The Court of Appeal for Bermuda

CIVIL APPEAL No 6 of 2014

Between:

LAEP INVESTMENTS LTD

Appellant

-v-

EMERGING MARKETS SPECIAL SITUATIONS 3 LTD

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Delroy Duncan and Ms. Nicole Tovey, Trott & Duncan Limited, for the Appellant
Mr. John Wasty, Appleby (Bermuda) Limited, for the Respondent

Date of Hearing: **12 &13 March 2015**

Date of Decision: **20 March 2015**

Date of Reasons: **9 April 2015**

REASONS FOR JUDGMENT

Bell, JA

Introduction

1. On 20 March 2015, we indicated that we would allow the appeal, grant a stay of the Enforcement Order (as defined in this judgment), and set aside the order to wind up the Appellant ("the Company"), and those orders ancillary to the winding up order, including orders relating to the appointment and activities of the Joint Provisional Liquidators ("the JPLs"). Mr Duncan for the Company raised a number of issues upon delivery of judgment. The principal matters were the costs of the JPLs, and whether or not our order should have been to dismiss the

winding up petition, rather than set aside the order to wind up the Company. We gave liberty to apply to the trial judge in respect of both matters. In relation to the latter, we would simply comment that in circumstances where the outcome of the proceedings in Brazil cannot presently be ascertained, it seems sensible to allow for the possibility that the Respondent might ultimately prevail. We indicated that we would give our reasons in writing as quickly as possible. This we now do.

2. The dispute ultimately giving rise to this appeal goes back to a reference to arbitration submitted by the Company in Brazil in October 2010. That reference to arbitration followed a dispute as to the existence and/or extent of obligations owed by the Company to the Respondent. The transaction which led to the arbitration request arose from the restructuring of a debt owed by a wholly owned subsidiary of the Company, pursuant to which the Respondent discharged a substantial debt owed by the Company and its subsidiaries. In a Ruling dated 1 April 2014 ("the Ruling") the judge at first instance, Hellman J, dismissed the Company's application for a stay of the arbitration award dated 18 March 2013 ("the Award") and held that he was in principle prepared to order that the Company be wound up, subject to hearing the parties as to the terms of such order. The judge then adjourned to hear argument, and when the matter came back before him on 4 April 2014, made an order winding up the Company. He subsequently gave a ruling on 23 April 2014 dealing with other matters relating to the appointment of JPLs, who were by that time represented before him.

The Brazilian Arbitration Proceedings and the Status of the Award

3. Pursuant to the Award, the Company was ordered to pay to the Respondent a sum of approximately R$145 million, including interest and costs, an amount said by the judge in paragraph 3 of the Ruling to be equivalent to well in excess of US$73 million at then current exchange rates. On 29 April 2013, the arbitral tribunal rendered an addendum to the Award, providing that payment of the amount awarded became due immediately as of the date of the notification of the Award, presumably because there had been some contention to the contrary.

4. As the judge set out in paragraphs 11 to 15 of the Ruling, there were two principal challenges to the Award made in the Brazilian courts. The first he

defined as the Annulment Application, which was filed by the Company on 18 June 2013, in which the Company sought to annul the Award under article 32 of the Brazilian Arbitration Law, on the basis that the decision of the arbitral tribunal was inconsistent with and was rendered in violation of Brazilian public policy. That application was dismissed on 20 June 2013, but this dismissal was in turn reversed by the Court of Appeals of the State of Sao Paulo, on 23 August 2013. The effect of that reversal was to remit the request for annulment to the lower court, and this process has yet to be completed. The judge commented (paragraph 26) that he had no information as to when the lower court was to hear the Annulment Application, and that he had no doubt that the unsuccessful party would wish to pursue an appeal.

5. The second application was defined by the judge as the Suspension Application, which was filed ex parte by the Company and by its parent company LAEP Holdings Ltd ("Holdings") on 1 October 2013 in the 43rd State Lower Civil Court in Brazil. That application was denied the following day, but the Company and Holdings appealed, and on 19 December 2013 the Sao Paulo State Court of Appeals made an interim order ("the Stay Order"), staying the effect of the Award pending the hearing of the Annulment Application. In our view this order and its effect are key to the determination of this appeal.

6. Accordingly, the position at the time of argument in this appeal is that the Award stands as a valid award, albeit one which remains subject to attack in terms of the Annulment Application, and the effect of which is subject to the Stay Order, pending both conclusion of the application to annul the Award, and of any further order which might be made regarding either the terms or continued existence of the Stay Order.

The Bermuda Proceedings

7. Against that summary of the steps that have been taken in Brazil following delivery of the Award, it is next necessary to consider the steps taken in Bermuda. First, four days after the arbitral tribunal had made the Award in Brazil, the Supreme Court made an order ("the Enforcement Order") granting the Respondent and its majority shareholder, GLG Emerging Markets Special

Situations Fund ("GLG"), leave under Order 73 rule 10 of the Rules of the Supreme Court 1985 ("RSC") to enforce the Award in the same manner as a judgment or order. Some four days later, the Supreme Court granted a worldwide Mareva injunction against the Company, prohibiting it from dealing with its assets up to the value of the Award. The Company then made an application to set aside the Enforcement Order, but following a hearing, that application was dismissed by the Chief Justice on 21 June 2013. That, of course, was at a time when the Award had, at first instance, withstood the attack of the Annulment Application, and before the appellate court had reversed that dismissal and remitted the request for annulment to the lower court, on 23 August 2013, and, most significantly, before the Stay Order was made on 19 December 2013.

8. Following the dismissal of the application to set aside the Enforcement Order, the Respondent then issued a statutory demand on 27 June 2013, and a petition to wind up the Company was issued on 20 September 2013, which petition was later amended. The judge consequently had before him for the March 2014 hearings which led to the Ruling, the amended petition, the Company's summons of 23 October 2013 to dismiss the petition and set aside the appointment of JPLs, and, lastly, the Company's summons to stay execution of the Enforcement Order, which had been issued just two days before the hearings before the judge.

9. The judge dealt first with the application to stay the Enforcement Order, which application was made pursuant to RSC Order 45 rule 11. This order is concerned with the enforcement of judgments and orders generally. We will similarly deal with that aspect of matters first.

Stay of the Enforcement Order

10. RSC Order 45 rule 11 provides that a party against whom an order has been made may apply to the Court for a stay of execution of that order "on the ground of matters which occurred since the date of the … order". Accordingly, the Court has power to grant a stay of execution of any judgment or order made, in the event of some relevant subsequent event. As the judge pointed out in paragraph 17 of the Ruling, this means that the facts must be such as would or might have prevented the judgment or order being made, or would or might have led to a stay

of execution, if the matters in question had already occurred at the date of the judgment or order.

11. The particular matter which the Company submitted before the judge represented a material change in circumstances since the Enforcement Order had been made by the Court on 22 March 2013 was the Stay Order, which it maintained had the effect of suspending the operation of the Award (see paragraph 5 above). The Enforcement Order had been granted only four days after the issue of the Award, and before the various steps identified in paragraphs 3 and 5 above had been taken by the Company in an effort to set aside the Award. As appears in paragraph 3, the Annulment Application was denied at first, but following an appeal remains extant. The Suspension Application was similarly denied at first, but subsequently the appellate court made its order on 19 December 2013, and that order survived an appeal by the Respondent which the Sao Paulo Court of Appeals rejected in a decision published on 11 March 2014. The Respondent's expert indicated that the Stay Order is only in force pending determination of the issue by a quorate panel of justices sitting together in the chambers which granted the interim stay order. Because of the manner in which Mr Wasty for the Respondent characterised the order for a stay, it will be necessary in due course to examine the terms of such order, and its effect in detail. But it is the Stay Order which the Company maintains should have led the judge to grant a stay of the Enforcement Order, on the application made shortly before the hearing.
12. Having referred to the terms of RSC Order 45 rule 11, the judge then set out the principles applicable for the grant of a stay, as these appear in the commentary to the 2014 edition of the White Book, in relation to the provisions of Order 52. This order is concerned with the grant of a stay where there has been an appeal against a judgment. That approach on the part of the judge led to the first of the Company's grounds of appeal, on the basis of a contention that the judge erred in law in equating the principles applicable to a stay of execution under RSC Order 45 rule 11 with those pertaining to an application for a stay pending appeal.
13. Tied in with this ground of appeal is the Company's next ground, relating to the principles applicable to the enforcement of an arbitration award, pursuant to

section 42 of the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"). Specifically, the Company maintains that the judge confused the provisions of section 42(5) of the 1993 Act with those of section 42(2)(f). The former provisions give the Court the power to adjourn the proceedings where an application for the suspension of a Convention award has been made (and the Award is a Convention award), whereas section 42(2)(f) is the subsection giving the Court the discretion to refuse enforcement where, inter alia, the award has been suspended by a competent authority of the country in which it was made. So section 42(2)(f) deals with the position where an award has been suspended, whereas section 42(5) deals with the position where an application for suspension has been made to the competent authority identified in section 42(2)(f), but has not yet been adjudicated upon, and the Court is empowered to adjourn the proceedings, presumably until such application has been determined by the competent authority. Because the application for suspension of the award has not been ruled on, rather wider criteria fall to be considered than is the case where a court is asked to refuse enforcement of an award on the ground that the award has (inter alia) been suspended by the competent authority in question.

14. Turning back to the provisions of the Ruling, the judge commented that he was not in a position to assess the merits of the Annulment Application (paragraph 25). He did accept that the Annulment Application was "not clearly without merit", since otherwise the Suspension Application would not have been allowed. However, the judge then went on to hold (paragraph 27 of the Ruling) that there was no material before him to outweigh the bias towards enforcement inherent in the 1993 Act. Although the judge identified in paragraph 17 of the Ruling the factors which were brought into play by an application made pursuant to Order 45 rule 11, there is an issue between the parties as to whether the judge did in fact follow the guidelines which he set out in this paragraph. Although he had identified the question in paragraph 17, the judge does not appear to have considered whether the Enforcement Order would have been made, if the application for enforcement had been made after 19 December 2013, or whether, had the Enforcement Order been adjudicated upon earlier, there should have been a stay of execution pursuant to RSC Order 45 rule 11, on the basis that the

application for the Enforcement Order would or might have been differently decided. The test that the judge seems to have applied is that since there was no material before him to outweigh the bias towards enforcement inherent in the 1993 Act, it followed that he was not satisfied that there was any real prospect that the developments in the Brazilian courts (and particularly the prospects of success of the Annulment Application) would have led the Bermuda Court to refuse to make the Enforcement Order. The judge then carried on to say in paragraph 28 of the Ruling …

> "The Company has pointed to nothing which would or might have led the arbitral Tribunal to make a different award."

15. At this point, the judge again appears to be focusing on the prospects of success of the Annulment Application, rather than the manner in which the application for enforcement would or might have been decided, had he focused on the fact that (as he had held) the Award was subject to suspension at the time of such application.

16. The judge then carried on to consider the balance of convenience, in the event he were to have been wrong in regard to the stay, and concluded that that balance did not favour interfering with the Respondent's right to enforce the Award. In doing so, the judge had regard to the considerations outlined by Clarke LJ in the case referred to in the White Book commentary applicable to stays under Order 52, *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065. Accordingly he dismissed the application for a stay, and then carried on to consider the merits of the winding up petition.

The Winding up Petition

17. In view of the finding that he had by then made, the judge was of course looking at matters on the basis that the Enforcement Order remained in full force and effect. Given that premise, it is hardly surprising that he should have concluded that a winding up order should be made. The judge reviewed the basis upon which an order for the winding up of the Company had been sought, namely that the Company was unable to pay its debts, having failed to satisfy the statutory demand which the Respondent had issued against the Company. The judge

reviewed the Respondent's motivation in seeking the winding up order, and declared himself satisfied (paragraph 47 of the judgment) that the Company was unable to pay its debts as and when they fell due, and further that the Company was "balance sheet insolvent" (paragraph 48). He therefore concluded that, *prima facie*, it would be in the interest of the creditors as a whole to wind up the Company.

18. The judge then examined the four grounds on which the Company had submitted that the winding up petition should be dismissed. The first of these was that the Award had been suspended in Brazil. In paragraph 51 of the Ruling, the judge held that having decided that the Suspension Application was not a sufficient reason for him to stay the Enforcement Order, it followed that it was not a sufficient reason for him to decline to wind up the Company.
19. The second ground advanced on behalf of the Company as a ground to dismiss the petition was that the winding up proceedings were being used to subvert the judicial process in Brazil. Specifically, the Company maintained that it was unrealistic to expect the liquidators to pursue the Annulment Application unless put in funds to do so. The judge indicated that he had confidence in the liquidators' objectivity, and declared himself satisfied that the winding up proceedings had not been brought improperly with respect to the judicial process in Brazil (paragraph 56).
20. The next ground put forward on behalf of the Company was that the debt was fully secured, and that the Respondent had commenced proceedings in Brazil to enforce its collateral. The judge held that there was no merit in this ground (paragraph 64).
21. The final ground was that the debt was fully secured and there were no supporting creditors. The judge held that he was not satisfied that the debt was in fact fully secured. He noted that four purported creditors had filed notices opposing the petition, but given the total value of their claims, and that these did not represent the majority in value of the creditor companies, the judge held that their objections were nothing to the point.
22. Accordingly, the judge held that he was in principle prepared to make a winding up order. In practical terms, it seems that the judge took the view that the merits

of the winding up petition were very much influenced by his view of the continuing force and effect of the Enforcement Order.

The Arguments of Counsel regarding a Stay

23. The case for the Company was that if the order for a stay had been in place when the application to enforce the Award had first come to be considered, the Enforcement Order would not have been made. This proposition relies simply on the application for a stay pursuant to Order 45 rule 11. The issue was whether the Enforcement Award would have been made had the Brazilian court made its ruling of 19 December 2013 at an earlier time, and specifically by the time the enforcement application came to be considered by the Bermuda Court. This depended, it was said for the Company, on how the Court would have ruled bearing in mind the provisions of section 42(2)(f) of the 1993 Act. For the Respondent, it was submitted that the Court should look at the grant of a stay with an eye firmly on the terms and effect of the Stay Order in Brazil, and with reference to section 42(5) of the 1993 Act. This approach was urged on the basis that the Brazilian order still fell to be considered by a fuller quorate court, and the fact that the Stay Order was interim, something which Mr Wasty equated on more than one occasion to "provisional". Against that background, it is necessary to consider carefully the terms of the Stay Order.

24. The Stay Order was exhibited to an affidavit sworn by Maria Salgado for the Appellant on 10 January 2014, and the pertinent part as translated reads as follows:

> "I grant the active effect requested to, in the interlocutory relief of appeal, stay the effects of the arbitration award rendered in …",

And the arbitration proceedings are identified. Ms Salgado in her affidavit said that this meant that:

> "The interim order of the single justice is fully effective and binding and is not subject to any possible appeal prior to the definitive ruling of the appeal panel."

25. For the Respondent, an affidavit was sworn by Gilberto Giusti on 24 March 2014, which referred to Ms Salgado's affidavit, and added:

> "This interim order of a single justice is only in force pending determination of the issue by a quorate panel of justices sitting together …" in the chambers of the judge who had made the interim order.

The Nature of the 19 December 2013 Order

27. In the Respondent's supplemental skeleton argument, the paragraph dealing with this aspect of matters is headed "Incomplete challenge to the Award…". The Respondent submitted that in the present case, the Brazilian court's suspension order is an interim remedy temporarily staying enforcement of the award. There is a reference to the Respondent's description in its earlier skeleton that the effect of the order is that it "provisionally suspends the effect of the award."
28. We have referred to the use by Mr. Wasty of the word "provisional" in reference to the stay order, a description which was repeated in submissions. There was also a reference in submissions to the fact that the Stay Order had been made on an ex parte basis, as if this in some manner reduced the effect of the Stay Order.
29. The fact is that injunctions in this jurisdiction are frequently ordered both on an ex parte basis, and on an interim basis, typically until trial in the latter event. There are, obviously, limits as to the circumstances when an injunction may be ordered on an ex parte basis, and an injunction so ordered may be subject to challenge on an inter partes basis. But if ordered, and unless or until set aside, the injunction operates in just the same way as an injunction which has been heard inter partes. The interim nature of an interlocutory injunction in this jurisdiction is typically to preserve the status quo until the rights of the parties have been determined in the action, as is the case in Brazil in this matter, where the Annulment Application remains outstanding. It is clear from a reading of the Stay Order that that is the basis upon which the Brazilian court granted the Stay Order. While it may be that the Stay Order could be affected by any determination made by a wider body of judges in the future, the important words in Mr. Giusti's affidavit are that the interim order is "in force pending determination" by the wider body, and the word "only" which he uses clearly does

not affect the meaning of those subsequent words, and particularly the words "in force".

30. We therefore take the view that the Stay Order does operate to stay the effect of the Award, pending the determination of the outstanding Annulment Application. And it is to be noted in passing that since the Stay Order was granted, some 15 months have passed without its operation having been affected.

31. As to the precise wording of the Stay Order, we see no difference between an order staying the effect of an arbitration award, and one which suspends the operation of the award. And it is clear from the affidavits to which we were referred that the words "stay" and "suspension" have been used interchangeably on both sides. By way of example, Roy Bailey, one of the JPLs, referred in an affidavit sworn on 6 March 2014 to advice which the JPLs had received from a Brazilian law firm, indicating that;-

> "An injunction preventing GLG and EMSS 3 from enforcing the arbitration award in Brazil was granted on 19th December 2013."

And it should be remembered that the judge himself referred to the Suspension Application, which he had defined in paragraph 11 as an action to suspend the Award, as having been allowed (paragraph 25).

The Judge's Approach to a Stay

32. While the judge correctly identified the basis upon which an application for a stay might be made, in paragraphs 16 and 17 of the Ruling, we have no doubt that he fell into error by considering the principles applicable to the grant of a stay in the context of applications for a stay following judgment, pending the outcome of an appeal. And in our view the judge similarly fell into error when he appears to have considered the grant of a stay with reference to the effect of section 42(5) of the 1993 Act, rather than section 42(2)(f). Before continuing, it will no doubt be helpful to set out the terms of this subsection, and of section 42(5), which Mr. Wasty for the Respondent contended, both in the court below and before us, was the applicable provision to be considered in this case.

33. The two subsections are in the following terms:-

Section 42(2)

> "Enforcement of a Convention award may be refused if the person against whom it is invoked proves ….
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."

And section 42 (5)

> "Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

So it can be seen, as set out in paragraph 14 above, that section 42(2)(f) is concerned with the position when a Convention award has been suspended, whereas section 42(5) is concerned with the position before an order suspending a Convention award has been made, but where an application has been made, and the court is invited to adjourn the enforcement proceedings, to enable the suspension application to be determined.

Finding in regard to the Stay Issue

34. In our view, there is no doubt but that the Stay Order fell within the terms of section 42(2)(f), which the judge had identified in paragraph 20 of his judgment. However, the judge had then gone on to consider the principles applicable to the enforcement of a Convention award with reference to the judgment of Kawaley J (as he then was) in *LV Finance Group Ltd v IPOC International Growth Fund Ltd* [2006] Bda LR 67, summarising and applying the judgment of Gross J in the English Commercial Court in *IPCO (Nigeria) Ltd. v Nigerian Petroleum Corporation* [2005] 2 Lloyd's Rep 326.
35. The problem with the judge's reliance on these cases is that the *IPOC* case was concerned not with opposition to enforcement on any of the grounds contained in section 42(2), but with an application to adjourn the enforcement application pursuant to section 42(5). As Kawaley J held at paragraph 21: -

> "I find that *IPOC* has on June 21, 2006 appealed the SPA, but has not sought or obtained a suspension of the award pending appeal. These facts are not in dispute."

And at paragraph 23:

> "In my view the crucial facts are that neither of the two awards are currently suspended nor have yet been set aside. An appeal against one award is pending, and it is possible that such appeal may succeed"

Having referred to the prospects of such appeal succeeding, Kawaley J then asked himself how the discretion to adjourn under section 42(5) should be exercised, and it was in this context that he then summarised the applicable law as expressed by Gross J in the *IPCO (Nigeria)* case, with reference to section 103 of the English Arbitration Act 1996, the equivalent section to section 42 of the 1993 Act. Gross J was looking at enforcement under section 103 very broadly, whereas Kawaley J was concerned with the exercise of the discretion to adjourn under section 42(5) of the 1993 Act, which led him to comment at paragraph 27:

> In the present case, the Plaintiff is not seeking to enforce a money award. So the need to protect the Defendant's commercial interests from being prejudiced if enforcement by execution proceeds and then is subsequently shown to be illegitimate, surely the implicit rationale underlying most adjournment applications, does not fall for consideration in the present context. Nor does the question of security being given during any adjournment period arise. LVFG ultimately seeks to enforce the SPA "*by applying for its permanent anti-suit injunctions*."

And Kawaley J commented in terms that he was not dealing with the type of situation which pertains in this case.

36. A further demonstration of the difference between section 42(2)(f) and 42(5) can be found in the judgment of Mance LJ in the case of *Yukos Oil Co v Dardana Ltd* [2002 EWCA CIV 543]. Particularly, this judgment demonstrates that the judge was wrong to refer to the absence of material before him which might outweigh "the bias towards enforcement inherent in the 1993 Act" (paragraph 27 of the Ruling). As we understand it, the judge was not referred to *Yukos*, from which we would quote paragraph 8 of the judgment, which is in the following terms:-

> "It is clear, and was effectively common ground before us, that s. 103(2)(b) is one vehicle enabling the present appellants to challenge the recognition and enforcement of the Swedish award, by maintaining that they never became party to the contract dated 17 January 1995. Mr. Malek QC maintains that the appellants can also resist recognition and enforcement, on the basis that it was and is for the respondents, under s.100 and 102, to show a valid arbitration agreement in writing. He suggests that this is fair, since s. 103(2) offers no more than what he described as 'discretionary' relief, whereas any entitlement to rely on s. 100 and 102 would be as a matter of right. I am not impressed by that suggestion. Section 103(2) cannot introduce an open discretion. The use of the word 'may' must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for this is found in van den Berg, *The New York Convention of 1958* (Kluwer), p. 265."

And at paragraph 18:

> "Second, so long as the appellants' application under s. 103(2) remained undetermined, there could have been no question of the court allowing enforcement. That would have been a denial of justice. The word 'may' at the start of s. 103(2) does not have the 'permissive', purely discretionary, or I would say arbitrary, force that the submission suggested. Section 103(2) is designed, as I have said in para. 8, to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s. 103(2)."

37. Having focused on the provisions of section 42(5) rather than section 42(2)(f), the judge at paragraph 23 of the Ruling set out the argument for the Company in relation to the material change of circumstances effected by reason of the Stay Order. But having identified the issue, at least from the Company's perspective, the judge then proceeded to consider the merits of the Annulment Application. Not surprisingly, he found himself in difficulty in terms of assessing the prospects of success of that application. That exercise would no doubt have been appropriate when considering the merits of an application to adjourn under section 42(5), but that was not the appropriate test for an application where the

arbitration award had been suspended, such that section 42(2)(f) pertained. This led the judge to conclude that there was no material before him to outweigh the bias towards enforcement which he had previously identified. The judge then gave his conclusion on the question of a stay in paragraph 28, in the following terms:

> "Turning to the question of a stay, it follows that I am not satisfied that there is any real prospect that the developments in the Brazilian courts, had they taken place prior to 22nd March 2013, would have led this Court to refuse to make the Enforcement Order. The Company has pointed to nothing which would or might have led the arbitral Tribunal to make a different award."

38. There are two puzzling aspects of this paragraph. First, the judge refers to "developments" in the Brazilian courts in the plural, when for the purposes of the stay application under order 45 Rule 11, he should have been concerned only with the grant of the Stay Order. Secondly, the closing sentence shows that the judge took into account the prospects of success of the Annulment Application. That might have been relevant in relation to an application to adjourn the enforcement process under section 42(5), but had no relevance in relation to an application to enforce an arbitral award, the effect of which had been suspended in the country of the arbitration hearings and award. It was and is a matter for the Brazilian courts to assess the prospects of success of the Annulment Application, and the Bermuda court has to await the outcome of that application. It has to be said that the Respondent's skeleton argument before us appeared to confuse the issues of suspension and annulment; but the only factor for the judge to consider was whether enforcement should have been ordered after the Stay Order had been granted, the Award having been suspended. Given that suspension, our view is that the judge should have appreciated the nature of the Stay Order as we have held it to be in paragraph 30 above. He should then have considered how the application for the enforcement of the Award should have been dealt with, if the Stay Order been in existence when the enforcement application was made, without reference to section 42(5) or the bias towards enforcement of the 1993 Act (in fact, Gross J used the words "a pre-disposition to favour enforcement"). Had he done this, he would surely have appreciated that

there could have been no question of the Court allowing enforcement in respect of an award which was subject to a stay in the country where it had been made.

39. In summary, our view is that the judge erred in his approach to the correct test to be applied on an application to stay under 45 rule 11, by failing to appreciate the effect of the Stay Order, and that its grant, suspending the operation of the Award, meant that the question of enforcement should have been considered under section 42(2)(f) and not under section 42(5) of the 1993 Act.

Discretion

40. As part of the submissions on behalf of the Respondent, it was urged upon us that the decision of the court below, being concerned with the exercise of the court's discretion, meant that the stringent test set out by Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] 1 A.C. 191 needed to be borne in mind.

41. We think there are two answers to this. First is the nature of the discretion to be exercised under section 42(2), and we respectfully adopt the approach of Mance LJ in *Yukos,* to the effect that section 42(2) cannot introduce an open discretion and that the use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely upon them had been lost. Mance LJ found support for that proposition in Mr. van den Berg's work on the New York Convention. So we do not believe that the application of section 42(2)(f) represented an exercise of discretion in the traditional sense, so as to bring the principles of *Hadmor Productions* into play. But if that had been the case, we are satisfied that the judge's exercise of discretion was based upon a misunderstanding and misapplication of the relevant law, so as to entitle us to exercise an original discretion ourselves.

The Winding up Order

42. As indicated in paragraph 18 above, the prima facie reason for the judge's finding that a winding up order should be made was that the Company was unable to pay its debts, having failed to satisfy the statutory demand, and further was

balance sheet insolvent. The first of these reasons flowed inexorably from the judge's finding that the Enforcement Order, which gave judgment on the Award, remained operative and should not be stayed.

43. Nevertheless, the Company sought to challenge the making of a winding up order under the following grounds of appeal:

> 3. The distinction between the Petition Debt and a debt owed to a third party by a third party
> 4. No petition debt
> 5. Motive
> 6. The relevance of the funding of the liquidators

Accordingly, it is necessary for us to address these grounds.

Ground 3

44. This ground operates only if the Award were to be set aside, and is premised on the judge's holding at paragraph 30 of the Ruling, when he was still dealing with the issue of the grant of a stay. The grounds relate to the complex financial arrangements giving rise to the original debt, and the argument for the Respondent was that even if the Award were to be set aside, the Company would still owe its counterpart under the debenture $4 million more than the amount of the Award. The judge found that these submissions had not been challenged. The ground of appeal deals with matters not in relation to the grant of a stay, but as being relevant to the winding up petition. That is not the basis upon which the judge dealt with matters, and we see nothing in this ground. The judge was looking at these financial arrangements only in support of the argument for the Respondent that the Company was engaged in delaying tactics, something which would certainly have been relevant had the judge been correct in looking at the position under the provisions of section 42 (5) of the 1993 Act.

Ground 4

45. This ground went directly to the judge's finding in relation to the grant of a stay, and hence addresses the position on the basis that the judge had been wrong in failing to grant a stay. We agree that if the judge were to have been wrong in that regard, as we have found, there would have been no basis for the statutory demand which led to the issue of the winding up petition. In relation to this ground of appeal, the Company is saying no more than that the judge erred in failing to grant a stay of the Enforcement Order, and that if a stay had been granted, there would have been no debt leading to the statutory demand, which in practical terms formed the basis for the petition to wind up the Company.

Ground 5

46. As part of the Company's argument before the judge, it was maintained that the winding up proceedings were being used to subvert the judicial process in Brazil. The Company prayed in aid of this submission that the Respondent had issued the winding up petition when it had become clear that the steps which it was taking in Brazil had failed to end the Company's challenge to the Award. Complaint was also made that the Respondent had immediately applied ex parte for the appointment of JPLs, and it was argued that it was unrealistic to expect any liquidator to continue the Annulment Application unless put in funds to do so. Although there was a funding arrangement in place at that time, the Company complained that those arrangements prevented the JPLs from using the funding to pursue the Company's cause of action against the Respondent in the Brazilian courts.

47. The judge dealt with this aspect of matters in paragraph 54 of the Ruling, in which he commented in follows:

> "If the liquidators conclude that the Annulment Application is not worth pursing, then the Petitioner will be saved the expense of contesting it: an expense which the Company, if unsuccessful, is unlikely to be in a position to repay. The fact that the Petitioner may well hope that the liquidators take that view does not mean that it has brought the Petition for an improper purpose."

It is hard to fault this reasoning, premised as it is on an argument that the Annulment Application would not be worth pursuing. It follows that there is nothing to this ground.

Ground 6

48. This ground again relates to the funding of the JPLs and to the judge's finding that the lack of available funding was relevant. Essentially, the judge operated on the basis that funding would be made available to the JPLs, and carried on to comment that he had every confidence in the JPLs' objectivity, so that it was simply a question of the merits of pursuing the Annulment Application being determined by the JPLs, as opposed to the Company.
49. The judge's assumption that funds would be made available to pursue the Annulment Application means that this ground of appeal rather misses the point, since it is premised on the basis that funding would not be made available to the JPLs, so that they would not pursue the Annulment Application, even if they took the view, or were advised, that such litigation ought to be pursued. The judge was not addressing matters from this perspective. The argument on behalf of the Respondent similarly failed to address the issue of a lack of funding, or the position if the Annulment Application were not pursued due to lack of funding, thus potentially depriving the Company's unsecured creditors of a benefit.
50. The problem with this ground is that the factual background in relation to the funding or lack thereof was not canvassed in detail before us. As indicated, the judge operated on the basis that funding would be made available, and no doubt the true position in relation to funding would depend upon the advice which the JPLs received as to the prospects of success of the Annulment Application. If those prospects did not warrant the expenditure of funds, that could hardly be said to be to the detriment of the Company's creditors. Conversely, if the prospects of success warranted the expenditure of funds, no doubt funding arrangements would follow. In the circumstances we do not find there to be anything to be in this ground of appeal.

Summary regarding the winding up petition

51. The position therefore is that in the event that the judge was correct and we were wrong in relation to the stay issue, so that the Enforcement Order remained in effect, we would expect an order for the winding up of the Company to follow, and the Company's liquidation to proceed.

Costs

52. In relation to costs, the position was not agreed. We ordered that the costs below should be ruled on by the judge, and that the costs of the appeal should be the Appellant's, subject to any application which might be made by the Respondent within 14 days of delivery of these reasons, with leave to the Appellant to file written submissions in reply within 14 days thereafter.

Signed

Bell, JA

Signed

Baker, P

Signed

Kay, JA