# IN THE SUPREME COURT OF BERMUDA

## COMMERCIAL COURT

## 2006: No. 351

**IN THE MATTER OF THE COMPANIES ACT 1981**

**AND IN THE MATTER OF P.E.G. REINSURANCE COMPANY, LTD.**

**BETWEEN:**

**DISCOVER REINSURANCE COMPANY**
**Petitioner**

**-and-**

**P.E.G. REINSURANCE COMPANY LTD.**
**Respondent**

## RULING

Date of hearing: February 19- 21, 2007
Date of Ruling: March 1, 2007

Mr. Rod S. Attride-Stirling and Ms. Kehinde George,
Attride-Stirling & Woloniecki, for the Petitioner
Mr. Narinder K. Hargun, Conyers Dill & Pearman, for the Respondent

**Introductory**

1. The following review of the background to the present strike-out application is substantially taken from my December 4, 2006 Ruling on the Company's application to discharge the appointment of the Joint Provisional Liquidators.

2. On November 15, 2006, on the Petitioner's ex parte application, I appointed Messrs. Peter Mitchell and Geoffrey Hunter as Joint Provisional Liquidators ("JPLs") of the Respondent company. The JPLs have commenced proceedings in the United States against, inter alia, several of the Company's directors to preserve a cause of action in respect of a possibly unlawful dividend, which they claim is potentially a significant asset in the event of the Company ultimately being unable to pay its actual and contingent debts to the Petitioner in full.

3. The Petitioner's application disclosed that it was arguably an admitted creditor in an amount of nearly $1 million in respect of certain paid losses which were

reinsured by the Company. The application also made out a strong case of balance-sheet insolvency, combined with a strongly arguable case for the urgent appointment of the JPLs to file a claim against the Company's parent in respect of an allegedly unlawful dividend before a limitation period expired.

4. On November 20, 2006, the Company filed a Summons seeking to: (a) discharge the November 15, 2006 Order appointing the JPLs ("the JPL Appointment Order"); and (b) seeking to strike-out the Petition as an abuse of the process of the Court. On the afternoon of November 22, 2006, Mr. Hargun sought to move his application substantively, and I refused an application by Mr. Attride-Stirling for an adjournment because it seemed obvious, in light of the submissions made by the Company, that the Petitioner ought to have given notice of the original ex parte application.

5. After hearing argument which continued over to the following day, it became clear that further evidence was required to fairly adjudicate the merits of the strike-out application. Even if the admission of liability relied upon by the Petitioner was not an admission, it seemed likely that this issue might be resolved, one way or another, at the resumed arbitration hearing scheduled for December 8-9, 2006. Since the affidavit evidence as to the Company's solvency was controversial, it seemed likely that oral evidence might be required to resolve this important factual controversy. I therefore adjourned the strike-out application to a date to be fixed and directed that the parties be at liberty to adduce further affidavit evidence, which was anticipated to be filed as soon as practicable after the conclusion of the pending arbitration proceedings between the parties.

6. Against this somewhat unusual background of a hotly disputed Petition, the viability of which in large part depends on the outcome of pending proceedings between the Company and a petitioner which is seemingly the only unsecured insurance creditor of the Company, on November 24, 2006 I varied the JPL Appointment Order. I did so in order to empower the directors to not only instruct Counsel to defend the present contested winding-up proceedings, but also US Counsel to pursue the pending arbitration and court proceedings against the Petitioner. I declined to summarily strike-out the Petition.

7. At this initial interlocutory stage, however, in considering whether the Petitioner in the present case has sufficiently demonstrated a *prima facie* case for the existence of an undisputed petition debt, I adopted the following approach. In my view, the Petitioner was undeniably a policyholder whose right to petition is materially affected by section 34 of the Insurance Act. This has been held to prohibit a single contingent insurance creditor of an insurance company from seeking the winding-up protection of the Court. Although this point was not considered in the Court of Appeal decision which established this principle[1], the result is to materially restrict the insurance creditors' right of access to the Court. The Court is required as a matter of general principle to seek to apply the law in a manner which does not contravene constitutional rights. In my view, in these circumstances, I am entitled at this stage (and, subject to argument, on the effective hearing of the Petition[2]) to lower the usual evidential threshold for proof of an undisputed presently due petition debt. The Petitioner is admittedly a contingent creditor who could conceivably be owed in excess of $10 million.

8. On December 4, 2006, I ruled: "*The JPL Appointment Order is accordingly varied to substantially limit the role of the JPLs to (a) preserving the Delaware action, a potential asset for the liquidation estate, and (b) approving the Company's necessary operating expenses, pending the determination of the*

[1] *Chesapeake Insurance Co. Ltd.-v- The Mutual Fire, Marine and Inland Insurance Company (in Rehabilitation)* [1991] Bda LR 42.

[2] The propriety of this approach to the evidence was not directly addressed on the present strike-out application, so I approached the analysis of whether or not the Petition debt is disputed on substantial grounds applying the traditional approach.

*Company's strike-out application or further order*." The Respondent is in run-off, and so no question of damage to its trading interests arose.

9. On December 15, 2006, I adjourned the Petition to January 26, 2007 for Mention and indicated that the status of the Petitioner as a creditor needed to be decided on the hearing of the Company's strike-out application. On January 26, 2007, the Petition was adjourned again with the Petitioner complaining that the Company was taking no steps to fund the completion of the arbitration proceedings. By this juncture it was clear that the Company was, absent financial support, commercially insolvent. Evidence filed by the JPLs indicates that the Petitioner is the principal unsecured creditor. I indicated that rather than making a winding-up order summarily, I would further adjourn the Petition and draw appropriate inferences against the Company if they had not pursued the arbitration proceedings before the effective hearing of the present application.

10. By the time the Company's present application was heard, Mr. Hargun indicated that the Respondent was not minded to pursue the arbitration unless the present proceedings were dismissed, and was unable to do so without financial support from its shareholders.

**Strike-out grounds**

11. The Petition was presented on December 14, 2006. For present purposes, the Petition is based on an allegedly admitted debt of some $991,085.00 said to be due under a Reinsurance Agreement. By Summons dated November 20, 2006 (paragraph 3), the Respondent sought an Order : " *that the Petition of Discover Reinsurance company be struck-out as an abuse of process*."

12. The First Dresback Affidavit in support made the following key assertions: (a) the Petition debt was disputed and had yet to be determined in pending arbitration proceedings, (b) the Company was solvent, and (c) the Company proposed to close its case in the arbitration proceedings on December 8, 2006. In the Company's Written Submissions dated November 22, 2006 filed in support of the present application when it was initially heard in November, the abuse of process complained of was that (a) the Petition was based on a disputed debt, (b) no arbitration award had been made, and (c) the Respondent had cross-claims in the arbitration proceedings which had to fail for the Petitioner's status as a creditor to be made out[3].

13. In the Company's oral and Written Submissions tendered on February 19, 2007, the additional argument was made, without a formal application being made, that the Company was entitled as of right to a mandatory stay of the winding-up proceedings under Article 8 of the UNCITRAL Model Law[4].

**Law applicable to Petitioner's creditor status**

14. It is well settled that when the existence of a debt is disputed in good faith on substantial grounds, a winding-up petition may be struck-out as an abuse of the process of the Court. The Court should ordinarily resolve the dispute as to the existence of the debt in the winding-up proceedings save to decide whether or not there is a substantial dispute as to its existence Where the respondent company asserts a cross-claim which does not affect the existence of the petition debt, it is also well settled that the court has a discretion , assuming insolvency has been made out, to either (a) make a winding-up order or (b) adjourn or dismiss the petition so that the cross-claim can be established in separate proceedings.

15. Mr. Hargun was forced to concede that this Court was, in addition, bound by a further principle established by a case on which Mr. Attride-Stirling relied, the

[3] Paragraphs 22-34, Written Submissions. The additional complaint that the collateral claim cannot be relied upon was taken by the Court on November 14, 2006 on the hearing of the Ex Parte application to appoint the JPLs.
[4] Paragraphs 69-83.

Privy Council decision in *Brinds Limited-v-Offshore Oil N.L. & Others* (1986) 2 BCC 98,916. This case holds significantly as follows:

> "*It is a matter for the discretion of the judge whether a winding-up order should be made on a disputed debt, and it is also a matter of discretion whether he decides the substantive question of debt or no debt*." [5]

16. As the Court of Appeal for Bermuda held in *IPC Mutual Holdings Ltd.-v-Friedberg* [2004] Bda LR 27, the "*rule of practice*" is that a petition based upon a debt which is disputed bona fide on substantial grounds will ordinarily be struck out, although the court will often determine whether or not a substantive dispute exists. How should this discretion be exercised? I am assisted in this regard by another case on which the Petitioner relied, *Alipour-v-Ary* [1997] 1 BCLC 557, and the following passage from the Court of Appeal judgment delivered by Peter Gibson LJ at 564-566 which merits extensive recitation :

> "*It has long been the practice of the Companies Court when faced with a creditor's petition based on a disputed debt to dismiss the petition, insisting that the dispute be determined outside the petition (see, for example, Stonegate Securities Ltd. v Gregory [1980] Ch.576). The reason for the practice has been essentially pragmatic. The vast majority of petitions to wind up a company are creditors' petitions. The Companies Court procedure on such petitions is ill-equipped to deal with the resolution of disputes of fact. There are no pleadings, there is no discovery and there is no oral evidence normally tolerated on such petitions, even though no doubt pleadings and discovery could be ordered and oral evidence received, and the Companies Court like any other court is perfectly capable of determining such disputes. But that it is only a rule of practice and not one of law for the Companies Court to refuse to determine a dispute on the creditor petitioner's locus standi was made clear in two cases.*
>
> *The first is Re Russian and English Bank [1932] 1 Ch. 663, in which Bennett J. held that, notwithstanding the general rule that a disputed debt may not be the basis of a creditor's petition, in the case of a foreign company the alleged creditors of which would be without a*

[5] Per Lord Brightman, at page 98,921.

*remedy unless they could proceed by way of a winding-up petition, the Companies Court could wind up the company on the footing that it would be the duty of the liquidator to consider the claims of the petitioning creditors.*

*The second case is the Claybridge Shipping case. In that case alleged creditors petitioned to wind up a foreign company. The petitioning creditors' debt was disputed by the company, though not on substantial grounds, as this court held. But each of Lord Denning M.R., Shaw and Oliver L.JJ. emphasised that the practice of not allowing a petition based on a disputed debt to proceed was no more than a rule of practice… Oliver L.J. [stated]:*

> *'But the court must, I think, remain flexible in its approach to such cases. There may well be cases where to compel the creditor to go off to another division of the court to establish his debt would effectively deprive him of any remedy at all. That may, of course, be inevitable where the court is convinced that the dispute is a genuine one, genuinely raised and persisted in, and one which cannot conveniently be determined in a short space of time on hearing the one application - and that, I think, must be particularly the case even in cases which can perhaps conveniently be dealt with where the grounds of dispute have been known to and canvassed with the petitioner well before the presentation of the petition.*
>
> **But it ought not, in my judgment, to be an inflexible rule that the Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground, and it is only too easy for an unwilling**

**debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings. Whilst I do not in any way, therefore, seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross-examination. The court must, I think, reserve to itself the right to determine disputes - even in some cases substantial disputes - where this can be done without undue inconvenience and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether.'**

*The observations of this court in Claybridge Shipping were applied by this court in Capital Landfill (Restoration) Ltd. v William Stockler & Co. (unreported, 5 September 1991) in which a creditor's petition to wind up an English company was allowed to proceed, notwithstanding that the debt was disputed.* **A factor which weighed with the court was the possibility that a liquidator might seek to set aside a floating charge granted by the company which was prima facie insolvent.**" [emphasis added]

17. The main factor which would mitigate against this Court resolving any substantial dispute about the existence of the Petition debt is that the parties have agreed that such disputes should be referred to arbitration. The main factor which mitigates in favour of this Court either (a) resolving even a substantial dispute in the present proceedings, or (b) adjourning the present proceedings to enable a substantial dispute to be resolved in the arbitration proceedings, is that the asset which the JPLs have sought to preserve would be potentially lost if the Petition herein were

to be dismissed. There is no obvious reason why this Court should not determine whether or not there is, in the first instance, a substantial dispute.

**Factual findings: Is the Petition debt disputed on substantial grounds?**

18. It is common ground that the parties entered into a Reinsurance Agreement under which the Respondent reinsured the Petitioner, dated November 15, 1999 ("the Contract"). Article 20 provides for arbitration in Connecticut as a condition precedent to enforcement of the Contract, while Article 21 provides for Connecticut law as the governing law.

19. It is also common ground that the Respondent commenced arbitration proceedings against the Petitioner on or about May 9, 2005 in which the primary dispute turned on an interpretation of the Contract and its provisions dealing with how the aggregate limits of liability were to be calculated. The Respondent contended that loss adjustment expenses could be taken into account in determining whether its liability to pay had reached its upper aggregate limit, and the Petitioner contended that they should not be. The Respondent's January 6, 2006 Position Statement, I find, asserted eight counts which are all premised on its contractual interpretation[6].

20. It is further agreed that on October 12, 2006 the arbitration panel made the following findings, which are set out in paragraph 13 of the First Fisher Affidavit:

> "*Over the past two days, and in particular in deliberations today, the panel has carefully reviewed all the evidence presented in this initial phase of the hearings, again, with respect to the issue of whether allocated loss adjustment expense was included or excluded from the computation of PEG Re's aggregate limit, limits and all contract periods of the program. Such evidence included the live testimony of witnesses offered by both parties, documents presented to and discussed by these witnesses, documents entered into evidence and noted by the parties in the record, and finally, each party's designations of relevant portions of the depositions taken during the discovery phase of this proceeding.*
>
> *Based upon our review of all of this information and evidence, the panel would like to issue or now issues the following interim order: We so order that the reinsurance agreement executed by PEG Re and Discover Re effective November 15, 1999 and Addendum Number 1 effective January 1, 2001are unambiguous and consistent with the plain language of the Discover Re binders and amended binders that preceded them with respect to the treatment of allocated loss adjustment expense and PEG Re's aggregate limit under these contracts. In other words, ALAE is outside of the computation of PEG Re's aggregate limit for these contract periods and must be paid by PEG Re in accordance with the reinsurance agreement before Discover Re must make any aggregate payments.*"

21. It is also not disputed that the paid losses figures produced in evidence before the arbitration panel were admitted by the Respondent's counsel to be agreed (First Fisher, TAB 17, page 101 of transcript for November 9, 2006). The dispute centred on whether the Respondent was required to post collateral, which in turn depended on whether the allocated loss expenses had to be taken into account.

22. Having regard to in particular Second Visintainer paragraphs 4-9 and the Exhibits referred to therein, I find that the paid losses figure of $991,085 as at May 31, 2006 was in a schedule before the arbitral panel which the Respondent had an

[6] First Affidavit of Jeffrey Fisher dated November 14, 2006, Exhibit "JLF-1" TAB 8.

opportunity to challenge. And after the admission set out above was made, Arbitrator Gass said without contradiction:

> "*I understood the point, the thrust of the examination. I just wanted to make sure that I wasn't missing a dispute over the accuracy of the figures here in terms of amounts fronted by Discover Re on behalf of PEG Re.*"[7]

23. At the end of the day's hearing, cross-examination of Mr. Visintainer had been completed, and only re-examination (or "rebuttal") was outstanding. Having regard to the aforesaid evidence, the post-winding-up petition assertions on behalf of the Respondent seeking to raise a dispute on these same figures cannot be taken seriously. I find that the disputes have no substance.

24. There is a further reason why it seems to me that there is no substance to the suggestions that (a) the arbitration panel's interim ruling has no bearing on the Respondent's "CUPTA" claim, and that (b) it is still possible for the panel to rule that the Petitioner cannot compel the Respondent to comply with any further obligations under the Contract. After the arbitration panel gave its interim ruling of October 12, 2006, the Respondent applied, without success, to stay the arbitration proceedings pending an application to set aside the interim ruling. The status of the arbitration proceedings, prior to the November admission that the paid loss figures were not in dispute, according to the Respondent's own October 25, 2006 Motion filed in the Hartford County Superior Court, was as follows:

> "*With PEG Re now stripped of its claims against DRC, the Arbitration Panel is poised to reconvene on November 8 to address the issues of damages and DRC's counterclaim.*"

25. The Respondent's stay application was refused on November 7, 2006 by Wiese J. The Respondent has represented to the Court supervising the arbitration proceedings that the panel has (a) rejected its claims, and (b) dealt with all issues except damages and the Petitioner's counterclaim. The Respondent in the arbitration proceedings admitted that the paid losses figures relied upon by the Petitioner were not in dispute.

**Respondent's "new" defences**

26. Mr. Hargun sought to extricate himself from this evidential quicksand with an elaborate array of arguments he contended it was still open to the Respondent to assert in the arbitration proceedings, by way of amendment to their original claim. These arguments, including a re-formulated CUPTA claim, reduced to their bare essentials, involve the proposition that the Respondent may be held entitled to avoid its obligations under the Contract's unambiguous terms because its employees and/or agents, to the Petitioner's knowledge, misunderstood the terms of the agreement.

27. This broad case is not supported by the substantially complete evidence before the arbitration panel. To advance this entirely new case would involve, therefore, virtually a complete re-hearing, when it could have been advanced from the outset on an alternative basis. Further, it seems wholly implausible to suggest that the panel is likely to view more favourably the notion that the Petitioner acted unlawfully in enforcing its rights under an agreement the panel has held is unambiguous. By the Respondent's own account, it has been "stripped" by the interim ruling of all of its claims based on the more straightforward premise that the Petitioner was acting in breach of contract in failing to disclose the way in which it was computing the aggregate limits under the Contract.

28. In the absence of independent expert evidence as to Connecticut law, I am entitled to presume that Connecticut law, the governing law of the Contract, is the same as Bermuda law in assessing the extent to which the Respondent's proposed new

[7] Exhibit "MAV-2" TAB 1, Transcript 1027-1028.

claims are arguable. The Petitioner filed evidence from its Connecticut lawyer, Harold Horwich, but his affidavits did not on their face purport to express expert opinion as opposed to making factual assertions about the position under Connecticut law. The Respondent filed similar evidence on Connecticut law matters furnished by its Connecticut lawyer, Joseph Pastore. While helpful in terms of general background and explaining the parties' respective cases, I place no weight on these affidavits due to their lack of independence, as regards the central issues in controversy.

29. The Respondent's Counsel firstly suggested that the Plaintiff's status as a creditor would be affected by the re-cast breach of contract claim because the parties Connecticut lawyers were agreed that the breach alleged, if proved to be material, would result in the Respondent being relieved from any further obligations under the Contract. This was a defence which would extinguish the Petition debt. The new breach of contract claim was based on Article 9A of the Contract, which provides as follows:

> "*Discover agrees that when it files with the insurance department or sets up on its books reserves for Reinsurance Obligations, Discover will forward to Reinsurer a statement showing the proportion of such Reinsurance Obligations which are reinsured by the Reinsurer pursuant to this Agreement.*"

30. Mr. Hargun rightly submitted that it was clear that the Petitioner had failed to supply the Respondent with copies of its regulatory filings. More controversially, however, he contended that this constituted a material breach of Article 9A because it deprived the Respondent of an opportunity to see that the limits were being computed on a different basis than they assumed would occur because of the practice under a corresponding contract with AIG. Mr. Attride-Stirling raised two objections to the viability of this new claim.

31. Firstly, and very technically, he suggested that this clause was misplaced in the Contract because the proportion of risk assumed by the Respondent was always (implicitly) 100% of the Ultimate Net Loss and Allocated Loss (Adjustment) Expenses ("ALAE") under Article 4 as read with Exhibit A Section 2. This was "*boiler-plate*" language properly used in the context of quota-share reinsurance. Secondly, and even more conclusively, however, the Petitioner's Counsel derided the suggestion that Article 9A obliged the Petitioner to supply the Respondent copies of its financial statements by reference to Article 12 of the Contract: "*…Reinsurer will have the right to review Discover's quarterly and annual financial statements upon Reinsurer's request.*"

32. In my judgment both of these submissions made on the Petitioner's part have merit, and it is not seriously arguable that in circumstances where the Respondent failed to exercise its inspection rights under Article 12, any failure by the Petitioner to voluntarily supply its financial statements amounted to a material breach of Article 9A. Any breach of Article 9A which did occur by virtue of a failure of the reinsured to inform the reinsurer of the obvious[8] each year would not in my view constitute a material breach entitling the Respondent to repudiate the Contract.

33. The second new claim which Mr. Hargun eloquently contended for, as a defence to the Petitioner's claim, was an equitable estoppel claim, which required proof of (a) an inducement by the Petitioner to the Respondent to believe in a state of facts and act on such belief, and (b) detrimental reliance. Contract apart, it is said that the Petitioner owed a duty of good faith to the Respondent which it knew was under a misapprehension.

[8] Namely that its proportion of liability was 100% of qualifying losses.

34. This claim, carefully considered, is also afflicted with an inherent logical inconsistency. The arbitral panel, in part based on binders sent by the Petitioner to the Respondent, at least once to Mr. Dresback, the appropriate agent, has already found that the contractual position was unambiguously clear. These issues were explored in the arbitration in the context of the construction issue, and there is no tangible basis apparent in the record of those proceedings for the core assertion that the Petitioner knew that the Respondent was under a misapprehension as to how the limits were to be calculated.

35. As submitted by the Petitioner, the suggestion that the Petitioner induced the Respondent to believe that ALAE was not being claimed by not supplying financial statements which would have made this clear, when the arbitral panel has found that the contractual documentation made the position unambiguously clear, is wholly lacking in substance.

36. The third new claim which the Respondent argued was a defence capable of impeaching the Petitioner's claim was that of material non-disclosure. It is validly asserted that the Petitioner was under a general duty in respect of an annual contract to disclose any and all facts material to the risk assumed by the Respondent. No arguable breach of contract was advanced in respect of Article 9A, for the reasons set out above. The treatment of ALAE has already been found to have been unambiguously clear on the face of contractual documentation to which the Respondent had access. This "defence" is in essence based on the premise that a reinsured is required to explain to the reinsurer what the terms of an unambiguous contract are. This is legally flawed, as the Petitioner's Counsel pointed out in paragraph 19.17 of their Written Submissions, citing *Carter-v-Boehm*: "*The insured need not mention what the under-writer ought to know…*"

37. The fourth new claim is a revised version of the original Connecticut Unfair Trade Practice Act ("CUPTA"). The original claim was based on the premise that the Petitioner had acted in breach of contract. Mr. Hargun argued that it was still possible to assert this claim (for $7 million), despite the falling away of the original breach of contract case in light of the interim arbitral panel ruling. In Counsel's Written Submissions, it is implied that the Respondent will rely on the evidence of four witnesses who have already testified before the arbitration panel (paragraph 50).

38. It must be remembered that the Respondent's initial reaction to the interim ruling, after at least some (if not all) of this evidence had been led and a formal decision on its CUPTA claim was still pending, was to apply to the Court to seek to have the interim ruling set aside, complaining in its Motion that this ruling had "stripped" PEG Re of all its claims. This is a powerful indicator as to the Respondent's own assessment of the prospects of its CUPTA claim in the wake of the interim ruling on the ALAE issue. What must be proved to make out the CUPTA claim, which is clearly simply a cross-claim not capable of extinguishing the Petition debt? The Respondent ("Written Submissions, paragraph 52) cites the case relied upon by Mr. Horwich for the Petitioner, *Commercial Union Insurance Company-v- Seven Provinces Insurance Company*. This statute can apply to insurers, but the conduct complained of :

> "*…must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce…*"

39. The Respondent cannot point to any plausible breach of contract on the Petitioner's part, nor to any arguable material non-disclosure. The high point of the case on CUPTA appears to be its own expert's tepid assertion before the panel (quoted at paragraph 53.10 of the Respondent's Written Submissions) that:

> *"I believe there is considerable evidence that there was a lack of communication from Discover back towards PEG about where this stood in relation to the reinsurances that were applicable under the terms of the contract.*"

40. It is difficult to imagine a more lukewarm criticism of an insurer's conduct and hard to see how the CUPTA claim can be viewed as so cogent as to justify this Court exercising its discretion to dismiss or adjourn the Petition while this cross-claim is pursued. However, I express no concluded view on the adjournment issue at this stage, particularly since, as explained below, the Respondent has not evinced a serious desire to pursue the arbitration proceedings. On any view, this cross-claim cannot affect the Petitioner's status as a creditor in any event.

**Factual findings on Petitioner's status as a creditor: summary**

41. Having regard to all the evidence, I find that the Respondent has raised no substantial dispute about the Petitioner's status as a creditor and that the Petitioner has a good arguable case that it is currently a creditor in an amount of approximately $1 million. The Respondent is admittedly currently unable to pay its debts as they fall due. I would dismiss the application to strike-out the Petition on abuse of process grounds based on the premise that the debt is disputed on substantial grounds.

42. If I had been required to find that a substantial dispute did exist, I would in any event have exercised my discretion to allow the Petition to proceed, because (a) it would be unjust to deprive a substantial contingent creditor of the potential benefit of the cause of action preserved by the JPLs, and (b) any substantial dispute could be resolved either (i) with cross-examination, if necessary, on a contested hearing of the Petition or (ii) in the arbitration proceedings, pending the conclusion of which the present proceedings could be either adjourned or stayed.

**Legal findings: informal application for stay under Article 8 of the UNCITRAL Model Law**

43. Although no formal application under Article 8 of the Model Law has been made, in my view this issue was sufficiently raised by Mr. Hargun to require at least some consideration by this Court. It might fairly be contended that this legal argument is merely another string to the abuse of process bow, in that it essentially complains on alternative grounds that the Petitioner is misusing the winding-up processes of the Court by seeking to recover a disputed debt the existence of which it is contractually bound to establish by way of arbitration.

44. However, for the reasons set out below, I would decline to exercise my discretion to entertain an application under Article 8 at this stage. Mr. Hargun made it clear that the Respondent could not obtain the financial support that it needs to pursue its arbitration claims while the winding-up proceedings were still pending, so it seemed to me that no formal application under Article 8 was effectively made. A party who wishes to enforce an arbitration clause cannot, in view, be treated as making a serious application under the 1993 Act when it (a) does not file a formal application, and (b) represents to the Court that it will only pursue the arbitration if the Court dismisses the entire Court proceedings, without regard to whether or not certain aspects of the Court proceedings are in no way in breach of the arbitration agreement.

45. An additional factor which I take into account in the exercise of my discretion is that these proceedings have already been adjourned on more than one occasion to afford the Respondent an opportunity to pursue the arbitration proceedings, opportunities which the Respondent has demonstrably scorned. Against this background, and with no justification put forward for the delay in advancing this point, I would reject the arguments based on Article 8 of the Model Law. In case I am wrong, however, I set out below the findings I would have reached had I granted leave to the Respondent to make a formal Article 8 application.

46. Article 8 of the Model Law provides as follows:

> *"Article 8. Arbitration agreement and substantive claim before court*
>
> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
> *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."*

47. Mr. Attride-Stirling contended, with reference to authority which did not consider the wording of Article 8 itself, that it was too late for the present application to be made. The crucial words in Article 8(1) are that the reference to arbitration must be made "*if a party so requests not later than when submitting his first statement on the substance of the dispute"*. In my view making submissions that Court proceedings should be struck-out so that the substantive dispute can be arbitrated cannot sensibly be construed as a submission "*on the substance of the dispute*". Indeed in a case cited in the extract from the 1999 White Book upon which Counsel for the Petitioner relied, *Eagle Star-v-Yuval* [1978] 1 Lloyds Law Rep 357, Lord Denning M.R. held in relation to a strike-out application:

> *"On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration."* [9]

48. Mr. Hargun submitted, again with reference to authority which did not consider the peculiar wording of Article 8, that if the stay was granted, it should be a permanent stay. This submission must be rejected, because it ignores the express terms of Article 8(2), which in my judgment contemplate that Court proceedings may be pending while the related arbitration continues.

49. Having regard to my finding that there is no substantial dispute about the Petitioner's status as a creditor, on the facts of the present case it cannot be suggested that the pursuit of the present proceedings involves, in the words of Article 8, " *a matter which is the subject of an arbitration agreement.*" What paid losses are recoverable by the Petitioner was a matter which could have been referable to arbitration, but in the arbitral proceedings under the Contract it was formally conceded that no dispute as to this liability existed. If a winding-up order is made, it does not follow that any breach of the arbitration agreement contained in the contract will occur. The JPLs will be able to take over the arbitration proceedings and bring any outstanding disputes with the Petitioner to an appropriate conclusion, if they see fit to do so.

50. Mr. Hargun accepted that the legal test for deciding whether a dispute existed which should be referred to arbitration under Article 8 was essentially the same as under the 1986 Arbitration Act. The position thus must be that "*where the case raised by the defendant does not afford a defence and is not available as a ground of set-off or counterclaim, the Court has no jurisdiction to stay the action*": *Supreme Court Practice 1999*, Volume 2, paragraph 21A-56.

51. In light of the findings that I have made with respect to the traditional abuse of process strike-out application, I would be bound to find that this Court has no jurisdiction to grant a stay under Article 8 of the Model Law, as regards the insubstantial defences which I have held do not deprive the Petitioner of the right to present and prosecute the present Petition. In summary, this is because there is no substantial defence to the Petition debt, and the prosecution of the Petition

[9] At 361.

does not involve the determination of any dispute which is arbitrable under the Contract.

52. However, this conclusion would not deprive the Court of the inherent or statutory jurisdiction to adjourn the Petition pending the trial of the Respondent's CUPTA claim, if good cause could be shown for doing so on the hearing of the Petition.

**Conclusion**

53. To conclude, the Petitioner's application to strike-out the Petition is dismissed on the grounds that the Petitioner's claim to be an admitted creditor in the amount of approximately $1 million is a good arguable one which is not disputed on substantial grounds.

54. Even if the Petition debt was disputed on substantial grounds, I would exercise my discretion in favour of resolving the dispute in the present proceedings because (a) the Petitioner is admittedly a substantial contingent creditor, (b) dismissal of the Petition could cause irreparable damage through the loss of the potential recovery from the action commenced by the JPLs against many of the respondent's directors, (c) the Respondent has displayed little enthusiasm for actually resolving the alleged disputes through the arbitration process, and (d) the Respondent is in run-off and clearly insolvent on a cash-flow basis.

55. No formal application was made for a stay under Article 8 of the UNCITRAL Model Law, and I reject the arguments advanced in this regard on this basis. On December 4, 2006 I gave directions designed to facilitate the completion of the pending arbitration proceedings, but the Respondent's have failed to take any material steps towards that end. Had I been required to consider such an application, I would have dismissed it on the grounds that no tenable defences were raised by the Respondent to the Petition, which is not designed to adjudicate any genuine contractual disputes which are referable to arbitration.

56. As the Respondent is admittedly unable to pay its debts as they fall due, the only outstanding issues to be determined on the hearing of the Petition fixed for tomorrow's date appear to be as follows. Firstly, if the Petition is not opposed, a winding-up order should logically be made. Secondly, if the Respondent wishes to appeal the present Ruling, consideration will have to be given to whether or not the Petition should be further adjourned to allow the Respondent to seek a stay pending appeal. Thirdly, in the event that the Respondent wishes a full *inter partes* hearing to oppose the Petition on discretionary or other merits grounds not inconsistent with the present Ruling, the Petition will doubtless have to be adjourned to a date to be fixed.

57. The primary decision which has been made is that (a) the Petitioner has a good arguable case that it is an actual creditor in respect of a sum of approximately $1 million, and (b) the Petition is not liable to be struck-out on abuse of process grounds, nor to be stayed under Article 8 of the UNCITRAL Model Law.

58. I will hear Counsel, if necessary, as to costs, although there is no obvious reason why costs should not follow the event.

Dated this 1st day March, 2006

KAWALEY J.