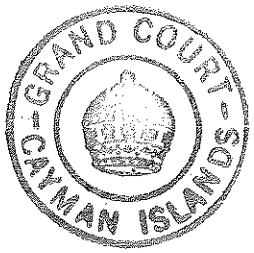
IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 115 OF 2013 (AJEF)

The Hon. Mr. Justice Angus Foster
In Chambers as Open Court
17th and 18th October 2013



IN THE MATTER OF THE COMPANIES LAW (2012 REVISION) (AS AMENDED)

AND IN THE MATTER OF SRT CAPITAL SPC LTD

Appearances: Ms. Colette Wilkins and Mr Barnaby Gowrie of Walkers for the Petitioner

Mr Colm Flanagan and Mr Steven Barrie of Nelson & Company for the Company

JUDGMENT

Introduction

1. This matter concerns an opposed creditor's winding up petition. The petition is brought on the ground that the company concerned is alleged to be unable to pay its debts and consequently insolvent because of its failure to pay a particular sum said to be due pursuant to a share swap transaction between the petitioner and the company. The company opposes the petition on the ground that the debt on which the petition is based is disputed and that the question whether or not it is due and payable is required to be determined by the courts in England.

The Parties and Procedural Background

2. The petitioner, Morgan Stanley and Co. International PLC, with registered office at Canary Wharf, London ("the Petitioner"), by its petition dated 20th August 2013 seeks the winding up of SRT Capital SPC Ltd ("the Company"), pursuant to Sections 91(a) and (b) and 92 (d) and (e) of the Companies Law (2012 Revision) (as amended).

3. The Company is an Exempted Segregated Portfolio company incorporated pursuant to the Companies Law on 14th December 2009, and having its registered office at Maricorp Services Ltd, The Strand, West Bay Road, Grand Cayman. The Company carries on business in trading and dealing in investments, securities and commodities. It is not registered as a mutual fund. The sole director of the Company is Ms Oya Okay, who is apparently based in Turkey.

4. In connection with the transaction which the Petitioner contends gives rise to the allegedly due debt, the Company dealt principally through its investment manager, Emerging Markets Intrinsic Ltd of Connecticut, USA, the managing partner of which is Mr. Eric Maas. Mr. Maas swore an affidavit on behalf of the Company. In turn, Mr. Maas used the services of a broker, Mr. Slim Jmel of SFG Partners LLP, an FSA registered broker dealer. The Petitioner acted through its associated company in Hong Kong, Morgan Stanley Asia Limited, principally by the vice-president thereof, Mr. Christian Lhert. Mr. Lhert swore two affirmations on behalf of the Petitioner, the first in support of the petition and the second in response to Mr. Maas's affidavit.

5. The necessary formalities with regard to the petition have been complied with by the Petitioner. In particular the petition has been advertised in compliance with the Companies Winding up Rules 2008 in the Caymanian Compass newspaper and also, in Turkish, in a widely read newspaper in Turkey. Apart from the Petitioner and the Company, no other person or entity appeared on or has given notice of any interest in the winding up petition.

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6. The Company was out of time in entering an appearance and filing evidence in response to the petition and applied for leave to do so late. After a contested hearing, I duly granted such leave by order dated 25th September 2013. Following directions given in that order, as I have already mentioned, the Company filed the affidavit of Mr. Maas explaining its opposition to the petition and its dispute of the alleged debt. In response to that affidavit the Petitioner filed the second affirmation of Mr Lhert. It is that affidavit and that affirmation and their exhibits which respectively comprise the substantive evidence relied upon by each of the parties.

The Transaction and the alleged Debt

7. It is not disputed that during the early part of this year, 2013, the Company decided to seek financing to fund the purchase of a significant number of ordinary shares in a company, Gitanjali Gems Ltd, listed on the National Stock Exchange India ("the Shares") on a leveraged basis. For this purpose the Company approached several brokers, including Mr. Jmel. The evidence of Mr. Maas for the Company is that it was made plain to the brokers, including Mr. Jmel, that the Company was seeking such financing on the basis that it would be secured over the Shares themselves and not over any of the assets of the Company, i.e. it would be non-recourse, with the financing party assuming some of the risk in relation to the on-going value of the Shares.

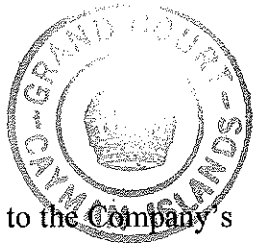
8. In March 2013 Mr. Jmel informed the Company that the Petitioner would be able to provide financing which would fit within the Company's requirements. Negotiations then took place between the Company, the Petitioner and Mr. Jmel during the course of which the parties held telephone discussions and exchanged emails. Amongst other terms it was agreed that the total initial acquisition would be USD30m worth of the Shares with the Petitioner paying 55% of the price and the Company paying 45%. Title to and custody and control of the Shares were to be held by the Petitioner.

9. In due course, as discussions progressed, the Petitioner produced various term sheets reflecting the proposed terms of agreement. Two of these, including the final one, were

exhibited to the affidavit of Mr. Maas. On 19th March 2013 Mr. Lhert, for the Petitioner, sent a revised term sheet by email to Mr. Jmel and other representatives of the Company, including Mr. Maas and Mr. Bulent Toros, a senior manager of the Company. In his email Mr. Lhert said that the main transaction documents would include: "*1. A swap under long form confirmation. This is the key document which will be approx. 20 page* (sic) *long and will reflect the key commercial terms described in the termsheet. 2. Other ancillary documents (for example board resolutions for the Swap buyer* [the Company]*). These documents are very standard and should not be controversial. The exact nature/content is primarily driven by the country of incorporation of the issuer. Our counsels* (sic) *will draft these documents as well to facilitate the execution process.* Mr. Lhert also said: "*The finalization of the transaction documents is typically much smoother as it is a pure legal reflection of what's been pre-agreed commercially and this can definitely be done within a week*".

10. On the same date, 19th March 2013, Mr Jmel emailed Mr. Kummer, an executive director of the Petitioner, and Mr. Craig Donadio, a vice president of the Petitioner, with copy inter alia to Mr. Lehert, Mr. Maas and Mr. Toros, asking Mr. Kummer and Mr. Donadio to confirm that there was *"no need for ISDA"* as they were using a long form confirmation for the swap. Later that same day Mr. Kummer replied by email, copying in the same people, confirming that there was no need for ISDA.

11. On 15th April 2013 Mr. Lhert sent out a final term sheet. Both this term sheet and the earlier one dated 19th March referred to the transaction as an "*Equity Swap Financing Facility*" and described the structure as a "*Stake-building Equity Swap (the "Equity Swap") secured against the Underlying Shares. The economic exposure to the Underlying Shares will be acquired in synthetic form via the Equity Swap in a transaction partially financed by the Swap Seller*" [The Petitioner]. While the term sheets provided for a margining mechanism whereby if the value of the Shares fell and the leverage ratio rose over 61.1% the Petitioner could make a margin call for additional cash collateral to be paid by the Company in order to maintain the Petitioner's exposure at not more than 55%, the term sheets also provided that final settlement would be by "*Cash or Physical* [meaning the Shares] *at the Option of the Swap Buyer*" [meaning the Company].



Neither of these term sheets made any mention of ISDA or of recourse to the Company's assets.

12. The day after the date of the final term sheet the Petitioner apparently produced a formal agreement referred to as the "Confirmation" in the form of a letter dated 16th April 2013 addressed to the Company and headed "Share Swap Transaction". The document indicates that it was executed on the same date on behalf of the Company by its sole director, Ms. Okay. The Confirmation also indicates that on the same day Mr. Jmel, on behalf of SGG Partners LLP, executed a statement at the end of the document that as part of the transaction SFG Partners LLP made the same representations, warranties and undertakings as were set out in paragraph 10 of the Confirmation as if the references to the Company therein were references to SFG Partners LLP.

13. The Confirmation made no reference to the swap being secured against the Shares; on the contrary it provided throughout that settlement, including final settlement, was to be in cash. Furthermore, the Confirmation made a number of references to ISDA. It incorporated ISDA definitions and it also provided that the parties would use all reasonable efforts to negotiate and agree an agreement in the form of the 2002 ISDA Master Agreement ("the ISDA Form"). It stated that until such an agreement in the ISDA Form was executed, the Confirmation would nonetheless be deemed to be part of and subject to an agreement in the ISDA Form as if such agreement had in fact been executed.

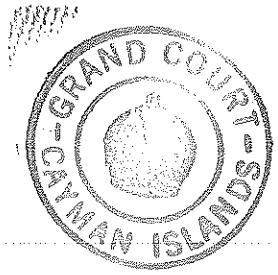
14. Apparently also on 16th April 2013, Ms. Okay, together with Mr. Toros acting as secretary, executed minutes of a board meeting of the Company, prepared by the Petitioner as part of the transaction documentation. The minutes referred to the transaction with the Petitioner as contemplated by the Confirmation. In summary, the minutes stated that the terms of the Confirmation and the transaction were carefully considered and the benefit to the Company of the transaction referred to in the Confirmation was noted and participation in the transaction contemplated in the Confirmation was determined by the director to be in the best interests of the Company. The minutes then recorded formal resolutions basically to the same effect and authorized

execution of the Confirmation (and any ancillary documentation necessary to give effect to the Confirmation) by the Company.

15. Unfortunately, by early June 2013, the value of the Shares had dropped and the leverage ratio had risen to 62.30% from the top up figure of 61.1%. On 10th June the Petitioner issued a Margin Notice Call to the Company for US$1,315,860.39; which was paid by the Company. By 20th June the value of the Shares had continued to drop and the leverage ratio had risen to 63.07%. A second Margin Call Notice calling for payment by the Company of a further US$1,269,806.55 was issued on that date by the Petitioner and was paid in due course.

16. On 24th June the Petitioner issued a third Margin Call Notice for a further US$ 1,811,589.02 in respect of a further increase in the leverage ratio to 69.54%. The following day, the Company exercised its option under the Confirmation for early termination in relation to 430,000 of the Shares in an attempt to reduce the leverage ratio. However, later on the same date the leverage ratio rose further to a figure at or greater than 72.5%, which was the level which entitled the Petitioner to exercise its option for early termination in relation to all the remaining Shares, which it duly did.

17. Representatives of the Petitioner and of the Company then had discussions concerning a possible re-structuring of the transaction but failed to reach agreement. Over the following period the Petitioner then issued various notices and demands, including a demand for payment of the third margin call of 24th June, a fourth Margin Call Notice, a demand for payment of a further sum and finally, on 8th August, notice to the Company that the whole swap had been unwound and that the total sum due and payable by the Company by 13th August was US$6,802,558.13. Following the Company's failure or refusal to pay, on 14th August, the Petitioner's attorneys issued a formal demand letter to the Company for a total payment, including interest, of US$6,825,132.50. Six days later, on 20th August the Petitioner produced its petition to wind up the Company based on non-payment of that sum, which was then filed on 23rd August 2013.



The principles on disputed debt

18. It has been so often repeated as to have become almost trite that the winding up jurisdiction of the court may not be invoked in respect of a debt which is disputed on *bona fide* and substantial grounds. It is clear, therefore, that the company concerned must indeed have substantial grounds for disputing the alleged debt. In *Re Parmalat Capital Finance Limited [2006] CILR 480,* after a review of English authorities, the Court of Appeal (Mottley, JA) at 499, paragraph 46 said:

> "*These authorities all show that in order to petition for the winding-up of a company, a person must show that he had locus standi as a creditor within s.96 of the* [Companies] *Law. He must show that a debt is due to him by the company. If, however, the debt upon which the petition is based is disputed by the company in good faith and on substantial grounds, this would indicate that the petitioner does not have locus standi as a creditor and the presentation of the petition would be an abuse of process of the court. The onus is on the company, if it disputes the bona fides of the debt, to show that it does so on substantial grounds. A dispute which is based on insubstantial grounds would not suffice.*"

In *Re FIA Leveraged Fund [2012] 1 CILR 248* this court (Smellie,CJ) said at 266, paragraph 59:

> "*It is well understood, since Mann v. Goldstein ([1968]1 W.L.R. at 1096, per Ungoed-Thomas, J) that a dispute about the existence of a debt will not justify a winding-up petition for non-payment of the debt, if the court is satisfied that "the debt is disputed by the company on some substantial ground (and not on some ground which is frivolous or without substance and which the court should, therefore, ignore)." Further, in Re a Company (No. 0010656 of 1990) ([1991] BCLC at 466, per Harman, J), "it is clear that mere honest belief that payment is not due is not sufficient. There has to be a substantial ground for disputing the*

liability to justify non-payment." And perhaps most completely, in In re a Company (No. 006685 0f 1996) ([1997] BCC at 835, per Chadwick, J):

" The general rule under which this court refuses to entertain a petition founded on a disputed debt applies only where the dispute is a genuine dispute founded on substantial grounds; and does not preclude this court from determining – or entitle this court to decline to determine – the question whether or not there are substantial grounds for dispute."

"60 These principles, described as settled principles of practice though not of law (as they permit a discretion to wind up even where there appears to be a genuine dispute of the debt), are now well established in this court: see Parmalat Capital Fin. Ltd v. Food Holdings Ltd [[2008] CILR 202)] *and In re GFN Corp Ltd* [[2009] CILR 650]."

19. In the present case it is therefore for the court to consider, on the evidence before it, whether or not the Company's dispute of the debt claimed by the Petitioner is *bona fide* and that the grounds on which it relies in contending that there is a genuine dispute are substantial and not frivolous or without substance such that they should be ignored. It was submitted by counsel for the Petitioner and accepted by counsel for the Company that the court has to be satisfied in these respects.

<u>The Petitioner's Case</u>

20. Counsel for the Petitioner contended that there is no substantial dispute about the debt on which the petition is based. The dispute, such as it is, was said to be simple and straightforward and that the Company, which is a sophisticated investor, is bound by its signature, by its sole director, to the Confirmation pursuant to which the debt is clearly due and payable.

21. It was submitted that the normal rule in contract is that a party of full age and understanding is bound by his signature to a document, whether or not he read it. It was

said that the Company's argument that it should not be bound by the Confirmation amounts to a plea of *non est factum*, an exception to the normal rule, which should not be allowed where a person of full age and capacity has signed a written document embodying contractual terms. Reliance was placed upon the well-known case of *Saunders v Anglia Building Society [1971] AC 1004* and in particular the comment by Lord Reid at 1016 that there is a heavy burden of proof on the person who seeks to invoke the remedy of *non est factum*. I was also referred to *Chitty on Contracts (31st edn.) para 5–109* in which it is stated that *"it will be a rare case in which a person who does not suffer from a disability will be able to plead non est factum when he has signed a document without checking to see what it is, or in what capacity he is signing it"*. It was submitted on behalf of the Petitioner that there was no basis on which a plea of *non est factum* could be made in this case. The Petitioner was entitled to rely upon the terms of the agreement as set out in the Confirmation.

22. It was pointed out for the Petitioner that the minutes of the Company's board meeting on 16th April 2013 stated in several places that the terms and conditions of the transaction as set out in the Confirmation had been carefully considered by the sole director, Ms. Okay, that the chairman of the meeting, Ms. Okay, noted that the transaction was being entered into for the account of the general assets of the Company and that the benefit to the Company of the transaction referred to in the Confirmation was noted and considered to be in the best interests of the Company. Ms. Okay had also executed a Director's Certificate on 16th April 2013 confirming that neither the entry into the Confirmation by the Company nor the performance of its obligations thereunder would breach any restrictions on the Company, that each resolution passed at the director's meeting of the same date was in full force and effect and that Ms. Okay was duly authorized to execute the Confirmation on behalf of the Company together with any document or notice in connection with the Confirmation. It was also emphasized for the Petitioner that the Confirmation had been executed, not only by Ms. Okay as the director of the Company but also by Mr. Jmel, the managing director of the Company's investment manager.

23. It was submitted that the Petitioner was entitled to rely upon the terms of the Confirmation by which the Company was bound in the circumstances. Attention was drawn to the fact that in the introductory paragraphs of the Confirmation, ISDA was referred to no less than 10 times and the second paragraph expressly incorporated the ISDA Form into the agreement.

24. Counsel for the Petitioner also emphasized that the Confirmation expressly provided that it was a complete and binding agreement between the parties as to the terms of the transaction between them and particular reference was made to the representations by the Company, as also agreed to by Mr. Jmel, in paragraph 10 of the Confirmation, the relevant parts of which are as follows:

> .....
>
> *(vii)* *Neither Party A* [the Petitioner] *nor its affiliates has given Party B* [the Company] *any advice concerning any of the laws, rules and regulations mentioned in this Confirmation and Party B has sought advice from its own legal counsel, to the extent it considers necessary;* .....
>
> *(xiv)* *Party B is acting for its own account, and it has (and each of its directors) made its own independent decision to enter into the Transaction and as have* [sic] *to whether the Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisors as it has deemed necessary. Party B is not relying on any communication (written or oral) of Party A (or any of its affiliates) as investment advice or as a recommendation to enter into the Transaction, it being understood that information and explanations related to the terns and conditions of the Transaction will not be considered investment advice or recommendation to enter into the Transaction. No communication (written or oral) received from Party A (or any of its affiliates) will be deemed to be an assurance or guarantee as to the expected results of the Transaction;*

(xv) *Party B and each of its directors are capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), understands and accepts, the terms, conditions and risks of the Transaction and are capable of assuming, and assumes, the risks of the Transaction……."*

As I have already explained, the Confirmation, on its terms, incorporated the ISDA Form. Paragraph 9 of the ISDA Form under the heading "Miscellaneous" provides:

(a) ***Entire Agreement***

"This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Agreement will limit or exclude any liability of a party for fraud."

25. Counsel for the Petitioner submitted that the Company had expressly agreed in the Confirmation that it had obtained legal advice as necessary, that it was not relying on any communication, written or oral, received from the Petitioner and that it was capable of assessing the merits of and understood and accepted the terms, conditions and risks of the transaction on its own behalf, or through independent professional advice. Counsel relied more particularly on the entire agreement provisions of the ISDA Form by which the Company acknowledged that it had not relied on any oral or written representations or other assurances and waived any rights and remedies which it might have in respect of any such representation.

26. I was referred to the judgment of the English Court of Appeal in *E A Grimstead & Son Ltd v Francis Patrick McGarrigan* [1999] EWCA 3029. In that case the Court considered provisions in a share sale agreement between the plaintiff and the defendant prior to which various oral representations were made. The agreement contained clauses as follows:

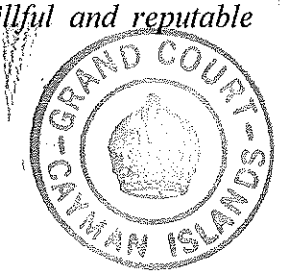
> *"2.5 The Purchaser confirms that it has not relied on any warranty, representation or undertaking of or on behalf of the Vendor (or any of them) or of any other person in respect of the subject matter to this Agreement save for any representation or warranty or undertaking expressly set out in the body of this Agreement……*
>
> *8.1 This Agreement sets out the entire agreement and understanding between each of the parties hereto in connection with the Company and the sale and purchase of the Shares and no party hereto has entered into this Agreement in reliance upon any representation, warranty or undertaking of any other party which is not set out or referred to in this Agreement.*

In his judgment for the Court Chadwick L.J. said at p.30:

> *"In my view an acknowledgment of non-reliance, in the form which appears in clauses 2.5 and 8.1 in the present agreement, is capable of operating as an evidential estoppel. It is apt to prevent the party who has given the acknowledgment from asserting in subsequent litigation against the party to whom it has been given that it is not true. That seems to me to be a proper use of an acknowledgment of this nature, which, as Mr. Justice Jacob pointed out in the Thomas Witter case, has become a common feature of professionally drawn commercial contracts. He identified, as the genesis of such clauses, remarks of Mr. Justice Browne-Wilkinson in Alman and another v Associated Newspapers Group Limited (unreported, 20th June 1980) that:*

"If it [the entire agreement clause which he was considering] were designed to exclude liability for misrepresentation it would, I think, have to be couched in different terms, for example, a clause acknowledging that the parties had not relied on any representations in entering into the contract.

It is of interest to note that Mr. Justice Browne-Wilkinson found as a fact on the evidence that the entire agreement clauses in the form which he had to consider – that is to say in a form which extended only to the first sentence of clause 17.2 in the Thomas Witter case – were commonly included by skillful and reputable solicitors in share purchase agreements.



And he continued at page 31:

I would have no difficulty in holding that the acknowledgements of non-reliance contained in clauses 2.5 and 8.1 were clear and unequivocal. For my part, had the matter been investigated at trial, I have little doubt that the judge would have found as a fact that the purchaser intended that Mr. McGarrigan should act on the terms of the agreement, including the terms in clauses 2.5 and 8.1. That was, after all, the purpose of including those clauses in the agreement. I do not think that it would have been any answer, in the present case, for Mr. Grimstead to assert that he had not himself read the clauses. There were solicitors and accountants advising the purchaser in the transaction who must have known that the clauses were in the agreement and why. But, in the absence of evidence on the point from Mr. McGarrigan, I do not think it safe to assume, in a case in which the point was not pleaded, that the judge would have reached the conclusion that Mr. McGarrigan entered into the agreement on the basis that the purchaser was not relying on whatever representations he had made at the meeting on 12th September 1989. Mr. MaGarrigan's case was that he had made no representations at that meeting. The judge held that he had made the representation alleged. If Mr. McGarrigan did make that representation, in the circumstances alleged, it is difficult to avoid the conclusion that he did so in order

to persuade Mr. Grimstead to agree to the purchase. In that case it would have been open to the judge to hold that Mr. McGarrigan knew that the acknowledgments of non-reliance in clauses 2.5 and 8.1 did not reflect the true position. If he knew that, he could not rely on any estoppel which might otherwise have been created by those acknowledgments.

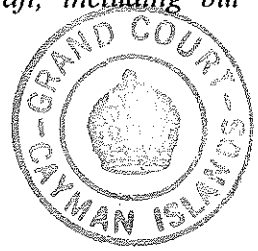
For these reasons – which differ from those given by the judge – I would not have been prepare to hold, in the circumstances of this case, that Mr. McGarrigan could rely on the acknowledgments of non-reliance contained in clauses 2.5 and 8.1 of the agreement.

It was argued for the Petitioner that the provisions of clauses 2.5 and 8.1 of the agreement in the *Grimstead* case, as quoted above, were very similar to the provisions of paragraph 9 of the ISDA Form as incorporated into the Confirmation; indeed, it was pointed out that in agreeing to the provisions of paragraph 9 the Company went further and expressly waived all the rights and remedies which might otherwise be available to it in respect of any oral or written representation, warranty or other assurance. It was the Petitioner's case that the Company's express confirmation that it had not relied on any representations and its waiver of any rights which it might have had in respect of any such representations created an evidential estoppel of the kind explained by Chadwick L.J. This prevented the Company from seeking to rely upon any such representations, which it now sought to allege were not true and had relied upon in agreeing to the Confirmation.

27. Counsel for the Petitioner also referred to the judgment in another English case, *Trident Turboprop (Dublin) Limited v First Flight Couriers Limited* [2008] EWHC 1686. That was an application for summary judgment and concerned two aircraft leases in identical terms. The lease agreements provided at clause 19.1 *inter alia* as follows:

"the Lessee also agrees and acknowledges that save as expressly stated in this Agreement and the other Transaction Documents to which the Lessor is a party,

the Lessor has not and shall not be deemed to have made any warranties or representations, expressed or implied, about the Aircraft, including but not limited to the matters referred to above"



The Judge (Aikens J.) said:

> *"33 The parties who agree such a clause are thus agreeing that no representations were made by* [the Lessor], *or, if any representations were made, then it is "deemed" that they were not. The legal effect of provisions such as this has been analysed by the courts in terms of an estoppel created by contract* [and then reference was made to two cases one of which was Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA 386 to which I was referred by counsel for the Petitioner in reply and which I will consider below] *As Moore-Bick LJ points out at paragraph 56 in the Peekay case, it is commercially convenient and desirable for parties to a contract to agree that a certain state of affairs (ie. that no pre-contractual representations were made) is the case, so as to provide a clear basis for the contract itself. If the parties do agree a certain factual basis on which the contract is made, the contractual agreement is that neither party can subsequently deny that basis. Hence the phrase 'estoppel by contract'.*

The judge went on the explain the distinction between "estoppel by contract" and "evidential estoppel", as the latter was explained by Chadwick LJ in the *Grimstead* case, and concluded that the two forms of estoppel are indeed different. The contractual provisions in the case before him amounted to an estoppel by contract, which he therefore concentrated on.

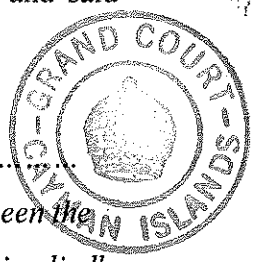
28. I was referred also to *Watford Electronics Ltd v Sanderson Cfl Ltd* [2002] FSR 19, also in the English Court of Appeal. That case concerned three contractual documents concerning the provision of computer equipment and software licences. The terms and

conditions of sale included an entire agreement clause by which the parties agreed that those terms and conditions represented the entire agreement between them and which provided that no statements or representations made by either party had been relied upon by the other in agreeing to enter the agreement. The principal issue concerned the applicability of the Unfair Contract Terms Act 1977 but in the course of his judgment Chadwick L.J. considered the effect of the entire agreement clause, and in particular the acknowledgment by the parties that *"no statements or representations made by either party have been relied upon by the other in agreeing to enter the contract"*. Chadwick L.J. referred to what he had said previously in the *Grimstead* case and went on:

> *"41 The importance of the entire agreement clause in the present context – and, in particular, the importance of the acknowledgment of non-reliance which constitutes the second part of that clause – is that the first sentence in clause 7.3 (or clause 10.6 as the case may be) has to be construed on the basis that the parties intend that their whole agreement is to be contained or incorporated in the document which they have signed and on the basis that neither party has relied on any pre-contract representation when signing that document. On that basis, there is no reason why the parties should have intended, by the words which they have used in the first sentence of the limit of liability clause, to exclude liability for negligent pre-contract misrepresentation. Liability in damages under the Misrepresentation Act 1967 can arise only where the party who has suffered the damage has relied upon the representation. Where both parties to the contract have acknowledged, in the document itself, that they have not relied upon any pre-contract representation, it would be bizarre (unless compelled to do so by the words which they have used) to attribute to them an intention to exclude a liability which they must have thought could never arise."*

29. In *Fleet Mobile Tyres Ltd v Stone and Anor* [2006] EWHC 1947 the terms of a franchise agreement were in issue and it was argued that the relevant clauses were of no effect by

reason of the Misrepresentation Act 1967 because they failed to satisfy the test of reasonableness pursuant to the Unfair Contract Terms Act 1977. In the course of his judgment the Judge referred to the *Grimstead* and *Watford Electronics* cases and said that:



"92 ..... Chadwick LJ has explained and illuminated the relationship between the issue of reliance and the contract term which either expressly or impliedly provides that the parties have not relied on warranties or representations outside the four corners of the contract. In the first place such clauses may operate to create an evidential estoppel. In other words, once the parties have agreed terms in the substance of the form set out in clause 25, the representees are estopped from relying on statements not incorporated into the contract. In Grimstead & McGarrigan estoppel had not been pleaded, and therefore it was not safe to assume that the judge at first instance would have reached the conclusion that the defendant in that case entered into the agreement on the basis that the purchaser was not relying on the representations made. Secondly, Chadwick LJ in Watford Electronics Ltd & Sanderson expressed the opinion that if the parties to a contract agree that there is no reliance on an extra-contractual statement:

> *"It would be bizarre (unless compelled to do so by the words which they have used) to attribute to them an intention to exclude a liability which they must have thought could never arise."*

93 As I understand it, the Court in Cremdean & Nash, and Chadwick LJ in the two cases to which I have referred, have left open the possibility that despite the existence of an entire agreement clause or a non-reliance clause the representee may still be able to establish an actionable representation that triggers the Court's duty under section 11 of the 1977 Act to decide whether the representor has satisfied the test of

reasonableness. In the face of such a clause, however, the task of satisfying the Court that the representee did rely on an extra-contractual statement despite the clause, and that the representor knew that he would rely on the statement, is made very much more difficult."

30. Lastly, in reply, counsel for the Petitioner referred to the *Peekay* case which was referred to in the *Trident Turboprop* case (supra). That was a case, also in the English Court of Appeal, in which the judgment was delivered on 6th April 2006. The circumstances, in summary, were that an individual investor ("the investor") had a company ("the company") which was an investment vehicle which invested at the investor's behest in a financial product described as a *"Structured US Dollar Hedge Russian Treasury Bill Deposit"* developed by the defendant bank. Repayment of the deposit was linked to the performance of a Russian Government issued bond (GKO). Subsequently, after the company had invested in the product pursuant to certain terms and conditions, the Russian Government announced a moratorium on certain of its debt obligations as a result of which the investment became virtually worthless. The investor and the company contended that the defendant bank had misrepresented the nature of the investment to the investor and that he had been induced by that representation to procure his company to make the investment.

31. The Judge at first instance found that in the course of various conversations with the investor the representative of the defendant bank had misrepresented the nature of the investment that the bank was offering its clients by giving him the impression that his company would obtain a proprietary interest of some kind in a GKO and that he had been induced by that misrepresentation to procure the company to make the investment on his behalf. The Judge therefore ordered the defendant bank to pay the investor's company damages in the amount of its loss pursuant to the Misrepresentation Act 1967. The bank appealed that decision. In his judgment on behalf of the Court of Appeal Moore-Bick LJ said:

"25 *Despite the rather rough and ready way in which* [the defendant bank's representative] *had described the investment product, the judge found that* [the investor] *reasonably understood from what she had told him that* [the investor's company] *would be acquiring an interest in a GKO. The judge's finding that* [the investor] *did in fact obtain that understanding in the light of his conversations with* [the defendant bank's representative] *is one with which in my view this court should be very slow to interfere since it reflects the judge's conclusion after hearing his evidence on the point. I do not think, however, that we need feel quite so constrained when it comes to the finding that* [the investor's] *understanding was reasonable. I say that because he was acknowledged to be an experienced investor and had been sent a copy of the Indicative Term Sheet relating to the proposed GKO linked Note in order to give him some understanding of the nature of the product* [the defendant bank] *was intending to offer. If he had read that document, he would have seen that the investment was described as a note linked to GKO bonds, rather than a share in the bonds themselves. That ought at least to have raised in the mind of an experienced investor the question whether the investment he was being offered was a derivative, and, if it was not, why* [the defendant bank] *had bothered to send him the document at all. Moreover, the terms in which* [the defendant bank's representative] *had described the investment to him, as found by the judge, were scarcely such as to enable him to obtain a very clear understanding of the precise nature of the investment.*

26 Two days later, however, [the investor] *received by e-mail from* [the defendant bank's representative] *the FTCs* [the Final Terms and Conditions] *and accompanying Risk Disclosure Statement. In paragraph 88 the judge made the following findings about what he did next:*

"I am satisfied that [the investor] *did no more than glance through the FTCs and the Risk Disclosure Statement. Having seen and heard* [the

investor] *give evidence, I do not find this at all incredible, as* [the defendant bank] *suggested it was.* [The investor] *clearly placed great confidence in* [the investment arm of the defendant bank] *as his private bankers, and he evidently had no prior cause to think that the FTCs would contain any nasty surprises. He did notice the heading of the FTCs, "USD Hedged Russian Treasury Bill", which he reasonably regarded as consistent with what he had been told about the product by* [the defendant bank's representative]. *He did not, however, take in either the fact that the FTCs described a structured deposit, which gave investors no interest, whether legal or equitable, in the GKO defined therein as the Reference Obligation, or the settlement procedures applicable in the event of default. Mr. Shah, the countersignatory, did no more than exactly what he was told to do by* [the investor] *i.e. to initial and countersign the documents"*

27 *The judge made no findings about what* [the investor] *would have learnt from the FTCs if he had taken the trouble to read them, even cursorily, but in my view it is possible to conclude simply from the form of the document that a number of things would have been obvious to him. First, he would have seen that the investment to which it related, and in which* [the company] *was being invited to participate, was a deposit of some kind and, moreover, one described as a 'Structured USD Hedged Russian Treasury Bill' Deposit. Next he would have seen the amount of the total deposit (USD 2,000,000). He could hardly fail to notice the use of the expression 'Reference Credit', if only because that is the one place where there is a direct reference to a specific GKO. In my view these features would have been enough to alert him as an experienced investor to the fact that the documents related to an investment in a derivative and therefore something that was in his mind fundamentally different from what he had been expecting. If he had read on as far as Appendix 2 in order to see what would happen in the event of a default (a matter in which he had professed a particular interest), he would have seen that the*

investor would obtain only the market value of the Reference Obligation at the time of default.

28 *By the end of the trial it was common ground that a contract between* [the company] *and* [the defendant bank] *did not come into existence until the documents had been returned to the bank at the earliest, and probably not until the bank acted on the instructions contained in* [the company's] *letter of 7th February. In those circumstances* [leading counsel for the defendant bank] *submitted that whatever* [the defendant bank's representative] *had said about the investment in the course of earlier conversations with* [the investor], *any misrepresentation as to the nature of the investment product was dispelled by the terms of the FTCs of which* [the investor], *having signed the disclosure statement, must be taken to have been aware, whether he had actually read them or not. Accordingly,* [the plaintiff company] *could no longer say that it had been induced to enter into the contract by any representations made in the course of the earlier conversations.*

29 [Leading counsel for the company and the investor] *accepted that the effect of a false statement can be nullified if a correction is effectively brought to the attention of the person to whom it was made before he enters into the contract, but he submitted that that is essentially a question of fact to be decided on the evidence in each case……."*

After considering two decisions of the English Court of Appeal: *Assicurazioni Generali SPA v Arab Insurance Group [2002] EWCA Civ 1642* and *Flack v Pattinson [2002] EWCA Civ 1820 [unreported]* Moore-Bick LJ said:

40 *It can certainly be said that these decisions support the conclusion that whether a person has been induced by misrepresentation to enter into a contract is a question of fact. As such it is always open to the defendant to*

show, if he can, that since the claimant was aware of the true facts, he was not induced by the misrepresentation to act as he did. For that purpose, however, it is not enough to show that the claimant could have discovered the truth but that he did discover it……."

Having reviewed the particular facts of that case the Court of Appeal determined that the conclusion of the Judge at first instance could not be sustained and accordingly allowed the defendant bank's appeal. In the present context I should mention also that, although not necessary to decide the question whether the company was estopped, by virtue of its having signed the Risk Disclosure Statement, from alleging that it had been induced to enter into the contract by misrepresentation, Moore-Bick LJ said:

"57 It is common to include in certain kinds of contracts an express acknowledgement by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see [the Grimstead case (supra)]."

32. The Petitioner submits that the Confirmation amounts to a complete and binding agreement between the parties and that by incorporation of the ISDA Form, the

Confirmation amounts to an entire agreement including the non-reliance and waiver clauses. As a result of those provisions and in light of the cases referred to above, particularly the *Grimstead* case and the *Peekay* case, it is contended that it is not now open to the Company to seek to rely on any representations which may have been made prior to its execution of the Confirmation; it has contractually waived any right it may have had to rely on such representations, whether or not misleading, unless fraudulent, and is estopped from doing so. The Petitioner submits that the Company is bound by the terms of the entire Confirmation, including the ISDA Form, and is obliged to comply with its terms. Pursuant to that contract the sum upon which the petition is founded is clearly due and owing and has been since August 2013. The Company has failed to pay that sum and is therefore to be considered as unable to pay its debts as they fall due and consequently insolvent.

The Company's case

33. The Company disputes the debt on which the petition is founded and contends that its dispute is *bona fide,* genuine and based on substantial grounds. As I have already said, it was not disputed in principle that this is the established test.

34. By way of further elaboration I was referred by counsel for the Company to *French on Applications to Wind Up Companies (2 edn.)* p. 486 where, by reference to various cases, it is stated:

> *"On hearing an application to prevent a disputed debt petition proceeding, the court is not normally concerned to decide the dispute, only to determine whether a dispute on substantial grounds exists. Accordingly, the court will not normally order the cross-examination of persons making affidavits or witness statements to be put in evidence at the hearing".*

I was also referred to the passage at the foot of p. 485:

> *"If there is a substantial ground for dispute, the petition will be dismissed even if the company's case is "shadowy". The court should not consider the prospect of success of either party to the dispute."*

35. It is the Company's position that the commercial terms of the Confirmation do not represent what the Company contends was expressly agreed with the Petitioner and was provided for in the term sheets, namely that the share swap transaction would be non-recourse and that the Petitioner's position would be secured solely by and limited to the Shares themselves, of which it had possession and control, together with any cash collateral which it already held. It was said to be an integral part of the transaction that the Petitioner would share in the risk in respect of the Shares. The Company says that it was induced to enter into the Confirmation on what are significantly different and prejudicial commercial terms, far more favourable to the Petitioner, by knowing or reckless misrepresentations made on behalf of the Petitioner, in particular by Mr. Lhert and also Mr. Kummer. The representation by Mr. Lhert that the Confirmation would be purely a legal reflection of the commercial terms agreed in the term sheets was clearly not true but the Company relied upon it and reasonably expected the Confirmation to be as Mr. Lhert said it would be. Similarly, Mr. Kummer categorically confirmed that in view of the long term form confirmation to be used for the swap transaction there was no need for an ISDA Form and the Company relied on that too yet this was also not true since the Confirmation incorporated the ISDA Form with the all terms thereof, even though the parties never agreed or even attempted to agree an ISDA form of agreement.

36. Counsel for the Company referred to the note of the Court of Appeal's decision in *Bodden v Ferryman Investments Ltd. and O'Brien (1992-93) CILR Notes 8-1st December 1993* which states:

> *"Fraud is proved when it is shown that a false representation has been made (a) knowingly; or (b) without belief in its truth; or (c) recklessly, careless whether it*

be true or false (Derry v. Peek (1889), 14 App. Cas. 337, dictum of Lord Herschell applied)."

37. I was also referred to the report of *Nike Real Estate Limited v. De Bruyne and Others [2002 CILR 389]* in which the judge (Kellock, Ag.J.) considered a claim for rescission of a contract for the purchase of real estate, including premises which were leased, for rescission of the contract on the ground of misrepresentation as to the terms of the lease. The contract also included an entire agreement clause in the following terms (see para. 17):

> *"Entire agreement*
>
> *This offer to purchase, when executed by both parties, is the complete agreement between the parties and the purchaser hereby admits and declares that no statement, guarantee, promise, agreement, warranty or representation, whether oral or written, has been made with or to him on or prior to the date hereof by the vendor, by anyone acting or purporting to act on the vendors' behalf, by the listing broker/co-broker or any real estate agent concerning the property or otherwise which he relied upon, apart from as specifically set out in this offer to purchase. ....."*

It was agreed during the course of argument in that case that if the judge were to find that the alleged misrepresentation upon the basis of which the plaintiff purchaser entered into the agreement was fraudulent then the entire agreement clause as set out above would not operate. On the other hand it was also agreed that if the judge was to find that the misrepresentation was made negligently or innocently, the entire agreement cause would operate to bar the plaintiff's claim. The judge, having considered all the evidence, concluded that the representation made in that case was fraudulently made and said that he was using the term "fraud" in the sense in which that word is used in the decided cases. He said he was using the word "fraud" in the sense that Lord Halsbury, L.C. used it in *Arnison v. Smith (1889) 41 Ch.D. 348* and he referred to his judgment at 367-368 *:*

"I am of opinion that this appeal must be dismissed. The action is one in which the Plaintiffs complain that they have been deceived by the Defendants, and have by reason of that deceit lost certain sums of money, and so sustained damage. In an action of this character, speaking for myself, I adopt the language of Earl Selborne in Smith v. Chadwick ..... 'I conceive that in an action of deceit, like the present, it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts: and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct.'

The judge also referred to the judgment of Cotton, LJ in the same case at 371:

"I have come to the same conclusion, but on somewhat different grounds. I do not think that in order to enable the Plaintiffs to obtain a decree it is necessary to show that fraud was intended. When a person makes a statement to others with a view of their acting upon it, he is bound to see to its truth, and if it is untrue it is not necessary to show that he intended to deceive. I have already expressed my view to that effect in Peek v. Derry....., and in Smith v. Chadwick.....Sir George Jessel said: 'Without repeating at full length what I have said in a recent case, I think the law on this subject is clear. A man may issue a prospectus, or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions and did not intend to defraud'. If a man makes statements to another person with a view to their being acted on he undertakes the duty of seeing that his statement are

correct, and is liable if he does not take due care to see that they are correct……"

38. Counsel for the Company also relied on a passage in the judgment in the *Trident Turboprop* case *(supra)* at paragraph 42:

> *"This conclusion* [namely that the relevant provisions in the leases, by which the lessee gave up any rights regarding any warranty or representation, extended to all such rights, other than in respect of fraudulent warranties or representations] *is reinforced when the position in respect of fraudulent misrepresentations by either Trident or BAE acting as its agent are considered. They will not be excluded because of the law's attitude to fraud, particularly in a commercial context. Fraud is "a thing apart", proof of which unravels all. On public policy grounds the law does not permit a party to exclude liability for its own fraud. Liability for the fraudulent acts of a party's agents will only be excluded if the language of the contract is in clear and unmistakable terms: see the HIH case at paragraphs 15-16 per Lord Bingham of Cornhill. Rights in respect of fraudulent misrepresentations, whether by Trident or its agent, are therefore not waived by clause 19.2. However, given that rights in respect of all types of fraudulent misrepresentation claims are not given up, it is necessary to ask: what rights are covered by the clause? In my view, the comprehensive wording of the clause indicates clearly that it was the parties' intention and agreement that FFCL agree to give up all its rights based on all other types of misrepresentation by Trident."*

39. In the present case it was pointed out that the relevant provisions of paragraph 9 of the ISDA Form expressly provided that nothing in the agreement limited or excluded any liability for fraud. It was argued for the Company that the Petitioner had been trying to sell a product to the Company and wanting to attract the Company to it and to induce it into entering into an agreement in the form of the Confirmation and ISDA Form in relation to it. It was submitted that Mr. Lhert's representation, made on behalf of the Petitioner, that the Confirmation would simply reflect the commercial terms agreed in the

term sheets and the inference that it was just a formality, when he well knew that the Company was seeking a non-recourse swap transaction and thought the Petitioner had agreed to that given how the transaction was described in the term sheets, was intended to re-assure the Company and entice it into contracting with the Petitioner. It was an intentional or at least reckless and consequently to be considered a fraudulent misrepresentation, which the Company had reasonably relied upon. The entire agreement and waiver provisions upon which the Petitioner relied were of no effect in the particular circumstances.

40. It was also the Company's case that the dispute about the alleged debt is anyway required to be determined by the courts in England and that the Company was entitled to that. It was emphasized that the Confirmation provided as follows:

> "*12.* ***Governing Law:***
>
> *This Confirmation, the Agreement and any non-contractual obligations arising out of or in connection with it will be governed by and construed in accordance with English law.*
>
> *13.* ***Jurisdiction and Third Party Rights:***
>
> *(a) With respect to any suit, action, or proceedings relating to any dispute arising out of or in connection with this Confirmation or the Agreement (including a dispute relating to any non-contractual obligations arising out of or in connection with this Agreement)* ***("Proceedings")****, for the benefit of the other Party and its Affiliates, each Party:*
>
> *(i) irrevocably submits to the exclusive jurisdiction of the English court;*
>
> *(ii) agrees to bring any Proceedings against the other party, and/or any Affiliate of that other Party, in the English courts and agrees*

accordingly that any such Affiliate has a corresponding enforceable right to be the subject of Proceedings only before the English courts; and

(iii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such Party."

41. I was referred in this context to *Re Times Property Holdings Limited* [2001] 1 CILR 223 in which I stayed a winding up petition in circumstances in which the parties had expressly agreed that any dispute arising out of the subscription agreement in issue was to be resolved by arbitration in Hong Kong. An arbitration commenced pursuant to that agreement was already underway and the substantive hearing was to take place within six months. I concluded that the parties should be held to their agreement. However, in the course of doing so, I also reached the view that there were substantial issues between the parties to be determined and I was satisfied that the dispute by the company of its alleged indebtedness was *bona fide.* Nonetheless, counsel for the Company in the present case pointed out that in my conclusion at paragraph 22 I said:

> *"In my opinion, the parties having agreed that any dispute arising out of or relating to the subscription agreement should be resolved by arbitration in Hong Kong, which is now taking place and will result in a determination of the dispute between the parties, it is not appropriate for this court, even if minded to do so, to deprive the company of putting its case and pre-judging the issue by seeking to determine that the compay's dispute with the alleged indebtedness has no real substance. It seems to me that that question is for the arbitral tribunal in Hong Kong, with the agreement of the parties. In any event, if I am wrong in that approach, I do not anyway feel able to conclude that the company's arguments are of so little substance that they have no reasonable prospect of success. It is*

*my opinion that the company's dispute of the alleged indebtedness is bona fide and on sufficiently substantial grounds that they should be tried in the appropriate forum, which is the Hong Kong arbitration. As Byron CJ said in the Sparkasse case [*Sparkasse Bregenz Bank AG v Associated Corp. BVI C.A., Civil Appeal No.10 of 2002, 18th June, 2003, unreported], *a winding up order could sound the death knell of the company. It seems to me that I should err on the side of caution in circumstances where the very issues on which the amended winding up petition is grounded are already to be the subject of determination in another tribunal to which the parties have explicitly agreed. In all the circumstances, I therefore decline to make a winding up order at this time."*

42. In the *Times Property Holdings* case I had also referred to a judgment of Bannister J in the BVI case *Pioneer Freight Futures Co Ltd v Worldlink Shipping Ltd (BVI High Ct, Claim Nos BVI HC 135/2009 and BVIHC 152/2009, 1st July 2009 unreported)* in which the decision turned on the fact that the relevant agreement between the parties contained a choice of law clause that it was governed by English law and an exclusive jurisdiction clause pursuant to which the High Court in England was to have exclusive jurisdiction with respect to the agreement. Counsel for the Company in the case before me referred to and relied upon a passage in that judgment at paragraph [17]:

"In truth, [the applicant's] position is more than that. [The applicant] is saying (a) that it wishes to deploy its construction point (b) that it is contractually entitled to deploy the point in the High Court in London and (c) that it is not for the BVI court to deprive it of that right. Understood in this way, it seems to me that [the applicant], whatever I might think privately about its point of construction, does indeed raise a dispute of substance."

43. In light of the choice of law and exclusive jurisdiction provisions in the Confirmation and in reliance upon these authorities, Counsel for the Company contended that the dispute over the alleged debt is undoubtedly required to be determined by the English courts in accordance with English law. It was submitted that the Company is contractually entitled

to make its arguments in support of its dispute of the alleged debt in the English courts and that it is not for this court to deprive it of that entitlement. It was argued that there are factual issues in the dispute which require to be resolved by way of discovery, oral evidence and cross-examination in accordance with English law, practice and procedure. For example, the evidence on behalf of the Company is that the telephone discussions concerning the swap transaction between its representatives and the representatives of the Petitioner were recorded by the Petitioner. It was submitted that the transcripts of such recordings would be relevant evidence in the English court's appropriate consideration of the whole circumstances, as would the Petitioner's internal memoranda, e-mails and other communications and records relating to the transaction.

44. It was also submitted that since the Confirmation expressly provided that it was to be governed by English law, the Company would wish to rely upon the UK Financial Services Act 2012 which by Part 7 establishes offences relating to Financial Services. By sections 89 and 90 the Act makes it a criminal offence for a person to make a statement knowing it to be false or misleading in a material respect, or is reckless as to whether it is false or misleading, with the intention of inducing a person to enter into a relevant agreement (which the Confirmation would be). Counsel argued that these criminal provisions reflected UK public policy which the Company would seek to argue before the English courts in support of its challenge to the alleged debt claimed by the Petitioner.

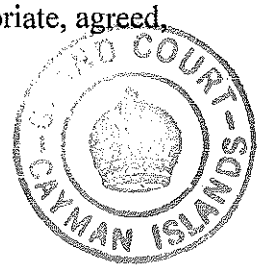
45. It was said too that the Company would seek further support for its dispute of the alleged debt from the English Unfair Contract Terms Act 1997 and would argue that the entire agreement provisions in the Confirmation and the ISDA Form were not reasonable in the circumstances. I was referred in particular to sections 8 and 11 (1) of that Act in this respect and in particular to the provisions of section 11(1) which are as follows:

"(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967, is that the term shall have been a fair and reasonable one to be included having regard to the

circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made"

It was submitted that what was known to or in the contemplation of the parties, or ought reasonably to have been, having regard to the circumstances of this case was clearly a question of fact which would have to be determined by the English courts on the basis of the relevant available evidence in accordance with the law, practice and procedure of those courts.

46. Counsel for the Company accepted that it was open to this court to determine, on examining the evidence before it, that the Company's dispute of the debt was so obviously not genuine or frivolous or without substance that it should be ignored. However, it was strongly contended that the material before the court on this hearing clearly demonstrated that the Company's case did not fall into that category and that its dispute of the debt is genuine, of substance and should be tried in the appropriate, agreed, forum, namely the English courts in accordance with English law.

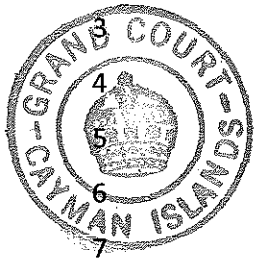


Comment and Conclusions

With regard to the Company's case in relation to the choice of law and exclusive jurisdiction provisions in the Confirmation, in the *Sparkasse* case in the BVI the trial judge had dismissed the winding up petition based on an alleged unpaid debt, concluding that there was a genuine and substantial dispute as to whether the debt was due. The agreement between the parties provided that it was governed by Austrian law and that the court in Vienna, Austria, had exclusive jurisdiction to determine any dispute arising out of the agreement. On appeal Byron C.J. said at paragraph [4]:

"……*This provision is unambiguous. Austrian Law would be relevant to resolve the questions that were raised by the parties. It is not necessary to rely on Austrian Law to determine whether there was a dispute. One can conclude that a dispute exists without knowing how the dispute would be resolved. The learned*

trial judge concluded that there were disputes of both a factual and legal nature and it is not for this court to resolve those disputes……

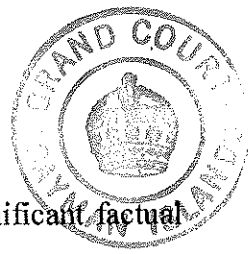


……

The questions that the judge was required to answer, and those that he did answer did not require any knowledge of Austrian Law. If he had attempted to resolve the dispute he would have been improperly encroaching on, and usurping a jurisdiction which the parties had conferred on the Austrian Court."

47. In the passage in the BVI *Pioneer Freight* case as cited in the Times Holdings case (supra) upon which counsel for the Company relied, Bannister J. does seem at first glance hold that the fact that the party concerned wished to argue it's case before the English High Court pursuant to the relevant choice of law and exclusive jurisdiction clause and was contractually entitled to do so and that it was not for the BVI to deprive it of the right to do so, amounted to a dispute of the debt of substance. However, it is clear on analysis that the judge considered the dispute to be exclusively one of law based entirely upon the construction of the contract concerned, which was governed by English law. There were no insolvency proceedings under way and no issues of fact to be resolved. It is in my view understandable and unsurprising that in those circumstances the judge would defer to the exclusive jurisdiction clause and dismiss the winding up petition on the basis that there was a dispute of substance.

48. In my view the situation in the present case is quite different. The circumstances in the *Times Property* case, upon which reliance was placed, were also different but it is clear anyway that in that case, in which there were clearly factual issues, I gave consideration to whether the company's grounds for disputing the alleged debt were substantial. In fact, as I have already mentioned, counsel for the Company, in response to a question from me, accepted that I had to be satisfied in the instant case that there were substantial issues in dispute. He did submit that the "substantial" test only applies when there are issues of fact or of fact and law to be resolved and not when the dispute is purely one of law, where there is a choice of law and exclusive jurisdiction clause. While I am not



entirely convinced of that, as on the Company's own case there are significant factual issues to be resolved in the present case and I was urged on behalf of the Company to consider the whole background and surrounding circumstances giving rise to the Confirmation, it is not necessary in this case for me to analyse what the position is or should be when, in the context of choice of law and/or exclusive jurisdiction provisions, the dispute is purely one of law.

49. I have therefore concluded on this aspect of the matter that I should, in accordance with the agreed established practice, determine whether the Company's dispute of the debt is genuine and on substantial grounds or whether it is frivolous and of no substance and so should be ignored. Of course if I do conclude that there is a substantial dispute about the alleged debt, that dispute must be resolved by the English courts in accordance with English law.

50. The Petitioner's case in reliance upon the terms of the Confirmation, as executed by both parties, is relatively straightforward. The argument is in effect that the Confirmation speaks for itself and is binding on and enforceable against the Company. It was also pointed out that the Company submitted no evidence of solvency apart from a bare assertion by Mr. Maas in his affidavit that the Company is solvent, despite the Company having been given the opportunity to do so expressly by the order dated 25th September 2013. The Company admits that it executed the Confirmation, with its provisions for the incorporation of the ISDA Form. There is no doubt about that and that is not open to challenge. However, although not addressed in the submissions by counsel at the hearing, the Confirmation and all the other transaction documentation, including the relevant Company's board meeting minutes and the director's Certificates were not negotiated documents but the Petitioner's documents and it is perhaps worthy of comment that on their face they were apparently all executed by Ms. Okay for the Company (and Mr. Jmel in one case)) on the day immediately after the final term sheet was sent out by the Petitioner. There could not have been any opportunity on the part of the Company in fact to consider the documentation in any detail and, of course, it is in effect the Company's case that as a result of the representations made on behalf of the Petitioner it had been

assured that the Confirmation would be purely a legal reflection of the commercial terms agreed in the term sheets, the final one of which had been sent out only the day before.

51. The Petitioner also relies on the fact that the Company made payment of the first two margin calls, on 10th and 20th June 2013, in compliance, it says, with the terms of the Confirmation. Thereafter, the Petitioner claims, the Company reneged on its obligations under the Confirmation by failing to make payment of the subsequent margin calls and then the sums it claims were payable on the unwinding of the swap transaction. The Company says it made the payments on 10th and 20th June to protect its share of the investment in the Shares. It says that as soon as it was apparent that the value of the Shares was continuing to drop the Petitioner should have realized its security by selling all the Shares (which it held and controlled and which were its security for its share of the risk) in order to minimize its loss. The Company argued that under the swap transaction as intended (and it says as agreed) there was and is no basis for the Petitioner to seek to attempt to recoup from the Company its loss due to its own failure to realize its security. That was the risk the Petitioner took and was also reflected in the high level of the fee which the Petitioner charged to the Company for undertaking the transaction. It was pointed out by Mr. Maas for the Company that at no stage did the Petitioner seek financial statements from the Company or any other evidence of its financial position, which, he said, was inconceivable if the Petitioner was, as it claims, relying on ultimate recourse against the Company's assets. It was contended that the fact that the Petitioner did not do so was evidence that it was relying, as the Company says was the agreed intention, on recourse solely against the Shares themselves and not the Company's assets.

52. The Petitioner of course relied upon the *Grimstead* and *Peekay* cases (supra) in particular in contending that was not open to the Company to argue that it had entered into the Confirmation in reliance upon any alleged misrepresentations by the Petitioner. In fact the most relevant part of paragraph 10 of the Confirmation itself (subparagraph (xiv)), which is the paragraph containing the representations and warranties which Mr. Jmel also made, says that the Company is not relying on "*any communication (written or oral) of* [the Petitioner] *(or any of its affiliates) as investment advice or as a recommendation to*

enter into the Transaction [my emphasis], *it being understood that information and explanations relating to the terms and conditions of the Transaction will not be considered investment advice or a recommendation to enter into the Transaction……".* However, I did not understand the Company to be contending that the alleged misrepresentations by the Petitioner upon which it relies constituted investment advice or recommendations to enter into the transaction. In my view the provisions which really fall for consideration are in the entire agreement clause in subparagraph (a) of paragraph 9 of the ISDA Form, which I have already quoted at paragraph 24 above. These provisions were, along with the rest of the ISDA Form, incorporated into the Confirmation. It is, of course, the Company's position that the Petitioner represented to it that the ISDA Form would not be used.

53. The relevant judgments in the *Grimstead* and *Peekay* cases, of course, related to appeals from the decisions of judges at first instance following, in each case, a trial at which the judge concerned heard and read the evidence relating to the whole circumstances surrounding the agreements concerned, including the representations which were made and relied upon. In each case the Court of Appeal considered the findings of fact of the judge. That is not my function here. I have before me two opposing affidavits exhibiting correspondence on the basis of which, the Company bearing the onus, I must determine whether the Company's dispute of the debt on which the winding up petition is grounded is genuine and on substantial grounds or is frivolous or so lacking in substance that I should ignore it and make a winding up order. It is not for me to attempt to determine the dispute, only to come to a view as to whether there is a substantial dispute to be tried, in this case by the English courts.

54. It is true that the circumstances in the *Peekay* case appear similar in many respects to the circumstances in the present case. Those behind and in control of the Company are experienced investors and if they had done little more than glance at the Confirmation they would have seen the references to ISDA and that it said nothing about the transaction being non-recourse or the Petitioner's position being secured by the Shares, but that it required that all settlements, including final settlement, were to be in cash.

However, there are, in my view differences in the circumstances of that case which may be considered material by a trial judge. In the present case the final term sheet stating that the structure of the swap was that it was secured against the underlying Shares was issued by the Petitioner only a day before the Confirmation and the other closing documents prepared by the Petitioner were executed. Furthermore, the Company had been assured by the Petitioner that the transaction documents were a mere formality and purely a legal reflection of the commercial terms "pre-agreed" in the term sheets.

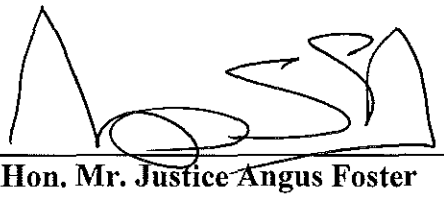
55. Although, as quoted above, Chadwick L.J. said in the *Grimstead* case that an acknowledgement of non-reliance of the kind in the ISDA Form in the present case is capable of operating as an evidential estoppel, as I understand it, it was accepted that there were factual issues to be determined and assessed in determining whether such an estoppel applied in the particular circumstances. I emphasise again that this is the hearing of a winding up petition and not a trial of these disputed issues.

56. Furthermore, the Company, as I have already explained, asserts that the misrepresentations by the Petitioner on which it relies were fraudulent in the sense of having been made without belief in their truth or not caring whether they were true or false (see: the *Bodden v. Ferryman* case (supra), the *Nike Real Estate* case (supra) and the passage relied upon in the *Trident Turboprop* case (supra)). Apart from the sworn testimony of Mr. Maas, the Company has produced documentary evidence in the form of emails establishing that the representations concerned were made. It is said that there are transcripts of telephone discussions recorded by the Petitioner which will be relevant also.

57. The language of section 92 of the Companies Law (2012 Revision) makes it clear that whether or not the court will make a winding up order is a matter of discretion. In the present case the Petitioner seeks a winding up order on the ground that the Company is unable to pay its debts as they fall due and so is to be considered insolvent. However, the evidence before me is that the Company has not paid the debt which the Petitioner contends is due and payable because it disputes the debt. I have concluded that its

dispute is *bona fide* and genuine and based on sufficiently substantial grounds that I should not ignore the dispute. In the exercise of my discretion I am not willing and do not consider it appropriate in all the circumstances to sound *"the death knell"* of the Company at this time by making a winding up order and I decline to do so. In my opinion the appropriate course for the Petitioner is and would have been to seek to obtain judgment against the Company in respect of the alleged debt in the appropriate English court and then, if successful in doing so and if the judgment was or is not satisfied, to petition this court for the winding up of the Company. In all the circumstances, having considered the evidence, authorities and the skeleton arguments as well as the submissions of counsel, in the exercise of my discretion I order that the winding up petition be dismissed and that, in accordance with the provisions of O.62, r.4. of the Grand Court Rules, the Petitioner pay the Company's costs, such costs to be taxed on the standard basis if not agreed.

Dated the 22nd day of November 2013



The Hon. Mr. Justice Angus Foster
JUDGE OF THE GRAND COURT