In The Supreme Court of Bermuda

COMMERCIAL COURT

2013: No. 333

IN THE MATTER OF LAEP INVESTMENTS LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

EMERGING MARKETS SPECIAL SOLUTIONS 3 LTD

Petitioner

-v-

LAEP INVESTMENTS LTD

Respondent

RULING ON APPLICATION TO DISMISS PETITION

(in Chambers)

Winding-up petition-enforcement of arbitration award-prosecution of petition after suspension of award-dismissal of petition- abuse of process-collateral purpose-disputed debt-indemnity or standard costs

Date of hearing: September 19, 2017
Date of Ruling: October 2, 2017

Mr John Wasty, Appleby Global (Bermuda) Limited, for the Petitioners
Mr Delroy Duncan, Trott & Duncan Limited, for the Company

Introduction and summary

1. The present application represents only one scene in the drama which has been played out in the form of a multi-jurisdictional and multi-layered 'cat and mouse' legal battle between the parties in Bermuda and Brazil over the last four years.

The Enforcement Action

2. In Bermuda, the present winding-up proceedings were preceded by proceedings to enforce a Brazilian arbitration award obtained by the Petitioner[1] against the Company on March 18, 2013 requiring the Company to pay sums in excess of US$73 million ("the Award") in Civil Jurisdiction 2013: No.84 (the "Enforcement Action"). In the Enforcement Action, with which I was seised, the main events were the following:

- March 22, 2013: leave to enter judgment in terms of the Award ordered ex parte (the "Enforcement Order");
- March 26, 2013: ex parte Mareva injunction granted against the Company;
- June 21, 2013: application to set aside the ex parte Orders of March 23 and 26, 2013 dismissed.

The winding-up proceedings

3. The main events in the winding-up proceedings prior to the present action were the following

- September 20, 2013: the Petition herein was presented based upon the Company's failure to pay the sums due under the Award which the Petitioner was entitled to enforce as a local judgment;
- September 23, 2013: Messrs Morrison and Thresh of KPMG Advisory Services Limited appointed as joint provisional liquidators ("JPLs");

[1] The Petitioner was originally the 2nd Applicant/Plaintiff in the Enforcement Action and the 1st Petitioner in the present proceedings, which were amended on September 23, 2013 to remove the 2nd Petitioner.

- October 24, 2013: Messrs Bailey and Hutchison of Ernst & Young replace the initial JPLs;

- December 13, 2013: JPLs restrained from assuming control of Brazilian proceedings brought by the Company to, *inter alia*, annul the Award;

- April 4, 2014: the Company is wound-up;

- May 9, 2014: the Company files its Notice of Appeal;

- May 29, 2014: the Official Receiver is appointed as Liquidator of the Company without a committee of inspection;

- March 20, 2015: Court of Appeal for Bermuda sets aside Orders of September 23, 2013 and April 4, 2014, stays the Enforcement Order and remits the matter back to Hellman J in the Supreme Court;

- April 9, 2015: Court of Appeal delivers Reasons for Decision;

- December 7, 2015: Judicial Committee of the Privy Council refuses leave to appeal.

The Brazilian proceedings

4. A compressed version of the key events in the Brazilian proceedings is as follows:

- June 18, 2013: Company files annulment application on public policy grounds with the 43rd State Lower Civil Court in Sao Paulo;

- September 10, 2013: Petitioner appeals Court of Appeals (37th Private Law Chamber) August 23, 2013 decision holding public policy is a valid ground of annulment, reversing trial court's initial dismissal of annulment application;

- December 19, 2013: Company obtains Suspension Order staying Award, which is still in force pending the determination of the annulment application;

- October 19, 2016: 13th Private Law Chamber of Court of Appeals upholds 37th Private Law Chamber's decision that annulment application may be entertained by trial court.

The present application

5. By a Summons dated June 27, 2017, the Company sought an Order:

   (1) That the Amended Petition of Emerging Markets Special Situations 3 Limited be dismissed;

   (2) That the Petitioner pay the Company's costs of the Petition up to and including the hearing on April 4, 2014;

   (3) That the Petitioner pay the costs of the provisional liquidation;

   (4) That the Petitioner pay the Company's costs of the present application.

6. This Summons was supported by a short Affidavit sworn on April 11, 2017 by Ms Maria Salgado, a Partner with the Company's Brazilian lawyers, Escritório de Advocacia Sergio Bermudes. It was first heard on July 6, 2017 when by consent a timetable was fixed for filing further evidence and filing of skeleton arguments. The Company filed a further Affidavit sworn by director Raphael Silveira on December 13, 2016, who deposed that "*the outstanding Petition is hampering on-going discussions about the restructuring and/or financing of LAEP and its operational subsidiaries in Brazil*". The Company also filed a skeleton argument prior to the hearing. The Petitioner filed neither evidence nor written arguments in opposition to the June 27, 2017 Summons.

7. At the effective hearing of the Company's application to dismiss the Petition, Mr Wasty appeared and indicated that he had no instructions to oppose the Petition but only to orally address the Court on the issue of costs. No point was taken on the fact that the present application had been listed before me and not Hellman J, as the Court of Appeal contemplated. I accordingly dismissed the Petition on September 19, 2017, but reserved judgment on the legal basis for the dismissal since this question raised somewhat complicated legal and factual issues which did not receive the benefit of full argument.

8. Mr Duncan agreed that the issue of who should bear the costs of the provisional liquidation should not be disposed of without affording the provisional liquidators an opportunity to be heard. That aspect of the Company's Summons was adjourned to a date to be fixed. The main question in controversy on costs was not whether the Petitioner was liable to pay the Company's costs, but whether the Petition was being dismissed on one of three potential grounds, each of which would result in potentially different costs consequences:

(1) if the Petition was dismissed on the grounds that it was presented for improper motives, the Company would in principle be entitled to its costs from the date of the presentation of the Petition (September 20, 2013) on an indemnity basis;

(2) if the Petition was dismissed on the grounds that it was based on a disputed debt, the Company would only be entitled at best to its costs from the date when the Award was stayed in Brazil (December 19, 2013), but in principle also on an indemnity basis; and

(3) if the Petition was dismissed on the grounds that it was an abuse for it to remain on the Court's file by reason of non-prosecution, the Company conceded that it would at best only be entitled to the costs of the dismissal application and (it seemed to me) merely on the standard basis.

Summary

9. Having considered the written and oral submissions of the Company's counsel and the oral submissions of the Petitioner's counsel, I have concluded that:

- the appropriate ground on which to base the dismissal of the Petition is the abuse of process (disputed debt) ground.; and

- that the Company is entitled to its costs in relation to the Petition (including the costs of the present application) on the standard basis from December 20, 2013;

- unless either party applies to the Registrar within 14 days to be heard as to the costs of the present application, the Company is awarded its costs on the standard basis discounted by 25% because of the time apparently devoted to the rejected collateral/improper purpose arguments.

Was the Petition presented for an improper purpose?

10. The argument that the Petition was presented for an improper purpose (essentially preventing the Company from attacking the Award) was potentially supported by both legal authority and the undisputed evidence. However, in my judgment the argument must be rejected because it was both evidentially and legally fundamentally unsound. Mr Duncan in evidential terms highlighted the following chain of events:

The factual matrix

- on August 23, 2013, the Company succeeded in restoring its annulment application in Brazil;
- on September 10, 2013, the Petitioner appealed against that first tier appellate decision;
- on September 20, 2013, the Petition was presented;
- on September 23, 2013, the JPLs were appointed on the Petitioner's application and empowered to, *inter alia*, independently assess overseas arbitration proceedings involving the Company;
- on December 13, 2013, the Company obtained an Order from Hellman J restraining the JPLs from taking control of the annulment proceedings pending the determination of the Company's application to discharge the appointment of the JPLs.

11. It was firstly submitted that it was self-evident that the dominant purpose of the winding-up proceedings was to prevent the Company from annulling the Award because no benefit could be obtained by the Petitioner from the present winding-up proceedings. This contention was supported by reference to the fact that:

- the Company was a holding company which carried on no business in its own right and had no liquid assets;
- although on a group basis the Company was insolvent, that insolvency reflected a financial crisis in the subsidiary companies operating primarily in Brazil;

- all shareholding transfers in those Brazilian subsidiaries had been frozen prior to the Petition on the application of the Brazilian Ministério Público Federal.

12. It was common ground that the Petitioner was, if it was a creditor at all, the main creditor of the Company. The Second Roy Bailey Affidavit sworn on March 6, 2014 reveals that the JPLs had at that point only identified claims in respect of unpaid legal (and regulatory) fees of just over $800,000 in addition to the Petitioner's $73.3 million judgment debt.

13. Mr Wasty reminded the Court that the Petition was filed following entirely proper steps taken in the Enforcement Action in which the Petitioner successfully resisted the Company's attempts to set aside the Enforcement Order and made a further demand for payment under that Order on June 27, 2013. The Petition which was subsequently filed was in turn based on the Enforcement Order and a related statutory demand. Moreover, in the Second Alun Davies Affidavit sworn on January 31, 2014, it was deposed that the sole purpose of the Petition was to enforce the Award and that the Petitioner viewed the annulment proceedings as a wholly unmeritorious attempt to thwart its legitimate enforcement action.

14. Before considering the legal requirements for establishing improper purpose in this context, the Company's argument only seemed to have any cogency if it could succeed in establishing that the Petitioner knew when the Petition was presented that its Award was likely to be set aside and had effectively initiated the Enforcement Action in bad faith. Bearing in mind that the JPLs were appointed on terms that would only entitle them to discontinue the Brazilian annulment proceedings if they formed the independent view that those proceedings lacked merit, there was an important link missing in the Company's reasoning chain. The Petitioner itself had no legal power to use the winding-proceedings to stifle the annulment proceedings without the intervention of the JPLs and (most likely) the sanction of this Court.

15. In short, this limb of the Company's improper purpose thesis presupposed, without any or any solid evidential support, that the Petitioner was aware on September 20, 2013 that its Award was liable to be annulled on public policy grounds. Four years later, the annulment proceedings have yet to be determined on their merits by the trial court. The merits of the public policy argument relied upon by the Company, namely that the debt which forms the basis of the Award was obtained in 2007 in violation of Brazilian Federal law (which if right would

potentially invalidate an entire 2009 restructuring[2]), are impossible for this Court to assess.

16. The mere fact that the effects of the Award have been frozen pending the determination of this allegation some three months after the filing of the Petition supports a finding that the debt based on the Award has since that date (December 19, 2013) been a disputed one. It does not support the further finding that the Petitioner's purpose in presenting the Petition on September 20, 2013 was an improper one.

17. However, it was also submitted that the Petition was presented for an improper purpose because the Petitioner's conduct of the Petition suggested that there was no genuine interest in winding-up the Company. Considerations relied upon included the following:

    - the Petitioner did not honour its funding agreement with the JPLs and only paid the first of three tranches on November 20, 2013[3];

    - the Petitioner's apparent lack of funding support for the JPLs justifies the inference that it intended to stifle the annulment proceedings by having the JPLs take control of them without the capacity to pursue them; and

    - a winding-up order would not have been for the benefit of the entire class of creditors because creditors other than the Petitioner would have benefited from the annulment of the Award.

18. The second sub-point clearly does not stand up to scrutiny. Looked at in a broad commercial way, it seems self-evident (as Mr Duncan contended) that the Petitioner hoped that the JPLs would take control of and stop the annulment proceedings. Before the JPLs could complete an independent assessment of the annulment proceedings (and certain other Brazilian proceedings), however, the Company won an interim stay of the Award. It seems plausible that the Petitioner at that point made a commercial judgment that it made no sense to provide further support for the provisional liquidation, a judgment which (if made) was vindicated by subsequent events, culminating in the recent dismissal of the Petition. The suggestion that the Petitioner intended from the outset to 'stifle' the annulment proceedings by having the JPLs assume control over them without the funding to pursue them is both speculative and inherently improbable.

[2] Antonio da Silva Affidavit, sworn in the Enforcement Action, paragraph 18.
[3] The second of three tranches was due on January 11, 2014 and neither that nor the third tranche was paid.

19. The Privy Council advised the parties in refusing the Petitioner leave to appeal against the Court of Appeal's decision setting aside Hellman J's winding-up Order that the earlier findings of this Court which were approved *obiter* by the Court of Appeal had no binding effect once the winding-up Order was set aside. Nevertheless, considering this point for the third time, I have reached the same conclusion as Hellman J and Bell JA on this limb of the improper purpose complaint. As Bell JA held in *Re Laep Investments Limited* [2015] Bda LR 38 :

> "*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.*"

20. The complaint that the Petitioner's interests were inconsistent with those of the general body of creditors also requires analysis. This point, it is noteworthy, was also advanced at the initial substantive hearing of the Petition which resulted in

Hellman J winding-up the Company on April 4, 2014. Hellman J rejected the argument holding, *inter alia*, in *Re Laep Investments Limited* [2014] Bda LR 35:

> "*57. There are a number of difficulties with this ground. First, the fact that a company is a secured creditor does not prevent it from bringing a winding up petition. As Jessel MR stated in Moor v Anglo-Italian Bank [1879] 10 Ch 681 at 689: 'the winding up is equally good whether it is obtained by a secured creditor or an unsecured creditor'.*
>
> *58. In a passage approved by the Privy Council in Cleaver v Delta American Reinsurance Co [2001] 2 AC 328 at 341 A – B, Jessel MR went on to explain at 689 – 690 that if a secured creditor wants to prove in the liquidation he may give up his security altogether and prove for the full amount; or get it valued and prove for the difference; or sell and realise his security and prove for the difference.*
>
> *59. However, as Jessel MR stated in In re Carmarthenshire Anthracite Coal and Iron Co (1875) 45 LJ Ch 200 at 200 – 201, secured creditors are not bound to elect between resting on and giving up their securities until the time arrives for them to prove their debts.*
>
> *60. Second, I am not satisfied that the debt is fully secured. There is a factual dispute between the parties, which I am not in a position to resolve, as to the value of the underlying security and whether it would be sufficient to satisfy the Award.*"

21. The Company did not at the time consider its argument on this point to be sufficiently meritorious to justify complaining about this finding in argument before the Court of Appeal. The Court of Appeal judgment, which appears to deal with all grounds of appeal which were argued before it, makes no mention of Hellman J's finding on this limb of the improper purpose complaint. The Court of Appeal in any event implicitly found no merit in the point. Bell JA concluded his judgment on behalf of the Court of Appeal ([2015] Bda LR 38) as follows:

> "*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.*

22. If the Petitioner knew or ought to have known from the outset that a winding-up order would only benefit itself at the expense of unsecured creditors generally, would this suffice to establish that the Petition was presented for improper

purposes? On the face of it, presenting the Petition with such knowledge would be an abuse of process. The difficulty for the Company is that it has failed to identify any or any cogent basis for a finding that this is what occurred. The JPLs never conducted a comprehensive analysis of the profiles of all identifiable creditors so there is no proper evidential support for concluding that the Petitioner was the only contingently unsecured creditor, let alone any basis for finding that this was known by the Petitioner pre-Petition. Moreover, on the hypothesis that the Award was valid and enforceable and the Petitioner had incomplete but only partially valid security:

- there was no inherent conflict between the Petitioner and wholly unsecured creditors to the extent that the secured assets were unavailable to meet the claims of unsecured creditors in any event; and

- there was no inherent conflict between the interests of the Petitioner in respect of the unsecured portion of its debt and the interests of the wholly unsecured creditors.

23. It is difficult to see how it could amount to an abuse of process to present a Petition based on an unpaid judgment debt merely because it emerged at the effective hearing of the Petition that the Petitioner's interest were fundamentally inconsistent with those of other creditors-had this occurred. It did not. On the contrary, in the present case the Company was unable to persuade Hellman J or the Court of Appeal that any material conflicts of interest existed. And no damning fresh evidence was placed before me for the purposes of the current dismissal application which dramatically changed the picture.

Legal requirements for establishing an improper purpose

24. Mr Duncan placed an array of cases before the Court which supported the following principles:

    - *In re Majory* [1955] 1 Ch 600 at 624 (Evershed MR): because of the potentially oppressive nature of bankruptcy proceedings, the courts will always carefully scrutinize their use to ensure that the petitioner has not used them to obtain some improper collateral advantage;

    - *Re a Company* [1983] BCLC 492 at 495 (Harman J): "*A judge has to decide whether the petition is for the benefit of the class which the petitioner forms a part or is for some purpose of his own. If the latter, then it is not properly brought*";

- *Ross-v- Stonewood Securities Limited* [2000] BPIR 636 at paragraph 28 (Nourse LJ): a petition will be improperly presented if its sole purpose is to stifle proceedings being brought by the bankrupt against the petitioner, but not if "*part at least*" of the purpose was obtaining a dividend;

- *Ebbvale Limited-v-Hosking* [2013] UKPC 1 at 33 (Lord Wilson): a winding-up petition (presented by a substantial creditor which was only contingently unsecured) will not be improperly presented if obtaining substantial benefits from a winding-up order are merely a subsidiary motivation for presenting the petition;

- *Maud-v-Aabar Block and Edgworth Capital* [2015] EWHC 1626 at paragraph 29 (Rose J):

  "*In the light of these authorities I conclude that the pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed will amount to an abuse in two situations. The first is where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors. It is also clear from those authorities, and as a matter of common sense, that the jurisdiction of the court to dismiss a petition based on an undisputed debt on the grounds of collateral purpose must be exercised sparingly. Bankruptcy proceedings cannot be allowed to become the forum for a detailed investigation into past and present relationships or an exploration of what the petitioner hopes to gain from the insolvency of the company or individual, in financial or personal terms and a consideration of whether those hopes are legitimate or not*." [Emphasis added]

25. The cases demonstrate two broad categories of improper purpose: (1) where there is no genuine intention of obtaining winding-up order at all, and (2) where the petitioner is not acting in the interests of the class of creditors he purportedly represents. As to the first category, in my judgment caution is necessary to appreciate that the range of legitimate purposes for winding-up proceedings in Bermuda is today broader than it was in England in the 1980's. It is now well settled under Bermudian insolvency law that a company or a creditor may present a winding-up petition where the primary goal is to restructure a company's debts

and not to wind-up the company at all. For instance in *Re Z-OBEE Holdings Limited* [2017] Bda LR 19, I noted that:

> "*13… Even if a petition is presented by the company with the specific purpose of pursuing a restructuring which if successful will result in the petition being dismissed, it will rarely if ever be the case that there is no possibility at all that the plan will fail and that a winding-up order will still result. In such circumstances, the winding-up jurisdiction is still being used to fulfil the primary purpose of the winding-up jurisdiction: protecting the best interests of the general body of unsecured creditors.*"

26. In either category of collateral purpose case, where a debt is undisputed, there is almost a presumption that the petitioner's reasons for invoking the winding-up jurisdiction are at least partially legitimate. The Company in the present case must therefore demonstrate that there was no legitimate purpose at all to justify a finding that the Petition was presented for improper collateral purposes. This point is illustrated by the following passage from the leading judgment in *Ross-v-Stonewood Securities Limited* [2000] BPIR 636 where Nourse LJ concluded as follows:

> "*28….one of the considerations which has led to the presentation of Stonewood's petition is was that Mr Ross would not be able to pursue the claim against Miss Jeffs himself….we cannot in my view proceed on the footing that it was presented solely for the purpose of stifling the action. What has to be considered is the purpose of Stonewood, which had obtained a regular judgment against Mr Ross...It must therefore be assumed that part at least of Stonewood's purpose in presenting the petition was the lawful purpose of seeking to obtain a dividend in the bankruptcy.*
>
> *29. Accordingly, though I remain suspicious of Miss Jeff's motives, I do not think that this case can confidently be treated as one of abuse of process. But it does not at all follow from that that it was appropriate for the bankruptcy order to be made.*"

27. This Court should also in either category of improper purpose case be reluctant to investigate the commercial motivations of the petitioner with an undisputed debt save in clear-cut cases where there is no legitimate reason for the petition at all. The latter point was explicitly made by Rose J in *Maud-v-Aabar Block and Edgworth Capital* [2015] EWHC 1626 in the passage reproduced above. I would merely add that the scheme of Part XIII of the Companies Act 1981 is designed to facilitate access to the winding-up jurisdiction of this Court on the part of creditors with undisputed debts, not to impede it. This is why section 162 of the Act deems a company to be insolvent, *inter alia*:

"*(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*

(b)*… the execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;…*"

Findings: application of legal principles on collateral purpose to the facts

28. The Petition was presented on September 20, 2013 by an unpaid judgment creditor whose Bermudian judgment was based on a Brazilian arbitration award which was in full force and effect under the law governing the arbitration. There is no credible evidence sufficient to displace the starting assumption that the Petitioner's motives in presenting the Petition at least included the aim of properly invoking the winding-up jurisdiction of this Court. The Company has failed to establish that the Petition was liable to be dismissed on the grounds that it was only presented for improper collateral purposes.

Did prosecution of the Petition become an abuse of process after December 19, 2013 because the Petition debt was at that point a disputed one?

The Court of Appeal's findings

29. It is clear beyond sensible argument that after the operative effect of the Award was stayed under Brazilian law on December 19, 2013, the Petition debt ceased to be an undisputed one. The Court of Appeal held that:

- the operative effect of the Award was stayed under Brazilian law on December 19, 2013;
- if the application for the Enforcement Order had been made after that date, the application could only properly have been refused (by virtue of section 42(2)(f) of the Bermuda International Conciliation and Arbitration Act 1993);
- it followed that the Enforcement Order should be stayed and the winding-up order set aside, with any application to dismiss the Petition being made to this Court;

- by necessary implication, the Court of Appeal held that it was not proper for the Petition to be prosecuted once the Enforcement Order upon which it was based was liable to be stayed pending the determination of the annulment proceedings in Brazil, because the Petition debt was no longer an undisputed one.

Abuse of process and winding-up petitions based on disputed debts

30. Mr Wasty argued that the Petitioner should not be held liable to pay the Company's costs until the Company itself sought a stay of the local Enforcement Order. He provided no or no coherent answer to the proposition that further prosecution of the Petition became an abuse of process after December 19, 2013. Following the reasoning of the Court of Appeal, the Enforcement Order was liable to be stayed as soon as the Brazilian stay order was granted on December 19, 2013. Mr Duncan was in my judgment correct to contend that the Petition debt became a disputed one after that date. When the Company chose to take action to retrain further prosecution of the Petition cannot alter this fact. The following classic statement of the law by Ungoed-Thomas J in *Mann-v-Goldstein* [1968] 1 W.L.R. 1091 at 1099D-F, made almost 50 years ago, reflects the Bermudian legal position today:

> "*…it is an abuse of process to prosecute a winding-up application otherwise than in accordance with the legitimate purpose of such a process…It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because …it* [is] *a prerequisite that he should be a creditor before he is entitled to present a petition at all…when a petitioning creditor's debt is disputed on some substantial ground this court should restrain the prosecution of the petition as an abuse of process*…"

31. *Mann-v-Goldstein* has been cited with approval on this specific point by various courts since, including the Court of Appeal for Bermuda in *IPC Mutual Holdings Ltd-v-Friedberg* [2004] Bda LR 27 at page 7 (Evans JA), the Eastern Caribbean Court of Appeal in *Jinpeng Group Limited-v- Peak Hotel Resorts Limited* [2015] J1208-4 at paragraph [27] (Webster JA (Acting)) and the Cayman Islands Court of Appeal in *Re Parmalat Capital Finance Limited* [2006] CILR 480 at paragraph 45 (Mottley JA). The Judicial Committee of the Privy Council upheld the Caymanian Court of Appeal's decision in *Parmalat Capital Finance Limited-v-Food Holdings Limited and others*[2008] UKPC 23, tacitly approving the *Mann-v-Goldstein* principle. Lord Hoffman opined as follows:

> "9… *If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute…*"

Findings on abuse of process ground for dismissal of Petition

32. I find that the relevant ground for dismissing the present Petition is that its further prosecution became an abuse of process after December 19, 2013. The validity of both the Enforcement Order and statutory demand was parasitic on the effectiveness of the underlying Award which was suspended on that date under the curial law of the arbitration.

33. I am unable to identify any reasoned basis for concluding that further prosecution of the Petition was legitimate until such time as the Company applied for a stay of the Enforcement Order. The position might have been different if the Petitioner was able to demonstrate genuine uncertainty about the Company's position and point to the fact that as soon as the Company indicated it was seeking a stay the Petitioner readily consented. There could have been no doubt about the Company's determination to oppose the Petition in Bermuda and seek annulment of the Award in Brazil. What actually happened post-December 19, 2013 clearly indicates that the Petitioner was determined to continue to prosecute the Petition, even though the legal basis for its standing to do so (the Enforcement Order and the statutory demand) had already (as the Court of Appeal held) effectively fallen away.

Costs

34. It follows that the Petitioner must pay the Company's costs of the Petition up to and including the present application for the period commencing December 20, 2013. Mr Wasty was not instructed to make any legal submissions so no legal basis was suggested for departing from the 'usual rule' invoked by Mr Duncan of awarding the costs of a petition which is dismissed on abuse of process grounds

on the indemnity basis. No local authority was cited in support of this proposition. There is, to my knowledge, no such local 'usual rule'.

English authorities on indemnity costs as the usual rule for disputed debt petitions

35. Reliance was placed on *Paramount House Property Estates Ltd-v-Koshal* [2015] EWHC 1097 (Ch) where Warren J held:

> "*3. As to the substance of the matter, the principles to be applied in relation to disputed debts hardly need repeating. The insolvency procedure is not to be used as one for resolving debts, which are genuinely disputed on substantial grounds. The test is not unlike that which is to be applied in an application for summary judgment. Petitions based on such debts are to be dismissed as a general rule, although there can be exceptional cases. The ordinary rule is that the petition will be dismissed with indemnity costs, although again that is subject to exceptions. But the court…must be astute to avoid smokescreens disguising what are really claims without any merit whatsoever that the debt is disputed.*"

36. I have identified additional judicial support for the proposition that it is the usual rule in England and Wales (and was in the pre-CPR era) to award indemnity costs when a petition is dismissed or restrained on the grounds that it prosecution or presentation would be an abuse of process because the debt upon which it is based is a disputed one: see e.g. *Bank Saderat Iran-v-Calgarth Investments Limited* [1997] EWCA Civ J0508-1; *Re Sol Group Ltd.* [1998] EWHC J1005-3. In the latter case, Lloyd J after granting an injunction to restrain the presentation of a winding-up petition based on a disputed debt made the following brief costs ruling (at page 10):

> "*I also propose to order, so far as the costs covered by today's order are concerned, that they should be paid on the indemnity basis on the authority of the familiar decision of Hoffmann J. to the effect that where it is clear that to use the winding-up procedure would be an abuse of process and at any rate where the materials from which that is apparent have been known to the respondent since before the issue of the proceedings, then indemnity*

costs are appropriate to deter people from threatening an abuse of process in this respect."

The Bermuda law position

37. Order 62 rule 10 of the Rules confers a discretion to award costs on the indemnity basis and explains what that basis is. It does not indicate when such an award is appropriate, but it is implicit that it is more favourable to the receiving party and is not intended to be the "standard" basis of taxation:

> "***62/12 Basis of taxation***
>
> *(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term 'the standard basis (2)' in relation to the taxation of costs shall be construed accordingly.*
>
> *(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.*
>
> *(3) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on a basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis.*"

38. The present local practice position appears to be that indemnity costs are awarded for serious misconduct rather than as a general rule because an abuse of process has been made out: see e.g. *Phoenix Global Fund Ltd-v-Citigroup Fund Services (Bermuda) Ltd* [2009] Bda LR 70 at paragraphs 9-13 (Bell J, as he then was); *Majuro Investment Corp-v-Timis (Ruling on Costs)* [2016] Bda LR 23 (Kawaley CJ at paragraphs 8-14).

39. In my judgment the traditional local approach to indemnity costs in relation to abusive winding-up proceedings is far too lenient. It serves as no real deterrent against the misuse of the Court's winding-up jurisdiction and provides no meaningful support to the obligation of the Court and the parties to further the overriding objective. I see no reason why the English approach (which is in no

way dependent on the CPR regime which does not apply here) should not in future cases be followed here. Where further prosecution or the presentation of a petition is restrained on abuse of process grounds, the usual rule should be that costs area awarded against the actual or prospective petitioner on an indemnity basis.

Costs award

40. As far as the present matter is concerned, in my judgment it would be unfair to hold the Petitioner to a higher standard of litigation conduct than prevails under existing local practice, merely because Mr Duncan has persuaded me that such higher standards should be required in future cases. There was an abuse of process, but not a serious one in further pursuing the prosecution of the Petition. The Petitioner succeeded in persuading this Court that a winding-up order should be made. The contrary position contended for by the Company was only vindicated before the Court of Appeal.

41. I also am bound to take into account the fact that the Petitioner was not given notice on the face of the Company's dismissal Summons that indemnity costs were being sought. Mr Wasty did not have an adequate opportunity to decide whether or not to prepare a full response to Mr Duncan's submissions on this aspect of the costs application.

42. As far as the costs of the present application are concerned, subject to hearing counsel if required on written notice to the Registrar within 14 days, the Company is awarded its costs of the present application subject to a 25% discount for the unreasonable amount of costs incurred in relation to the collateral/improper motive arguments which have now been rejected for the third time.

43. The Petitioner is accordingly ordered to pay the Company's costs of the Petition from December 20, 2013 on the standard basis.

Dated this 2nd day of October 2017 _____

IAN R.C. KAWALEY CJ