IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 1 OF 2020 (IKJ)

IN THE MATTER OF A DEBTOR

AND

IN THE MATTER OF THE BANKRUPTCY LAW (1997 REVISION)

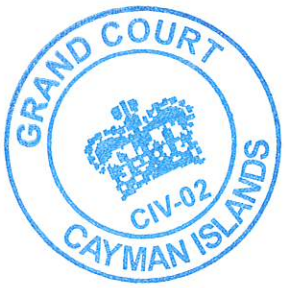
IN CHAMBERS-VIA VIDEO-CONFERENCE

THE TRUSTEE IN BANKRUPTCY OF THE ESTATE OF RICHARD PAUL JOSEPH PELLETIER

PLAINTIFF

AND:

(1) OLGA PELLETIER



DEFENDANT

(2) PDP CORPORATION

SECOND DEFENDANT

(3) PDP HOLDINGS INC.

THIRD DEFENDANT

(4) BUTTERFIELD BANK (CAYMAN) LTD.

FOURTH DEFENDANT

(5) FORBES HARE TRUST COMPANY LIMITED

FIFTH DEFENDANT

Appearances:	Mr Colin McKie QC, Ms Allegra Crawford, Adrian Davey of Maples and Calder for the Trustee in Bankruptcy of Mr Richard Pelletier (the "Trustee") by her Agents, Margot MacInnis and Hugh Dickson, Grant Thornton Specialist Services (Cayman) Limited (the "Agents") Mr Tom Lowe QC of counsel and Mr Guy Dilliway-Parry and Mr David Lewis-Hall of Priestleys for the 1st-3rd Defendants ("D1-D3") Mr Christopher Young, Forbes Hare, for the 5th Defendant ("D5")[1]
Before:	The Hon. Justice Kawaley
Heard:	18-19 June 2020
Draft Judgment Circulated:	20 July 2020
Judgment Delivered:	31 July 2020

[1] Mr Young was in attendance but did not address the Court save that he confirmed that D5 took a neutral position with respect to the proceedings.

HEADNOTE

Plaintiff's summary judgment application - Defendants' application to dismiss on jurisdictional grounds - approach to determining solvency of bankrupt at date of impugned settlements - statutory meaning of "all his debts"-Bankruptcy Law (2018 Revision), section 107 - sufficient connection of avoidance claim with jurisdiction - forum non-conveniens

JUDGMENT

Introductory

1. By a Writ dated January 8, 2020, the Trustee in Bankruptcy for Mr Richard Pelletier (the "Trustee"/ the "Debtor", respectively) sought declarations that 8 transfers of property from the Debtor to the Defendants were void under section 107 of the Bankruptcy Law (the "Law"). By a Summons dated February 6, 2020, the Trustee, acting by her agents Ms Margot MacInnis and Mr Hugh Dickson of Grant Thornton Specialist Services (Cayman) Limited (the "Agents') applied for summary judgment against the 5th Defendant. Following a hearing on February 10, 2020 an order dated February 13, 2020 was made by consent on the Trustee's Summons that D1 being a beneficiary of the relevant trust of which D5 is the trustee (as a successor to D4) be joined to the claim against D5 so as to permit D1 to defend the claim, D5 having stated that it took a neutral position with regard to the proceedings

2. Priestley's, attorneys for D1-D3 applied by Summons dated February 11, 2020 seeking the following principal relief:

> *"(1) An order setting aside service of the Writ...on the First Defendant pursuant to an Order dated 8th January 2020 on the First Defendant out of the jurisdiction.*
>
> *(2) An order staying the proceedings against the Second, Third and Fifth Defendants."*

3. By Order dated March 16, 2020, an Order Absolute was made against the Debtor in FSD 193 of 2019 (the "Bankruptcy Proceedings"). That Order is subject to a pending appeal to the Cayman Islands Court of Appeal expected to be heard late this year. On March 20, 2020, directions were ordered by consent as between the Plaintiff and D1-3 for the Trustee's Summons and D1-D3's Summons to be heard together.

4. The Petitioner in the Bankruptcy Proceedings was Pacer Construction Holdings Limited ("Pacer"). On May 16, 2019, Pacer obtained a judgment in this Court against the Debtor based on this Court's recognition of an arbitral award in the enforceable amount of CAN$23,928,767.50 (the "Judgment"). The Judgment was entered by way of enforcement of, *inter alia*, the Principal Award of an Arbitral Tribunal dated March 19 2019 (the "Award") which required the Debtor and his company ("RPHI") to pay Pacer CAN$60,189,965 on a joint and several basis.

5. The Award arose out of claims made under a Share Purchase Agreement entered into between, *inter alia*, the Debtor, RPHI and Pacer on June 26, 2014 ("SPA"). The Debtor agreed, *inter alia*, to indemnify Pacer against certain losses under Section 5.1 of the SPA. The first of the impugned transactions involving a CAN$20 million transfer to D1 took place the day after the SPA was signed, on June 27, 2014 (the "Olga Transfer").. The last material transfers to D4 (the predecessor trustee to D5) took place on September 17, 2015 (the "Second Holdings Transfer") and October 14, 2015 ("Second PDP Corp Transfer").

6. As regards D1, the jurisdictional challenge was based on the main grounds that (a) there was no serious question to be tried on the merits of the avoidance claim, legally or factually, and (b) there was no sufficient jurisdictional connection between the impugned transactions so that the Cayman Islands should in its discretion decline to assume jurisdiction over the claim. As regards D5, the principal question was whether or not the Trustee was right that section 107 applied to the contingent liabilities arising under the SPA. If they did not, summary judgment would have to be refused. If contingent liabilities could be taken into account, whether there was a triable issue as to the Debtor's solvency when the transfers were made fell to be assessed. I am indebted to counsel for their assistance in particular with the difficult and important issues of the scope and application of section 107 of the Law.

Overview of the statutory scheme

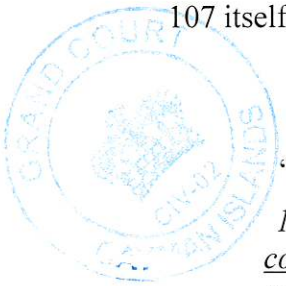
Preliminary

7. The main issue of legal principle which was pivotal to the determination of both applications was whether or not transactions which took place between June 2014 and September 2015 were liable to be avoided. This turned on whether the solvency of the Debtor had to be assessed taking into contingent liabilities which did not crystallize until

the Award was obtained by Pacer just over 5 years later (as regards D1) and just under 5 years later (as regards D5).

8. The relevant avoidance provision is substantially based on section 42 of the Bankruptcy Act 1914 (UK) (the "1914 UK Act"). Section 42 is itself derived from section 47 of the Bankruptcy Act 1883 ("1883 UK Act"). The Law, itself originally enacted in 1964 and last revised in 1997, was said to be mainly based on the Jamaican Bankruptcy Act, 1880. Construing the contentious words of section 107 in its wider statutory context was a task which received no assistance from directly relevant local case law and somewhat limited judicial consideration of substantially similar legislative provisions in other jurisdictions. Despite substantial similarities between the Australian avoidance provisions and our own section 107, the critical term "debts" was defined broadly in Australia while under the Law it is not. Nonetheless, the Agents' counsel submitted that the most valuable guidance could be derived from English decisions on the scope of section 42 of the 1914 UK Act. The First to Third Defendants' counsel agreed, relying on one potentially supportive English authority on section 47 of the 1883 UK Act.

9. As regards the statutory context, the Agents' counsel encouraged the Court to construe section 107 in its narrower context of Part XVII of the Law. D1-D3's counsel encouraged the Court to have regard to how the crucial term "debts" was used, inter alia, in contradistinction to the term "liabilities" in the wider context of the Law as a whole. Section 107 itself provides as follows:



> "*Settlement by debtor, how far void as against Trustee*
>
> *107. (1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage, in right of his wife, shall, if a provisional order in bankruptcy, or an absolute order in bankruptcy in cases where no provisional order is made, takes effect against the settlor within two years after the date of the settlement, be void against the Trustee and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the Trustee unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee of such settlement on the execution thereof.*
>
> *(2) Any covenant or contract made by any person in consideration of marriage, for the future settlement upon his wife or children of any money or property wherein he had not, at the date of his marriage, any estate or interest whether vested or*

contingent, in possession or remainder and not being money or property of or in right of his wife, shall, if a provisional order, or an absolute order in bankruptcy in cases where no provisional order is made, takes effect against him before such money or property has been actually transferred or paid pursuant to such contract or covenant be void against the Trustee.

(3) In this section-

'settlement' includes any conveyance, gift or transfer of property." [emphasis added]

10. Section 107(1) creates two alternative gateways to avoiding a voluntary transfer made by a person who becomes bankrupt within the qualifying period:

(a) automatic avoidance of a voluntary transfer made by a settlor who becomes bankrupt within the next 2 years;

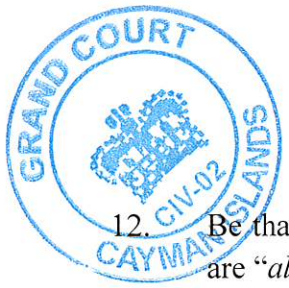
(b) conditional avoidance of a voluntary transfer made by a settlor who becomes bankrupt within the next 10 years, coupled with a presumption of insolvency which the transferee has the burden of displacing.

11. From the perspective of corporate insolvency law, section 107(1), the appropriate solvency test apart, seems on its face to be a somewhat aggressive, pro-creditor statutory provision. By way of contrast, in the corporate insolvency regime (which Mr Lowe QC encouraged me to take into account) under the Companies Law (2020 Revision) has the following main avoidance elements:

(a) automatic avoidance only (or most significantly) arises in the case of dispositions of assets or shares after the commencement of the winding-up (section 99);

(b) preferences are only voidable if the applicant is able to prove fraud in relation to a transaction occurring within the 6 months period preceding the commencement of the winding-up (section 145);

(c) transactions at an undervalue are only voidable if the liquidator is able to prove



that the disposition was made with the intention of defrauding creditors and the transaction was made within 6 years of the commencement of the winding-up.

12. Be that as it may, the critical words in dispute on the hearing of the present applications are "*all his debts*".

The narrower context: Part XVII of the Law ("*Benefit of Transactions Affecting the Debtor and his Property*")

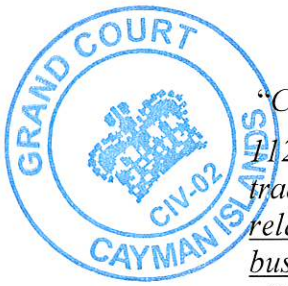
13. The next section in Part XVII provides in material part as follows:

> "*Extension of power to avoid certain voluntary settlements, etc., as against the representatives of deceased settlers whose estates are insolvent*
>
> *108. In the administration by the Court of the assets of any deceased person, it shall be lawful for the Court, on the petition of any creditor or creditors of such deceased person whose claim or claims together, against the estate would have been sufficient to support a petition in bankruptcy against such person had he not died, and on proof that the assets of such person were, at the time of his death, insufficient to pay his debts and liabilities in full, to order that any settlement of property made by such deceased person within the meaning of section 107 and except as therein excepted, or any conveyance or transfer of property or charge thereon, or any payment, obligation or judicial proceeding, made, incurred, taken or suffered by such person, he being at the time of making, taking, paying or suffering the same, unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor preference over the other creditors, and which settlement, conveyance, transfer, charge, payment, obligation or judicial proceeding would have been void against the Trustee if a provisional order had taken effect against such deceased person at the moment of his death, shall be void as against the executor, administrator, receiver or other person charged with the administration of the assets of such decreased person:*
>
> *Provided that such petition shall be presented within six months after the death of such deceased person...*" [emphasis added]

14. Section 108 extends section 107 to claims against estates provided a petition is presented within six months of the deceased's death. It contains two different solvency tests, however. Mr McKie QC submitted that the first test ("*proof that the assets of such person*

were, at the time of his death, insufficient to pay his debts and liabilities in full") applied to determining whether the petitioner had standing to petition for relief under section 108. That submission seemed plausibly correct yet was difficult to unreservedly accept. However, it followed that if the solvency test in section 107 had the breadth the Trustee contended, the operative solvency test under section 108 was a different, far narrower cash-flow insolvency test, requiring proof that the settlor was "*unable to pay his debts as they become due from his own moneys*".

15. The same explicit cash-flow test is found in the fraudulent preference provision in the Law, which applies transfers made within the 6 month period preceding bankruptcy with the intention to prefer creditors. The disposition will only be voidable if the settlor is at the material time "*unable to pay his debts as they become due from his own moneys*" (section 111(1)). The third relevant section in Part XVII is the somewhat inelegantly drafted section 112:



> "*Conveyance, assignment, etc., of stock-in-trade, etc.*
>
> *112. Every conveyance, assignment, transfer, sale or disposition made by any trader unable to pay his debts of his stock-in-trade, debts or things in action relating to his business or any part thereof, otherwise than in the ordinary way of business, to any other person shall, if a provisional order or an absolute order takes effect against the person making the same within six months after the date of making the same be deemed fraudulent and void as against the Trustee; unless the same were made and executed with the assent of seventy-five per cent in number and value of the creditors of such person; or unless the same were made and executed after not less than twenty-one days' notice in the Gazette and in a newspaper circulated in the Islands of the intention of the trader to make such conveyance, assignment or transfer, sale or disposition.*" [emphasis added]

16. This section uses the same language as section 107 ("*unable to pay his debts*"), but expands the express solvency definition through the addition of "*debts or things in action*". Although it covers a 6 month period, it has what might be viewed as an aggressive pro-creditor deemed fraud ingredient, operable unless 75% in number and value of creditors approved the transaction.

17. In summary, there is no clear pattern reflected in the legislative language which at first blush strongly points to the conclusion that "*unable to pay his debts*", without any further embellishment, is a term which connotes either debts narrowly construed or debts broadly construed. Because Part XVII has other provisions which spell out explicitly when the draftsman intends to apply a narrow cash-flow test (sections 108, 111(1)) and a broader test (section 112). These provisions will, however, be more closely considered below.

The wider context: the Law as a whole

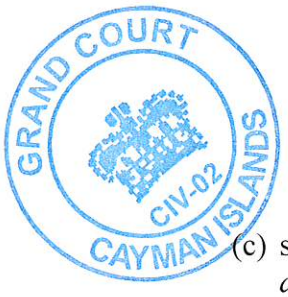
18. As Mr Lowe QC pointed out, there are various provisions in the law which support the thesis that the term "debt" means a presently due sum which a "creditor" can assert a claim to recover. For example:

(a) the term "*creditors*" is defined to include "*any two or more persons to whom a debt is owing jointly*" (section 2);

(b) the proviso to section 14 provides that:

"*(i)*...

(ii) the debt of the petitioning creditor must be a liquidated sum due or growing due at law or in equity...";



(c) section 20 ("*Provisional Order, when made*") refers to the "*petitioning creditor's debt*";

(d) section 66 applies the same standing test for bankruptcy petitions to petitions against the estate of deceased debtors;

(e) Section 68 deals with applications for discharge. Grounds for refusing a discharge under subsection (3) include giving a preference to creditors "*when unable to pay his debts as they become due*";

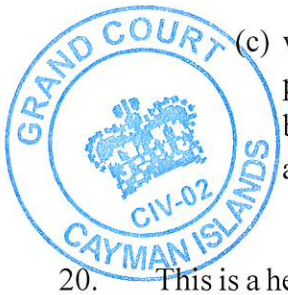
(f) Debts which qualify for presenting a bankruptcy petition also qualify for presenting a petition against one or more of partners in a partnership (section 134).

19. It was not immediately obvious that the narrow definition of debt for the purposes of establishing standing to petition was indicative of the meaning to be assigned to the term "debts" in section 107 (1). Mr McKie QC submitted that there were three policy objectives in the various provisions to which the Court was referred:

(a) what debts confer standing to petition, understandably narrow;

(b) who can prove in a bankruptcy, which was a broader construct of "debt". (Thus while section 119 (1) of the Law excludes the proof of non-contractual debts, all

contractual debts could be proved under section 119(2)[2]);



(c) which assets can be recovered for the estate under, *inter alia*, avoidance provisions such as section 107. What debts qualified for the solvency test should be determined, it was contended, according to the words of the relevant avoidance provision.

20. This is a helpful way of analysing the different solvency tests found in the Law which fairly acknowledges that even within Part XVII, there is no obviously consistent linguistic or policy theme so that each avoidance provision must ultimately be construed on its own terms. It also involves a realistic concession that no consistent solvency test can fairly be found in the various different avoidance provisions because of the variations in the language used.

21. The primary point of statutory construction which is in dispute here is the threshold question of whether or not solvency should be determined by reference to contingent liabilities at all. However, closely connected with this question is the further issue of whether the Debtor's liabilities under the SPA qualify to be taken into account for the solvency computation, if contingent liabilities in fact generally qualify for potential consideration. Applying the solvency test, assuming the liabilities in question are indeed eligible for consideration, is a purely evidential exercise, which focusses on how the contingent liability should be valued at the time the impugned transfers were made. The first of these three questions will now be considered.

Findings: the scope of the solvency test in section 107(1) of the Law

The Agents' submissions

22. In the course of the hearing, I quibbled with Mr McKie QC's merging of what I considered to be two distinct legal questions, the first a question of pure law and the second a mixed question of law and fact. However the authorities he relied upon seemed to adopt a similar approach. In the '*Skeleton Argument of the Plaintiff for Summary Judgment against the*

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[2] Section 119(2) provides:

"(2) *Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the provisional order or to which he may become subject by reason of any obligation incurred previously to the date of the order, shall be deemed to be debts provable under a bankruptcy petition under this Law.*"

Fifth Defendant', the following foundational legal argument was advanced:

> "*15 The question of whether Mr Pelletier was, at the time of each transfer, able to pay all his debts without the aid of the funds transferred, raises the following issues of law:*
>
> *15.1 whether "debts" in this context includes the kind of contingent liability that Mr Pelletier had to Pacer and/or MasTec under the SPA; and*
>
> *15.2 if so, how such contingent liabilities are valued for these purposes.*
>
> *16 In Official Receiver v Saebar39, the court considered whether a transfer of property by a bankrupt and his wife (as joint tenants) to the wife was void against the Official Receiver, under a provision in very similar terms to s 107 of the Bankruptcy Law. It had to determine whether the bankrupt was, at the time of executing the transfer, able to pay all his debts without the aid of the property comprised in the transfer. It determined that the bankrupt's contingent liability for damages in tort in respect of an act already committed by him should be taken into consideration when assessing his liabilities at the time of the transfer. The onus of proving the solvency of the settlor was (as here) on the transferee, and:*
>
> *'... It would seem that the correct approach is to consider the whole of the circumstances and if the liability can be regarded as purely speculative and without any real likelihood of liability being established then the liability can be ignored. However, if there is a real likelihood of the prospective liability becoming in due course an actual one, then that liability must be taken into account. ...*
>
> *Considered objectively at the time of the transfer, it was very probable that should a civil action be brought by Wilschut against the bankrupt it would result in a very substantial award of damages. We know that in fact an award of $55,000 was made, but it is not necessary to refer specifically to this amount as quantifying the liability at the relevant time. It is sufficient to say that it was obviously a very substantial liability and in all the circumstances this was a liability which had to be regarded when determining the solvency of the debtor at the relevant time. Accordingly the bankrupt is not able to establish that the bankrupt was able to meet all his liabilities without the aid of the property comprised in the transfer.'*"
>
> *17 The principles stated in Saebar have been applied in subsequent cases. Saebar and those subsequent cases are also consistent with the English cases of Re Ridler and Re Densham.*"

23. *Official Receiver*-v-*Saeber* [1972] A.L.R. 612 (Qld) is a decision of the Supreme Court of Queensland (Hoare J, in a case in which, coincidentally, the author of the leading text '*McPherson's Law of Company Liquidation*' appeared for the Official Receiver). As Mr

Lowe QC rightly pointed out, this case is not directly relevant to the primary point of construction in issue here. The statute in that case apparently expressly defined "*debt*" as including a "*liability*" (see page 614). The Law does not define "*debt*" at all.

24. The decision is indirectly of potential persuasive effect in that the English authorities on section 42 were cited with apparent approval and the generous conclusion was reached that even a tortious prospective liability should be taken into account in the context of a broadly similar avoidance provision to section 107 and 42 of the UK 1914 Act. Section 120 of the Australian Bankruptcy Act was reproduced in *Re Finney* [1997] 35 ATR 259 at 261. Einfeld J held that "*in assessing whether a settlor can pay 'all his debts', a court should take into account contingent liabilities*", following the decision of Davies J in Cao, ex parte Dixon (unreported, Federal Court, 12 August 1994). The decision that "*all his debts*" includes contingent liabilities is only partially supported by the fact that the Australian Act defined "debt" as including a "liability". It could have been held that "*all his debts*" only embraces presently due debts and liabilities. These authorities are relevant to the secondary question of what type of contingent liabilities should be taken into account if section 107 permits the inclusion of such liabilities at all.

25. Mr McKie QC referred to *Re Densham* [1975] 3 All ER 726, but this provided less explicit assistance than he desired. It considered a settlement on a wife at a time when he had stolen money from his employers, but the theft had not been discovered. By the time of the application to set aside the settlement under section 42 of the UK 1914 Act, the debtor had been convicted of theft and made bankrupt on a petition based on his former employer's civil judgment. Goff J held (at 736d):

> "*…but it was argued that the indebtedness to the employers was not a debt at all at that time but a mere liability to be sued in damages for fraudulent conversion. I cannot accept that argument. An action for money had and received would lie, and in my judgment the bankrupt was clearly indebted to his employers for the sum which he had stolen from them.*"

26. The argument "*all his debts*" in section 42 (a statute which like the Law did not define the term "debt" at all) did not include a contingent liability was essentially summarily dismissed. This supports the inference that Goff J assumed it obvious that contingent liabilities were relevant, but left room for Mr Lowe QC to persuasively argue that the result may have been influenced by the fact that the amount due to the employer was a liquidated amount, due and owing as of the date of the theft and at the date of the impugned settlement. Reference was also made to Muir Hunter, David Graham and Michael Crystal, '*Williams and Muir Hunter: The law and Practice in Bankruptcy*', 19th edition, at page 340 where

equally terse support for the Agents' case appears:

> "*Some guidance on the manner in which doubtful assets and contingent liabilities are to be valued for this purpose , will be found in re Ridler and in Re Densham.*"

27. The learned authors clearly did not consider it to be controversial that contingent liabilities could potentially be taken into account. This provides stronger but less than fulsomely explicit persuasive support for the Agents' position. With such sparse direct English support for the proposition that "*all his debts*" includes contingent liabilities, Mr McKie QC understandably placed heavy reliance on the reference to the following English text authority reproduced at page 614 of *Saebar*:

> "*Halsbury, 3rd ed., vol2, at p. 549, on the aspect of solvency of the settlor states:*
>
> *'In enquiring into the settlor's ability to pay all his debts at the date of settlement without resorting to the settled property, it is necessary to take into account all his liabilities, whether present or contingent, and place a reasonable estimate on them.*"

The First to Third Defendants' submissions

28. Mr Lowe QC had little difficulty in establishing that the meaning of "*all his debts*" could not easily be ascertained upon a straightforward reading of the statutory words either in section 107 or when read together with the wider context of the Law as a whole. He also ably demonstrated that the express judicial support for construing the term "all his debts" as including contingent liabilities (and in a statute where the word "debt" was not expressly defined as including "liability") was very thin indeed.

29. D1-D3's counsel advanced two broad rationales for adopting a narrow construction of the critical words in section 107 for the purposes of the present case, with a view to buttressing his primary point that the draftsman would have expressly added 'and liabilities' after the words "*all his debts*" if was intended for the section to have this effect. Firstly, reliance was placed on the contrasting company law position. Secondly it was submitted that there was a general policy reflected in the Law that effective dispositions of property should not be disturbed.

30. It was clear beyond serious argument that the construction of section 107 which the Agent contended for would give this personal bankruptcy avoidance provision a scope which is far wider than is prescribed under the corporate insolvency law regime. This justifies careful analysis but may in part be explained by the fact that the Law was first enacted almost 50 years ago and has not been (to my knowledge) comprehensively modernised since then. It was last revised over 20 years ago. The Companies Law is revised regularly. The field of corporate insolvency is like a major sporting arena while the field of personal bankruptcy is like a comparatively quiet village green. In my judgment little assistance could be gleaned for the interpretative task of construing section 107 of the Law from the arguably more modern Companies Law (2020 Revision) approach to avoidance provisions, which adopt a wholly different approach to section 107.

31. Reliance was also placed by counsel on *In re Nortel* [2014] A.C. 209 (UKSC) at paragraphs 66, 87-95, as I understood it because it illustrated a restrained approach should be adopted to interfering with the validity of antecedent transactions. This case concerned the approach to provable debts and confirmed a broad approach. If anything the following passage from the leading judgment of Lord Neuberger supports (in very general way) the notion that the term "debts" has historically been closely linked with "liabilities" of all kind in the personal bankruptcy law context:

> "*93. The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in any insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh. Indeed, that seems to have been the approach of the courts in the 19th century before the somewhat aberrant decisions referred to in para 88 above. Thus, in Ex p Llynvi Coal and Iron Co; In re Hide (1871) LR 7 Ch App 28, 32, James LJ described one of the main aims of the bankruptcy regime as to enable the bankrupt to be 'a freed man – freed not only from debts, but from contracts, liabilities, engagements and contingencies of every kind'. If that was true in 1871, it is all the more true following the passing of the 1986 and 2002 Acts, and as illustrated by the amendment to rule 13.12(2) effected following the decision in In re T & N Ltd [2006] 1 WLR 1728, so as to extend the rights of potential tort claimants to prove.*"

32. It would be odd of a settlor contemplating making a voluntary transfer was entitled to ignore, when assessing the impact of the transaction on his own solvency was entitled to

ignore the claims of contingent creditors eligible to prove in his subsequent bankruptcy. I agree with Mr Lowe QC that the proviso to section 13(6) of the Law does reflect a legislative policy leaning towards preserving rather than avoiding antecedent transactions. But this policy imperative is expressed in the particular context of regulating the right of the Trustee to recover dividends paid to creditors, not in relation to an avoidance provision in Part XVII of the Law.

33. I am not readily able to accept the proposition that the term "*unable to pay its debts*" does not include contingent liabilities for all purposes in the corporate insolvency context, although of course there is no need to decide this point. A company may be wound-up under section 92(d) of the Companies Law on the grounds that it is "*unable to pay its debts*". However the standing to petition to wind-up is conferred on "*any creditor or creditors (including any contingent or prospective creditor or creditors)*" (section 95 (b)). Contrary *dicta* suggesting a narrower interpretation of the winding-up jurisdiction, in *Re European Life Assurance Society* [1869] LR 9 Eq 122 at page128, were expressed long ago in a different statutory context. Similar differences of statutory context diminish the weight that can be attached to the finding of Jessel MR in *Re Pen-y-Van Colliery Company* (1877) 6 Ch. D, 477 at 482 (construing the Companies Act 1862 in a standing dispute) that "*the Act treats 'claims' as distinguished from 'debts', thus shewing that a claim sounding in damages…*" *Re a Debtor* [1981] Ch 384 was a case primarily concerned with cross-border cooperation.

34. *Re Strategic Turnaround Master Partnership Limited* [2008] CILR 447 is a local Court of Appeal decision, but concerns standing to present a winding-up petition against an insolvent company. Mr Lowe QC relied on paragraphs 16, 25 and 36 *et seq*. This decision confirms that, when this case was decided, the Companies Law only had a cash-flow insolvency test and that a prospective creditor had no standing to petition. The standing position has now been liberalised; there is no need to consider here how (if at all) that affects the meaning of "*unable to pay its debts*" in the Companies Law (2020 Revision). This case sheds no significant light on the construction of the term "*able to pay all his debts*" in section 107 of the Law. Far more nuanced was the reliance placed by D1-D3's counsel on the following passages in *BNY Ltd-v-Eurosail* [2013] 1 WLR 1408 :

> *"37. Despite the difference of form, the provisions of section 123(1) and (2) should in my view be seen, as the Government spokesman in the House of Lords indicated, as making little significant change in the law. The changes in form served, in my view, to underline that the 'cash-flow' test is concerned, not simply with the*

petitioner's own presently-due debt, nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business. That is consistent with Bond Jewellers, Byblos Bank and Cheyne Finance. The express reference to assets and liabilities is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, and the burden of proof must be on the party which asserts balance-sheet insolvency. The omission from Condition 9(a)(iii) of the reference to proof 'to the satisfaction of the court' cannot alter that.

38. Whether or not the test of balance-sheet insolvency is satisfied must depend on the available evidence as to the circumstances of the particular case. The circumstances of Eurosail's business, so far as it can be said to have a business at all, are quite unlike those of a company engaged in normal trading activities. There are no decisions to be made about choice of suppliers, stock levels, pricing policy, the raising of new capital, or other matters such as would constantly engage the attention of a trading company's board of directors. Instead Eurosail is (in Mr Moss's phrase) in a 'closed system' with some resemblance to a life office which is no longer accepting new business. The only important management decision that could possibly be made would be to attempt to arrange new hedging cover in place of that which was lost when Lehman Brothers collapsed. To that extent Eurosail's present assets should be a better guide to its ability to meet its long-term liabilities than would be the case with a company actively engaged in trading. But against that, the three imponderable factors identified in para 9 above – currency movements, interest rates and the United Kingdom economy and housing market – are and always have been outside its control. Over the period of more than 30 years until the final redemption date in 2045, they are a matter of speculation rather than calculation and prediction on any scientific basis." [Emphasis added]

35. This provided indirect support for the central thesis that the draftsman of section 107 had deliberately created a cash-flow insolvency text by omitting the words "*and liabilities*", which could have been inserted after "*all his debts*". In a similar vein, reliance was placed on *Re Weavering Macro Fixed Income Fund Limited (in liquidation)* [2016] (2) CILR 514 at paragraphs 36-40 (CICA) and *Skandinaviska Enskilda Banken-v- Conway & Anor (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Limited* [2019] 3 WLR 493 (at paragraphs 40 et seq). The Court of Appeal reiterated its view that the cash-flow insolvency applied under Cayman Island corporate insolvency law. Mr Lowe QC

understandably placed particular emphasis on the observation of Martin JA that "*I do not regard the words 'as they fall due' as adding anything of substance*" (paragraph 40). This provided further potentially significant indirect support for the proposition that section 107 created a cash-flow insolvency test by use of the words "*able to pay all his debts*", even though the words "as they fall due" were omitted and the additional words "all his" are included in section 107. This decision was upheld by the Privy Council, although more attention was seemingly given to contractual redemption rights than to the statutory meaning of the term "*unable to pay its debts*".

36. D1-D3's counsel then turned to a case which he submitted was "*the only case on point*", *Ex Parte Mercer; Re Wise* (1886) 17 QBD 290 (Court of Appeal). This was a case under the Statute of Elizabeth and, alternatively, under section 47 of the UK 1883 Act. Neither statute was found to apply to avoid the impugned transaction. Section 47 was re-enacted in substantially the same terms as section 42 of the 1914 UK Act from which it is common ground section 107 of the Law is derived. The County Court jury found for Miss Vyse, the woman scorned, on the Statute of Elizabeth claim, and seemingly did not consider the section 47 claim. Fresh evidence was placed before the Divisional Court including an affidavit from the debtor (Mr Wise) to the effect that at the time of his settlement for the benefit of himself and the woman did marry, he had no debts and did not contemplate Miss Vyse would sue him. The Divisional Court set aside the jury's verdict and also held that the alternative claim under section 47 of the 1883 Act was not supported by the evidence. That decision was appealed to the Court of Appeal by the trustee in bankruptcy.

37. The Court of Appeal unanimously dismissed the appeal, holding (it was argued) that a contingent claim for breach of promise of marriage which existed at the date of the settlement (and resulted in a judgment after it) was not a "debt" which had to be taken into account in determining the debtor's solvency. The judgments can be summarised as follows:

(a) Lord Esher considered the Statute of Elizabeth point alone;

(b) Lindley LJ considered the Statute of Elizabeth point before briefly concluding:

"*I should add that I have looked at s. 47 of the Bankruptcy Act, 1883, and it is quite clear that it does not apply*";

(c) Lopes LJ considered the Statute of Elizabeth claim before concluding:

> "*What, then, is the question in this case ? The question which I should have left to the jury is this—Whether, having regard to all the circumstances, the settlor intended to defeat or hinder his creditors?. That is a question of fact which can only be deter-mined by the evidence. Before the county court judge there was only one affidavit, and he came to a conclusion at which I am not at all surprised. Before the Divisional Court there were several other affidavits, and they arrived at a different conclusion, with which I entirely agree. I adopt the words of Cave, J., when he says, 'Looking at the facts which are established by the affidavits, it appears to me reasonably clear that the settlor had no intention whatever of defrauding his creditors, and that he had not got Miss Vyse and her claim in his mind when he made the settlement.' I entirely agree with that conclusion, and I think the decision of the Divisional Court was right.*"

38. Only one member of the Court of Appeal panel expressly dealt with the section 47 claim at all, and that was in summary terms. The majority of the panel considered that the case was really all about the Statute of Elizabeth claim. The only reasoned analysis, and this was more extensive than the statements of principle found in the authorities upon which the Agents relied, was at the Divisional Court level. Cave J dealt fully with the Statute of Elizabeth point as the main question before the Court, before adding (at page 294):

> "*There is another point which was not dealt with by the county court judge, though it was taken before him, viz., that, if the settlement is not void under the statute of Elizabeth, it is void under s. 47 of the Bankruptcy Act. I think, however, that the parties claiming under the settlement have proved that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in it. The bankrupt himself in terms swears that he had no debts then, and this is confirmed by the statement of his debts and liabilities which he has made in the bankruptcy.*"

39. That was again a summary determination of an alternative point. However, in the Divisional Court, Grantham J addressed the point more fully, holding (at pages 296-297):

> "*With regard to s. 47 of the Bankruptcy Act, I do not think that the present case comes within it, and for this very simple reason, that, at the time when the bankrupt made the*

settlement he was, on the evidence before us, able to pay his debts without the aid of the settled property. The only case which has been quoted as justifying us in coming to a contrary conclusion is Crossley v. Ellworthy, in which, no doubt, it was held that damages recovered in an action against the settlor after the settlement had been made, must be taken into account in deter-mining whether the settlor was solvent at the date of the settlement. But in that case Elworthy, the settlor, had been involved to a very large extent in Stock Exchange speculations and other financial transactions. He had been connected with a company, and it was in consequence of false representations made by him with regard to that company prior to the settlement, that judgment had been recovered against him for 36,000Z. Under those circumstances the Court could come to no other conclusion than that he was by the settlement intentionally abstracting from his creditors, or those who were likely to become his creditors, the sum comprised in the settlement, which might otherwise have been made available by them. In my opinion Crossley v. Elhvorthy[3], is not an authority for saying that the mere fact of a writ having been issued by Miss Vyse compels us, in determining whether he was solvent at the time when the settlement was made, to come to the conclusion that a liability under that writ must be assumed to have existed to the extent of making him then insolvent."

40. So *Mercer* does provide explicit support for the proposition that the mere existence of a contingent liability without more (in particular an intention to defeat creditors' claims), even where a writ has been issued at the time of the settlement, does not mean the liability must be taken into account for deciding the debtor's solvency. However, as Mr McKie QC pointed out in reply, *Mercer* confirms that a contingent liability does potentially qualify to be taken into account. However, it appears to be more fact-based decision than a case which decides a point of statutory construction.

41. Mr Lowe QC submitted that *Re Densham* was distinguishable on the facts of the present case and that, in any event, the appellate decision of *Re Mercer* should be preferred.

42. In his oral reply, Mr McKie QC suggested that because of the old common law action for a debt, it was unsurprising that a narrow definition of the term "debt" had been imported into corporate insolvency legislation. This was perhaps an echo of Lord Atkin's famous allusion to "*ghosts of the past*". In *Letang-v-Cooper* [1964] EWCA Civ 5, a case to which counsel did not refer, Lord Denning articulated the need to escape the ghosts of the past as follows:

> "*I know that in the last century Maitland said "the forms of action we have buried but they still rule us from their graves". But we have in this century shaken off their*

[3] Law Rep. 12 Eq 158. The report of this case could not be found by counsel and so was not placed before the Court.

trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:

> *'When these ghosts Of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the Judge is to pass through them undeterred": see United Australia v. Barclays Bank, 1941 Appeal Cases.* '"

43. This submission did not explain why a different approach should have been adopted in the personal bankruptcy law context. If the common law forms of actions were to be fully explored, it might well be necessary for the Court to acknowledge the existence of, rather than flee, the linguistic "ghosts of the past". Although I place no material reliance on this interesting point of legal history, it is possible that the old writ of *indebitatus assumpsit* (which I understand to have been a tortious remedy developed out of the narrower action for debt for all breach of contract claims[4]) meant that the term "debts" to the nineteenth century English lawyer (and Parliamentary draftsman) potentially connoted not just simple debts, but unliquidated liabilities as well.

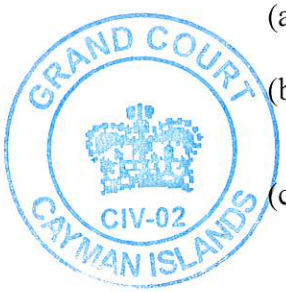
Findings: meaning of "all of his debts" in section 107 of the Law (does it encompass contingent liabilities?)

44. The preponderance of authority placed before the Court in the present case, carefully read, points to a broad consensus spanning more than 100 years amongst common law lawyers and judges that the term "*all his debts*" means debts and liabilities of all kinds. I find that it is ultimately clear that the term "*all of his debts*" in section 107(1) of the Law includes both presently due debts and contingent liabilities. This point of construction does not obviate the need to make a separate determination, as matter of mixed fact and law, as to whether the particular liabilities the Agents rely upon should be taken into account (and if so to what extent) in applying the statutory solvency test.

45. In my judgment it is helpful to start by recalling that section 107 is not simply derived from section 42 of the 1914 UK Act, but indirectly from section 47 of the 1883 UK Act as well. Just as the Law does not define "debt", neither did those foundational English statutes either. This suggests, at least as a starting hypothesis, that the term was viewed by the draftsman as a flexible rather than a rigid term. Its meaning was capable of being moulded, depending on the particular policy objectives of specific statutory provisions, by context- appropriate qualifying words. This may well be attributable in part to the fact under at least one of the old common law forms of action the term "debt" had a broad meaning including actions for liquidated and unliquidated sums, although this historical consideration is not material to my decision .

[4] See e.g. W.S. Holdsworth, '*Debt, Assumpsit, and Consideration*' (1913) 11 Michigan Law Review 347.

46. It is self-evident that under the Law the term "debt" has various shades of meaning informed by accompanying words. Looking at Part XVII alone, in which the avoidance provisions are found, the notably distinct constructs relevant to assessing solvency for avoidance purposes are as follows:



(a) "*all of his debts*" (section 107(1));

(b) "*debts and liabilities*" and "*his debts as they become due*" (sections 108);

(c) "his debts as they become due" (section 111(1)) and "*his debts*" (section 111(2));

(d) "*his debts*" (section 112).

47. Since the draftsman explicitly applies what is generally now referred to as a cash-flow solvency test in sections 108 and 111, it is difficult to infer an intention to limit the qualifying debts under sections 107-108 to debts which are presently due. In this statutory context, do the words "*as they become due*" add something, in contrast to the position described by Martin JA in *Re Weavering Macro Fixed Income Fund Limited (in liquidation)* [2016] (2) CILR 514 (at paragraph 40). Those remarks were made in relation to the Companies Law, section 93(c), in which the words "*as they become due*" do not even appear. It is not easy to infer a straightforward legislative purpose for the different approaches, however. Nor is it easy to understand why "as they fall due" is used in some contexts and not in others.

48. Sections 111-112 are both quasi-penal provisions covering a short six month period preceding the onset of bankruptcy. Where engaged, they create a presumption of fraud and they invalidate transactions automatically, even if they are for value and involve third parties without notice of the debtor's insolvent status. The only way of validating such transactions is through the assent of 75% in number and value of the debtor's creditors. However, section 111(1) uses the term "*his debts as they become due*" while section 111(2) also uses the term "*his debts*". Section 112 (a similar provision which, if operative, invalidates transactions for value unless approved by 75% in number and value of the creditors) only uses the term "*his debts*". I find it impossible to identify any obvious legislative intent to convey different meanings when using "*his debts as they fall due*" and "*his debts*" in section 112. The better view appears to me to be that, in this statutory context as well as in the corporate insolvency realm, As Mr Lowe QC contended, the words "*as they fall due*" add little. What is in my judgment significant to note is that section 107 is the only section in the entire Law in which the term "all his

debts" appears. In this context, the addition of the word "*all*" must mean something.

49. Accordingly, the best preliminary view of the wider context of Part XVII, based on an analysis of , in particular, sections 111-112, is that those strict avoidance provisions which invalidate all transactions caught within a six month period preceding the onset of bankruptcy apply a cash flow insolvency test. What then, of section 108? It is closely connected to 107 but has important differences. Although it applies to transactions covered by section 107 (i.e. voluntary settlements), it also applies to preferences as well. It thus incorporates elements of both section 107 and section 111. These two distinct elements may be discerned when one separates the various limbs of section 108:

(a) the first limb contains prefatory words of general application, by way of creating the procedural remedy:

"*In the administration by the Court of the assets of any deceased person, it shall be lawful for the Court, on the petition of any creditor or creditors of such deceased person whose claim or claims together, against the estate would have been sufficient to support a petition in bankruptcy against such person had he not died, and on proof that the assets of such person were, at the time of his death...*";

(b) the second limb extends section 107 to the estates of deceased persons:

"*insufficient to pay his debts and liabilities in full, to order that any settlement of property made by such deceased person within the meaning of section 107 and except as therein excepted...*"; and

(c) the third limb extends an avoidance provision analogous that found in section 111 to the estates of deceased persons:

"*or any conveyance or transfer of property or charge thereon, or any payment, obligation or judicial proceeding, made, incurred, taken or suffered by such person, he being at the time of making, taking, paying or suffering the same, unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor preference over the other creditors...*"[5] ;

[5] Section 111 (1) provides, *inter alia*:

(d) the fourth limb applies to claims falling into either category (b) or (c) above) and may be described as the operative part of the avoidance provision:

> "*and which settlement, conveyance, transfer, charge, payment, obligation or judicial proceeding would have been void against the Trustee if a provisional order had taken effect against such deceased person at the moment of his death, shall be void as against the executor, administrator, receiver or other person charged with the administration of the assets of such decreased person:*
>
> *Provided that such petition shall be presented within six months after the death of such deceased person...*" [emphasis added]

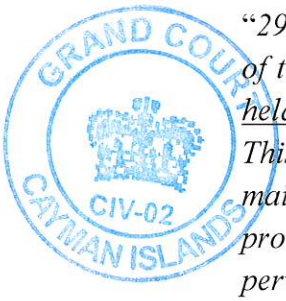
50. In my judgment the second limb of section 108 is not a standing provision; rather it provides a broader solvency test than is applicable under the third limb of section 108 and sections 111-112, in the specific context of enabling claims under section 107 to be advanced against the estates of deceased persons, within a six months of death time-frame. The words "*and liabilities*" are added for clarity to distinguish the broader section 107 solvency test from the narrower test created for the purposes of the other limb of the same section. Generally, each section has a single solvency test. This ultimately straightforward reading of section 108 supports rather than undermines the notion that the solvency test under section 107 is not the same as the cash-flow test applicable to the other avoidance claims (section 108, third limb, section 111 and 112).

51. Turning now to section 107 itself, the critical question was (as correctly identified by Mr Lowe QC), why did the draftsman not use the same term "*assets and liabilities*" which appears in the closely connected second limb of section 108? Was it a deliberate choice to create a narrower solvency test in section 107 and a broader one when extending section 107 to section 108? In my judgment the short answer is that section 107 does not in fact replicate the same term found in the other avoidance provisions, namely unable to pay "his debts". It uses the distinct phrase "all his debts". A further part of the answer , accepting that it is insufficient by itself to dispose of the primary point of construction, is that the relevant provisions of the Law are derived from an 1883 statute which was not drafted with the sort of precision which one would expect today. If any pattern within Part XVII can be discerned, it is that the terms "*his debts*" and "*his debts as they fall due*"

"*Every conveyance or transfer of property, or charge thereon, and every payment, obligation and judicial proceeding, made, incurred, taken or suffered by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if a provisional order takes effect against the person making, taking, paying or suffering the same within six months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the Trustee.*" [emphasis added]

are used interchangeably in the context of 'high-octane" avoidance provisions which potentially invalidate even transactions for value if the debtor was insolvent at either (a) the time of his death (section 108, third limb) or (b) if the impugned transfer took place within six months preceding the commencement of the bankruptcy. However there are more substantive reasons for concluding that section 107, a *sui generis* avoidance provision intended to cover the long span of 10 years, incorporates a broader solvency test which includes both presently due debts (or debts due in reasonably foreseeable future) and contingent debts as well.

52. Firstly, modern courts primarily adopt a purposive approach to statutory construction and, rather than pursuing esoteric linguistic enquiries, seek to identify what legislative purpose underpins the relevant provision based upon the language used and the wider legislative context. Where a statutory provision creates a legal remedy, a fundamental part of construing the provision involves seeking to identify what meaning is most likely to allow the remedy created by the Legislature to be available to its intended beneficiaries. No authority is required for this proposition, but it may be illustrated by the following passages in the Privy Council's decision in *DD Growth Premium 2X Fund (in official liquidation)-v- RMF Market Neutral Strategies (Master) Limited* [2017] (2) CILR 739 dealing with a solvency test in the Companies Law (per Lord Sumption and Lord Briggs, Lord Carnwath concurring) :



> *"29 The insolvency test laid down by s.37(6)(a) is quoted in full at the beginning of this judgment. The main submission made for RMF was that 'debts' should be held, on a purposive construction, to exclude debts due to former shareholders. This, it was said, is because s.37(6) is part of a statutory buttress for the maintenance of capital, and maintenance of capital is something designed for the protection, not of contributories, but of ordinary creditors, so that it would be perverse to read s.37(6) as designed to ensure that former shareholders could not be paid on redemption merely because of a shortfall available to pay all redeeming shareholders in full. Accordingly, the test should address only the question whether, after the proposed payment, the company would be able to pay its ordinary creditors (principally trade and expense creditors), and since this company was not proved to have had any such creditors at the material time, it could not be said to have failed this solvency test.*
>
> *30 In the Board's judgment this submission should be rejected for the following reasons. First, although there is force in the proposition that the underlying purpose of any statutory or common law provisions or principles for the maintenance of capital is to protect ordinary creditors rather than shareholders or former shareholders, the protection afforded by s.37(6) would not be effective if debts still owing to former shareholders who had redeemed could not be paid after the proposed payment. This is because those creditors would, pending any liquidation, be competing for payment with the company's "ordinary" creditors,*

and the existence of those competing debts would hamper the ability of the company to pay its ordinary creditors in full as and when their debts became due. It is in that context nothing to the point that s.49 of the Companies Law postpones claims of members of a company to the claims of ordinary unsecured creditors precisely because it only operates in the context of a liquidation. Until then, former shareholders with redemption debts are as much entitled to exercise creditors' remedies as any other creditors."

53. In my judgment the most broad principled ground on which I would accept the construction contended for by the Agents is that the contrary construction would mean that section 107 would not confer effective relief in a wide array of circumstances and would almost be rendered nugatory. Standing to petition must be grounded on the petitioning creditor having a debt which is "*a liquidated sum due or growing due*" (section 14, proviso of the Law). A bankruptcy proceeding, like a corporate insolvency, will only commence when the debtor is cash-flow insolvent. The Law implicitly applies a policy assumption that such insolvency did not begin when the bankruptcy proceeding commenced, because it enables certain transactions entered into for value within the preceding six months to be set aside if shown to be, *inter alia*, preferential to creditors on terms prescribed in sections 111-112. Section 107, by way of contrast, enables the Trustee to look back beyond what amounts to a six month presumed cash-flow insolvency period to a time when the debtor might well have been able to pay his day to day debts as they fall due and targets voluntary transfers of property which may have been made to avoid non-current debts. The look-back periods are :

(a) a 2 year period, during which any voluntary transfers made are automatically void as against the Trustee; and

(b) a 10 year period during which any voluntary transfers made by the debtor are void as against the Trustee, unless the transferees can prove that the debtor was at the material time "*able to pay all his debts*".

54. Once a bankruptcy commences, the legislative scheme retrospectively creates the following notional avoidance zones:

(a) **a high level hazard zone**: 6 months preceding the bankruptcy, even transactions for value are liable to be set aside if they are preferential or outside of the ordinary course of business;

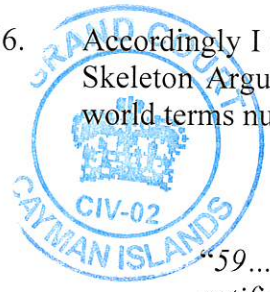
(b) **a medium-high level hazard zone**: 2 years preceding the bankruptcy, voluntary settlements are liable to be automatically set aside;

(c) **a moderate level hazard zone**: 10 years preceding the bankruptcy,

voluntary settlements are liable to be set aside, unless the transferees can prove the debtor was "*able to pay all his debts*" when the impugned transfer was made.

55. As noted above, section 107 is quite an aggressive pro-creditor provision. Yet if the First to Third Defendants' construction is correct, the extended 10 year period is only intended to be available in circumstances where the debtor was, many years before the bankruptcy commenced, unable to pay his debts as they fall due. Yet the utility of the provision is only likely to inure to the benefit of a creditor who did not have a presently due claim (or a commercially significant presently due claim) at the time when the impugned transfer was made. A creditor with a commercially significant presently due claim would ordinarily obtain a judgment promptly and, if it was unsatisfied and the debtor had no available assets, promptly petition for bankruptcy. It would be absurd if section 107 in its extended 10 year scope could not apply at all to a debtor who was able to meet minor bills could dispose of all his assets and ignore substantial contingent claims. On this basis, the 10 year look-back period in section 107 would be unavailable when it was most needed (i.e. by large creditors whose claims were contingent when the voluntary settlements were made) and available when it was not needed at all (i.e. by small creditors whose debts would likely have been paid or would lack the resources to pursue an avoidance claim in any event).

56. Accordingly I firmly reject the following submissions in the First to Third Defendants' Skeleton Argument on the grounds that the construction contended for would in real world terms nullify the efficacy of section 107a almost altogether:



> "*59... the TIB's construction requires the Court to embark on an entirely artificial exercise, potentially upsetting receipts that have taken place many years previously without any bankruptcy occurring...*"

57. However, a more minute analysis of section 107 and the limited relevant authorities supports the same broad purposive view of how the section should be construed. Firstly, section 107 is the only section in the entire Law which uses the phrase "*all of his debts*" (emphasis added). On balance, it seems to me, despite the somewhat idiosyncratic drafting style found in Part XVII of the Law, that this signifies a broader solvency test than that connoted by "*his debts*" *simpliciter*. It permits one to construe the solvency test in section 107 harmoniously with the solvency test in the second limb of section 108, which applies the section 107 avoidance remedy to claims against the estates of deceased persons utilizing the phrase "*debts and liabilities*".

58. In my judgment, the main authorities cited on the English statutory provisions from which section 107 is derived, carefully read, support the thesis that the solvency test under section 107 does potentially cover contingent claims. In summary:

(a) in *Re Densham* [1975] 3 All ER 726, the debtor was made bankrupt on the petition of his former employers, who obtained judgment against him for £13,000 after he was convicted of stealing from them some years earlier. The trustee sought to set aside a transfer of property made at a time when the monies had been stolen but the theft had not been discovered. Goff J summarily dismissed the argument that the debt did not qualify for calculating the debtor's solvency under section 42 of the UK 1915 Act because it was "*merely a liability*" (at 736 d);

(b) '*Halsbury's Laws*', 3rd edition, Volume 2 at page 549 (as cited in *Official Receiver-v-Saebar* [1972] A.L.R. 612 (Qld) at 614 and apparently commenting on section 42 of the 1914 UK Act), states unreservedly that when "*enquiring into the settlor's ability to pay all his debts at the date of settlement without resorting to the settled property, it is necessary to take into account all his liabilities, whether present or contingent, and place a reasonable estimate on them*";

(c) '*Williams and Muir Hunter: The Law and Practice in Bankruptcy*', 19th edition, at page 340, only condescends to mention the issue of valuing contingent liabilities for the purposes of the solvency test in section 42 of the UK 1914 Act. That implies an assumption that it is obvious that contingent liabilities must be taken into account;

(d) the Australian authorities upon which Mr McKie QC relied do not directly support the interpretation of "*all of his debts*" which I accept should be applied. This is because the Federal statute defines debts in more clearly broader terms. However to the extent that the decisions show that the Australian avoidance provision was considered to be substantially the same as section 42 of the UK 1914 Act, the Australian counterpart provision may be viewed as more refined re-enactment of the same provision from which section 107 is derived. The same term "*all his debts*" appears; but the term "*debt*" has a statutory definition which includes "*liability*".

59. It remains to briefly deal with the one case which provides apparent support for the contrary proposition. *Ex Parte Mercer; Re Wise* (1886) 17 QBD 290 (Court of Appeal) is a case on somewhat unusual facts in which the primary claim under consideration was a breach of the Statute of Elizabeth. No or no reasoned finding that contingent claims were excluded from the ambit of section 47 of Bankruptcy Act 1883 can be extracted from the judgments of the Court of Appeal or the Divisional Court. It was at most assumed that a contingent claim was potentially admissible as part of the solvency test, but it not taken into account

as a matter of fact. Cave J opened the leading judgment in the Divisional Court as follows: "*The question we have to decide is one of fact, whether this settlement was made with intent to defeat or delay creditors*". The leading judgment in the Court of Appeal did not mention the section 47 point at all and the second judgment mentioned it in passing. The third judgment considered and dismissed the section 47 claim, but it is impossible to extract any reasoned decision that as a matter of statutory construction contingent claims could never be taken into account. The somewhat colourful facts of the case were summarised in the report as follows:

> "*The bankrupt was a master mariner. In the year 1881 he was engaged to be married to Miss Emily Agnes Vyse, but, being at Hong Kong in the course of a voyage, he, on the 31st of May, 1881, married another lady. On the 25th of August, 1881, Miss Vyse commenced an action for breach of promise against him in the Queen's Bench Division, and on the 8th of October, 1881, he was served with the writ at Hong Kong. He was under the will of his stepfather entitled to a legacy of 500l., subject to a life interest given to his mother. His mother died on the 11th of May, 1881, and thereupon the legacy vested in the bankrupt in possession. The money was in the hands of W. P. Brown, the executor of the will. On the 17th of October, 1881, the bankrupt executed at Hong Kong, where he then was, a voluntary settlement of this legacy, whereby he assigned the legacy to Brown, on trust to invest the same, and to pay the income thereof, during the joint lives of Wise and his wife, to the wife for her separate use without power of anticipation, and, after the death of such one of Wise and his wife as should first die, to pay the income to the survivor during his or her life, and after the death of the survivor, Brown was to stand possessed of the trust fund in trust for the children of the marriage as therein mentioned, and, in default of children, in trust for Wise absolutely. On the 20th of July, 1882, Miss Vyse obtained judgment in the breach of promise action for 500l. damages and costs. On the 14th of November, 1884, Wise was adjudicated a bankrupt.*"

60. Apart from the bold-spiritedness of the master mariner in conforming to the stereotype of the sailor with a woman in every port, the facts of *Mercer* are unusual to this extent. The legacy which he inherited only became his vested property, seemingly by happenstance, when his mother died 10 days before he married in Hong Kong, his marriage creating a contingent liability to his former fiancé in England. Although he made the impugned settlement less than a week after he had been served with Miss Vyse's writ in Hong Kong, the Divisional Court and the Court of Appeal were seemingly united in the view that it would be unjust for him to lose his inheritance. Such an outcome may, perhaps, have been viewed as inconsistent with the spirit of either avoidance

provision under consideration[6]. Be that as it may, the focus in *Mercer* was on the settlor's subjective intent, a factor which may have been relevant under the Statute of Elizabeth but was wholly irrelevant under section 47 of the Bankruptcy Act 1883. This case sheds no meaningful light at all on how to construe the solvency test in section 107. There was no analysis of this issue whatsoever.

61. The fact that '*Williams and Muir Hunter: The Law and Practice in Bankruptcy*' only mentions the difficulties of valuing contingent liabilities is instructive in two ways. Firstly, it indirectly demonstrates that the learned authors (Muir Hunter, David Graham and Michael Crystal) viewed that as the only problematic aspect of the solvency test. But secondly, and more importantly, it implies an assumption that the statutory solvency test in the English counterpart to section 107 of the Law was a balance sheet test, not a cash-flow test. This would be consistent with the common sense assumption that a trustee in bankruptcy, seeking to invalidate voluntary settlements made between 2 and 10 years before the commencement of a bankruptcy, would almost invariably be seeking to establish insolvency based on what were at the date of the settlement merely contingent or prospective claims.

62. The idea of the transferees being required to prove that the transferor was able to pay his debts as they fell due many years ago is, to my mind, a very peculiar idea indeed. For forensic reasons, if nothing else, section 107 only becomes effective from the standpoint of those seeking to validate voluntary settlements made years ago if there is a practical way of demonstrating that the settlor was able to pay "*all his debts*". Proof of inability to pay debts is a well-recognised process which requires little more than establishing that the debtor has failed to pay one or more undisputed presently due debts. There is, to my knowledge, no statutory precedent for proving the converse: that a person <u>was able</u> pay his debts as they fall due. Establishing balance sheet solvency through statements of assets and liabilities is an entirely straightforward and commercially and legally familiar exercise. It is particularly instructive that in *Ex Parte Mercer; Re Wise* (1886) 17 QBD, the evidence relied upon (primarily to defeat the Statute of Elizabeth claim) was described in the Divisional Court by Cave J as follows:

> "*There is another point which was not dealt with by the county court judge, though it was taken before him, viz., that, if the settlement is not void under the statute of Elizabeth, it is void under s. 47 of the Bankruptcy Act. I think, however, that the parties claiming under the settlement have proved that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in it. <u>The bankrupt himself in terms swears that he had no debts then, and this is confirmed by the statement of his debts and liabilities which he has made in the bankruptcy</u>.*"

[6] It is ultimately unclear from the report of the case the key facts judicially relied on as displacing the application of the two avoidance provisions concerned.

[Emphasis added]

63. Although the finding clearly was that the specific contingent liability in person should not be taken into account, a matter which will be revisited further below, the evidence relied upon included not just the debtor's own word but a statement of "*debts and liabilities*" as well. This illustrates, in a very general way, that giving section 107 a purposive construction, it is impossible to sensibly conclude that the solvency test provided for is anything other than a balance sheet test.

64. Accordingly I find, not without difficulty, that the solvency test under section 107 of the Law potentially applies as a matter of law to debts which are presently due and contingent debts and/or liabilities.

Findings: legal requirements for estimating contingent liabilities for the purposes of the section 107 of the Law solvency test

65. Is there any legal basis on which it may be held that the character of the Debtor's contingent liabilities under the SPA were such that should not be taken into account for computing his solvency when the impugned settlements were made? This question must be answered in the negative.

66. Because the burden is on the transferees to prove that the Debtor was able to pay "*all his debts*", it is for them to satisfy the Court that no value should be assigned to the liability relied upon by the Trustee or that the appropriate value is such that the solvency requirement is still met. *In Re Densham* [1975] 3 All ER 726, Goff J, dealing with the question of whether the debtor's wife's willingness to assist him should be taken into account for solvency purposes, stated (at page 736e-f):

"*In my judgment, however, it is not a question of balance of probabilities. I am not deciding doubtful facts. If the question were what the assets were or what the debts were, that would be a different matter…*"

67. The Court's task is to decide on a balance of probabilities, whether, when a dispute arises on the facts:

(a) a particular debt or liability existed at the date of the impugned settlement; and

(b) if it did exist, what value can best be assigned to it as of the relevant date.

68. In the present case, having rejected the submission that the relevant test is a cash-flow solvency test, it is difficult to see what serious argument arises as to the question of whether the Debtor had a substantial liability under the SPA. The contingent claim subsequently crystallised and, as in *Re Densham*, resulted in a judgment debt which was used to found the bankruptcy petition. There the judgment debt was admittedly based on a claim for a liquidated sum; nonetheless, it was summarily accepted that the debtor was at the time of the settlement indebted in the amount of the subsequent judgment. Mr Lowe QC placed considerable emphasis on the fact that in *Re Densham* the liability in question had already crystallized in the amount of monies stolen when the settlement was made. A similar point was made in relation to *Official Receiver-v-Saebar* where the tort had been committed before the settlement was made. Having rejected the proposition that debts which are presently due or will become due in the immediate future are the only debts which need be taken into account, there is no principled basis on which contingent liabilities can be left out of account simply because they will not become presently due until years after the impugned settlement.

69. In the present case, the starting assumption can only be that the Debtor was indebted contingently in an amount of not less than the amount of the Principal Award. The burden lies on the Defendants to show on a balance of probabilities that a lesser value or no value should be assigned to the contingent liability. Difficulties of estimation should ordinarily only arise in cases where the solvency test is being applied at a date when the debt is still contingent. However, it is possible to imagine scenarios (particularly in the context of tortious claims) where it might be contended that, based on facts which were known at the date of the settlement, no value or a lesser value would have been assigned to the contingent claim at such earlier time. Even in the contractual context it is easy to imagine that unforeseeable subsequent developments might materially increase the ultimate quantum of the crystallised claim in a way which justify significantly lowering the value assigned to the liability at the date of the impugned settlement. The Australian authorities on section 120 of the Bankruptcy Act (Commonwealth), which is also derived from section 42 of the 1914 UK Act, provide valuable guidance in this regard. In *Official Receiver-v-Saebar* [1972] A.L.R. 612 (Qld) at 614-616:

> "*As to whether the prospective liability for damages is to be taken into account when assessing the liability of the bankrupt, the few authorities which there are indicate that there is no clearly defined solution...I am satisfied that it is necessary to consider all liabilities, not merely liabilities immediately provable in a bankruptcy...*

Considered objectively at the time of the transfer, it was very probable that should a civil action be brought by Wilschut against the bankrupt it would result in a very substantial award of damages. We know that in fact an award of $55,000 was made, but it is not necessary to refer specifically to this amount as quantifying the liability at the relevant time. It is sufficient to say that it was obviously a very substantial liability and in all the circumstances this was a liability which had to be regarded when determining the solvency of the settlor at the relevant time. Accordingly, the bankrupt is not able to establish that the bankrupt was able to meet all his liabilities without the aid of property comprised in the transfer...." [emphasis added]

70. The Agents' counsel aptly relied on this passage. The pertinent facts in *Saebar* were as follows. On April 23 1966, in the course of a dispute between neighbours, the settlor killed one neighbour and seriously injured another. On June 6, 1966, the settlor was indicted on a murder charge. On June 7. 1966, the settlor transferred the land to his wife. The surviving neighbour obtained a judgment for damages for personal injuries in the amount of $55,000 on March 12, 1968 in judgment enforcement proceedings applied to set aside the transfer form the settlor to his wife. Mr Lowe QC submitted that these facts indicated that the prospective liability was only taken into account because it was obvious at the date of the settlement that a claim would soon be made, as mentioned briefly above. This was on the basis that the solvency test was a cash-flow one so that only presently due debts or debts which would become due in the reasonably near future had to be taken into account. Although my own researches reveal that it has been suggested by a subsequent Australian court that Hoare J was applying a cash-flow solvency test in relation to an earlier version of section 120, those views were expressed obiter under an entirely different form of wording[7].

71. In my judgment, Hoare J was clearly applying a balance sheet solvency test consistent with the language of the wording he was considering, which was (so far as is material for present purposes) precisely the same as our own section 107 ("*able to pay all his debts*"). This view finds support another case upon which Mr McKie QC relied, which also considered the "old" Australian statutory wording, *Re Finney* (1997) 35 ATR 259. In that case, the settlor paid off his son's mortgagee in 1989. In 1994, the settlor was made bankrupt on the petition of the Australian Tax Office in relation to pre-1989 tax liabilities which were only assessed in 1992. Einfeld J held (at pages 269, 270):

"*Section 120(2)(a) provides that if the bankrupt can prove that at the time of making the settlement he was able to pay all his debts without the aid of the money*

[7] *McBain-v-Palffy* [2009] FCA 260 at paragraph 19. Section 120 no longer retains the same wording as section 42 of the 1914 UK Act and section 107 of the Law. The modern solvency test is explicitly a cash-flow test.

comprised in the settlement, then the settlement is not void as against the trustee in bankruptcy...

In Cao ex parte Dixon [unreported, Federal Court, 12 August 1994] Justice Davies held that in assessing whether a settlor can pay 'all his debts', a court should take into account contingent liabilities including liability for tax, notwithstanding no assessment having been made and the tax not having been quantified as at the date of settlement. His Honour said at 7:

> *... the liability to tax arose by reference to the events in and the taxation laws applying in the relevant years of income. In such event, the liability, though not due and owing because no assessment had issued, may nevertheless be treated as a contingent liability and therefore as a relevant debt.*

I can see no valid reason for applying a different rule in this instance."

72. In *Re Cao* [1994] FCA 1263[8], in reviewing case law considering the relevance of contingent liabilities for the Australian counterpart of section 107 of the law, Davies J stated (at pages 5-6):

"8...*In In re Ridler. Ridler v. Ridler (1883) 22 ChD 74, it was held that a liability under a guarantee was a relevant indebtedness which should be valued. At 82, Cotton LJ said:-*

> *'Then as to the point that the settlor was not indebted, but only subject to a liability which might never become a debt. A man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen. In the circumstances of this case, any reasonable man must have looked upon this guarantee as one which would probably be enforced, and the settlement must be taken as made with intent to delay or hinder creditors.'*

This decision, in which the Court was constituted by Lord Selborne LC, Jessel MR and Cotton LJ, has been since applied on many occasions both in the United Kingdom and in Australia...

10. These principles have also been applied in this country. In Re Saebar; Official

[8] The citation for unreported cases used by the Federal court of Australia.

Receiver v. Saebar (1971) 18 FLR 317, Hoare J referred to a number of the authorities I have mentioned and to others and held that, in determining the debts of a settlor, a prospective liability for damages should be considered, though if the liability was purely speculative and without any real likelihood of being established, that liability should be disregarded. In Re Hyams; Official Receiver v. Hyams (1970) 19 FLR 232, Gibbs J held that, in ascertaining the settlor's debts, it was necessary to take account of contingent liabilities, if there was a reasonable possibility that the settlor would have had to meet them. At 258, his Honour referred to the fact that the bankrupt had not been called upon to make payment under guarantees but that the evidence showed that at that date it was probable that he would be required to pay, and that this is what in fact had happened. His Honour referred with approval to In re Ridler. Ridler v. Ridler..."

73. Davies J considered it obvious that *Ridler-v-Ridler* (1882) 22 Ch D 74 was relevant to an avoidance provision similar to section 107 of the Law even though it was a Statute of Elizabeth case. In the course of the hearing, I doubted the relevance of this English Court of Appeal decision upon which Mr McKie QC relied. On reflection, there is indeed a practical analogy. Under the Statute of Elizabeth, a fraudulent conveyance will be void if made with the intention of defeating or hindering the settlor's creditors. One basis on which the requisite intention may be inferred (in the absence of decisive evidence of actual intent) is by analysing whether or not the effect of the impugned transfer was to leave the settlor unable to pay his debts and liabilities. As Cotton LJ put it (at page 82):

"A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them..."

74. Although the intention of the settlor is not relevant at all under section 107 of the Law in the bankruptcy context, the forensic process of assessing the impact of the settlement on the solvency of the settlor is broadly similar that undertaken under Statute of Elizabeth claims. Hence, Lord Selborne opined as follows (at page 80):

"I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that that it need not be regarded.; but if he conveys away all his property by a voluntary settlement I think it is doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee."

75. The Statute of Elizabeth (or the Fraudulent Conveyances Act 1571) may arguably be viewed as the mother of all avoidance provisions. It created a freestanding remedy,

available within or without a bankruptcy proceeding, and subject to no express limitation period at all. It exempted *bona fide* transfers for value to persons without knowledge of the fraud, but invalidated any conveyance made with the "*purpose and intent to delay, hinder or defraud creditors*". The various avoidance provisions in the Law, deriving from the UK 1883 Act and the UK 1914 Act, may be seen as more narrowly defined adaptions of the broad concept that transactions which are intended to defeat creditors' claims should be invalidated. Some avoidance provisions contain an element of deemed fraudulent intent (e.g. sections 111 and 112 of the Law). Other provisions, like section 107 and 108, are concerned only with the practical effect of the transaction: did the voluntary settlement in fact result in the settlor not being able to pay "*all his debts*"? The factual analysis of whether or not the settlor was able to pay "*all his debts*" is closely connected with an inquiry into whether the effect of a voluntary settlement was to "delay, hinder or defraud" creditors so that the intention requirement under the Statute of Elizabeth may be inferred.

76. So not only does section 107 require the Court to assess the settlor's solvency taking actual and contingent debts and liabilities into account. It further requires the beneficiary of a voluntary settlement to displace the statutory presumption that the now bankrupt settlor was insolvent when the settlement was made. Additionally, in assessing the evidence as to what liabilities should be taken into account, the statute implicitly requires the Court to start with the working assumption that the liability should be taken into account unless good cause is shown to the contrary. As Lord Selborne put it when considering the settlor's liability under a guarantee: "*I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that that it need not be regarded.*" "Remote" in my judgment was used to convey not only a liability which would crystallize at a remote time in the future, but also a liability which was highly improbable to accrue.

77. In summary, the Debtor's liability under the SPA should be taken into account in computing his solvency at the date of impugned transfers unless any of the Defendants are able to show on the balance of probabilities that, when the transfers were made, the prospects of the liability accruing were so remote that they could properly have been ignored. What value should be assigned to a particular contingent liability is simply a matter of fact, albeit one to be determined as of the date of the settlements, and bearing in mind that the contingent creditor's claim was not for a fixed liquidated sum. Where a contingent unliquidated liability has crystallized into a liquidated sum after the date of settlement, the starting assumption should in my judgment usually be that the amount determined to be payable by a judgment or arbitration award can be used as a proxy for the settlement date valuation amount.

Findings: the summary judgment application against D5

Should the Debtor's contingent liability under the SPA not be taken into account?

78. In the First to Third Defendants' Skeleton Argument, the following argument was made:

> *"48. The Defendants case is that as a matter of law, the TIB is wrong to include the liability under the Arbitral Award as relevant "debt" for the purposes of Section 107. If this is correct it would necessarily follow that TIB's claim against all the Defendants would fail."*

79. Having rejected the legal submission that the solvency test under section 107 does not extend to contingent liabilities at all, it remains to consider whether D1 in respect of the claim against D5 has established on a balance of probabilities that the contingency was so remote that it should not be taken into account or, alternatively, should be assigned no value. Mr Lowe QC in his oral submissions argued that there was "no evidence" of a contingent liability to Pacer, so the evidence before the Court must be reviewed.

80. In the First Affirmation of Richard Pelletier, the Debtor made two significant averments for present purposes. Firstly he averred that CAN$ 9,375,000 was paid into an escrow account as security for the Seller Parties' indemnification obligations pursuant to section 1.4.2 of the SPA (paragraph 16). He then made the following important averments:

(a) overall he was "*surprised and extremely disappointed*" by the Final Award "which, as can be seen from the offers set out above, exceeded anything either I or the other seller parties had reasonably foreseen or anticipated" (paragraph 30);

(b) in relation to "*No Additional Funding Claims*", $48 million (approximately) or 79% of the total Final Award was awarded under this head. The Debtor averred:

> *"41. I do not accept that I had any way of reasonably foreseeing the losses that PPEC would eventually suffer. The 'losses' from advances to PPEC and TFL were in whole or in part from an [sic] unforeseeable management, labour and safety events and also as a result of an unexpectedly low post-Closing date settlement in relations to certain projects (ThyssenKrupp and CNRL). I still believe as well that the*

precipitous decline in all prices severely affected our ability to collect on agreed upon Change Orders. By way of example, in May 2014 the ThyssenKrupp project for Imperial oil was behind schedule and Imperial oil ordered acceleration of the project schedule. PPEC sent Requested Change Orders to reflect overtime and shift extension costs and additional rental costs. While these were not signed, PPEC was given oral assurances and a 'hand shake' by senior manager Bill Cheek of Imperial Oil that these would be met. The subsequent reneging on this position was entirely unexpected.";

(c) the Debtor deposed in relation to the approximately $12 million awarded in relation to Purchase Price Adjustment Claims, based on a finding that the relevant accounts were not properly prepared, that he relied upon others "*and I had a very high level of confidence in them*" (paragraph 31).

81. While the factual findings in the Final Award are not binding on this Court, in the sense that no issue estoppel arises, the weight to be attached to the Debtor's account as to why he considered the outcome unforeseeable is not strengthened by the fact that the Tribunal has already rejected them. For instance:

(a) the Tribunal found that the ThyssenKrupp problems were "*expected*" (paragraph 404);

(b) the Tribunal found that the decline in oil prices had no "*demonstrable causal connection to the PPEC demise*" (paragraph 434) ;

(c) The Tribunal found (at paragraph 436) that:

"*Based on Pelletier's evidence the Arbitral Tribunal finds that the Sellers knew, and a reasonable person in the position of the Sellers would have known, that it was reasonably likely that Pacer would have to advance 100% of additional funding required by PPEC after the Closing Date.*";

(d) a similar finding was made (without express reference to the evidence of the Debtor) in relation to the need for additional support for TFL (paragraph 451);

(e) however, the Tribunal made no adverse findings in concluding that a Price

Adjustment award of approximately $12 million was required in favour of the Pacer parties, basing its decision primarily on expert accounting evidence.

82. Bearing in mind the scale of the transaction consummated by the SPA, it is somewhat surprising that the Debtor primarily speaks to his own subjective view unsupported by any contemporaneous financial advice or accounts. The suggestion that the Escrow Fund was intended to cover all liabilities under the SPA is on its face wholly untenable. Schedule 2.34 of the SPA, reproduced at page 25 of the Final Award, included the following Pacer Seller Parties' Solvency representations:

> "*As of the Closing Date… (ii) each Pacer seller Party will have the ability to pay his, her or its total debts and liabilities as they become due in the usual course, (iii) each Pacer Seller Party will pay or make adequate provision for the satisfaction in full of any Liabilities of such Pacer Seller party under this Agreement, and (iv) no Pacer Seller Party will have an unreasonably small amount of capital with which to live his, her or its life and earn a living or operate a business…*"

83. The contingent liabilities of the Debtor under the SPA were coupled with a positive contractual obligation to (a) have the ability to pay "*his…total debts and liabilities as they become due*" and to "*make adequate provision for the satisfaction of any Liabilities in full*". On the face of it, the impugned transfers could not have been validly made in the contractual sense without the Debtor carrying out an objective assessment about what the potential quantum of the Liabilities was. He has adduced no evidence (or no credible evidence) that he carried out such an exercise. It is obvious that having regard to the nature of the liabilities and the Debtor's related solvency warranties under the SPA, the contingent liabilities were not so ethereal that they could properly have been ignored altogether when the various settlements were made.

84. The Debtor's assertion in his First Affirmation (at paragraph 54) that "*Never in my wildest dreams when the deal closed did I believe that claims would be made against the Sellers*" is not only completely at odds with objective reality. As the Agents' counsel rightly submitted, his subjective state of mind is wholly irrelevant to an objective assessment of whether the contingent liability had sufficient solidity to warrant being taken into account in an objective assessment of the Debtor's solvency.

85. I find that the Defendants have not raised a triable issue on the question of whether the Debtor's contingent liabilities under the SPA should not be taken into account. I find that the contingent liabilities should be taken into for the purposes of the Agents' summary judgment application.

Has a triable issue been shown to exist as to whether or not the Debtor's was able to pay all his debts at the material time?

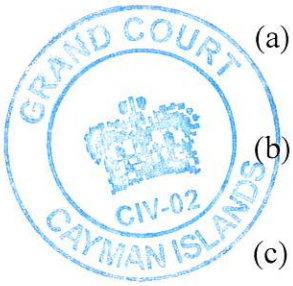
86. The Debtor's primary case as to his solvency when the Second PDP Corp transfer was made on October 14 2014 and when Second Holdings Transfer was made on September 17, 2015 is that his contingent liabilities which matured by virtue of the Final Award should not be taken into account at all. The big picture is that starting on the day after the SPA was executed on June 26, 2014, the Debtor distributed (or caused RPHI to distribute) virtually all the sale proceeds in a series of voluntary transfers. The cumulative effect of this series of transfers was unarguably that the gap between the sum which became due under the Final Award and the Debtor's available assets steadily widened. The Agents' case becomes easier at the bottom of the transfer chain while the Debtor's position in seeking to establish his solvency becomes much more difficult.

87. In her Second Affidavit, Margot MacInnis calculated the deficit between assets and liabilities position at the date of the two impugned transfers to D5 as follows:

(a) Deficit-Low: ($46,823,000)/ High ($56,000);

(b) Deficit-Low: ($65,500,000)/High ($18,953,000).

88. Mr Pelletier in his First Affirmation complained that:



(a) his assets had been understated because certain assets were not taken into account;

(b) the inclusion of $15 million for arbitration costs was unreasonable;

(c) the tax liability should be reduced by virtue of the liability to the Pacer parties on the basis that it was obvious they would pay;

(d) credit should be given for the fact that other Sellers paid their share of the Final Award.

89. The Debtor deposed that if these adjustments were made, even if the contingent liability was taken into account, he would solvent after the Olga Transfer and the Second PDP Corp Transfer. In fact the analysis in the Second MacInnis included in the high column an assumption that the $31 million contribution which was made was predictable (and was an available asset for the computation exercise) and that the costs award liability was not eligible to be taken into account. The other criticisms were considered and resulted

in a revised analysis set out in the Third Margot MacInnis Affidavit. Credit was given for many previously omitted assets based on the available evidence. Certain non-Pacer liabilities (principally class actions in the US) which came to light were taken into account. Additional gifts to family members admitted by the Debtor were also taken into consideration. The tax liability was kept in on the basis that it was an actual liability and there was no evidence that a refund was being sought. The result was an increase in the deficit position after each of the two transfers with the following result:

(a) Deficit-Low: ($52,451,000)/ High ($3,072,000);

(b) Deficit-Low: ($76,865,000)/High ($26,486,000).

90. The Plaintiff's Skeleton Argument for Summary Judgment set out the uncontroversial governing legal principles as follows:

"*5. Summary judgment may be entered under GCR O. 14, r. 1* ***[Authorities/2/64]*** *where the defendant has "no defence" to the claim.*

6. The Court of Appeal has set out the proper approach to GCR O.14 as follows:

' 5 The proper approach to an O.14 application, where there is conflicting or competing affidavit evidence, was settled in England in National Westminster Bank plc v. Daniel *(4), in which Glidewell, L.J. reviewed the history, and concluded by applying the dictum of Ackner, L.J. in* Banque de Paris et des Pays-Bas (Suisse) S.A. v. Costa de Naray *(1), where he said ([1984] 1 Lloyd's Rep. at 23):*

"It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

6. Glidewell, L.J. himself concluded ([1993] 1 W.L.R. at 1457):

"I think it right to ask, using the words of Ackner, L.J. in the Banque de Paris *case, at p.23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd,*

L.J. in the Standard Chartered Bank *case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?,' amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."*

...

7 In the Cayman Islands, there are two reported first-instance cases to which we have been referred. In Panier S.A. v. Burns *(5), Graham, J. expressly applied* National Westminster Bank plc v. Daniel, *while in* Zuiderent v. Christiansen *(9), Sanderson, J. purported to apply* Panier S.A. v. Burns, *in suggesting that the appropriate test should be applied in two stages: (i) Is what the defendant says credible? and (ii) Has he shown that that there is a fair and reasonable probability that he has a real bona fide defence?*

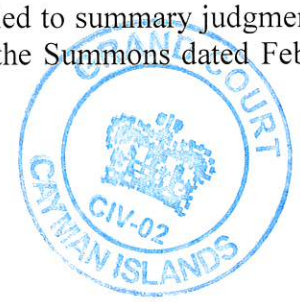
8 *In my judgment, the test is not really in two stages, because the two stages, as Glidewell, L.J. pointed out in* National Westminster Bank plc v. Daniel *(4), amount to much the same thing, because ([1993] 1 W.L.R. at 1457) "if [the evidence] is not credible, then there is no fair or reasonable probability of the defendant having a defence." No harm would be done, it seems to me, by adopting the two-stage approach, even if, in reality, a negative answer to the first question would inevitably lead to a negative answer to the second question. For my part, however, I would prefer to regard the test as simply requiring the court to ask whether the defendant has shown a fair or reasonable probability that he has a real, or bona fide, defence. ..."*

91. D5 did not oppose the application and took a neutral position. Pursuant to the consent order dated February 13, 2020 (referred to in paragraph 1 above) the application was opposed by D1 who relied on the evidence filed and submissions made by D1-D3's counsel on behalf of D1. The only serious dispute raised by the First Affirmation of Mr Pelletier was as to the position after the Second PDP Corp transfer on October 23, 2014. Mrs MacInnis' revised figures took important matters into account in the Debtor's favour but still produced a deficit after that transaction took place. The adjusted high (deficit) figure of $3.072 million included giving full credit for the $31 million contribution made by other Sellers and deducting the $15 million costs element of the Final Award, which it was not accepted had to be done. It could not have been known in October 2014 that the contribution would be made, so giving full credit for it (instead of e.g. reducing it by 50%) is a generous allowance in the Debtor's favour. In addition the high column assumes the Debtor is right in contending that he could not have foreseen the Price Adjustment element of the Final Award of approximately $12 million based on expert accounting evidence.

92. Overall, the Agents' approach to the solvency calculation displays an objective and fair approach. I accept in general terms the evidence of Mrs MacInnis, the purport of which is that on any sensible view of the position the Debtor was insolvent on a balance sheet

basis when the two voluntary transfers were made. Her high estimates do not assume that 100% of the amounts awarded in the Final Award would have been reasonably provided for in October 2014 and September 2015.

93. The onus would be on D1 in respect of the claim against D5 at any trial to establish that the Debtor *was* "*able to pay all his debts*" when the two transfers were made. The opposing evidence filed by the Debtor was, as regards the position when the October 23, 2014 transfer was made, on its face unreliable as an objective analysis of his ultimate financial position at the material time. D1 in respect of the claim against D5 has not "*shown that that there is a fair and reasonable probability that he has a real bona fide defence*" to the claim under section 107 of the Law in relation to which summary judgment is sought. I find that that the Plaintiff is entitled to summary judgment and to an Order substantially in the terms of paragraph 1 of the Summons dated February 6, 2020.



Findings: application to set aside service on D1

Grounds of application

94. D1 applied to set aside service on the grounds that (a) there was no serious issue to be tried on the merits of the claim under section 107 and/or (b) that the Court should in its discretion decline to assume jurisdiction, because there was an insufficient connection between the claim and the Cayman Islands.

Is there a serious issue to be tried against D1?

95. Two arguments were advanced in support of the contention that leave to serve out should be set aside on the grounds that there was no serious question to be tried:

(a) the Debtor was not arguably insolvent when the Olga Transfer was made because the contingent liabilities to Pacer under the SPA could not as a matter of law be taken into account; alternatively

(b) on the evidence before the Court, it was clear that the Debtor was in fact solvent at the time of relevant transfer.

96. I have already rejected the legal argument that the contingent liabilities do not have to be taken into account. Only the second submission remains for consideration. Mr Lowe QC submitted that any proper analysis of the evidence the Debtor was solvent after the Olga Transfer was made on June 27, 2014. The Agents accepted that the position was too

nuanced to justify seeking summary judgment. That is because Mrs Margot MacInnis' adjusted high figures which, *inter alia*, did not include the costs award of $15 million and gave credit for the $31.847 million contribution by other Sellers resulted in a surplus of $3.42 million as opposed to a deficit of $45.959 million if those adjustments were not made.

97. Mr McKie QC accepted that some adjustment was required for the possibility that that the contribution which was in fact made would be made and that the difficulty in assessing costs should be taken into account. He submitted that a median position was reasonable. Even if one assumes that it was reasonable on June 27, 2014 to discount 100% of the liability shared by the co-respondents, the Debtor would only clearly have been solvent after the Olga Transfer if no provision was made for the costs award at all. I find that an important factor to be taken into account when considering what reasonable allowance should have been made for the Pacer Liabilities is the fact that Mr Pelletier and RPHI were under a positive contractual obligation to ensure that they retained sufficient assets were retained to meet those liabilities when the Olga transfer was made.

98. In my judgment it is seriously arguable that a reasonable approach would have provided for at least 50% of the eventual arbitration costs and at least 50% of what in the event was contributed by other Pacer Seller parties. Having regard to the burden of proof on D1, I find that there is a serious issue to be tried on the merits of the claim against her under section 107 of the Law. There is room for serious argument both for and against D1 as to where the true solvency position lies.

Findings: should the Order granting leave to serve out be set aside?

Was leave to serve out required?

99. On January 8, 2020, although my primary view that no leave to serve out was required, I made an Order, "*TO THE EXTENT THAT LEAVE TO SERVE THE FIRST DEFENDANT OUT OF THE JURISDICTION IS REQUIRED*", that:

> "*1. The Plaintiff be granted leave, pursuant to GCR Order 11, rule 1(1)(a) and (c) to serve the Writ of Summons herein, and any other document , pleading, notice or order herein, on the First Defendant, wherever they may be found…*"

100. D1's position on leave was a very nuanced one. In the First to Third Defendant's' Skeleton Argument it was apparently accepted that no leave to serve out was required:

> "*64. When the Agent caused the avoidance proceedings to be served on Olga whilst she was outside the jurisdiction the question arose as to the service requirements*

which had to be satisfied and whether there was any basis for effecting service. The Agent submitted that no leave was required because Section 107 had extra-territorial effect.

65. That is to confuse service with the question whether the law permits the Court to make orders in cases which have a foreign element despite the general rule in Re Blain (1879) 12 Ch D 522). The extra-territorial effect of provisions such as Section 107 appears to be confirmed by Company cases such as Paramount Airways [1993] Ch 223 and Jetvia v Bilta [2016] AC 1).

66. In Paramount Airways the originating process was served in accordance with the English Insolvency Rules 1986 Rule 12.12(1). Rule 12.12 created a broad gateway which has no counterpart in the Cayman Islands. Indeed, the Court explained that leave did need to be obtained (see p240H-241G). It was clear that even when Order 11 did not apply in terms the Court was nevertheless testing whether there was a seriously arguable case and whether the defendant had a sufficiently connection which justify the exercise of discretion under the avoidance provision.

67. The Cayman Bankruptcy Rules and Bankruptcy contain no provisions which suggest that service is unnecessary irrespective of whether Section 107 can be applied to foreign transactions. None of the other long arm provisions of the Grand Court Rules in Order 11 apply. There are similar difficulties now in England in applying long arm jurisdiction to avoidance proceedings which are outside insolvency proceedings (see Orexim Tradingv Mahavir Port [2018] Bus Law Report 470)."

101. Neither the Law nor the Bankruptcy Rules require or provide for leave to serve proceedings out of the jurisdiction. The Grand Court Rules ("GCR") Order 1 rule 4(2) provides that except for Orders 3, 38, 45-51, 62, 67 and 80, the GCR shall not apply to proceedings "*(b) governed by the Grand Court (Bankruptcy) Rules 1977…*" Mr McKie QC submitted that the present action was a separate action commenced outside of the bankruptcy proceedings and was not a proceeding "*governed by*" the Bankruptcy Rules. On reflection I agree that my initial view of the position at the ex parte hearing was misconceived. It is obvious that the GCR govern the present action because:

(a) as a matter of form it was commenced as a freestanding proceeding; and

(b) there is no substantive law requirement in the Law for claims against third parties under section 107 or other avoidance provisions to be brought as interlocutory applications within the relevant bankruptcy proceeding.

Is there a sufficient connection with the Cayman Islands?

102. D1 did not contend that to the extent that GCR Order 11 did apply, the requisite gateway tests had not been met. Instead the following argument was attractively advanced:

> *"68. ... it nevertheless remains the fact that, apart from showing a serious issue to be tried, the Plaintiff must nevertheless show a good case that there is a sufficient connection with this country to justify an exercise of extra-territorial discretion. The connecting factors were explained in Re Paramount Airways (see also Jyske Bank (Gibraltar) v Speldnaes [1992] 2 BCLC 101).*
>
> *69. In Paramount at pp239-240 Nicholls VC made the following observations with regard to the degree of connection which would have to be considered in making an order under the avoidance provisions with a foreign element*
>
> *The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would by itself be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.*
>
> *Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent,*

the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

103. The legal test for sufficiency of connection relied upon is clearly a flexible one. In my judgment, as Mr Lowe QC rightly argued, this involves a distinct principle which from the *forum non conveniens* ground for seeking a stay. This argument is a somewhat nuanced one, because the relevant facts involve a somewhat tenuous residential connection with the jurisdiction when proceedings were commenced combined with no apparent connection whatsoever with the Cayman Islands (as regards D1 or the transfer) when the transfer occurred on June 27, 2014. On the other hand, D1 is legally a permanent resident here and all other Defendants are Cayman Islands entities. If one focusses on the date of the transfer, the jurisdictional connection is very weak-almost non-existent. If one focusses on the date of commencement of the proceedings, the connection is clearly sufficiently strong. The test commended to the Court by D1's counsel indicates that the Court should "*look at all the circumstances*": per Nicholls V-C (as he then was) in *Re Paramount Airways* [1993] Ch 223 at 240. Applying the sufficient interest test "*the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred*" by an extra-territorial statutory provision.

104. Adopting that approach, I find that the following factors point decisively to there being a sufficient connection between the Trustee's avoidance claim under section 107 of the Law and the Cayman Islands to enable this Court exercise the jurisdiction that section confers:

(a) although there was no apparent connection with this jurisdiction when the relevant transfer was made it was the first of series of voluntary transfers made or directed by D1's husband, and the other transfers were to transferees within the jurisdiction;

(b) in addition to the related transfers being connected with the Cayman Islands, D1 took up residence here between August 2015 and June 2017, just over a year after the relevant transfer occurred in June 2014, and apparently benefitted from assets which the Debtor transferred to this

jurisdiction (1) arguably in breach of his contractual obligations under the SPA and (2)(as I have now found above in granting summary judgment against D5) in breach of section 107 of the Law;

(c) when the present proceedings commenced on January 8, 2020, the Debtor and D1 continued to have access to residential property in the jurisdiction and were in legal terms still seemingly permanent residents of the Cayman Islands;

(d) the Debtor's bankruptcy proceedings are before this Court, and have been recognised by a Canadian court as a foreign main proceeding. This jurisdiction is the most natural forum to adjudicate a section 107 avoidance claim.

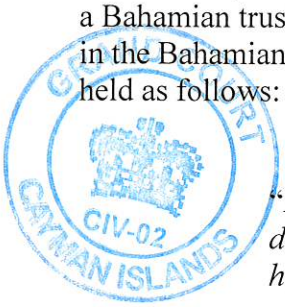
105. Mr Lowe QC in the course of argument referred to steps taken by the Agents to discourage the responsible Minister from revoking their residential certificate, based on a letter sent to the Minister by the Debtor shortly after the bankruptcy proceedings were commenced. He implied that but, for that intervention, no residential jurisdictional connection would or might even now exist and her residential status was "artificial" as a result. I accept that D1 has in reality and apparently for family reasons all but severed her factual residential ties with this forum for the time being. However, D1 cannot validly (in a legal sense) complain about being thwarted in any attempts by her husband the Debtor to put the couple beyond the legal jurisdiction of this Court. It is one thing to move residence. It is another to seek to sever a legal connection with a jurisdiction shortly after bankruptcy proceedings have been filed. It remains to mention one other more substantive consideration which supports my conclusion that the sufficient connection requirement is met in all the circumstances of the present case.

106. Based on evidence as to Canadian law placed before the Court, it is doubtful that a Canadian avoidance remedy is still available and unclear whether a Canadian court would be competent to grant relief for a Cayman Islands law claim because the Debtor is in bankruptcy here, the Cayman Islands is the most natural forum to adjudicate a section 107 claim. In *Al Sabah & Anor.-v-Grupo Torras* [2005] 2 AC 333 at 341D (PC), Lord Walker opined as follows:

> *"6. Section 107 of the Bankruptcy Law (1997 Revision) of the Cayman Islands provides that any voluntary settlement (an expression which is widely defined) of property is to be void against the trustee in bankruptcy if the settlor is made bankrupt (i) within two years after the date of the settlement or (ii) within ten years after the date of the settlement unless (in the latter case) the beneficiaries can prove that the settlor was, when he made the settlement, able to pay all his*

debts without the aid of the property comprised in the settlement (and that the settled property passed to the trustee on execution of the settlement). Although this enactment speaks of the settlement being 'void' it is common ground that this should be interpreted as 'voidable' in accordance with the decision of the English Court of Appeal in In re Hart; Ex parte Green [1912] 3 KB 6. If the Cayman trusts are to be set aside under section 107, that can be achieved only by an order of a court of competent jurisdiction, prima facie the Grand Court of the Cayman Islands." [emphasis added]

107. In *Al Sabah*, the Privy Council confirmed that the Grand Court could properly recognise a Bahamian trustee in bankruptcy and authorise him to pursue a claim under section 107 in the Bahamian courts. In the penultimate paragraph of the judgment, Lord Walker also held as follows:



"But their Lordships have no reason to suspect that there will be any real doubt about the debtor's sufficient connection with the Bahamas, where he is permanently resident...."

Findings: should the application be stayed against D2, D3 and D5 on forum non conveniens grounds?

108. The First to Third Defendant's Summons only sought an Order staying the proceedings against D2, D3 and D5, implicitly on *forum non conveniens* grounds. Having found that there is a sufficient jurisdictional connection between D1 and this jurisdiction it is difficult to identify a coherent basis for concluding that the Cayman Islands corporate Defendants cannot conveniently be sued here. They are more than merely token and hollow anchor defendants.

109. The Plaintiff's Forum Skeleton dealt fully and irresistibly with why a stay was inappropriate, based on the principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) In summary :

"22 Canada is not an appropriate forum for the following reasons:

22.1 The Avoidance Claims may not be actionable in Canada

22.2 If Canadian Court would hear the Avoidance Claims, then they are likely to apply Cayman Islands law.

22.3 A stay in favour of Canada would be disadvantageous to the estate of the

Bankrupt and to the bankrupt himself and would not be in the interests of justice.

22.4 The Avoidance Claims under the Canadian analogue may be time barred, so no stay should be granted."

110. The Skeleton Argument filed on behalf of D1 made mention of the forum challenge made by D2and D3 in respect of themselves and D5, but did not address it. In oral argument, Mr Lowe QC advanced the following submissions on behalf of the Second and Third Defendants and in respect of the Fifth Defendant:

(a) Pacer obtained the Final Award three months before the Canadian avoidance limitation period expired in relation to the Olga Transfer. Pacer made a deliberate decision not to sue in Canada at a time when there was no juridical advantage to be gained from suing here;

(b) any factual inquiry to be conducted at trial would mostly depend on evidence located in Canada;

(c) the possibility of the Trustee being able to pursue a section 107 claim in Canada could not be excluded.

111. This was, understandably, an unconvincing stay argument in all the circumstances of the present case. Mr McKie QC in his oral reply submitted that the fact that this was a single forum case should be taken into account. The fact that there is presently no active competing forum is an important factor where this jurisdiction is the most natural forum. In addition the Agents' counsel submitted that if, as was likely, no detailed evidential inquiry would be needed in any event, the relevance of evidence being located in Canada had diminished significance.

112. The stay application of D2 and D3 in respect of themselves and D5 must be refused.

Summary

113. For the above reasons, I have made the following findings:

(a) "*all his debts*" in section 107 of the Law includes contingent liabilities and the solvency test is a balance sheet solvency test;

(b) the Plaintiff is granted summary judgment on her claim against D5 under section 107 of the Law;

(c) D1's application to set aside service on her abroad is refused on the grounds that (1) there is a serious question to be tried on the merits of the Plaintiffs claim and (2) this Court has sufficient interest to adjudicate the claim;

the application by D2 and D3 for the action against them and D5 to be stayed on *forum non conveniens* grounds is refused.

I will hear counsel if required, as to costs and any other matters arising from this Judgment.

GRAND COURT CIV-02 CAYMAN ISLANDS

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT