is noteworthy that in the English case of *In re a Company,*[43] Harman J dismissed the winding up petition presented by a person who claimed to be a prospective creditor in respect of an untaxed order for costs. Counsel for the company had argued that a debt for an unascertained sum could not be a "prospective debt". In the course of his judgment, Harman J said the following:

> Further I am of the opinion that, whether or not the petitioner is in truth a prospective creditor, it is not proper use of the Companies Court to present a petition based on an unascertained debt which has never been demanded and which the company, or more properly if there be a suspicion of insolvency a third party, has never had a chance to pay....The purpose of a petition is, it is true, not merely to obtain payment of a debt, but I cannot accept that it is right to present a petition when there has been no opportunity whatever for payment.[44]

Perhaps the first point to note is that Harman J did not expressly rule on the validity of the petitioner's claim to be a prospective creditor but dismissed the petition on other grounds. Secondly, his requirement that a prior demand be made on the company before the presentation of the petition failed to take into account the fact that this was not possible since the sum claimed was still unascertained. Furthermore, there is more than one way to prove the insolvency of a company, the statutory demand being only one of them. There appears to be no good reason why a demand should be made on the company if it could be shown by other evidence that the company was indeed insolvent. The decision could perhaps be best explained on the ground that although allegations were made in the petition that the company was insolvent, these were not convincing enough. Harman J's final alternative ground of decision was also dubious. He said that it could be that the true ground was that the prospective debt, so-called, was still in the state of a disputed debt.[45] This surely is a confusion between cases where the existence of a debt is disputed and cases where the existence of the debt is not disputed but only its quantification. In this case, an order for costs had already been made and it surely could not be disputed that costs had been incurred by the petitioner, the only question was the quantum thereof. In view of the foregoing, *In re a Company*[46] is probably very weak authority for the proposition that a prospective debt must be in respect of

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[43] No 001573 of 1983, (1983) 1 BCC 98,937.
[44] *Ibid,* 98,937 at 98,940.
[45] *Ibid,* 98,937 at 98,940.
[46] *Ibid,* at 98,937.

an ascertained sum. Nonetheless, it is unfortunate that the Malaysian court in *Ganda Holdings Bhd* v *Pamaron Holdings Sdn Bhd*[47] made no reference to it.

D. *Interpretation of "Contingent or Prospective Creditor"*

Sometimes, it is not necessary on the facts of a case to determine if a party to the proceedings is a contingent creditor or a prospective creditor since whichever capacity the party may assume, the outcome of the case would have been the same. Hence it has been held that the holder of dishonoured cheques would be either a contingent or prospective creditor.[48] Similarly, it has been held that the holder of a bond issued by a company who, upon making periodic payments to the company, would be entitled to the payment in the future of a certain sum of money, was a "contingent or prospective creditor".[49] In one case it was not even disputed that a person claiming unascertained damages and costs awarded under a judgment was a contingent or prospective creditor.[50]

The Singapore courts have hitherto been relatively silent on the meaning of the terms "contingent creditor" and "prospective creditor". It was only very recently in the case of *Re People's Parkway Development Pte Ltd*[51] that the Singapore High Court undertook some discussion on the meaning of these terms. In that case, the Attorney-General had applied to the court to be substituted as petitioning creditor in the winding up of a company. In order to qualify for such substitution under Rule 33(1) of the Companies (Winding Up) Rules 1969, the Attorney-General had to be a person who "would have a right to present the petition". The Attorney-General claimed that he was so entitled on the basis of an alleged debt owing by the company to the Government of Singapore. This debt had arisen from the sale of a certain piece of land by the Government to the company. The Attorney-General therefore claimed to be entitled to present a winding up petition against the company on behalf of the Government of Singapore in the capacity of a creditor. It was also submitted in the alternative that he was similarly entitled in the capacity of a contingent or prospective creditor.

Thean J held that since on the facts before him, there appeared to be no dispute by the company as to the existence of the debt but only as to the amount still owing to the Government, the Government was a creditor of the company. He went on further to hold that the Government was also

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[47] [1989] 2 MLJ 346.

[48] *In re MB Coogan Limited* [1953] NZLR 582.

[49] *In re British Equitable Bond and Mortgage Corporation, Limited* [1910] Ch D 574.

[50] *United States Surgical Corporation* v *Ballabil Holdings Pty Ltd* (1985) 9 ACLR 904.

[51] [1992] 1 SLR 413.

a contingent or prospective creditor of the company citing with approval, the cases of *Re William Hockley Ltd and Community Development Pty Ltd* v *Engwirda Construction Co.* It should be noted that the Government could only have been either a simple creditor on the one hand or a contingent or prospective creditor on the other. It could not have been both in respect of the same sum of money. Thean J's ruling that the company was both a creditor and a contingent or prospective creditor ought, therefore, to be read as alternative grounds of judgment as in fact, these two claims were rightly made by the Attorney-General in the alternative.

It is not clear from the facts of the case, as reported, on what basis the Government was held to be a prospective creditor. There was a hint in the judgment, however, that the purchase price of the land was payable by instalments. It was therefore possible that some of the instalments had not fallen due when the petition to wind up the company was presented. If it was merely a matter of time before they fell due, then the Government would rightly have been a prospective creditor. All this is, however, purely conjecture. One is also left guessing as to what the payment of the instalments could have been contingent upon to make the Government a contingent creditor. No attempt was made to ascertain whether the Government was a contingent or a prospective creditor as it was unlikely that it was both in respect of the same sum of money. In the light of these factual gaps in the report of the judgment, the case is an unsatisfactory guide as to what amounts to a contingent or prospective creditor. All we do know for certain from the judgment is that the statements made of "contingent creditors" in *Re William Hockley Ltd and Community Development Pty Ltd* v *Engwirda Construction Co* have found favour with at least one Singapore High Court judge.

IV. Are Contingent and Prospective Creditors "Creditors" of the Company?

The existing legislation is unsatisfactory in that while a contingent creditor and a prospective creditor are allowed to present a winding up petition and to prove their debts on the winding up of a company, there is no statutory provision to stipulate that upon so doing, they would be accorded the same rights and be subject to the same obligations as the other creditors of the company in the winding up proceedings. Needless to say, there are provisions both in the Companies Act and in the Companies (Winding Up) Rules which accord certain rights to and impose certain obligations on the creditors of a company in the course of being wound up. Yet there is nothing expressly in the Act or the Rules to put the contingent or prospective creditor on the same footing as the other creditors of the company.

It could be argued that unless a contingent or prospective creditor is

expressly referred to by the Companies Act or any of the rules made thereunder, he ought not, in the ordinary case to be considered a "creditor" for the purposes of the Act or the rules. It is, after all, an established rule of statutory construction, which goes by the Latin maxim of *expressio unius est exclusio alterius,* that where a statute recognises two terms of similar but not identical nature in one part of its text, then the express omission of one in another part of its text must be assumed to be a deliberate omission. It could therefore be argued that since sections 253(l)(b), 254(2)(c), 227B(1), 327(1) and 73(2)(c) of the Companies Act expressly recognise the concept of a contingent or prospective creditor, this must mean that in the other sections of the Act where the word "creditor" is used without any reference to contingent or prospective liability, the term "creditor" was not intended to include contingent and prospective creditors. There is judicial authority for the view that the term "creditor" connotes a person to whom is owed a debt which is presently existent and due.[52] There appears, however, to be a distinction between debts which are not due until a future date and debts which are due but the payment of which is deferred under an agreed scheme for administrative convenience. In the latter case, the person who is owed the debt would still be deemed a creditor.[53]

In *Pen-Y-Van Colliery Company,*[54] the petitioner who had presented a winding up petition against a company, had commenced an action against the company for damages in respect of some alleged misrepresentation on the company's part. No judgment had yet been obtained against the company. The petitioner claimed to be entitled to present the petition as a "creditor" of the company, the alleged debt of the company being the unliquidated claim for damages, interest and expenses under the pending

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[52] *Pen-Y-Van Colliery Company* (1877) 6 Ch D 477; *In re Vron Colliery Company* (1882) 20 Ch D 442; *In* re *Milford Docks Company* (1883) 23 Ch D 292; *Re United Club and Hotel Company Limited* (1889) 60 LT 665; *In re W Powell & Sons* (1892) WN 94; *Re The Melbourne Brewery and Distillery* [1901] 1 Ch 453. Contrast with *In re Australian Joint Stock Bank* [1897] WN 48, where a winding up order was granted on a petition presented by a creditor whose debt was only payable in the future. It should, however, be noted that the petition in that case was not challenged by the company. It has also been held that a a judgment creditor with a garnishee order is not a creditor of the garnishee: *In re Combined Weighing and Advertising Machine Company* (1889) 43 Ch D 99. Contrast this with *Pritchett* v *English and Colonial Syndicate* [1899] 2 QB 428 where it was held that a judgment creditor could enter judgment against a garnishee for the sum ordered to be paid under a garnishee order absolute as a preliminary step to the presentation of a winding up petition against the garnishee.

[53] *In re Australian Joint Stock Bank* [1897] WN 48; *In re The Acetylene Gas Company of Australasia, Limited* (1901) 1 SR (NSW) Eq 102. See also comments of Wright J in *Re The Melbourne Brewery and Distillery* [1901] 1 Ch 453 at 459.

[54] (1877) 6 Ch D 477.

court action. The Master of the Rolls noted that in section 158 of the English Companies Act 1862, relating to the proof of debts and claims, a distinction was made between "debts provable on a contingency" and other "claims against the company". He therefore reasoned that an unliquidated claim for damages against the company was merely a "claim" against the company and not a "debt" and hence the petitioner could not be deemed to be a creditor of the company for the purposes of the Companies Act 1862. He therefore dismissed the petition on the ground that the petitioner, not being a "creditor" of the company, had no *locus standi* to present it. Jessel MR's judgment could be summed up by the following statement:

> I do not think a claim for unliquidated damages, that is, a claim for damages for fraudulent misrepresentation, makes a man a creditor entitling him to petition under the Act either for a winding-up by the Court or a winding-up under supervision. He must change the claim for damages into a judgment, and thus make himself a creditor, before he can petition the Court.[55]

It should, however, be noted that *Pen-Y-Van Colliery Company*[56] was concerned with the interpretation of the English Companies Act of 1862,[57] which then allowed a winding up petition to be presented only by a creditor, a contributory or the company itself. The term "creditor" for such purposes was not expressly stated to include a contingent and prospective creditor. The Companies Act of 1862 was amended by the English Companies Act 1907,[58] to allow a contingent and a prospective creditor to present a winding up petition. In Singapore, contingent and a prospective creditors were included among those entitled to present a winding up petition on the enactment of the Companies Ordinance of 1915. The law in England is therefore, at present, similar to the law prevailing in Singapore in this respect.[59]

However, even in the absence of express provision in the statute books, it is not unnatural for one to assume that a contingent or prospective creditor would be deemed a "creditor" of the company so that all the statutory provisions relating to creditors would also apply to them. Hence notwithstanding cases like *Pen-Y-Van Colliery Company,*[60] this has in fact, been the stand taken by some courts in the interpretation of the term "creditor"

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55 *Ibid,* at 484.

56 *Ibid* at 477.

57 S 82.

58 S 28.

59 The Australian Corporations Law, s 462(2)(b), also allows contingent and prospective creditors of a company to present a winding up petition against the company.

60 *Supra,* note 54.

in provisions similar to section 210 of the Companies Act.

For instance, in *Re Midland Coal, Coke, and Iron Company,*[61] the lessee of several coal mines had assigned his lease to a company. Under the terms of the assignment, the company undertook for the whole duration of the lease, to perform all the lessee's covenants under the lease and to indemnify the assignor therefrom. While the lease was yet unexpired, a scheme of arrangement was entered into between the company and its creditors pursuant to section 2 of the Joint Stock Companies Arrangement Act of 1870 (which is similar in principle, although not identical in wording, to section 210 of the Singapore Companies Act). The scheme was subsequently approved by the court. The assignor took no steps to oppose the scheme. Subsequently, however, he tried to admit a claim against the company contrary to the approved scheme. Part of this claim was based on the company's covenant to pay and indemnify him against the future rents and royalties and liabilities under the lease. The issue before the court then was whether the assignor was a "creditor" within section 2 of the Joint Stock Companies Arrangement Act of 1870 and thereby bound by the scheme of arrangement. Despite the fact that the assignor looked like a contingent creditor of the company, the judge at first instance, Wright J, held that the assignor was "some sort of a creditor, within the meaning of the Act" and hence bound by the scheme of arrangement. On the ambit of section 2 of the Joint Stock Companies Arrangement Act of 1870, he had the following to say: "I may take it that sect. 2 is intended to apply to everybody who can be treated as a creditor of any sort, whether actual or contingent."[62]

On appeal by the assignor, Lindley LJ delivering the judgment of the court agreed unreservedly with Wright J, where he said that:

> we agree with Mr. Justice Wright in thinking that the word 'creditor' is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless.[63]

The decision in *Re Midland Coal, Coke, and Iron Company*[64] was subsequently applied by the Supreme Court of Victoria in the case of *Re Southern Australia Perpetual Forests Ltd,*[65] for the purpose of interpreting the term "creditor" in section 181 of the Victorian Companies Act (which

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[61] [1895] 1 Ch 267.
[62] *Ibid,* at 271.
[63] *Ibid,* at 277.
[64] *Ibid,* at 267.
[65] [1971] VR 475.

is again similar in principle to section 210 of the Singapore Companies Act). The court held that a person with a pecuniary claim against a company was a "creditor" of the company for the purposes of section 181, notwithstanding that the claim was then not capable of quantification until a future point in time. In particular, the court was of the opinion that the fact that the company was under a contractual obligation to account to certain persons for the proceeds resulting from the felling and sale of certain trees, made these persons creditors of the company although until the trees were felled and sold, no money would be due to them and any sum which may then become due would be unascertainable. While there was probably no doubt that the trees would be felled and sold eventually, the exact time this would take place was uncertain. Hence this case appears to be authority for the proposition that a prospective creditor would be a "creditor" for the purposes of a statutory provision like section 210 of the Singapore Companies Act. Indeed, in the case of *Sovereign Life Assurance Co* v *Dodd,*[66] it appeared to be accepted by all parties and the court that holders of life insurance policies which had not matured were creditors of the company under what is the English predecessor of section 210 of the Singapore Companies Act. This was not even an issue that was challenged before the court.

However, in *Trocko* v *Renlita Products Pty Ltd,* a South Australian court refused to follow *strictly Re Midland Coal, Coke, and Iron Company*[67] and *Re Southern Australia Perpetual Forests Ltd,*[68] although both cases were brought to its attention.[69] There it was held that a person who had entered judgment against a company for a sum of damages yet to be assessed, was not a "creditor" for the purposes of section 181 of the South Australian Companies Act 1962-1972. In so far as the definition of the term "creditor" given in *Re Midland Coal, Coke, and Iron Company* was concerned, Hogarth J had the following to say:

> I think the dictum must be regarded as obiter in so far as its terms are wide enough to include a person who has only a claim for unliquidated damages arising out of personal injuries which he has suffered, and for which the company is alleged to be liable.[70]

While this statement of the law may be right, its application to the facts of the case was perhaps questionable. After all, on the facts before the court, it was not concerned with a claim "for which the company is alleged to

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66 [1892] 2 QB 573.
67 *Supra,* note 61.
68 *Supra,* note 65.
69 [1973] 5 SASR 207.
70 *Ibid,* at 209.

be liable". The company had already been established to be legally liable in respect of the claim by virtue of the judgment entered against it. It was only the quantum of damages payable which was still uncertain. This ought to have placed the case on the same footing as *Re Southern Australia Perpetual Forests Ltd*[71] and the claimant ought to have been held to be a creditor of the company for the purposes of section 181. The court's attempt to draw a distinction between "debts" and "claims" in the light of section 291(1) (which is similar to section 327(1) of the Singapore Companies Act), is also irrelevant, since by no stretch of imagination could a judgment creditor not be considered to be a creditor. In adopting this line of reasoning, the court could have been following the trend of thought taken by Jessel MR in *Pen-Y-Van Colliery Company.*[72] However, even Jessel MR recognised that had the petitioner in that case reduced his unliquidated claim to a judgment, he would have become a creditor of the company.

Hogarth J's other ground for holding that a judgment creditor for unliquidated damages would not be a "creditor" for the purposes of section 181 nonetheless deserves further consideration. He reasoned that if such a person was deemed a creditor, it would be impossible to ascertain if "three-fourths in value of the creditors... present and voting either in person or by proxy at the meeting" had approved the scheme, as was required by the section. He went on to reason that since no mechanism was provided in section 181 to resolve this problem, the section could not be intended to include a person claiming an unliquidated sum as a "creditor".

While the existence of this lacuna in section 181 (and for that matter section 210 of the Singapore Companies Act) cannot be denied, this writer submits that the purposive interpretation adopted by the courts in *Re Midland Coal, Coke, and Iron Company*[73] and *Re Southern Australia Perpetual Forests Ltd*[74] ought to be favoured. The idea behind a provision like section 181 is after all to ensure that all creditors who have legitimate claims against the company are bound by any arrangement which may be agreed to by the company and the majority of all concerned and which is approved by the court. Allowing claimants against the company to reopen an agreed and approved scheme of arrangement simply because their claims are unliquidated would defeat the purpose of the section.

Section 327 of the Singapore Companies Act is a logical corollary to section 253(l)(b) which allows contingent and prospective creditors to present a winding up petition against a company. Section 327(1) provides that where the precise quantum of a debt or a claim to be proved is not

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[71] *Supra,* note 65.
[72] *Supra,* note 54.
[73] *Supra,* note 61.
[74] *Supra,* note 65.

known, a just estimate of it, as far as is possible, should be made. There is no magic in the formula stated in section 327(1) and there is no reason why a similar estimation could not be made in the case of a person with an unliquidated claim under section 210. While there may be a lack of "firmness" in the value of any estimate, an estimate by its very nature must necessarily be so. As Lord Halsbury once said:

> The word 'value' itself is one upon which subtle distinctions might be taken, but the moment you introduce contingency as one of the elements which is to enter into the question of value it is apparent that you introduce the element of conjecture and opinion and get out of the region of actual fact.[75]

Furthermore, section 325 of the Companies Act provides that in relation to all matters relating to the winding up of a company, the court may have regard to the wishes of, *inter alia,* the creditors of the company. Subsection (2) of the same section goes on to provide that in the case of creditors, regard *shall* be had to the value of each creditor's debt. Since contingent and prospective creditors may present a winding up petition against a company and some of their claims could be unliquidated at the time of the winding up, it would be inconceivable that section 325 was not meant to apply to them as well. Yet, if section 325 does apply to contingent and prospective creditors with unliquidated claims as well, then some estimate of the debt must inevitably be necessary for section 325(2) to operate even though there is no express provision therein calling for such estimation to be made. Hence, it is submitted that the absence of a mechanism to determine the notional value of an unliquidated claim in section 210 of the Companies Act is not necessarily indicative that persons with unliquidated claims against a company are not "creditors" for the purposes of the section.

Some support for this view may be found from the statements of McLelland J in the case of *Re Glendale Land Development Ltd,*[76] a decision of the Supreme Court of New South Wales, where he criticised Hogarth J's decision in *Trocko* v *Renlita Products Pty Ltd*[77] as having "done less than full justice" to the grounds of decision in *Re Midland Coal, Coke, and Iron Company*[78] and *Re Southern Australia Perpetual Forests Ltd.*[79] The learned judge was of the opinion that the uncertainty

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[75] *Hardy* v *Fothergill* (1888) 13 App Cas 351 at 356.
[76] (1982) 7 ACLR 171.
[77] *Supra,* note 69.
[78] *Supra,* note 67.
[79] *Supra,* note 68.

of the exact amount of any claim would not pose an insuperable problem to the operation of section 315 of the Companies (NSW) Code (the equivalent of section 210 in the Singapore Companies Act). He said:

> It may be that if a creditor who had an unqualified claim against the company attended and voted at a meeting under section 315 difficulties might arise in ascertaining whether the requisite majority had been attained under section 315(4)(a). However, if such difficulties proved insuperable in the particular case the consequences would be, no doubt, that if the amount of the particular claim in question proved critical in the assignment of the statutory majority the plaintiff might have difficulty in satisfying the court that the conditions set out in section 315(4)(a) had been fulfilled.... Furthermore, difficulties as to quantification and disputes as to liability are not confined to unliquidated claims.[80]

The court then went on to hold that "creditors" in section 315 of the Companies (NSW) Code ought to be read to include all person with claims which would be entitled to proof if the company were wound up. In the course of arriving at this decision, it took into account, among other things the history behind the provision and the long standing decision in *Re Midland Coal, Coke, and Iron Company.*[81]

Re Glendale Land Development Ltd[82] was recently cited with approval by a Malaysian High Court. In *Re Butterworth Products & Industries Sdn Bhd,*[83] the court held unequivocally that the beneficiary of a guarantee, who had yet to commence legal proceedings to recover on the guarantee although a demand had been made on it, was a "creditor" of the guarantor within the meaning of the term in section 176(1) of the Malaysian Companies Act 1965 which is identical to section 210(1) of the Singapore Companies Act. The decision takes on added significance when it is noted that the court actually held that the beneficiary of the guarantee was a contingent creditor of the guarantor. The Malaysian courts therefore appear to recognise that the term "creditor" in a provision like section 210 embraces a contingent creditor.

The term "creditor" was again given a wide interpretation in the case of *In re Telegraph Construction Company,*[84] this time in the context of a provision relating to a company's reduction of its capital. In that case,

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[80] *Supra,* note 76, at 176.
[81] *Supra,* note 67.
[82] *Supra,* note 76, at 176.
[83] [1992] 1 MLJ 429.
[84] (1870) LR 10 Eq 384.

a company had taken a lease of certain premises from a lessor in consideration of, *inter alia,* rent to be paid yearly. The lease was determinable by the company at the end of the first or any succeeding ten years of the lease. The company then sought to reduce its capital. The lessor objected, relying on section 13 of the English Companies Act 1867 (which contains words similar in effect to section 73(2)(a) of the Singapore Companies Act), to any court approval of the capital reduction unless sufficient provision was made by the company to secure their claim in respect of future rent. Sir James VC held that the lessor was so entitled to object, even though his claim as a creditor involved sums for which the company was only contingently liable. This trend continues in the case of *In re Paine,*[85] where it was held that an acceptor of a bill of exchange for the accommodation of a bankrupt before his bankruptcy was a "creditor" under the Bankruptcy Act 1883 so that payment by the bankrupt to the holder of the bill before the acceptor had been called upon by the holder of the bill to pay, was capable of being a fraudulent preference.[86]

There is further support in the Companies (Winding Up) Rules 1969 for the view that the term "creditor" at least in provisions relating to the winding up of companies includes contingent and prospective creditors. It is clear from section 327 of the Companies Act that contingent and prospective creditors would be entitled to prove their debts on the winding up of a company. However, rules 78 to 90 (inclusive) of the Companies (Winding Up) Rules 1969 which deal with the proof of debts, make no distinction between contingent and prospective creditors on the one hand and the company's other creditors on the other. In all these rules only the term "creditor" is used. Yet, it would be unlikely that anyone would argue that the requirements of a valid proof of debt set out in these rules have no application to a company's contingent and prospective creditors. Nonetheless, some statutory clarification of this ambiguity would certainly be welcomed. The Rules, however, do make it clear that a creditor of any unliquidated or contingent debt or any debt the value of which is not

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[85] [1897] 1 QB 122. The decision in this case was followed in the subsequent case of *In re Blackpool Motor Car Co* [1901] 1 Ch ,77.

[86] See also *Re Blackpool Motor Car Co Ltd* [1901] 1 Ch 77; *Re JF Aylmer (Manildra) Pty Ltd* (1967) 87 WN (Pt 1) (NSW) 409; affirmed sub nom *Burgess* v *Spooner* (1968) 89 WN (Pt 1) (NSW) 79; *Re Timbatec Pty Ltd* [1974] 1 NSWLR 613; *Re Jacques McAskell Advertising Freeth Division Pty Ltd* [1984] 1 NSWLR 249 at 256 *per* Powell J. The practice of interpreting "creditor" to include a surety or guarantor for the purposes of fraudulent preference provisions in the bankruptcy legislation was no longer necessary in England since the passage of the Bankruptcy and Deeds of Arrangement Act 1913 which expressly provided that payment to a creditor with a view to giving a guarantor of the debt a preference would still amount to a fraudulent preference. This is now preserved in s 340 of the Insolvency Act 1986 (c 45). The position is the same in Singapore: see s 53 Bankruptcy Act (Cap 20, 1985 Rev Ed).

ascertained may not vote at any creditors meeting (other than a court meeting of creditors held prior to the first meeting of creditors).[87]

To sum up, while it may not be abundantly clear (except in cases where there is an express provision like section 253(l)(c)) that the term "creditor" in the Companies Act would in all instances include contingent and prospective creditors, it would appear that the weight of authorities suggests that at least in the context of provisions like section 210 of the Companies Act, contingent and prospective creditors would be deemed to be "creditors". The approach taken by the courts thus far seems to favour the interpretation of the word "creditor" as it appears in the companies legislation on a section by section basis and construing each section purposively.[88] While not rejecting this approach adopted by the courts in respect of individual statutory provisions, it is submitted that the term "creditor" should be read to include contingent and prospective creditors in all the provisions of the Companies Act which deal with the winding up of a company (including the Companies (Winding Up) Rules 1969), at least in relation to events from the time of the commencement of the winding up.

V. Practical Considerations

The courts have always been of the opinion that to petition as a creditor, the existence of the debt upon which the winding up petition is based must not be disputed on substantial grounds[89] or be potentially extinguishable by a *bona fide* counterclaim of or a set-off by the company.[90] This must obviously be so as a disputed debt or a debt which would be extinguished by a counterclaim would challenge the *locus standi* of the petitioner to present the winding up petition. It may also indicate that the company is not insolvent so as to justify the making of an order for it to be wound up.[91]

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87 Rule 125 and 124(2), Companies (Winding Up) Rules, 1969, *supra,* note 4.

88 *In re Harvest Lane Motor Bodies Ltd* [1969] 1 Ch 457; *In re Midland Coal, Coke, and Iron Company* [1895] 1 Ch 267; *In re Telegraph Construction Company* (1870) LR 10 Eq 384.

89 See, *eg, Re The Catholic Publishing and Bookselling Company Limited* (1864) 2 De GJ & S 116; *In re Milford Docks Company* (1883) 23 Ch D 292; *Mann* v *Goldstein* [1968] 1 WLR 1091; *Jurupakat Sdn Bhd* v *Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49; *Re A Company (No 0010656 of 1990)* [1991] BCLC 464; *Re Wallace Smith Group Ltd* [1992] BCLC 989; Re *a Company (Nos 008725 and 008727 of 1991)* [1992] BCLC 633; *Re a Company (No 00751 of 1992); Ex pane Avocet Aviation Ltd* [1992] BCLC 869 (*cf Taylors Industrial Flooring Ltd* v *M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216).

90 See, *eg, Ng Tai Tuan* v *Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338; *Re Wallace Smith & Co Ltd* [1992] BCLC 970.

91 Most of the decided cases have involved the question of whether a company had good reasons for not meeting a statutory demand served under s 254(2)(a) of the Companies Act (or its foreign equivalent) and hence rebutting any presumption of insolvency which may arise

There is, however, some authority to suggest that the rule that a court would not hear a winding up petition if the debt upon which it is founded is substantially in dispute is only a rule of practice and not a rule of law[92] and where there are exceptional circumstances to warrant a departure from it, the courts have been prepared to do so. For instance, the rule was not followed in a few cases where a winding up order would have been the only remedy available to the petitioner.[93] Such cases must, however, be more the exception than the rule. After all, it has always been the view of the courts that the hearing of a winding up petition is not the proper forum to adjudicate on the validity of an alleged debt.[94] The courts view

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as a result of that section. There are numerous such cases, the following list of which is but a sampling: *Re Mechanised Construction Pte Ltd* [1989] 3 MLJ 9; *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393; *Ansa Teknik (M) Sdn Bhd* v *Cygal Sdn Bhd* [1989] 2 MLJ 423; *Ng Ah Kway* v *Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58; *Sun Soon Heng Coach Works Sdn Bhd* v *Nima Travel Sdn Bhd* [1986] 2 MLJ 374; *Re The London Wharfing and Warehousing Company (Limited)* (1866) 35 Beav 37, 55 ER 808; *Re The Brighton Club and Norfolk Hotel Company (Limited)* (1865) 35 Beav 204, 55 ER 873; *Re London and Paris Banking Corp* (1875) 19 Eq 444; *Mann* v *Goldstein* [1968] 1 WLR 1091; *Re Gold Hill Mines* (1883) 23 Ch D 210 (CA); *CVC Investments Pty Ltd* v *P & T Aviation Pty Ltd* (1989) 18 NSWLR 295, 7 ACLC 1,218; *Thiess Peabody Mitsui Coal Pty Ltd* v *AE Goodwin Ltd* [1966] Qd R 1; *Re Horizon Pacific Ltd* (1977) 2 ACLR 495; *Soverina Pty Ltd* v *Jackson & Associates Pty Ltd* (1987) 12 ACLR 693; *Frank Hermens (Wholesale) Pty Ltd* v *Palma Pty Ltd(1985)* 10 ACLR 257; *KL Tractors Ltd* [1954] VLR 505; *Re a Company (No 0013925 of 1991); Ex parte Rousell* [1992] BCLC 562; *Re a Company (No 0012209 of 1991)* [1992] BCLC 865 (*cf Mageleine Investments Pte Ltd* v *Swiss Levingston (Property Consultants) Pte Ltd* [1990] 1 MLJ 470; *Sunshine Securities (Pte) Ltd* v *Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57; *Re Ban Hong Co Ltd* [1959] MLJ 100); *Securicor (M) Sdn Bhd* v *Universal Cars Sdn Bhd* [1985] 1 MLJ 84; *Re Jeff Reid Pty Ltd* (1980) 5 ACLR 28; *Re Madison Avenue Carpets Pty Ltd* [1974] ACLC 27,895; *Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd* v *Rennat Constructions Pty Ltd* (1980) 4 ACLR 883; (*cf L & D Audio Acoustics Pty Ltd* v *Pioneer Electronics Australia Pty Ltd* (1982) 7 ACLR 180; *KL Tractors Ltd* [1954] VLR 505; *Clem Jones Pty Ltd* v *International Resources Planning & Development Pty Ltd* [1970] Qd R 37; *Future Graphics Pty Ltd* v *Fullpoint Pty Ltd* (1990) 8 ACLC 700); *Viking Consultants Pte Ltd* v *Syarikat Jaya Utara Construction (Kedah) Sdn Bhd* (Unreported-Digested in [1990] Mallal's Digest Yearbook, para 117); Re *Jeff Reid Pty Ltd* (1980) 5 ACLR 28; Re *Clem Jones Pty Ltd* [1970] QWN 6; *K & G Bradica Pty Ltd* v *Audi Constructions Pty Ltd* (1983) 8 ACLR 112; *Buying Systems (Aust) Pty Ltd* v *Tien Mah Litho Printing Co (Pte) Ltd* (1986) 5 NSWLR 317, (1986) 10 ACLR 503; *A Ravi (Builder) Pty Ltd* v *Jones* (1986) 4 ACLC 647; *Alperin Technical Pty Ltd* v *ACI Australia Ltd* (1990) 2 ACSR 234, (1990) 8 ACLC 744 (*cf Malayan Plant (Pte) Ltd* v *Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; *Ng Ah Kway* v *Tai Kit Enterprises Sdn Bhd* [1986] 1 MLJ 58; *Re Tweeds Garage Ltd* [1962] Ch 406; *Re LHF Wools Ltd* [1970] Ch 27.

92 *In re Claybridge Shipping Co SA* [1981] Com LR 107.

93 *In re Russian and English Bank* [1932] 1 Ch 663; *In re Russian Bank for Foreign Trade* [1933] 1 Ch 745; *In re Claybridge Shipping Co SA* [1981] Com LR 107.

94 *Mann* v *Goldstein* [1968] 1 WLR 1091 at 1101 and 1103, *per* Ungoed-Thomas J.

with disdain any attempt to coerce the payment of a debt by the threat of winding up proceedings especially where the company is solvent, the proper course being to bring an action for the debt.[95] Hence, unless there are exceptional reasons for taking an alternative course of action, the proper thing for the court to do in such situations is to dismiss the petition. While the court may be tempted to adjourn the petition *sine die* with liberty to restore the petition upon the adjudication of the disputed debt, this should not be the favoured course of action even if the company appears to be insolvent since the continued existence of the winding up petition leaves the company under the strain of the statutory restrictions imposed by the Companies Act upon companies undergoing winding up proceedings and upon those dealing with the company.[96] This would adversely affect the normal business activities of the company and prejudice third-party rights against the company.[97]

The courts have, however, found it unnecessary to dismiss the petition where the dispute is not *bona fide* nor disputed on grounds such as not to substantially affect the petitioner's *locus standi* to present it. For instance, if the existence of the petitioner's debt is not disputed but only the amount owing is disputed, the court is usually prepared to proceed with the hearing of the winding up petition.[98]

Special considerations arise in the case of a winding up petition that is presented by a contingent or prospective creditor. First of all, a challenge to the existence of a contingent or prospective creditor's debt may not be sufficient to discharge the petition since it must be implicitly anticipated by section 253(l)(b) of the Companies Act that such a creditor's debt may arise only in the future on the happening of a particular event. However, to the extent that a contingent or prospective creditor's debt is disputed on substantial grounds or is subject to extinguishment from the debtor company's *bona fide* counterclaims and set-offs, *even should and when the contingency upon which the debt is dependent occur,* it is submitted that he can be in no better position than any other creditor of the company and any winding up petition presented by him must fail. He must, therefore,

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[95] *In re London and Paris Banking Corporation* (1875) LR 19 Eq 444; *Mann* v *Goldstein* [1968] 1 WLR 1091 at 1096, *per* Ungoed-Thomas J; *Re Gold Hill Mines* (1883) 23 Ch D 210; *Re a Company (No 0013925 of 1991); Ex pane Rousell* [1992] BCLC 562; *Re a Company (No 0010656 of 1990)* [1991] BCLC 464.

[96] Ss 258, 259, 260, 261, 319, 320, 329(1), 329(3), 330, 331, 332, 334, 336, 339(1), 341 Companies Act, *supra,* note 2.

[97] *Re Boston Timber Fabrications Ltd* [1984] BCLC 328; *Metropolitan Railway Warehousing Co Ltd* (1867) LT 108.

[98] See, *eg. In re Tweeds Garages Ltd* [1962] 1 Ch 406; *L & D Audio Acoustics Pty Ltd* v *Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180; *Re People's Parkway Development Pte Ltd* [1992] 1 SLR 413.

prove that he will be a creditor of the company when the contingent or prospective event occurs.

It is obvious, although sometimes overlooked, that a person who is petitioning for the winding up of a company in the capacity of a contingent or prospective creditor may not rely on an unsatisfied statutory demand under section 254(2)(a) of the Companies Act to prove that the company is unable to pay its debts since the section requires that the statutory demand be in respect of a debt already due at the date the demand is made.[99] The courts have held that winding up proceedings are not suitable proceedings in which to determine whether a liability upon which a winding up petition is founded is an immediate or a contingent or prospective liability or for that matter, where the issue to be determined is whether there is any contingent liability at all.[100] It has, however, been suggested that all a claimant who alleges to be a contingent creditor needs to show at the hearing of a winding up petition is an arguable claim against the company whether the claim be for unliquidated damages or otherwise (subject to the limitations under the bankruptcy legislation on claims for unliquidated damages against insolvent companies) and that it is not for the court to determine the validity of such a claim in the winding up proceedings.[101]

Once a person's standing as a "creditor" is established, he is entitled to present a winding up petition. He need not go on to show that the

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[99] See *Stonegate Securities Ltd* v *Gregory* [1980] 1 Ch 576 at 579; *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1990] 1 MLJ 282. See also *In re Robertson* (1897) 18 NSWR 239 and *Bakewell* v *The Deputy Federal Commissioner of Taxation (South Australia)* (1937) 58 CLR 743. In the case of *In re Robertson,* it was held that the phrase "debts due and owing" does not include a future contingent liability.

[100] *Stonegate Securities Ltd* v *Gregory* [1980] 1 Ch 576.

[101] *Re Gasboume Pty Ltd* [1984] 8 ACLR 618. There is old case authority to suggest that the courts may dismiss a winding up petition even if a debt is established where the debt is less than the statutory minimum set for the presentation of a statutory demand: *In re Herbert Standring & Co* (1895) WN 99; *Re Fancy Dress Balls Co Ltd* (1899) 43 Sol Jo 657; *Re WH Hyde (Lim)* (1900) 44 Sol Jo 731. See also *In re Milford Docks Company* (1883) 23 Ch D 292 at 295, *per* Bacon VC. Compare with *Re Industrial Insurance Association Ltd* [1910] WN 245; *Re World Industrial Bank Ltd* [1909] WN 148. If there are other creditors who support the petition and their debts exceed the statutory minimum for the presentation of a statutory demand, the courts have been prepared to make a winding up order even if the petitioner's debt is less than the statutory minimum: *Re Metropolitan Fuel Pty Ltd* [1969] VR 328. See also *Re Leyton & Walthamstowe Cycle Company* (1901) WN 225, 46 Sol Jo 71. This, however, has only been a rule of practice rather than a rule of law and it is unclear if the Singapore courts would feel constrained to dismiss a winding up petition on the ground that the debt in support of the petition is not more than $2000. It is submitted that there is no statutory basis for this rule of practice and the Singapore courts ought not to apply it. There is nothing in s 254(2)(b) or s 254(2)(c) of the Companies which requires that the petitioner be owed a debt by the company exceeding $2000. The $2000 limit appears only in s 254(2)(a) so that s 254(2)(b) and s 254(2)(c) ought to be read independent of the

company is insolvent to be entitled to present and to be heard on the petition.[102] Ungoed-Thomas J put the legal position plainly as "the insolvency requirement, unlike the creditor requirement, is only a prerequisite of the order and not a prerequisite of the presentation of the petition."[103]

However, establishing the standing to present a winding up petition is only the first legal hurdle a contingent or prospective creditor has to cross. It is statutorily provided that a court shall not hear a winding up petition against a company presented by a contingent or prospective creditor until reasonable security for costs has been given and a *prima facie* case for the winding up of the company has been established to the satisfaction of the court.[104] These conditions, however, need not be satisfied at the time the petition is presented. It is sufficient if they are satisfied by the time the petition comes up for hearing.[105] The burden of proving the existence of this *prima facie* case lies with the petitioner and not the company.[106]

As a general rule, it is only such debts and liabilities (whether present or future, certain or contingent) to which the debtor is subject *at the date of the receiving order,* or to which he may become subject before his discharge by reason of any obligation incurred *before the date of the receiving order* that are provable under section 40(3) of the Bankruptcy Act. Consequently, the obvious question that would be in the minds of the liquidator and the creditors of an insolvent company is what event in the winding up of a company would correspond to a receiving order in the bankruptcy of an individual. If a strict comparison is made between bankruptcy proceedings and winding up proceedings, it would appear that the receiving order would be analogous to the winding up order in a winding up by the court.[107] In the case of a voluntary winding up, it would appear to be the time when a resolution to wind up the company is passed. The common denominator between a receiving order, a winding up order and a resolution to wind up a company is that they represent the point in time when it is determined that the insolvent person's assets should be gathered in and distributed to the legitimate claimants of the person's estate.

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limitation: *Re London & Birmingham Flint Glass & Alkali Co Ltd* (1859) 1 De GF & J 257; *In re Yate Collieries and Limeworks Company* [1883] WN 171.

[102] *Holt Southey Ltd* v *Catnic Components Ltd* [1978] 1 WLR 630.

[103] *Mann* v *Goldstein* [1968] 1 WLR 1091 at 1095.

[104] S 253(2)(c) Companies Act, supra, note 2.

[105] *Re A Company* [1974] 1 All ER 256. Hence, if the guarantor in *Re Fitness Centre (South East) Ltd* [1986] BCLC 518 had paid off the company's debt secured by the guarantee before the petition came up for hearing, he would have stood a better chance of establishing a *prima facie* case for the winding up of the company.

[106] *Stonegate Securities Ltd* v *Gregory* [1980] 1 Ch 576.

[107] There is some authority for this in *In re Northern Counties of England Fire Insurance Company* (1880) 17 Ch D 337 at 340 (*per* Jessel MR).

It is an established rule that the liquidation of a company and the distribution of its assets notionally take place simultaneously.[108] In other words, but for administrative delays, the ideal would be to have all the assets of a company distributed to all its claimants immediately once a decision to liquidate the company has been reached. Hence, there is sufficient case authority to suggest that in the case of a court winding up, the liabilities of the company which are provable in the winding up are those existing as at the date of the winding up order.[109] In the case of a voluntary winding up, the relevant date for the establishment of provable claims against the company would be the date of the resolution to wind up the company.[110] All this only establishes that the rights of the creditors *vis-à-vis* the company are to be determined as at the date of the winding up order or the resolution to wind up the company as the case may be. It does not mean that all claims against the company must be reducible to a liquidated sum as at this point in time.[111] This explains the provision for an estimate to be made under section 327(1) of the Companies Act for the purpose of proving debts and claims, the amounts of which are not then ascertainable. Hence, in the case of a prospective or contingent debt,

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[108] *In re Humber Ironworks and Shipbuilding Company* (1869) LR 4 Ch App 643; *In re Dynamics Corporation of America (In Liquidation)* [1976] 1 WLR 757; *MS Fashions Ltd* v *Bank of Credit and Commerce International SA* (1992 decision of the Chancery Division of the English High Court by Hoffman LJ, unreported as at the time of the writing of this article). Hence, in the case of bankruptcies, it is said by James LJ in *In re Savin* (1872) LR 7 Ch App 760 at 764, that "the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time."

[109] *In re Humber Ironworks and Shipbuilding Company* (1869) LR 4 Ch App 643; *In re Dynamics Corporation of America (In Liquidation)* [1976] 1 WLR 757; *MS Fashions Ltd* v *Bank of Credit and Commerce International SA* (Unreported 1992 decision of the Chancery Division of the English High Court by Hoffman LJ); *In re European Assurance Society Arbitration (Wallberg's case)* (1872) 17 SJ 69 at 70 per Lord Westbury; *In re British American Continental Bank Ltd* [1922] 2 Ch 575 at 582 *per* Lawrence J; *Re Law Car & General Insurance Corporation Ltd* [1913] 1 Ch 103 at 118-119 (*per* Cozens-Hardy MR) and 135 (*per* Kennedy LJ); *In re Northern Counties of England Fire Insurance Company* (1880) 17 Ch D 337 at 340 (*per* Jessel MR); *Re Pullins of Newcastle Pty Ltd* (1966) 85 WN (Pt 1) (NSW) 16; *In re English Assurance Co, Holdich's Case* (1872) LR 14 Eq 72. Similarly, claims against an insolvent person which must be set-off under s 41 of the Bankruptcy Act (Cap 20, 1985 Rev Ed) (read with s 327(2) of the Companies Act, in the case of a company in liquidation) are determined as at the date of the winding up order (in a court winding up) or the resolution to wind up the company (in a voluntary winding up), as the case may be: see, for instance, *In re Charge Card Services Ltd* [1987] 1 Ch 150 and the cases discussed therein.

[110] *In re Lines Bros Ltd (In Liquidation)* [1983] 1 Ch 1; *In re Islington Metal & Plating Works*

[111] *Ltd* [1984] 1 WLR 14; *In re Trepca Mines Ltd* [1960] 1 WLR 1273.
With the exception of, for present purposes, claims for unliquidated damages against insolvent companies falling within s 40(1) of the Bankruptcy Act which will be dealt with subsequently.

some estimation must be made of the amount of the debt which may or will fall due in the future. It is this estimate that is to be proved in the winding up of the company. The estimate must, however, be arrived at on some justifiable basis. An arbitrary estimate not made on oath has been held to be insufficient in the case of *Ex parte Ruffle*.[112] The court there held that a creditor was not allowed to vote in a creditors' meeting in respect of untaxed legal costs which he claimed (not under oath) to be due to him but which had been estimated on no apparent justifiable basis. The court was then called to rule upon two statutory provisions similar to Rules 124 and 125 of the Singapore Companies (Winding Up) Rules 1969. Although it would appear that the court in that case held that the untaxed costs were a form of "unliquidated debt", the same principle would probably be applicable to the case of a "contingent debt".[113]

There appears to be no basis for the stand taken in some of the courts that whether a debt is provable in a winding up by the court is to be determined by a reference to the time of commencement of the winding up, that is, the date of the winding up petition. Section 327(2) of the Companies Act states that the provability of debts in a winding up of an insolvent company is to follow the rules relating to bankruptcy. Under the Bankruptcy Act, the bankruptcy is deemed to commence from the time of the commission of the act of bankruptcy upon which the receiving order is made.[114] This would be prior to the date of the bankruptcy petition and the bankruptcy order. However, whether any particular debt is provable in the bankruptcy depends on its relation to the date of the receiving order,[115] that is, long after the bankruptcy is deemed to have commenced in the eyes of the law. Since it is imperative from the wording of section 327(2) of the Companies Act that analogy be made with the law of bankruptcy, whether debts are provable in a court winding up ought to be determined by a reference to the date of the winding up order. Even Harman J who held, in the case of *In re Islington Metal & Plating Works Ltd,* that an unliquidated tort claim was not provable unless it was liquidated before the commencement of the winding up, confessed that he was quite unable to see any fallacy in the equation of a winding up order to a receiving order.[116]

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[112] (1873) LR 8 Ch App 997.

[113] At one time, it was thought that it was impossible to put a just estimate on the claim of a landlord to future rent and possible breaches of covenant so as to preclude the landlord from proving in the winding up of the tenant: See *In re London and Colonial Company; Honey's Claim* (1867-68) LR 5 Eq 561. The position has since been the reversed by the case of *Hardy* v *Fothergill* 13 App Cas 351.

[114] S 46(1) Bankruptcy Act (Cap 20, 1985 Rev Ed).

[115] *Ibid,* s40(3).

[116] [1984] 1 WLR 14 at 20.

The apparent confusion in the existing authorities lies in the fact that some judges refer to the "date of the winding up"[117] without expressly stating whether it is the date of the commencement of the winding up[118] that they are referring to or the date of the winding up order (where the case involves a winding up by the court) or the date of the resolution to wind up the company (in the case of a voluntary winding up). Even when a judge refers to the "commencement of the winding up" it is not always clear that the intended reference is to the legal commencement of the winding up or the date of the winding up order (or the resolution to wind up the company in the case of a voluntary winding up). Hence, Brightman LJ interpreted Buckley J's reference to "the commencement of the winding up" in the earlier case of *In re WW Duncan & Co*[119] as a reference to the date of a winding up order or the date of the resolution to wind up a company.[120] Further confusion is caused in the case of *voluntary* winding up when judges refer to the relevant date for the determination of the provable claims against the company as the date of commencement of the winding up,[121] which in most cases would be the same date as the date of the resolution to wind up the company.[122] While equating the resolution to wind up the company and the commencement of the winding up is technically correct in these cases, it is misleading because it tends to suggest that in the case of a court winding up, the relevant date for the determination of the provable claims against the company is also the date of the legal commencement of the winding up (which would be the date of the winding up petition in the ordinary case) and not the date of the winding up order.[123] As pointed out earlier, the significance of the resolution to wind up a

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[117] See, for instance, *In re Parana Plantations Ltd* [1946] 2 All ER 214 at 218-219 (a case involving a voluntary winding up); *In re Law Car and General Insurance Corporation* [1913] 2 Ch 103 at 121-122 *per* Buckley LJ (a case involving a winding up).

[118] In a winding up by the court, this would usually be the date of the winding up petition unless there already exists, at the date of the winding up petition, a resolution to wind up the company, in which case the commencement of the winding up would be deemed to be at the date of the resolution: s 255, Companies Act. In the case of a voluntary winding up, the commencement of winding up is in the ordinary case, unless declaration of insolvency has been lodged with the Registrar of companies under s 291(1) of the Companies Act, the date of the resolution to wind up the company: s 291(6), Companies Act.

[119] [1905] 1 Ch307 at 315.

[120] *In re Lines Bros Ltd (In Liquidation)* [1983] 1 Ch 1 at 18.

[121] See, for instance, *In re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14 at 21 and *Re Parana Plantations Ltd (No 2)* [1948] 1 All ER 742; *In re Trepca Mines Ltd* [1960] 1 WLR 1273.

[122] S 291(6) Companies Act, *supra,* note 2.

[123] Similarly, in cases where a provisional liquidator has been appointed prior to a resolution for a voluntary winding up of a company, although the winding up would in law be deemed to have commenced as at the date the declaration of insolvency under s 291(1) is lodged

company in the case of a voluntary winding up lies not in the fact that it is deemed in law to be the commencement of the winding up but rather in the fact that it is the point in time when it is decided that the assets of the company are to be gathered in and distributed to all its legitimate claimants.

Where a contingent or prospective creditor's claim is in respect of unliquidated damages based otherwise than in "contract, promise or breach of trust",[124] there is yet a further legal obstacle which he would have to overcome where the debtor company is insolvent. While there may be nothing to prevent such a creditor from presenting a petition to wind up the company, he would meet with problems when he tries to prove his claim in the winding up. Section 327(1) of the Companies Act provides that:

> In every winding up *(subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy*) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as are subject to any contingency or sound only in damages, or for some reason do not bear a certain value. (Emphasis added.)

However, while this provision allows the proof of contingent and prospective claims, it applies only to companies that are solvent. Proof of debts and claims in the winding up of an insolvent company are governed by section 327(2) of the Companies Act, the relevant parts of which read as follows:

> in the winding up of an *insolvent* company the same rules shall prevail and be observed with regard to... *debts provable... as are in force for the time being under the law relating to bankruptcy* in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section. (Emphasis added.)

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with the Registrar of Companies, it is submitted that for the purposes of determining the debts and claims provable against the company, it would be the date of the resolution to wind up the company that would be material.

[124] See s 40(1) Bankruptcy Act, *supra,* note 114.

Put in plain words this simply means that in the winding up of an insolvent company, only such debts as would be provable under the laws of bankruptcy would be provable in the winding up. In this respect, the Bankruptcy Act makes all debts and liabilities generally provable save in a few exceptions. Section 40(3) of the Bankruptcy Act states the basic rule as follows:

> all debts and liabilities present or future, certain or contingent, to which the debtor is subject *at the date of the receiving order,* or *to which he may become subject before his discharge* by reason of any *obligation incurred before the date of the receiving order* shall be deemed to be debts provable in bankruptcy. (Emphasis added.)

There is, however, one important exception to section 40(3) which is laid down in section 40(1) of the Bankruptcy Act. This reads as follows:

> Demands in the nature of *unliquidated damages* arising otherwise than by reason of *contract, promise or breach of trust* shall not be provable in bankruptcy. (Emphasis added.)

It is clear from the foregoing statutory provisions that claims for unliquidated damages arising otherwise than by reason of "contract, promise or breach of trust" are treated differently from other forms of claims in the winding up of an insolvent company. Hence, if a contingent or prospective creditor's claim is in respect of unliquidated damages (as such claims often tend to be), he would not be able to prove it in the winding up of the debtor company if the debtor company is insolvent, unless the claim arises by reason of "contract, promise or breach of trust."[125]

This is a severe obstacle in the path of the contingent or prospective creditor since almost invariably the occasions when such a creditor would wish to present a winding up petition against the debtor company would be instances when the company is insolvent. The claims of a contingent or prospective creditor would also often be unliquidated. A common ground for the presentation of a winding up petition is section 254(l)(e), namely, that the company is unable to pay its debts. As pointed out earlier, there is case authority to suggest that a person with a claim for unliquidated damages could still be a contingent creditor (at least in respect of the costs of the action) and, hence, entitled to present a winding

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[125] As to what happens when a company is insolvent at the start of its liquidation but becomes solvent during the process, see *In re Rolls-Royce Ltd* [1974 1 WLR 1584 and *In re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14.

up petition.[126] It would therefore appear that if a contingent or prospective creditor with a claim for unliquidated damages (arising other than by contract, promise or breach of trust) desires to present a winding up petition, he should never rely on the ground that the company is unable to pay its debts. Instead, some other ground to wind up the company would be preferable. Even so, there is no assurance that the company would not be found to be insolvent in the course of the winding up, in which case, all the contingent or prospective creditor's efforts in winding up the company would be in vain. A contingent or prospective creditor contemplating the presentation of a winding up petition to recover a claim in unliquidated damages (other than one arising from contract, promise or breach of trust) would therefore be well advised to assess the solvency of the debtor company (in so far as he is in a position to do so) before proceeding with the presentation of the winding up petition.

Since claims for unliquidated damages other than those arising by reason of contract, promise or breach of trust are not provable in the bankruptcy of a debtor and in the winding up of an *insolvent* company, it is natural to ask at what point in time ought such unliquidated claims be reduced to a liquidated sum to fall outside the ambit of section 40(1) of the Bankruptcy Act. In *Re Berkeley Securities (Property) Ltd*[127] the court was concerned with an application for leave to commence an action against a company for negligent misrepresentation, *after* a winding up order had been made against the company. It was argued by those opposing the application that the claim being unliquidated and based in tort as at the date of the commencement of the winding up was not provable by virtue of the English equivalent of section 40(1) of the Singapore Bankruptcy Act even if subsequently reduced to a liquidated sum by judgment. The court was, however, of the opinion that so long as the claim was reduced to a liquidated sum at the *time of proof,* it was admissible. The claim need not be for a liquidated sum at the commencement of the winding up (which in the case of a winding up by the court, would in the usual case be at the time the winding up petition is presented).[128]

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[126] *Re Gasbourne Pty Ltd* (1984) 8 ACLR 618 at 652; *Re A Company* [1974] 1 All ER 256. In the case of *In re Trepca Mines Ltd* [1960] 1 WLR 1273, although the issue before the court was not the *locus standi* of a petitioning creditor, the English Court of Appeal held that a person who had initiated proceedings to reverse a judgment which had earlier reversed a judgment of a lower court in his favour against a company which had gone into liquidation was a contingent creditor of the company even though no final decision had been reached on the proceedings. The court therefore ruled that the liquidator of the company was wrong to reject the proof of his claim. A similar result was reached in the case of *In re Harvest Lane Motor Bodies Ltd* [1969] 1 Ch 457 (*supra,* note 35 and the accompanying main text).

[127] [1980] 3 All ER 513.

[128] S 255, Companies Act, *supra,* note 2.

The decision in *Re Berkeley Securities (Property) Ltd* is not consistent with judicial opinions in earlier cases involving the bankruptcy of individuals[129] and the liquidation of companies.[130] It was therefore not surprising that in the case of *In re Islington Metal & Plating Works Ltd*[131] Harman J refused to follow Vinelott J's decision in *Re Berkeley Securities (Property) Ltd,*[132] and held instead that admission to proof was to be determined as at the *commencement of the winding up.* There is also *obiter dicta* to be found in a subsequent decision of the Supreme Court of New South Wales, namely, *Re Autolook Pty Ltd,*[133] that for a claim of unliquidated damages based in tort to be provable in the winding up of an insolvent company, it need only be reduced to a liquidated sum by the time the *winding up order* is made.[134]

The weight of authorities would therefore appear to be against the stand taken by the court in *Re Berkeley Securities (Property) Ltd.* It is submitted that the decision is wrong. If the ruling in that case is accepted, then there would be no distinction between unliquidated claims which fall within section 40(1) of the Bankruptcy Act and those which fall outside the section, thus rendering section 40(1) superfluous. Hence, although there is nothing in the language of section 40 of the Bankruptcy Act which requires that the claim be reduced to a liquidated sum prior to the commencement of the winding up or prior to the date of the winding up order, it must be read to require that the claim be liquidated at the latest before the date of the winding up order so as to give it any sense.

On the other hand, while the decision in *In re Islington Metal & Plating Works Ltd* is correct, the terminology used by the judge in that case served more to confuse than to clarify the true position of the law. One should note that the case involved a creditors' *voluntary* winding up. Hence, the commencement of winding up would probably have coincided with the time when it was determined that the assets of the company were to be gathered in and distributed to the company's claimants, that is, the date of the resolution to wind up the company. It was probably this latter consideration, not the former, that was critical in that case in determining the point in time when a claim of the nature described in section 40(1) had to be reduced to a liquidated sum. It was only factually coincidental

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[129] *Re Newman* (1876) 3 Ch D 494; *In re Giles* (1889) 6 Morrell's Bankruptcy Reports 158.
[130] *In re Southern Cross Coaches Ltd* 49 WN 230.
[131] [1984] 1 WLR 14.
[132] [1980] 3 All ER 513.
[133] (1984) 2 ACLC 30. There is some support for this stand in Cave J's judgment in the case of *In re Giles* (1889) 6 Morrell's Bankruptcy Reports 158 at 162.
[134] No reference was made to Harman J's decision in the case of *In re Islington Metal & Plating Works Ltd.* One can only surmise that this was probably because the latter decision had not by then been reported.

in that case, that this was also the commencement of the winding up. When this interpretation is taken of *In re Islington Metal & Plating Works Ltd,* it becomes readily reconciliable with the existing authorities including the Australian case of *Re Autolook Pty Ltd.*

Notwithstanding the juridical criticisms that have been raised against it, it is submitted that there is, nonetheless, some merit in Vinelott J's judgment in *Re Berkeley Securities (Property) Ltd.* While it may not be defensible on the statutory and judicial authorities then existing, there is practical justification for what the judgment sought to achieve. This writer sees no good reason to prevent claims (present or future, certain or contingent) as at the date of the winding up order or the resolution to wind up a company (in the case of a voluntary winding up) from being proved in the company's liquidation simply because they have not by then been reduced to a liquidated sum. There is no practical necessity to require the claim to be liquidated before the winding up order is made. This is not required in respect of contractual claims, so there is little justification for requiring it in the case of tort claims (which would fall within section 40(1) of the Bankruptcy Act). The most practical deadline by which all claims (whether based on contract, promise or breach of trust or not) should be liquidated ought to be the time when the claims need to be proved. In essence, it is submitted that a provision like section 40(1) of the Bankruptcy Act lacks good sense.

To sum up, it is this writer's opinion that debts other than contingent and prospective debts should be due and payable as at the date of the winding up order (in a winding up by the court) or the date of the resolution to wind up the company (in a voluntary winding up) if they are to be provable in the bankruptcy of an individual or the winding up of a company. It could be argued by some that a distinction ought to be made between debts incurred by the company after the commencement of bankruptcy and debts incurred after the commencement of winding up. After all, the act of bankruptcy from which a bankruptcy is deemed to have commenced may not be an act known to the public whereas a winding up petition has to be advertised in the newspapers and a resolution to wind up a company has to be lodged with the Registrar of Companies *so* that the public may justifiably be deemed to have notice of them. The short answer to such an argument is that all that section 327(2) of the Companies Act calls for is an analogy to bankruptcy rules in determining whether a debt is provable. Based on a strict analogy, as explained earlier, the relevant date for the determination of the provability of a debt in a court winding up must be the date of the winding up order and not the date of the winding up petition.

In respect of contingent and prospective debts, whether they are provable in the winding up should be determined again with reference to the date

of the winding up order or the date of the resolution to wind up the company, in accordance with the principles laid down in section 40(3) of the Bankruptcy Act. In this respect, it should be noted that section 40(3) does not even require that the debts be legally in existence at the time of the receiving order (the equivalent of the winding up order). In other words, they need not even be accrued. It expressly provides that all debts "present *or future,* certain or *contingent"* and those debts which the debtor "*may"* become subject by reason of any obligation incurred before the date of the receiving order would be provable. The one exception to this involves claims for unliquidated damages against insolvent companies not arising by reason of contract, promise or breach of trust which would have to be liquidated as at the date of the winding up order or the date of the resolution to wind up the company as the case may be.

It is submitted that the present state of the law is rather unsatisfactory since claimants against an insolvent company could succeed or fail based on the way their claim is classified.[135] It is even more ironic that under the law as it presently stands, contract claimants in respect of unliquidated damages would be able to prove their claims while tort claimants, for instance, would not be able to do so in cases where the company is insolvent. After all, the cause of action of a contract claimant arises from a consensual relationship. In addition, contract claimants can often protect themselves through the contracting process against the contingency of the company's insolvency. While parties who have contracted with the company are often also able to phrase their action against the company in tort and may choose to pursue their claim on either ground,[136] many of the company's tort claimants may not have any contractual relationship with the company and would be brought into this tortious legal relationship with the company against their will. In such instances, it may not even be possible to foresee the injury sustained so as to take protective measures against it.

In *Macpherson, The Law of Company Liquidation,* this distinction between different types of claims for unliquidated damages is explained as follows:

> The reason for this unsatisfactory distinction is bound up with the history of the law of bankruptcy, which, while excluding from proof of claims for unliquidated damages in respect of personal torts, has always permitted them to be enforced against the bankrupt after his discharge. Dissolution of the company makes this course impossible, and the only ground on which the bankruptcy rule can be justified in its application to winding up is that corporate liability for torts is

[135] *Re Southern Cross Coaches Ltd* (1932) 49 WN (NSW) 230.
[136] *Parker* v *Norton* (1796) 6 TR 695, 101 ER 777; *Watson* v *Holliday* (1882) 20 Ch D 780.

> necessarily vicarious, so that the injured person always retains his right to proceed against the individual tortfeasor.[137]

This justification was in fact the view expressed by Jordan CJ in *Page* v *Commonwealth Life Assurance Society Ltd.*[138] It is submitted that this justification for the distinction is still far from satisfactory. Even if the tort claimant is able to bring an action for the tort against any of the company's servants or agents, there appears to be very little justification for the deprivation of his right to prove his claim against the company as well. One can easily imagine cases where the company's servants or agents responsible for the commission of the tort cannot be found to be made defendants in a legal action. In such cases, the tort claimant may even have obtained judgment against the company for the tort but the quantum of damages may yet remain to be assessed when the winding up of the company commenced. The judgment creditor in such a case would be a prospective creditor and yet be barred from proving his unliquidated claim for damages should the company turn out to be insolvent.

It should be further noted that in the case of a creditors' voluntary winding up, once the winding up of the company has commenced, no action may be brought against the company or be proceeded with except with the leave of the court and on such terms as the court may impose.[139] Similarly, in the case of a winding up by the court, no action may be brought against a company or proceeded with except with the leave of the court and upon such terms as the court may impose once a winding up order is made or a provisional liquidator has been appointed.[140] In this respect, the courts appear to take a more flexible approach to section 40(1) of the Bankruptcy Act when it is simply dealing with an application for leave to bring an action against a company that has gone into liquidation.[141] The primary consideration in such cases according to Street J,[142] is to determine if the granting of leave would promote an orderly winding up of the company. Leave is not to be withheld simply and solely as a punishment. Hence if no prejudice, procedural or substantive, to those having interests in the winding up would result, there would be strong grounds for the granting of leave. Therefore, the mere fact that a claim for unliquidated damages would not be provable in the winding up of a company may not *per se*

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[137] 3rd ed, at 380.
[138] 36 NSWSR 85 at 100.
[139] S 299(2), Companies Act, *supra,* note 2.
[140] S 262(3), Companies Act, *supra,* note 2.
[141] *Re AJ Benjamin Ltd* (1969) 90 WN (Pt 1) (NSW) 107 at 110; *Re Autolook Pty Ltd* (1984) 2 ACLC 30; *Re Berkeley Securities (Property) Ltd* [1980] 3 All ER 513.
[142] *Re AJ Benjamin Ltd, ibid,* at 110.

be a bar to the granting of leave to bring an action against the company to recover the damages.

While this may at first sight appear to be a rather curious distinction in the application of section 40(1), the rationale for the distinction was clearly explained in the case of *Re Autolook Pty Ltd.*[143] In that case, leave was sought to bring an action in tort for negligence in the manufacture of a car seat cover, against a company in the process of being wound up. The application was opposed by the company on the ground that any judgment obtained would be futile since the applicant's claim was in respect of damages which were unliquidated at the time of the commencement of the winding up and hence, it was argued, not a provable debt. The court acknowledged that not allowing the applicant to sue the company was harsh on the applicant since it would have been difficult for him to name any particular person as defendant in the negligence action. The court therefore was disposed to grant the applicant leave to sue the company, notwithstanding that any judgment debt resulting therefrom would not have been provable in the winding up of the company. The court reasoned that there was still a chance that the company would be discharged from the debts proved against it in a scheme of arrangement with its creditors. Thereafter, upon the satisfaction of the company's debts under the approved scheme, there would be nothing to prevent the applicant from enforcing its judgment against the company. This decision makes good sense since by not allowing the action against the company to proceed, the action could be time barred by the time the company discharged its existing debts under a scheme of arrangement with its creditors.

Disputes could also arise as to whether a claim for unliquidated damages arose in tort or in contract. A claim in tort would be unprovable in the winding up of an insolvent company. This would encourage a tort claimant, say for damages sustained as a result of the alleged negligence of the company, to try framing his cause of action in contract. Where there exists a contract but the contract does not expressly provide for the event which has occurred, it is likely that the claimant would attempt to establish a breach of an implied contractual duty of care. This subtle distinction in the various causes of action harps back to the days when the success of a litigant's claim depended on the the precise writ he used to start his action with and the court before which he pleaded his case. This, fortunately, is no longer the case and it is submitted that the law of bankruptcy and winding up should similarly move on and rid itself of such subtle and dubious distinctions as are still to be found in section 40(1) of the Bankruptcy Act. Indeed, this artificial distinction is now absent from the English

[143] (1984) 2 ACLC 30.

Insolvency Act 1986[144] and the Singapore Legislature would do well to follow this lead set by its English counterpart. Such a move would put an end to the agonising attempts of the courts thus far to construe narrowly the rule against the proof of such unliquidated claims.[145]

Even if the distinction is to be retained in cases involving the bankruptcy of an individual, it is submitted that the distinction should be abolished in the winding up of companies. Companies, after all, often cease to exist upon completion of liquidation proceedings unlike bankrupts who may be discharged at some future point in time. Hence, while it may be possible for a tort claimant to enforce his unliquidated claim against the bankrupt upon his discharge, there is no such possibility in the case of a company which is dissolved after it is wound up. As pointed out earlier, the argument that a company's tort is necessarily vicarious and the tort claimant of unliquidated damages may sue the company's officers instead, does not, in practice hold true in every case.

VI. CONCLUSION

It would appear from the foregoing review of the law that the contingent creditor must be one of the most feared of all the varied species of company predators. As the law presently stands, it is not clear where the outer limits of the definition of a "contingent creditor" lie. As pointed out earlier, some courts have even been prepared to hold that a person who simply alleges a claim against the company and who has started legal proceedings against the company is a contingent creditor. Hence, it would seem to be very easy to qualify as a petitioning creditor in the guise of a contingent creditor.

While section 253(2)(c) of the Companies Act does require a petitioner who is a contingent (or prospective) creditor to provide security for costs and to establish *aprimafacie* case for the winding up of the company before the court would hear the petition, the case authorities suggest that such requirements do not affect the contingent creditor's *locus standi* to present the petition. Since there would usually be a time lag between the time a winding up petition is presented and the time it is set down for hearing, in the interim, untold damage to the company's business operations and reputation could be done by the mere presentation of the petition.

In addition, while a petition from a creditor may be easily contested by disputing the existence of the petitioner's debt, such a defence is not

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[144] C 45. See also the *Cork Report* Cmnd 8558, paras 1310-1318.

[145] *Emma Silver Mining Co* v *Grant* (1880) 17 Ch D 122; *Watson* v *Holliday* (1882) 20 Ch D 780; *Jack* v *Kipping* (1882) 9 QBD 113; *Tilley* v *Bowman* [1910] 1 KB 745; *Re HB Harvey Pty Ltd* (1972) ACLC 27,386; *Re British Gold Fields of West Africa* [1899] 2 Ch 7; *Re WA Brown & Sons Ltd* (1964) WN (Pt 1) (NSW) 402.

easily available to the company where the petitioner claims only to be a contingent creditor since it is implicit in a contingent claim that the debt may not be in existence at the time the claim is made. It would therefore appear that not only would it be easier to qualify to petition for the winding up of a company as a contingent creditor than as a "plain vanilla" creditor, it would also be easier to sustain the petition and not have it struck off, if one petitions as a contingent creditor.

The law appears to have armed those who wish to harm a company or to coerce it to accede to their demands with a formidable weapon. So long as such persons have the necessary finance to put up the security for costs, it would not take a genius to contrive some contingency upon which the company could be financially liable to them. If such persons have some formal dealings with the company, it would not take much to start a legal proceeding in the courts against the company on some alleged claim, as a spring-board to the assumption of the role of contingent creditor (at least in respect of the costs he would in the ordinary case be entitled to on the contingency that he succeeds in his action). The only way to stop such abuse is to clarify the scope and ambit of the term "contingent creditor". As the law presently stands, the contingent creditor is still a very fuzzy creature. While the elephant may be difficult to define but easy to recognise, the contingent creditor is no elephant and is neither easy to define nor recognise in many cases.

This writer has found no satisfactory nor exhaustive definition of a contingent creditor and is close to the belief that the creature is beyond positive definition. Perhaps a "negative" definition of a contingent creditor should be provided in the Companies Act, that is, it should be made clear what the term "contingent creditor" does *not* include. Such a definition may not be exhaustive. However, it would at least shed a bit more light on who would qualify as a contingent creditor. For a start, the definition should expressly exclude persons engaged in litigation against a company from being contingent creditors of the company as to the costs of the action, where no judgment against the company has yet been obtained.

In addition, to prevent the abuse of the winding up process effectively, contingent creditors should be allowed to petition for the winding up of a company only with the leave of the court. The court could then assess, on such preliminary application for leave, the applicant's claims to be a contingent creditor. Although Shylock, in the oft-told story,[146] may not have succeeded in extracting his pound of flesh, neither was Antonio, the debtor in the story, spared the trauma of a court hearing. It is submitted that not all who claim to be Shylock should be allowed to bring his alleged

[146] William Shakespeare, *The Merchant of Venice.*

debtor to court to demand his pound of flesh. Surely, prudence requires that his identity be first verified.

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