IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

8-10-09

CAUSE NO. 292 OF 2009

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2007 REVISION, AS AMENDED)

AND IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

AND IN THE MATTER OF JUKEBOX L.P.

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 18TH DAY OF SEPTEMBER 2009

APPEARANCES: **Mr. David Quest, and Mr. Nicholas Fox of Harneys for the Petitioner**

Mr. Shaun Folpp and Ms. Madeleine Welham of Ogier for Jukebox L.P.

RULING

1. This is a petition to wind up Jukebox L.P., which is an exempted limited partnership registered pursuant to the Exempted Limited Partnership Law (2007 Revision) on 8 February 2008 ("Jukebox").

2. The Limited Partners of Jukebox are Mr. Agust Gudmundsson and Mr. Lydur Gudmundsson ("the Gudmundssons") and the General Partner is Jukebox Group Corp. ("JGC"), a company incorporated pursuant to the laws of the British Virgin Islands and registered in this jurisdiction under Part IX of the Companies Law (2009 Revision) ("the Companies Law"). There are no other partners of Jukebox.

3. Jukebox was formed in order to acquire a Gulfstream G-IV aircraft ("the aircraft"). The aircraft was acquired for the private use of the Gudmundssons who are two prominent Icelandic businessmen. The acquisition was financed by a loan of some USD23 million provided by the Petitioner by agreement entered into on 8 August 2007 ("the Loan"); as well as by USD6 million provided by the Gudmundssons to complete the purchase price of USD29 million. An overdraft facility was also provided by the Petitioner – denominated in three accounts respectively held in US dollars, Euros and Sterling by Jukebox with the Petitioner – for funding the maintenance and operation of the aircraft.

4. The Petitioner, Pillar Securitisation S.ar.l. ("Pillar") is the successor in title to Kaupthing Bank Luxembourg ("KBL"), following a restructuring on the 10 July 2009 under Luxembourg law. KBL was formerly part of the Kaupthing Banking Group which collapsed in October 2008 as a result of the financial crisis in Iceland. ("Pillar" and "KBL" are hereinafter referred to interchangeably as the context might require)

5. KBL formerly acted as Corporate Agent for JGC and provided its directors pursuant to a Corporate Services Agreement. However on 29 June 2009, the Gudmundssons appointed themselves as directors of JGC and JGC and Jukebox are now under their exclusive control.

6. The debt claimed by Pillar is two-fold. First, the balance on the loan account on which there have been no payments since 8 August 2008. This presently stands at $23 million plus interest, for a current total of some $24.2 million.

The second plinth of the petition are the outstanding balances of €2.4 million, USD5.2 million and £6,309 on the overdrawn accounts which had been provided by KBL. Including interest, the outstanding balances of the Loan and overdraft facilities thus together total a debt owed by Jukebox which is now exceeding USD30 million.

7. The initial term of the Loan was 12 months, expiring on 8 August 2008. On 6 August 2008 KBL granted by notice an extension to 7 August 2009. Accordingly, the extended term has itself now expired.

8. Interest was payable under the Loan at quarterly intervals but Jukebox failed to pay the interest due on 8 August 2008 and for every subsequent interest period.

9. On 20 February 2009, KBL wrote to Jukebox:

   (i) requiring the overdue interest to be paid within 10 days failing which the Loan would become immediately payable; and

   (ii) demanding payment of the overdrawn balances in the Jukebox bank accounts.

10. Jukebox failed to comply.

11. Its failure to pay interest constituted, on the face of it, an event of default under the Loan Agreement (Clause 13). This entitled KBL to demand repayment of the entire Loan. Such demand was made on 11 May 2009 and again on 10 June 2009.

12. These demands not having been met, statutory demands in respect of the debts were served on Jukebox on 14th May 2009, in keeping with section 93(a) of the Companies Law. These have also gone entirely unsatisfied.

13. Despite this documented history of non-compliance, Jukebox seeks to resist the petition for its winding up.

14. As part of its Defence, Jukebox, by reliance on the evidence of Lydur Gudmundsson claims that there was no default on the Loan, there having been an oral agreement for the suspension of payments. This is said to have come about under circumstances to be more fully examined below.

15. Irrespective of whether there have been events of default by non-payment of interest under the Loan or as demanded, it is clear, asserts Pillar in its petition, that the Loan would in any event now be repayable, its own term (even as extended) having expired on 7 August 2009. On this basis, by itself, the petition should therefore succeed.

16. The petition also avers that Jukebox has no funds with which to repay the indebtedness and the evidence is unrefuted in this regard. Jukebox has no assets other than the aircraft and no source of income. Even if the aircraft could be sold immediately, its apparent value, based on an offer from the Gudmundssons to purchase it, would be significantly less than the indebtedness. The amount offered was USD16 million.

17. Jukebox's only other means of obtaining funds by which its obligations could be met is by a capital contribution from its limited partners, the Gudmundssons themselves. Pursuant to an Agreement on Capital

Contribution, they had undertaken to contribute sufficient funds to allow Jukebox to meet its obligations under the Loan Agreement and to pay for the operation and maintenance of the aircraft.

18. This commitment notwithstanding, demands made on them on 12 May 2009 by KBL (then as director of Jukebox) were refused. They have made no contribution and deny any liability to Jukebox.

19. The non-payment of debts in satisfaction of the statutory demands is, of course, primarily relied upon by Pillar to ground the petition on the basis that Jukebox is in consequence to be deemed to be unable to pay its debts and to be insolvent, pursuant to section 93 of the Companies Law.

20. Jukebox seeks to resist the petition on the basis that there exists a bona fide and substantial dispute over whether the indebtedness is owed and due. This is by reliance on the alleged oral agreement already mentioned and on two other grounds - all to be discussed below. On the basis of the principle laid down in ***Mann v Goldstein*** *[1968] 2 All E.R. 769,* Jukebox argues that Pillar should be required to prove its claim by writ in which context alone can the dispute – which is said to be one of contract, law and complex fact – be properly resolved. The following words of Ungoed-Thomas J. from ***Mann v Goldstein*** are invoked by Mr. Folpp for the Defence:

> ***"...a creditor's petition can only be presented by a creditor,---***
>
> ***the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a***

creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court."

21. Further advice from the case law is to the effect that the Companies Court procedure (that is: a petition) is ill-equipped to deal with the resolution of complex disputes of fact where there are no pleadings, no discovery and as there is no oral evidence normally permitted upon the hearing of such petitions. See, for instance, ***Alipour v Ary, Re a Company (No. 002189 of 1996) [1997] 1 BCLC 557***, per Peter Gibson LJ.

22. I have come to the conclusion that there is no such substantial and bona fide dispute standing in the way of this petition. Rather, as insubstantial disputes of the present kind have been described and summarily dismissed by the Courts in the past, this Defence does no more, in my view, than seek to raise ***"a cloud of objections in affidavits (in order to) avoid the resolution of the issues raised in the petition."*** per Chadwick J (as he then was) in ***In Re a Company (No 006685 of 1996) [1997] 1 BCLC 639.***

23. In that case it was also declared that the Court ***"...is entitled and indeed bound to weigh the evidence to see whether there is really any substance in the dispute raised by the [debtor] or whether it is in reality contrived."***

24. In this case, I will summarise the issues raised by way of dispute, a summary which will, I perceive, readily reveal the basis for concluding that the dispute is self-evidently contrived. There are three aspects.

(I) <u>The Petitioner's standing</u>

25. It is said by the Defence that Pillar, the Petitioner, does not have standing to petition and that this disability arises from the circumstance of Pillar having come into existence as the result of the dissolution of KBL in Luxembourg.

26. The argument goes as follows: That as the result of the restructuring of KBL in Luxembourg was the splitting up of KBL into two separate successor entities – Pillar and Banque Havilland ("Havilland"), Pillar cannot claim to be the "universal successor in title" to KBL; the status which Pillar must have to be able to lay claim to KBL's rights under the Loan Agreement.

27. Further, that as Pillar acknowledges that the assets and liabilities of KBL were acquired by both it and Havilland, there cannot be said to have been a "universal" succession. That, for a transfer by way of universal succession to be recognised as a matter of English (Cayman) law, there must be an assumption by the successor of <u>all</u> the assets and liabilities of the predecessor and the successor must be amenable to being properly described as the same legal entity. In support, the case of ***<u>The Kommunar (No. 2)</u> [1997] 1 Lloyd's Rep.*** is cited.

28. This case requires analysis. A factor to note at the outset is that there was no legislative provision in Russia (the domicil of the entities in question) expressly stating that the successor entity was to be treated in Russian law as

the same legal person as the predecessor entity. The Russian statute provided only for the succession in title of the assets and liabilities from the predecessor to the successor entity.

29. A main question in the case was whether the Russian entity which was the successor in title to certain Russian ships (one of which was the Kommunar) following a process of privatization in Russia, was liable for certain debts which had been incurred in respect of a contract for the management of the ships, as between the plaintiff and the predecessor state-owned Russian entity, and incurred at times when the ships were still owned by that entity.

30. After the privatization in Russia, the Kommunar was arrested while in British waters and an action *in rem* brought against it for enforcement of the plaintiff's contractual claim.

31. The statutory provisions giving jurisdiction for the action *in rem* against the ship – Section 21(4) of the Supreme Court Act (1981) U.K. – required that the identity of the beneficial owner or demise charterer of a vessel at the time when it was sought to be restrained *in rem;* should be the same as the person who would be liable in personam as the owner, charterer or person in possession or control of the vessel, at the time when the cause of action against the vessel arose.

32. The case decided, (by reference to the peculiar statutory requirements of section 21(4) as a primary matter of English Law); that once there was discontinuity of legal personality (as appeared to have been the case as between the beneficial ownerships in points of time because of privatization in

Russia) no amount of statutory transfer of assets or liabilities by means of legal succession (albeit also under Russian Law) could serve to satisfy the wording of Section 21(4).

33. It was held that the Court therefore had no jurisdiction to entertain proceedings *in rem* against the ship and the plaintiff's motion for its arrest, appraisement and sale was dismissed.

34. For present purposes, it seems to me that the principles arising from this case are; first: the particular statutory requirement of universal succession as a matter of the UK statute; that the successor entity became in law the same legal entity as that which it succeeded (which by definition must also have fallen away). Second, and more to the point here in this case – the different and separate issue of the determination of questions of succession to the rights and liabilities of the predecessor entity will be regarded by the English (and Cayman) Courts, as being a matter for the law of the place of incorporation. The plaintiffs' case against the Kommunar failed on the first principle.

35. There is, in the present case, no statutory requirement that there must be identity in succession; (as was the case in the *Kommunar* (No. 2) under Section 21(4) of the Supreme Court Act); and therefore common law conflict of laws rules govern the situation here and serve to resolve the question of standing and jurisdiction which has arisen. Those rules provide that where the law of incorporation of a company (here, in the case of KBL, Luxembourg law) provides for a doctrine of universal succession on amalgamation of different entities, then that will be recognised in English (Cayman Islands)

Law: see Dicey, Morris & Collins, Conflict of Laws 14th Edition Sweet and Maxwell 2006 para 30-010; Rule 161 and the many cases there cited beginning with the Privy Council case of ***Bonanza Creek Gold Mining Co. v R [1916] A.C. 566*** and ***Lazard Bros. v Midland Bank [1933] A.C. 289,*** in the (House of Lords) and notably including the ***Kommunar (No. 2)*** (above)).

There can, in my view, be no logical reason for the same principles not to be applied where, as here, a single entity has been divided into two successor entities.

36. The following is an extract from the textbook:

"Rule 161 – The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.

Comment

Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so created, e.g. whether the entity is a corporation or partnership and, if the latter, the legal incidents which attach to it."

37. The following is clear from the unrefuted evidence of Luxembourg law from the affidavit of François Felten, a Luxembourg lawyer; filed in support of the petition:

(i) Following the financial crisis in Iceland, KBL was admitted to a regime of suspension of payments and administration in Luxembourg.

(ii) The administrators proposed a restructuring plan providing for the dissolution of KBL and its division into two new entities, Pillar and Havilland, with assets split between them in accordance with a Division Deed.

(iii) Following that division of KBL, in accordance with Article 303 of the Law of Luxembourg of 10 August 1915 on commercial companies(as amended) Pillar has been subrogated to the rights of KBL in relation to the receivables of KBL, including the Loan Agreement between JGC and KBL and as novated on 8 February 2008 as between JGC, Jukebox and KBL.

(iv) Pursuant to the Deed of Division, as from 21 July 2009, there has resulted a "universal transfer" of all the rights and liabilities of KBL to Pillar and Havilland in accordance with the allocation provided in the Division Deed. The "universal transfer" means that all assets and liabilities are transferred by operation of law and in principle without the need to fulfill any transfer formalities such as notifications of assignment in the case of transfer of contracts or of receivables. Accordingly, Pillar is entitled to claim under the loan agreement in its own name as successor of KBL.

38. It follows that Jukebox's further argument (as propounded in the affidavit of Lydur Gudmundsson) - that Pillar must claim by reliance on the Loan Agreement itself as a legal or equitable assignee of KBL, is misconceived.

39. This argument of Mr. Lydur Gudmundsson would opportunistically seek to rely on Pillar's admission (per Mr. Eggert Hilmarrson, the head of Havilland's legal department in his affidavit) that no assignment has taken place as contemplated by the Loan Agreement itself. Thus, it is argued, Pillar can have no standing to petition by reliance on the Loan Agreement, in any event.

40. It will not escape attention that the remarkable result of Jukebox's combined objections as to Pillar's standing; would be that the Loan obligations would have simply fallen, as if between Charybdis and Scylla into oblivion– beyond hope of recovery and with an undeserved, unintended windfall to Jukebox. This would be the outcome, for neither Pillar nor Havilland would have succeeded to KBL's rights (because neither entity claims to have identity of succession) and as KBL no longer exists, it could no longer assign its rights to either by reliance on the Loan Agreement.

41. Fortunately, a more palatable outcome is available: as has been amply demonstrated above, under Luxembourg law which governs the question of succession to KBL's rights as the place of its incorporation, dissolution and succession; KBL's rights under the Loan Agreement have been subrogated to Pillar as KBL's universal successor to those rights and obligations attached to the Loan Agreement.

42. Jukebox may not be heard to say therefore, as it attempts to say, that as a matter of English Law which governs its obligations under the Loan Agreement, it is entitled to insist upon those obligations having been *assigned* to KBL's successor, before it might be liable to that successor. Pillar stands in the same position as KBL did under the Loan Agreement by virtue of its succession under Luxembourg law and so has established its right to petition by reliance on the Loan Agreement.

43. And, for the sake of completeness, I should further explain the basis upon which the present case is distinguishable from ***The Kommunar (No. 2)*** above: In that case Section 21(4) of the Supreme Court Act expressly required that the identity of the owner of the ship be the same at the time the cause of action arose as at the time when it came to be restrained *in rem*, precluding reliance only on the circumstance of actual succession in title to assets and liabilities as a matter of Russian law. By contrast, there is no such impediment at common law, where the question of what amounts to universal succession is left to be determined by operation of the law of incorporation of the subject entities – here Luxembourg law.

44. The present case is more fully informed and guided, in my view, by the decision of the House of Lords in ***National Bank of Greece and Athens S.A. v Metliss [1958] A.C. 509.*** This case is compared and contrasted (at para. 30-011 of Dicey (above)) with ***The Kommunar (No. 2)*** (above) and where the latter is cited for the proposition that the law of the place of incorporation must provide for a true universal succession for the successor company to be

recognised in England as succeeding to the assets and liabilties of its predecessor(s).

45. In the Metliss case; two Greek banks had, by operation of a Greek Act, become amalgamated into a new banking company (the appellant bank) and it was enacted that the appellant bank was the "universal successor" to the rights and obligations of the amalgamated banks. The question was whether the appellant bank, was liable to a bond holder (the respondent) on certain bonds which had been issued to him in England by one of the predecessor banks and which bonds were governed by English law.

46. It was held that the appellant bank was liable for it must be recognised as clothed with the attributes with which it had been invested by the Greek Act, namely, the assumption of the assets, powers and liabilities of the old banks. There was no need for the bond holders to have asserted the identity of the new company (which had succeeded to the rights and obligations) as being the same as the old banks.

47. As Viscount Simonds put it (at p524):

> ***"It may be assumed that the Greek legislature using the word "universal successor" in the relevant Act was looking to the familiar [(Roman law)] principle under which the heir was the universal successor of his testator and regarded as eadem persona cum defuncto, and was asserting the identity of the new company with the old. But I do not care to rest my opinion upon a conception which is at the least artificial. The fact is that the***

new company is a new juristic entity which was not a party to any contract with the respondent [bond holder], ***and I do not think that, when a competent legislature has created a corporation and vested in it all the powers, assets and liabilities of an old corporation, which is then dissolved, anything is added by a further reference to universal succession, unless indeed it can be said that such a reference makes the path seem more familiar and therefore easier."***

48. So too, in this case, the notion of "universal succession" as it is relied upon for asserting the need for succession of identity between KBL and Pillar (or for that matter Havilland) adds nothing. What matters, in my view, is the reality of the succession to the rights and obligations as that issue was resolved, as a matter of Luxembourg law.

(II) <u>The Oral Agreement</u>

49. Jukebox's second line of defence relies upon the alleged oral agreement for the extension of the Loan.

50. There are obvious reasons why this line of defence must also fail.

51. Mr. Lydur Gudmundsson alleges (at paragraph 28 to 32 of his affidavit), that at a meeting on 24 June 2008 with Mr. Eggert Hilmarsson and Mr. Thordur Olafsson of KBL, Mr. Olafsson orally agreed to defer further payments of interest or principal under the Loan Agreement until "a more tax efficient structure could be found" for holding and operating the aircraft.

52. This is said to have arisen in response to an announced change in British taxation policy which would, without that accommodation, have resulted in severe tax consequences for the Gudmundssons who are both British tax payers. Thus implicitly in effect, that KBL had agreed indefinitely to defer the repayment of the Loan as an accommodation to the Gudmundssons.

53. It must be said immediately that such an implication seems highly implausible when KBL's position as a then operational commercial bank is borne in mind. The idea became only more implausible during the arguments before me when Mr. Folpp raised for the first time the suggestion that a further aspect of the accommodation involved KBL having agreed that it would itself be responsible for devising the more tax efficient structure which was to be found for avoiding the Gudmundsson's tax problems. And, that, until that was achieved, the deferral of repayments would remain in effect.

54. It is moreover, not asserted that KBL received any consideration for this unusual accommodation. Instead, the further implicit assertion is simply that as the Gudmundssons' extensive financial affairs were and remain so intricately interwoven with those of KBL what was in their best commercial interest, is also to be regarded as being in KBL's and was so regarded by the parties.

55. A still further inexplicable feature of Jukebox's case is that the first time this alleged oral agreement was ever mentioned appears to have been in Mr. Lydur Gudmundsson's affidavit filed on 21 August 2009 in response to the Petition. This was more than 14 months after the oral agreement is said to have been

made and nearly six months after KBL began pressing in February 2009 for payment of overdue interest. Despite correspondence between the parties through their attorneys since late May 2009 in England, Luxembourg and the Cayman Islands; no earlier mention appears to have been made of this alleged oral agreement.

56. Nonetheless, and indefatigably in support of this contention of the Defence; Mr. Folpp cited the case of ***Williams v Roffey Bros and Nicholls (Contractors) Ltd. [1990] 1 All E.R. 512.*** This case is authority for the proposition that where one party to a contract agreed, in the absence of economic duress or fraud, to made a payment to the other party to the contract over and above the contract price in order to secure completion of a contract by the other party in time and thereby obtained a benefit, (such as the avoidance of a penalty payable to a third party if the contract were not completed on time), the obtaining of that benefit could amount to consideration for the payment of the additional sum.

57. The present circumstances are readily distinguishable: from the oral agreement as described, it remains entirely unexplained and indeed seems inexplicable, how it is that KBL, whose very existence depended on the proper conduct of commercial lending activity, could have benefited from the indefinite suspension of its rights to repayment of the Loan.

58. In other words, the oral agreement, as alleged by Jukebox, simply makes no commercial sense. It is devoid of consideration and on that basis alone is unenforceable and so cannot avail Jukebox of a defence to the petition. The

alleged oral agreement provides no plausible basis for an argument that the sums demanded by the Petitioner are not due and payable.

(III) KBL's Conduct

59. This aspect of the defence invites the Court to postpone the hearing of the Petition until after certain proceedings in Luxembourg, brought against Havilland and Pillar, are completed.

60. Those proceedings arise from an action taken there by Jukebox and the Gudmundssons against Havilland and Pillar (ironically one might think - as successors to KBL) for having failed – while KBL was the Corporate Agent for JGC – to take action to satisfy KBL's demand for repayment of interest; thereby it is alleged, deliberately and in bad faith precipitating the event of default under the Loan Agreement which ultimately enabled the bringing of this petition. It is also said that the demand should never have been made, in light of the still extant oral agreement. The allegation is thus one of conflict of interest: It was KBL wearing its hat as creditor that served the relevant demands upon JGC (and thus upon Jukebox) and yet KBL which received those demands, wearing its other hat as Corporate Agents for the General Partner.

61. This is all said to have happened at a time before the Gudmundssons took direct control of JGC and Jukebox by replacing the KBL directors. Those proceedings in Luxembourg are still at an early stage. Pleadings have not yet been closed and so the nature of the case against Havilland and Pillar is not yet fully particularised.

62. Mr. Folpp's submission nonetheless in this respect, is simply that it is not for this Court to pre-empt the outcome of the proceedings before the Luxembourg Court, by granting this petition to wind up Jukebox here at the instance of Pillar. It is said to be trite law that a party to a contract is not entitled to take advantage of its own breach, which is an extension of the general principle that a party shall never be allowed by the Courts to take advantage of its own wrong doings. The principle is applicable not only to cases of avoidance of contractual obligations, but also to situations where a wrong-doer seeks to obtain a benefit under a continuing contract on account of his own breach; citing ***Alghussein Establishment v Eton College [1991] 1 All E.R. 267.***

63. This argument too is met, and summarily so in my view, by the fact that it depends, no less than the other arguments for the Defence, upon the absence of consideration for the alleged oral agreement. In the absence of such an enforceable agreement, KBL's only obligation was to give notice in keeping with the Loan Agreement (as extended). KBL did give notice that it required Jukebox to perform its obligations under the Loan. Such notice was clearly given, it appears, from the documented evidence, at the latest by KBL's letter dated 20 February 2009 to Jukebox, copied to Lydur and Agust Gudmundsson. That letter stated that KBL required prompt payment of overdue interest, failing which KBL would treat Jukebox as in default and demand repayment of the entire balance of the Loan.

64. From this it is apparent that neither JGC, Jukebox nor the Gudmundssons themselves can deny proper notice. It also follows that, by the time KBL

demanded repayment of the entire Loan on 11 May 2009, any right Jukebox might previously have had to a deferral of its obligations (albeit as agreed only as to interest payments) had long since expired.

The Overdraft

65. Whatever may be the asserted defence to the petition based on the unsatisfied statutory demand for repayment of the Loan, there simply is no coherent defence proffered in relation to the overdrafts. All that Mr. Lydur Gudmundsson asserts on behalf of Jukebox in this regard is that KBL had failed to provide the full account records showing how the amounts were used. He complains about the lack of information received from KBL in this regard and says (at para. 45 of his affidavit) that he has "not been able to determine whether Overdraft Amounts have been properly incurred by the Partnerships, with reference to the Partnership's purpose of holding and maintaining the Aircraft."

66. This line of defence is as implausible as the rest: it is clear from the evidence that the Gudmundssons were aware of the nature of the payments for the acquisition and maintenance of their aircraft; expenses which were self-evidently being incurred on their behalf by JGC and Jukebox. The account statements are now in evidence and, while the accounts had been "hold mail" accounts at the request of the Gudmundssons on opening; the unrefuted evidence is that a schedule of the expenses paid from the accounts was sent to Mr. Lydur Gudmundsson's lawyer, Mr. Bjarnfredur Olafsson, on 22 October 2008. The schedule identifies and matches the debits in the account

statements. No objection was made to the expenses set out in the schedule at the time, nor when KBL demanded repayment of the overdrafts on 20 February 2009, nor at any time prior to the filing of Lydur Gudmundsson's affidavit in these proceedings.

67. It is to be noted that even now Lydur Gudmundsson does not say that the expenses were not properly incurred – he simply says that he is not able to determine that they were.

68. By themselves, the debts owed by way of overdrafts are shown to be due and owing and are sufficient, in and of themselves, to ground the petition.

Service Issues

69. Much of Mr. Lydur Gudmundsson's evidence is concerned with his complaints about the validity of formal service and of the various demands for payment made to Jukebox. These complaints were not pressed by Mr. Folpp in his arguments before me. They appear, in any event, to have been adequately addressed and met by Mr. Quest in his written submissions.

Conclusion

70. In determining whether a defence to a petition to wind up should be summarily rejected, the Court "is entitled and indeed bound to weigh the evidence to see whether there is really any substance in the dispute raised by the [debtor]or whether it is in reality contrived" (per Chadwick J. in ***In re a Company*** (above)).

71. This principle applies also in cases where there is an alleged cross-claim to the petition debt: ***Quarry Products Ltd. v Austin Int'l Inc. 2000 CILR 265.***

72. The evidence filed in support of the Petition in this case clearly establishes that Jukebox owes debts in excess of USD30 million which it has no means of paying. Nothing in the evidence filed on behalf of Jukebox establishes that the debts are bona fide disputed on substantial grounds.

73. When faced with a defence or cross-claim to a petition, the Court should of course, proceed with caution. I think it is also worth noting therefore that to the extent that Jukebox - as plaintiff in the proceedings taken against Pillar in Luxembourg - has a genuine cross-claim against Pillar or Havilland on the petition here, it is to be expected that the liquidators appointed by this Court will be able to pursue it. Their appointment, although instigated by Pillar's petition, does not make them Pillar's agent. They will be bound, in the interest of all those having a claim against or a stake in the Jukebox estate; to act in all their best interests and to seek independent legal advice in that regard.

74. I am satisfied that the petition for the winding up of Jukebox should be granted. It is so ordered.

Hon. Anthony Smellie
Chief Justice

October 8, 2009