IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, et al.,

Plaintiffs-Appellants,

v.

DRYSHIPS INC., et al.,

Defendants-Appellees.

Supreme Court No. 2018-010

OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Associate Justices

SEEBORG, A.J., with whom CADRA, C.J. and SEABRIGHT, A.J. concur:

I. INTRODUCTION

Appellants in this fraudulent conveyance action ("Highland" or "the Highland Plaintiffs")[1] were creditors of a Republic of the Marshall Islands ("RMI") company named Ocean Rig UDW, Inc. ("UDW"). Highland accuses Appellee George Economou—the CEO and chairman of UDW—of orchestrating a series of transactions from 2015 to 2016 that siphoned money away from the company while it was in financial distress, thereby depleting the assets available to creditors. Appellee Antonios Kandylidis, Economou's nephew, allegedly served as

* The Honorable J. Michael Seabright, Chief U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, U.S. District Judge, Northern District of California, sitting by designation of the Cabinet.

[1] Appellants are Highland Floating Rate Opportunities Fund, Highland Global Allocation Fund, Highland Opportunistic Credit Fund, Highland Loan Master Fund, L.P., and NexPoint Credit Strategies Fund.

Executive Vice President of UDW and assisted in the execution of these transactions. Highland also seeks to recover damages from various entities that were party to the allegedly fraudulent transactions (collectively, with Economou and Kandylidis, "Appellees").[2] UDW is not named as a defendant in this action.

The High Court dismissed the Complaint with prejudice based on two primary grounds. First, the High Court found Highland was barred from pursuing the present action because it failed to comply with a no-action clause to which it was bound. Second, the High Court dismissed the Complaint because Highland is no longer a creditor and therefore lacks standing to pursue claims for fraudulent conveyance. The High Court also found partial dismissal appropriate with respect to (a) claims for "constructive" fraudulent conveyance, (b) the claim for aiding and abetting fraudulent conveyance, and (c) all claims against Economou and Kandylidis (the "Individual Appellees"). This appeal followed. Because the High Court correctly held that Highland lacked creditor standing to pursue its claims, the High Court's order is AFFIRMED.

II. BACKGROUND

A. The UDW Notes

In 2014, UDW issued 7.25% Senior Unsecured Notes (the "UDW Notes"). These notes are governed by a New York law indenture (the "Notes Indenture"), which includes the following no-action clause:

> Except to enforce the right to receive payment of principal, premium, if any, or interest or Additional Amounts, if any, when due, ***no holder may pursue any remedy with respect to this Indenture or the Notes unless:***

[2] The entities named as defendants in this action are DryShips Inc. ("DryShips"); Ocean Rig Investments Inc. ("ORI"); TMS Offshore Services Ltd. ("TMS"); Sifnos Shareholders Inc. ("Sifnos"); and Agon Shipping Inc. ("Agon").

> (1) such Holder has previously given the Trustee notice that an Event of Default is continuing;
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> (2) Holders of at least 25% in aggregate principal amount of the then outstanding Notes have made a written request to the Trustee to pursue the remedy;
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> (3) such Holders have offered the Trustee, and the Trustee has received (if required), security or indemnity (or both) satisfactory to it against any loss, liability or expense;
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> (4) the Trustee has not complied with such request within 60 days after its receipt of the request and the offer of security or indemnity (or both) satisfactory to it; and
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> (5) Holders of a majority in aggregate principal amount of the then outstanding Notes have not given the Trustee a direction inconsistent with such request within such 60-day period.

S.A.239 § 6.06 (emphasis added).[3] The Notes Indenture also identifies the Cayman Islands as a "Permitted Jurisdiction" to which UDW may move its domicile; a transfer subsequently undertaken by UDW. At the time this lawsuit was filed, Highland held $74 million of the UDW Notes.

B. UDW's Allegedly Fraudulent Transactions

During the relevant time period, UDW operated and leased ultra-deepwater drillships and semi-submersible drilling rigs to provide drilling services for oil companies. In 2014, UDW saw a decline in the market for its services and began experiencing financial strain. Highland alleges Economou orchestrated a series of transactions which siphoned money away from UDW and into his own pocket. Highland identifies four transactions occurring between mid-2015 and April 2016 which resulted in the transfer of hundreds of millions of dollars from UDW to Economou and his companies.

[3] Citations to "S.A." refer to the Supplemental Appendix filed by Appellees. Citations to "A." refer to Appellants' Appendix.

First, UDW loaned its parent company, Appellee DryShips, $120 million in late 2014. Economou was CEO, president, and controlling shareholder of Dryships during the relevant period. By mid-2015, UDW had forgiven the loan. In exchange for forgoing payment, UDW received its own shares which, for the purposes of the transaction, were priced at approximately 30% above their trading price. Second, in 2016 UDW signed a new management agreement (the "TMS Management Contract") with Economou's management company, Appellee TMS. This new contract obliged UDW to make an up-front payment of $2 million and then to pay $835,000 per month (more than $10 million annually) in management fees for the next ten years. The agreement also subjected UDW to a $150 million early termination fee. In January 2017, the TMS Management Contract was amended such that TMS's monthly fee was increased to nearly $1.3 million. The amendment also provided for TMS to receive up to $10 million in an annual performance fee at the discretion of UDW's board of directors and retroactively awarded TMS a performance award of $7 million for 2016.

Third, also in 2016, UDW created a subsidiary called ORI (also an Appellee in this action) and transferred $180 million in cash to the company for no apparent value. ORI used $49.9 million of this cash to purchase the remaining UDW shares owned by DryShips. DryShips then used $45 million of these funds to pay an outstanding debt to Appellee Sifnos, which was beneficially owned by Economou. Finally, in April 2016, UDW used another subsidiary named Agon (also an Appellee in this action) to purchase a drillship for $65 million in a Brazilian bankruptcy proceeding. Around that same time, UDW embarked on the costly process of cold stacking three of its drillships and experienced numerous contract terminations on the part of its customers. Notwithstanding those setbacks, UDW transferred $65 million to Agon so it could

purchase the drillship. The bankrupt Brazilian entity which sold the drillship owed management fees to Economou and used the proceeds from the drillship sale to pay off that debt.

C. Redomiciliation and Beginning of the Cayman Islands Proceeding

At the time of the four allegedly fraudulent transactions, UDW was an RMI company. In April 2016, the UDW board transferred the company's domicile to the Cayman Islands, and the following month, initiated insolvency proceedings in that venue. At some point the Cayman Debtors[4] concluded that corporate restructuring was preferable to liquidation. In March 2017, a duly constituted Court in the Cayman Islands appointed two joint provisional liquidators ("JPLs") to oversee restructuring of these companies. A few months later, the Cayman Debtors petitioned the Cayman Court for permission to convene the affected creditors ("Scheme Creditors") to vote on the proposed restructuring (the "Schemes of Arrangement").[5]

The Cayman Court held a hearing on whether it should permit the Cayman Debtors to convene such meetings (the "Creditor Meetings"). Highland appeared at the hearing and objected to the UDW Scheme of Arrangement. Among other things, Highland complained that approval of this scheme would deprive Highland of the ability to prosecute its fraudulent conveyance claims. Despite Highland's objection, the Cayman Court authorized the Debtors to convene the Creditor Meetings. On August 11, 2017, the UDW Scheme was approved by all Scheme Creditors who voted, with the exception of Highland. This scheme provided for the discharge of all UDW debt in exchange for new equity in UDW or, alternatively, a cash payment. The UDW Scheme also discharged all claims against UDW arising from (1) the UDW

[4] "Cayman Debtors" or "Debtors" refers to UDW and its affiliates/subsidiaries Drill Rigs Holdings Inc., Drillships Financing Holding Inc., and Drillships Ocean Ventures Inc.

[5] Schemes of Arrangement under Cayman Islands law are similar to Chapter 11 plans under United States bankruptcy law.

Notes or (2) any guarantees UDW had made with respect to the obligations of its subsidiaries. Finally, the scheme provided for the establishment of a litigation trust (the "Preserved Claims Trust" or "PCT") for the benefit of creditors. All claims held by UDW, Appellee Agon, or Appellee ORI arising from the allegedly fraudulent transactions were assigned to the PCT. Any recovery by the PCT trustees is to be distributed for the benefit of all UDW Scheme Creditors, including Highland.

D. Cayman Court Sanctions the UDW Scheme

In early September 2017, the Cayman Court conducted a hearing to determine whether it should sanction (i.e. approve) the Schemes of Arrangement (the "Sanction Hearing"). Again, Highland was the only creditor to object. One of the concerns Highland expressed was that the UDW Scheme would cancel and release all claims under the UDW Notes, thereby depriving Highland of the creditor standing needed to pursue its fraudulent conveyance claims. Over Highland's objections, the Cayman Court issued an order later that month (the "Sanction Order") approving the UDW Scheme of Arrangement. The Cayman Court also issued a Judgment on September 18, 2017 setting forth its reasons for sanctioning the Schemes of Arrangement. The Cayman Court specifically found that "[t]he restructuring of all four schemes put together is the best way of maximising value for the creditors." S.A.483 ¶ 130. Furthermore, "[u]nder each of the four Schemes the creditors achieve a better result than in a liquidation." *Id.*

The UDW Scheme went into effect shortly after the Cayman Court issued the Sanction Order on September 22, 2017, thereby discharging all creditor claims arising from either the UDW Notes or UDW's guarantees of the obligations of its subsidiaries. The trustees discussed in the Notes Indenture ("Notes Trustees") were also discharged at that time. Neither Highland nor any other party to the proceeding appealed the Sanction Order.

E. New York Bankruptcy Proceeding

In March 2017, prior to approval of the UDW Scheme, the Cayman Court-appointed JPLs commenced a Chapter 15 bankruptcy proceeding in the federal bankruptcy court located in New York (the "New York Bankruptcy Proceeding") and requested that the court recognize the Cayman restructuring proceedings (the "Cayman Proceedings"). The JPLs also moved the New York Bankruptcy Court for a temporary restraining order and provisional relief (the "Provisional Relief Motion") enjoining Scheme Creditors from "commencing or continuing any actions against the [Cayman] Debtors or their property within the territorial jurisdiction of the United States." The New York Bankruptcy Court granted the temporary restraining order on March 27, 2017 and scheduled a hearing on the Provisional Relief Motion for April 3, 2017. Then, in August, the JPLs petitioned the New York Bankruptcy Court for an order granting comity to the Cayman Schemes of Arrangement and enforcing them in the United States. Highland was given notice of this motion, but did not appear to oppose it. The New York Bankruptcy Court granted the request for recognition and issued an order giving full force and effect to (1) the Cayman Court's Sanction Order, (2) the Schemes of Arrangement, and (3) the Cayman Debtors' restructuring documents.

F. The Present Action and the High Court's Decision

On August 31, 2017, the Highland Plaintiffs filed a Complaint with the High Court in their capacities as creditors of UDW. The Complaint advances nine Causes of Action. The First, Third, Fifth, and Seventh Causes of Action are for "actual" fraudulent conveyance. The Second, Fourth, and Sixth Causes of Action are for "constructive" fraudulent conveyance. The Eighth Cause of Action, which is asserted exclusively against the Individual Appellees, is for

aiding and abetting fraudulent conveyance. Highland subsequently dismissed the Ninth Cause of Action for declaratory relief.

Appellees filed a joint motion to dismiss the Complaint. The Individual Appellees filed an additional motion to dismiss based on issues that applied only to them. On September 27, 2018, the High Court granted the motions to dismiss on several different grounds. First, the High Court granted comity to the UDW Scheme and held that it extinguished Highland's creditor status, thereby depriving Highland of standing to assert its fraudulent conveyance claims. Accordingly, the court granted dismissal of all claims under Marshall Islands Rule of Civil Procedure ("MIRCP") 12(b)(1). Second, the High Court held Highland was barred from pursuing its claims because it failed to comply with the no-action clause of the Indenture. The High Court also found dismissal appropriate (a) with respect to the Individual Appellees for lack of personal jurisdiction, (b) with respect to the "constructive" fraudulent conveyance claims for failure to state a claim, and (c) with respect to the aiding and abetting claim for failure to state a claim.

III. STANDARD OF REVIEW

This Court reviews *de novo* dismissal of a complaint. *Rosenquist v. Economou*, 3 MILR 144, 151 (2011). When reviewing complaints on a motion to dismiss, "'[p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences.'" *Id.* (citing *White v. Panic*, 783 A.2d 543, 549 (Del. 2001)). "The Court does not blindly accept as true all allegations," and "[i]nferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *Id.* (internal citations omitted).

Factual findings are reviewed for clear error. *Lobo v. Jejo*, 1 MILR 224, 225-26 (1991); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985).

IV. DISCUSSION

A. Rule 12(b)(1): Lack of Creditor Standing Based on the UDW Scheme

On a Rule 12(b)(1) motion for lack of standing, the plaintiff bears the burden of establishing standing. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). In a facial attack on standing, courts "draw all facts—which we assume to be true unless contradicted by more specific allegations or documentary evidence—from the complaint and from the exhibits attached thereto." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). In a factual challenge, on the other hand, a court may look beyond the complaint to determine whether subject matter jurisdiction exists. *Apex*, 572 F.3d at 443-44 (citations omitted).

As recounted above, the High Court held that Highland lacks standing to pursue its fraudulent conveyance claims because it is no longer a creditor of UDW. It is undisputed that only creditors have standing to bring claims for fraudulent conveyance. *See Eberhard v. Marcu*, 530 F.3d 122, 130-31 (2d Cir. 2008); *Carr v. Guerard*, 616 S.E.2d 429, 430-31 (S.C. 2005). Highland contends the High Court nonetheless erred in holding the company lacked creditor standing for two reasons. First, Highland argues the High Court should have declined to recognize and enforce the UDW Scheme which extinguished its creditor standing. Second,

Highland argues the RMI Business Corporations Act ("BCA") § 128(5) preserves its creditor standing notwithstanding the UDW Scheme.

1. Whether the High Court Erred in Granting Comity to UDW Scheme and Sanction Order

Comity has long been invoked by courts worldwide to give effect to "the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation." *Asignacion v. Rickmers*, H. Ct. Civ. No. 2016-26, at 18 (Nov. 10, 2016) (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 371 (5th Cir. 2003)). Indeed, comity is often accorded in the context of foreign insolvency proceedings. *See Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987). Deference to such proceedings is inappropriate, however, in the limited circumstances where those proceedings clash with domestic law and public policy. *See In re Schimmelpenninck,* 183 F.3d 347, 365 (5th Cir. 1999). While "foreign laws need not be identical to their" domestic counterparts, they "must not be repugnant to" the laws and policies of the jurisdiction where comity is sought. *Id*; *see also In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1044 (5th Cir. 2012).

The High Court did not err in recognizing and enforcing the UDW Scheme and the Cayman Court's Sanction Order. First, the High Court correctly concluded the RMI does not have a policy against corporate restructuring, "be the restructuring under Chapter 11 of the United States bankruptcy code or the Cayman Islands court-supervised restructuring." A.30. Highland argues this was error because the BCA expresses a clear public policy against the type of corporate reorganization at issue in this case. This argument is based primarily upon the fact that the BCA does not provide for the type of restructuring UDW pursued in the Cayman Islands.

BCA §§ 105, 106.[6] Sections 105 and 106 of the BCA authorize the High Court to supervise liquidation of a dissolved corporation and set out the procedures for resolving creditor claims. Although these provisions do not provide for the precise sort of restructuring accomplished in the Cayman Proceeding, the statute's silence on this topic does not equate to a finding that those proceedings are repugnant to RMI public policy. *Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route.").

Moreover, the Nitijela's recent enactment of the United Nations Commission on International Trade Law ("UNCITRAL") 2018 Model Law on Cross-Border Insolvency Implementation Act evinces a public policy *in favor* of recognizing foreign insolvency proceedings. 30 MIRC Ch. 7 §§ 700 *et seq.* The stated objectives of this enactment are to (1) promote cooperation between RMI and foreign States in cases of cross-border insolvency, (2) protect the interests of all creditors and otherwise interested parties, (3) protect and maximize the value of debtor's assets, and (4) facilitate the rescue of financially troubled businesses. *Id.* Moreover, the legislative history of the Model Law shows the Nitijela intended to empower courts to dismiss cases in favor of foreign proceedings rather than allowing disgruntled creditors a second or third bite at the apple. Model Law, N.B. No. 12, Bill Summary (stating that creditors in insolvency cases are often looking for "another bite at the apple" and explaining that the Model Law "give[s] the High Court the statutory authority to stay or dismiss cases in favor o[f] foreign proceedings," thereby empowering the court to manage its time and resources

[6] Appellees contend Highland abandoned this public policy argument at oral argument before the High Court. A.914:7-10 ("The notion that the public policy of the Marshall Islands is somehow hostile to restructuring is not the point. We have never argued that."). Highland responds that, regardless of what was said at oral argument, it continues to advance the public policy argument in its post-hearing briefing and therefore did not waive it. S.A.640.

effectively). In light of the foregoing analysis, the High Court correctly concluded the RMI does not have a policy against corporate restructuring as reflected in the Cayman Proceeding.

The decision to give full force and effect to the UDW Scheme and the Cayman Court's Sanction Order also had the effect of destroying Highland's standing to pursue its fraudulent conveyance claims against the non-debtor third parties, including Appellees Economou and Kandylidis. As the High Court acknowledged, although the UDW Scheme did not "expressly release[]" these fraudulent conveyance claims against non-debtor third parties, "the UDW Scheme did eliminate Highland's status as a UDW creditor upon which its fraudulent conveyance claims are based." A.27. Highland appears to have conceded as much when arguing before the Cayman Court that "the effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the Draft Complaint, ***or any other claim arising out of the matters alleged therein which is conditional upon its creditor status.***" S.A.356 ¶ 57 (emphasis added); *see also* S.A.374:20-25. Because a party must be a creditor to have standing to bring any fraudulent conveyance action, *Carr*, 616 S.E.2d at 430-31, the fact that Highland is no longer a UDW creditor strips Highland of the ability to bring fraudulent conveyance claims against Appellees Economou and Kandylidis related to UDW.

In a last-ditch attempt to preserve its claims against these non-debtor third parties, Highland argues in the alternative that, even if this Court affirms the grant of comity to the UDW Scheme and Sanction Order generally, this Court should not also "extend[] its grant of comity to provide releases to the non-debtor third parties that received the hundreds of millions of dollars in fraudulent transfers at issue in this case in violation of RMI public policy." Appellant Br. 19. In effect, Highland requests a carve-out from the otherwise complete recognition of the Cayman proceedings so as to allow Highland to pursue its fraudulent conveyance claims in our courts

against the non-debtor third parties. This Court declines Highland's invitation to grant only "partial comity" and thereby allow Highland to pursue its claims against non-debtor third parties separate and apart from the other Scheme Creditors. Such a ruling would undermine the entire UDW Scheme by placing Highland on unequal footing with the other creditors who would have been similarly impacted by the alleged fraudulent transfers. As the Cayman Court concluded:

> There is nothing inherently unfair to Highland in the fact that the Scheme results in **all** creditors losing their ability to pursue these claims themselves. It is clear from the expert evidence served on both sides that all creditors have the same right to bring these claims . . . . I find that the [Preserved Claims Trust]" is a much fairer way of dealing with any claims that may properly be asserted against officers of UDW and their affiliate[]s. It treats all of UDW's Scheme Creditors rateably and does not give priority to anyone."

S.A.482 ¶ 125 (emphasis in original). There is nothing inequitable, therefore, about granting comity to the Scheme and Sanction Order, and the fact that it puts Highland on equal footing with the other parties who lost money is neither "unconscionable" nor contrary to RMI public policy. We therefore affirm the High Court's decision to recognize and give full force and effect to the UDW Scheme and the Sanction Order, which has the effect of destroying Highland's standing to pursue even its claims against non-debtor third parties including Appellees Economou and Kandylidis.

2. Whether BCA § 128(5) Preserved Creditor Status Despite the UDW Scheme

In the alternative, Highland contends the High Court's dismissal for lack of standing was improper because BCA § 128(5) preserved its creditor standing. This statute states:

> Obligations prior to transfer of domicile. The transfer of domicile of any corporation out of the Republic shall not affect any obligations or liabilities of the corporation incurred prior to such transfer, nor affect the choice of law applicable to obligations or rights prior to such transfer, nor adversely affect the rights of

> creditors or shareholders of the corporation existing immediately prior to such transfer.

BCA § 128(5). The High Court interpreted this provision to mean "any creditor action [Highland] could have brought immediately before the transfer [of UDW's domicile], it could have brought immediately after the transfer." A.30. The court concluded, however, that a creditor's rights may be affected by subsequent actions or proceedings in the new domicile. Ultimately, the High Court held that, because Highland lost its creditor status a year and a half after transfer as a result of the Cayman Islands court-supervised restructuring (rather than as a direct result of the redomiciliation), Section 128(5) does not apply. Moreover, the High Court reasoned, because Highland had contractually agreed the Cayman Islands was a "Permitted Jurisdiction" to which UDW could be redomiciled according to the Notes Indenture, the company has no basis to complain about being subject to Cayman Islands law.

The High Court further concluded that, even assuming BCA § 128(5) shields creditors from the effects of subsequent proceedings in a new domicile, Highland failed to show the redomiciliation actually *caused* the corporate restructuring that extinguished Highland's creditor status. Indeed, Appellees' Cayman law expert states that, "[h]ad UDW not domesticated to the Cayman Islands, it could nevertheless have been subject to restructuring in the Cayman Islands because it had property and conducts business in the Cayman Islands." S.A.611 ¶ 10; *see also* S.A.612 ¶ 11. Although Highland's experts countered that "a foreign company with limited connection to Cayman" would have difficulty convincing the Cayman courts to exercise

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jurisdiction over its debt restructuring, A.572 ¶ 37, Highland makes no attempt to argue that UDW had only a "limited connection" to the Cayman Islands.[7]

In Highland's view, however, BCA § 128(5) "stop[s] the clock at the time of redomiciliation" such that creditors' rights cannot be prejudiced by any subsequent action taken in the new jurisdiction. Appellant Br. 24. This argument is unpersuasive. First, the High Court's interpretation is consistent with the plain meaning of the statute, which simply states that a "transfer of domicile" may not "adversely affect the rights of creditors . . . existing immediately prior to such transfer." BCA § 128(5). The statute says nothing about a company's ability subsequently to restructure debt under the laws of the new jurisdiction. Furthermore, *Indep. Inv'r Protective League v. Time, Inc.*, 50 N.Y.2d 259 (N.Y. 1980), on which Highland relies in support of its position, in fact supports the High Court's interpretation.

In *Time*, the New York Court of Appeals construed the New York Business Corporation Law ("NYBCL") § 1006(b), which states: "[t]he dissolution of a corporation shall not affect any remedy available . . . against such corporation, its directors, its officers or shareholders for any right or claim existing or any liability incurred before such dissolution." The court interpreted

[7] Highland argues that the High Court erred in finding Highland had failed to establish a causal connection between the redomiciliation and the subsequent restructuring of UDW. According to Highland, Appellees' challenge to jurisdiction was a facial attack, therefore the High Court should have drawn all facts from the complaint, rather than relying on extrinsic evidence. *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). Highland further contends questions of "proximate cause" are not generally adjudicated at the motion to dismiss stage. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). The High Court's primary interpretation of BCA § 128(5) does not, however, incorporate a causation element. Rather the court construed the statute narrowly to mean that a change of domicile, *without more*, cannot strip a creditor of any of its rights. The High Court explored the question of causation as a secondary basis for its holding. Furthermore, Highland's characterization of the present challenge as a facial attack is dubious at best. Finally, the High Court's ruling on a question of foreign law based on expert opinions is treated as a ruling on a question of law. MIRCP 44.1.

this to mean "the rights and remedies of the shareholders existing prior to dissolution are viewed as if the dissolution never occurred." *Time*, 50 N.Y.2d at 264. The court went on to hold that "dissolution, *without more*, did not deprive the shareholders of their derivative remedy." *Id.* (emphasis added). In other words, "corporate dissolution *in itself* cannot preclude a qualified plaintiff from being deemed a shareholder." *Id.* (emphasis added); *see also Snyder v. Pleasant Valley Finishing Co.*, 756 F. Supp. 725, 730 (S.D.N.Y. 1990). This holding is analogous to the conclusion the High Court reached with respect to BCA § 128(5)—that transfer of domicile, *in itself*, does not strip creditors of their rights. Accordingly, the High Court did not err in holding BCA § 128(5) protects creditor rights that are immediately affected by virtue of the "transfer of domicile," but does not protect creditors from the effects of subsequent actions or proceedings in the new jurisdiction.

B. Dismissal Based on Other Grounds

In addition to finding Highland lacked creditor standing to bring its claims, the High Court concluded there were several other, independent grounds for dismissal. Because dismissal was appropriate under Rule 12(b)(1) due to a lack of standing, however, we need not address the High Court's other grounds for dismissal.

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V. CONCLUSION

Based on the foregoing, the High Court's September 27, 2018 Order Granting Motion to Dismiss is AFFIRMED.

Dated: September 6, 2019

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: September 6, 2019

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: September 6, 2019

/s/ Richard Seeborg
Richard Seeborg
Associate Justice