[2015 Gib LR 74]

IN THE MATTER OF MOUNT GRACE INSURANCE COMPANY LIMITED

SUPREME COURT (Jack, J.): December 16th, 2014

Companies—compulsory winding up—inability to pay debts—statutory demand invalid if no reference to debtor's right to apply to court to set it aside—omission of reference in pre-2014 statutory demand not saved by Insolvency (Transitional Provisions) Regulations 2014, reg. 8(2)

Companies—compulsory winding up—inability to pay debts—invalid statutory demand means applicant cannot establish company's insolvency through presumption of insolvency in Insolvency Act 2011, s.10(1)(a)—may still prove insolvency under s.10(1)(b) if undisputed debt—court may entertain application to appoint liquidator without service of valid statutory demand but applicant normally to show good reason for not serving statutory demand

Companies—liquidators—appointment—court's discretion to appoint liquidator for company in dispute subject to arbitration to be exercised in accordance with principles of Arbitration Act 1895—commercial case with substantial disputes to be referred to specialist arbitrator

The applicants sought the appointment of a liquidator for the respondent company.

The applicants offered after-the-event ("ATE") insurance to personal injury claimants in England and Wales. The respondent's parent company, FIDC, found potential claimants to be referred to solicitors who would act under conditional fee arrangements using ATE insurance provided by the applicants. Between 2001 and 2004, FIDC introduced to a number of firms of solicitors many claimants who had been exposed to asbestos. Following the English Court of Appeal's decision that pleural plaques caused by exposure to asbestos did not constitute actionable damage, the applicants sought to cancel the ATE policies they had issued to claimants with pleural plaques introduced by FIDC, leading to a settlement between the applicants and FIDC whereby the applicants entered into a reinsurance agreement with the respondent. Under the agreement, the respondent reinsured 100% of the applicants' liabilities arising from business introduced by FIDC between 2001 and 2004, and the agreement contained an arbitration clause.

One of the applicants' clients, a firm of solicitors, was sued by a company providing industrial disease reports to recover the cost of medical reports provided to personal injury claimants introduced by FIDC. The solicitors then sought to recover these disbursements from the applicants and the applicants sought to recover all their liabilities and costs arising from that litigation, totalling £359,639.50, from the respondent pursuant to the reinsurance agreement.

The applicants served a statutory demand on the respondent in respect of this alleged debt of £359,639.50 on October 22nd, 2014. Prior to the coming into force of the Insolvency Act 2011 and the Insolvency Rules 2014 on November 1st, 2014, there had been no prescribed form for a statutory demand, but the 2011 Act and the 2014 Rules introduced a requirement that a statutory demand be made using a prescribed form which contained a reference to the debtor's right to apply to the court to set it aside. The old-style statutory demand served by the applicants did not contain this reference. The respondent did not pay the sum required by the statutory demand and the applicants therefore sought the appointment of a liquidator.

The respondent submitted that (a) the applicants' failure to include a reference to its right to apply to court in reply to the statutory demand meant that it was invalid, the applicants therefore could not rely on the presumption in s.10(1)(a) of the 2011 Act to establish the respondent's insolvency, and the application to appoint a liquidator should therefore be dismissed; and (b) there were substantial disputes over the existence of the debt alleged to be owed to the applicants and the court should therefore exercise its power under s.8 of the Arbitration Act 1895 to refer the disputes to arbitration in accordance with the arbitration clause in the reinsurance agreement and no liquidator should be appointed until an undisputed debt had been established by an arbitration award. The applicants submitted in reply to the respondent's first submission that reg. 8(2) of the Insolvency (Transitional Provisions) Regulations 2014 applied so as to save all steps taken under the pre-2014 procedure and to treat them as steps taken under the 2014 Rules.

Held, dismissing the application:

(1) The statutory demand served by the applicants was invalid under the 2011 Act and the 2014 Rules. A reference to the debtor's right to apply to the court was a key element of the statutory demand under the 2011 Act and the applicants' failure to include this reference meant that their statutory demand was invalid. Regulation 8(2) of the 2014 Regulations was a very specific provision which applied only to outstanding winding-up petitions and did not save a statutory demand made under the pre-2014 law (paras. 17–20).

(2) The fact that the applicants' statutory demand was invalid did not mean that their application to appoint a liquidator would be dismissed. The invalidity meant that they could not establish the respondent's insolvency through the presumption of insolvency resulting from failure to

comply with a statutory demand under s.10(1)(a), but it remained open to them to prove insolvency under s.10(1)(b) (*i.e.* that the respondent was unable to pay its debts as they fell due) provided that the respondent owed an undisputed debt above the statutory minimum. The court had jurisdiction to entertain an application to appoint a liquidator without a valid statutory demand having been served but a creditor should normally show that there was a good reason for not serving a statutory demand (paras. 21–22).

(3) There were substantial disputes between the applicants and the respondent in relation to the debts on which the application for the appointment of a liquidator was founded. In consequence, there was no single undisputed debt owed by the respondent to the applicants and the application would therefore be refused (para. 40).

(4) The disputes would be referred to arbitration. It was arguable that an application to appoint a liquidator constituted "legal proceedings" for the purposes of s.8 of the Arbitration Act 1895 and the court therefore had the power to stay the application and refer the disputes to arbitration. Even if this were wrong, the court had discretion as to whether to appoint a liquidator and that discretion would be exercised in accordance with the principles of the 1895 Act. This was a commercial case with substantial disputes; if ordinary proceedings by way of claim form had been issued, this would have been a clear case for granting a stay and a reference to arbitration, and reference to a specialist arbitrator was therefore appropriate. The court would exercise its discretion to stay the application to appoint a liquidator and refer the disputes to arbitration (paras. 46–47; paras. 50–52).

Cases cited:

(1) *Ace Contractors & Staff Pty. Ltd.* v. *Westgarth Dev. Pty. Ltd.*, [1999] FCA 728, considered.

(2) *Beecham Peacock Solicitors LLP* v. *Enterprise Ins. plc*, [2014] EWHC 2194 (QB), referred to.

(3) *Carlisle*, *In re*, *Clegg* v. *Clegg* (1890), 44 Ch. D. 200, considered.

(4) *Church* v. *Ministry of Defence* (1984), 134 New L.J. 623, referred to.

(5) *David Grant & Co. Pty. Ltd.* v. *Westpac Banking Corp.* (1995), 13 ACLC 1572; 69 ALJR 778; 131 ALR 353; 184 CLR 265; [1995] HCA 43, referred to.

(6) *Expile Pty. Ltd.* v. *Jabb's Excavations Pty. Ltd.* (2003), 45 ACSR 711; 21 ACLC 1354; [2003] ALMD 5583; [2003] NSWCA 163, referred to.

(7) *GBI Invs. Ltd.*, *In re*, *Lacontha Foundation* v. *GBI Invs. Ltd.*, [2010] 2 BCLC 624; [2010] B.P.I.R. 356; [2010] EWHC 37 (Ch), distinguished.

(8) *Lemma (Europe) Ins. Co. Ltd.*, *In re*, 2010–12 Gib LR 323, considered.

(9) *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd. (The Boucraa)*, [1994] 1 A.C. 486; [1994] 2 W.L.R. 39; [1994] 1 All E.R. 20; [1994] 1 Lloyd's Rep. 251, referred to.
(10) *Lury* v. *Pearson* (1857), 1 C.B.N.S. 639; 140 E.R. 263, referred to.
(11) *Phoenix Gen. Ins. Co. of Greece S.A.* v. *Halvanon Ins. Co. Ltd.*, [1988] Q.B. 216; [1987] 2 W.L.R. 512; [1987] 2 All E.R. 152; [1986] 2 Lloyd's Rep. 552, referred to.
(12) *Regent Centre Ltd.*, *In re*, 2015 Gib LR 30, referred to.
(13) *Rothwell* v. *Chemical & Insulating Co. Ltd.*, [2008] 1 A.C. 281; [2007] 3 W.L.R. 876; [2007] 4 All E.R. 1047; [2007] I.C.R. 1745; [2008] P.I.Q.R. P6; [2007] UKHL 39, referred to.
(14) *Salford Estates (No. 2) Ltd.* v. *Altomart Ltd.*, [2015] Ch. 589; [2015] 3 W.L.R. 491; [2015] BCC 306; [2015] B.P.I.R. 399; [2014] EWCA Civ 1575, considered.
(15) *Sykes* v. *Ministry of Defence*, *The Times*, March 23rd, 1984, referred to.
(16) *Townview Holdings Pty. Ltd.* v. *Sunstate Design & Construct Pty. Ltd.* (2012), 30 ACLC 12-061; [2014] ALMD 2797; [2012] FCA 1296, considered.

Legislation construed:

Arbitration Act 1895, s.8: The relevant terms of this section are set out at para. 45.

Arbitration Act 1996, s.9: The relevant terms of this section are set out at para. 43.
s.82(1): The relevant terms of this sub-section are set out at para. 46.

Insolvency Act 2011, s.10(1)(a): The relevant terms of this paragraph are set out at para. 6.
s.10(1)(b): The relevant terms of this paragraph are set out at para. 10.
s.143(1): The relevant terms of this sub-section are set out at para. 7.
s.158: The relevant terms of this section are set out at para. 9.
s.160(1)(b): The relevant terms of this paragraph are set out at para. 8.

Insolvency (Transitional Provisions) Regulations 2014, reg. 8(2): The relevant terms of this sub-regulation are set out at para. 20.

Arbitration Act 1975 (c.23), s.1(1): The relevant terms of this sub-section are set out at para. 44.

N.P. Cruz and *C. Wright* for the applicants;
D. Feetham and *N. Feetham* for the respondent.

1 **JACK, J.:** By an application issued on November 13th, 2014, the applicants seek the appointment of a liquidator of the respondent ("the company") under ss. 149–153 of the Insolvency Act 2011.

2 The applicants, on October 22nd, 2014, served a statutory demand on the company under s.221(a) of the Companies Act 1930, which was the

legislation then in force. The Insolvency Act 2011, which replaces the insolvency parts of the 1930 Act, only came into force on November 1st, 2014. The statutory demand sought payment of £359,639.50 under a reinsurance agreement between the parties. The company did not pay and the applicants issued the current application.

Procedural issues under the Gibraltarian legislation

3 I have already given some guidance on the new legislation in my judgment in *In re Regent Centre Ltd.* (12). In the current case, both parties raise different issues arising from the change in relevant applicable legislation.

4 When the statutory demand was served, there was no prescribed form of statutory demand. Under r.315 of the Insolvency Rules 2014, which came into force at the same time as the 2011 Act, there is a specified form, G1, which gives the debtor notice of its right to apply to set aside the statutory demand. The company argues that the statutory demand of October 22nd is therefore not a statutory demand for the purposes of the 2011 legislation.

5 Under the new Act, a company can apply to set aside a statutory demand. Under the old Act, this was not possible. The debtor's remedy on service of an old-style statutory demand was to apply for an injunction restraining presentation of a winding-up petition or (although there was only a small window of opportunity) restraining advertisement of the petition. If a debtor under the old legislation failed to make such an application, it could still oppose the winding-up petition on the basis that the debt was disputed.

6 Under the new legislation, the position is different. The debtor can apply to set aside the statutory demand within 21 days of its service: see the 2011 Act, s.142(2). The period cannot be extended by the court: see s.142(3). Section 10(1)(a) of the 2011 Act provides that a company "is presumed to be insolvent if—(i) it fails to comply with the requirements of a statutory demand that has not been set aside under section 143 . . ."

7 Section 143(1) provides:

"The Court shall set aside a statutory demand if it is satisfied that—

(a) there is a substantial dispute as to whether—

(i) the debt, or

(ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum,

is owing or due;

(b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or

(c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum."

8 Thus, the applicants argue that the company has failed to comply with the statutory demand, the statutory presumption of insolvency in s.10(1)(a) applies and, therefore, a liquidator should be appointed. The difficulty with this syllogism is that, under s.160(1)(b), the court is given the power to "dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved . . ."

9 In answer to this, the applicants argue that, under s.158 of the 2011 Act, the company does not even have the right to be heard in opposition to the appointment of a liquidator based on the statutory presumption. Section 158 of the Insolvency Act 2011 provides:

"(1) In so far as an application for the appointment of a liquidator on the grounds that it is insolvent relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground—

(a) that the company relied on for the purposes of an application by it for the demand to be set aside; or

(b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).

(2) The Court shall not grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

10 Section 10(1)(b) provides that a company—

"is insolvent if—

(i) it is unable to pay its debts as they fall due; or

(ii) the value of its liabilities exceeds its assets."

The failure of a company to comply with a statutory demand creates a presumption that it is unable to pay its debts as they fall due (the "going concern" basis of insolvency) but does not prove, or even raise a presumption, that liabilities exceed assets (the "balance sheet" basis). It is common for a company to be insolvent on a balance sheet basis but still to

be able (at least for a time) to pay its debts as and when they fall due, and *vice versa*.

11 One might, therefore, think that a company able to show that a statutory demand would have been set aside, if a timeous application had been made, is potentially able to prove that it is solvent on the "going concern" basis. If that argument were right, the court would have the power, under s.158(2), to give leave for the company to be heard in opposition on the basis that the debt on which the statutory demand was founded was disputed on genuine grounds.

12 The applicants argue to the contrary. They rely on the case in the Federal Court of Australia of *Ace Contractors & Staff Pty. Ltd.* v. *Westgarth Dev. Pty. Ltd.* (1), which concerned legislation similar to the new legislation of Gibraltar. There, the debtor failed timeously to challenge a statutory demand. At the hearing of the application for the appointment of a liquidator, the court considered that the debtor had failed to establish its solvency. The debtor did not challenge the debt underlying the statutory demand (it merely raised a potential cross-claim). The decision of the Court of Appeal of New South Wales in *Expile Pty. Ltd.* v. *Jabb's Excavations Pty. Ltd.* (6), which the applicants also cite, is similar.

13 There is an oddity in the approach of these Australian courts. If the failure to respond to a statutory demand shows "going concern" insolvency, it is surely irrelevant for the company to show "balance sheet" solvency. If the company cannot pay its debts when they fall due (and *ex hypothesi* it will not have paid the debt on which the statutory demand is founded), it is insolvent regardless of whether it is "balance sheet" solvent or not.

14 It may be that fuller citation of authority from Australia will show how the Australian courts came to adopt the approach taken in *Ace Contractors* and *Expile*. There will also need to be consideration as to how far this court, in construing the 2011 Act, should follow Australian authorities. On the one hand, it is obviously convenient to have a pre-existing body of case law on new legislation. However, without sight of the *travaux préparatoires* for the new legislation, it may not be possible to know what the intention of the Parliament of Gibraltar was, as regards Australian authorities. On the other hand, it may be that considerations pertinent to Australian conditions are not appropriate for Gibraltar. For example, the 21-day period for challenging a statutory demand is quite a short time. Many Gibraltarian companies are beneficially owned by people resident abroad. The Gibraltarian directors of such companies may well feel the need to consult the beneficial owners before taking potentially expensive steps, like disputing a statutory demand. That may take longer than three weeks.

15 In this regard, it may be relevant that a regime whereby a statutory demand in statutory form is incapable of challenge after the expiry of 21 days is extremely harsh, as was recognized by the High Court of Australia in *David Grant & Co. Pty. Ltd*. v. *Westpac Banking Corp.* (5). This has attracted criticism in Australia, with one commentator (O'Flynn, *The Harmer Amendments: 15 years on*, http://www.claytonutz.com/docs/UNSW_insolvency_paper.pdf) saying that "the statutory demand procedure is a legislative and practical disaster zone." It may be that the Parliament of Gibraltar did not intend this consequence, so that a different reading of the 2011 Act is appropriate. There may also be issues under the Constitution of Gibraltar, in particular ss. 6(1) (deprivation of property) and 8(8) (access to court for the determination of rights and obligations), if the Australian interpretation is to be applied. These, however, are issues to be decided when they are material to the outcome.

16 Even if the court has the power, under s.158(2), to give leave for the company to be heard in opposition on the basis that the debt, on which the statutory demand was founded, was disputed on genuine grounds, no doubt the court would be reluctant to permit a debtor, on the hearing of an application for the appointment of a liquidator, to go behind a statutory demand without good evidence as to why the debtor failed to apply timeously to set aside the statutory demand. If the court has the power, then, in the current case, there would be a powerful case for exercising it. There was no provision under the old legislation to set aside statutory demands served on companies and there is an obvious injustice in debarring the company from being able to dispute it.

17 I do not need to determine this issue because, in my judgment, the old-style demand is invalid under the new legislation. As I said in *In re Regent Centre Ltd.* (12) (2015 Gib LR 30, at para. 11), citing *L'Office Cherifien des Phosphates* v. *Yamashita-Shinninhon SS. Co. Ltd. (The Boucraa)* (9) ([1994] 1 A.C. at 528), it is necessary "to look to the practical value and nature of the rights presently involved as a step towards an assessment of the unfairness of taking them away after the event." Form G1 contains a crucial reference to the debtor's right to apply to the court. That reference was not on the old-style statutory demand, as served in this case, because there was no right to apply to the court to set it aside when it was served.

18 The notification of the right to apply to the court is a key element of the new-style statutory demand. In the Australian case of *Townview Holdings Pty. Ltd.* v. *Sunstate Design & Construct Pty. Ltd.* (16), Greenwood, J. held ([2012] FCA 1296, at para. 14):

> "Use of the prescribed form is a mandatory requirement because the language of [the relevant section] provides that the demand *must* be in the prescribed form (if any), and there is a prescribed form which

> gives particular emphasis to the matters addressed by the warning notice. In this context, it would be odd to dismiss the omission of the warning notice as an inconsequential, immaterial irregularity in circumstances where the form was amended expressly for the purpose of fixing the attention of the debtor on the important consequences flowing from a failure to deal with the notice." [Emphasis in original.]

Section 141(2)(f) of the (Gibraltarian) Insolvency Act 2011 is in similar mandatory terms and, in my judgment, the failure to include the notification in the statutory demand relied on in the current case is fatal to the validity of the demand.

19 A further problem with the applicants' argument is that, were it correct, it would have been possible for a creditor to serve an old-style statutory demand prior to October 9th, 2014. If that occurred, the time for applying to set it aside would have expired prior to November 1st, 2014, when the ability to challenge a statutory demand first arose. The debtor would, on the applicants' submission, have had no opportunity to challenge the demand at all, which, in my judgment, is a *reductio ad absurdum* of the argument.

20 Mr. Cruz, counsel for the applicants, sought to argue that reg. 8(2) of the Insolvency (Transitional Provisions) Regulations 2014 applied. This, he submitted, saved all steps taken under the old Act and treated them as steps under the new Act. I disagree. Regulation 8(2) of the Insolvency (Transitional Provisions) Regulations provides:

> "Where a petition presented to the Court for the winding up of a company under the former Companies Act has not been determined at the commencement date, the petition shall be treated as if it was an application for the appointment of a liquidator under the Act."

In my judgment, this is a very specific provision, which only applies to outstanding winding-up petitions. It cannot be read as a general provision applying to all pre-commencement steps, such as the service of a statutory demand.

21 The company goes further and seeks to argue that, if the statutory demand is ineffective, the application to appoint a liquidator should be dismissed too. I do not agree that this follows as a matter of law. Under s.149(1)(a) of the new Act, the court can appoint a liquidator if "the company is insolvent . . ." Section 10(1)(b) I have set out above. Section 10(1)(a) merely creates a presumption. It is, in my judgment, always open to an applicant for the appointment of a liquidator to prove insolvency under s.10(1)(b) in some other way, provided that the applicant has an undisputed debt above the statutory minimum (currently £750: see Insolvency Rules 2014, r.75(1)).

22 This is not to say that creditors should routinely issue applications for the appointment of a liquidator without first serving a statutory demand. On the contrary, an applicant will generally need to show that there was some good reason for not doing so. However, the court has, in my judgment, jurisdiction to entertain an application without a valid statutory demand having been served.

23 This does not mean, necessarily, that I should do so. I shall come back to this point after saying something about the substantive merits of the applicants' application. It is, however, important to note that Mr. Ozon's affidavit of November 13th, 2014 says virtually nothing about the underlying indebtedness, although it exhibits a mass of documents which the court has been expected to trawl through itself. Instead, he relies almost exclusively on the presumption arising from the failure to comply with the statutory demand to prove both an undisputed debt owed to the applicants and the insolvency of the company.

The background

24 The underlying facts are complicated and I shall give merely an outline. This is gleaned from the documentation with, as I have said, very little assistance from Mr. Ozon's affidavit. A subsequent affidavit, dated November 27th, 2014, from Mr. Newing, the first applicant's finance director, merely analyses the company's accounts. A witness statement from Mr. Flowers, dated November 25th, 2014, subsequently confirmed on oath by him, also addresses the company's solvency. It also deals with a matter, the possible non-payment of the premium for the reinsurance, which is not now relied on by the company in opposition to the application for the appointment of a liquidator.

25 The first applicant is a Gibraltarian insurer, formerly known as IOMA Insurance Company (Gibraltar) Ltd. The second applicant is an Isle of Man insurer. The company is a Gibraltarian reinsurer. It is a wholly-owned subsidiary of Freeclaim IDC plc ("FIDC"), an English company currently in administrative receivership.

26 The applicants offered after-the-event ("ATE") insurance to personal injury claimants in England and Wales. ATE insurance had come to prominence after the (UK) Access to Justice Act 1999 introduced the possibility of solicitors acting for claimants under conditional fee agreements ("CFAs"). Under a CFA, there were typically two outcomes. If the claimant lost his claim, then the solicitor was paid nothing, however, the defendant's costs (otherwise payable by a claimant) were paid by an ATE policy. The premium for the ATE insurance was usually lent to the claimant on terms that it was only repayable on success. Under the arrangement, the claimant's disbursements would also be paid up front. If the claimant succeeded on his claim, then the solicitor recovered an

enhanced fee from the defendant, who was also liable for the premium paid for the ATE insurance and the various other expenses.

27 In the current case, FIDC's task was to find potential claimants who could then be referred to solicitors who would act under a CFA using ATE insurance provided by the applicants. There were various agreements in 2000, 2001 and 2004 between the applicants and FIDC governing their relationship. Pursuant to these agreements, FIDC introduced many claimants exposed to asbestos to a number of firms of solicitors. Of these claimants, most suffered from pleural plaques. Lord Hoffmann, in *Rothwell* v. *Chemical & Insulating Co. Ltd.* (13), described pleural plaques as follows ([2008] 1 A.C. 281, at para. 1):

> "These are areas of fibrous thickening of the pleural membrane which surrounds the lungs. Save in very exceptional cases, they cause no symptoms. Nor do they cause other asbestos-related diseases. But they signal the presence in the lungs and pleura of asbestos fibres which may independently cause life-threatening or fatal diseases such as asbestosis or mesothelioma. In consequence, a diagnosis of pleural plaques may cause the patient to contemplate his future with anxiety or even suffer clinical depression."

28 In *Church* v. *Ministry of Defence* (4) and *Sykes* v. *Ministry of Defence* (15), it was established, at first instance in England, that pleural plaques gave rise to an actionable injury, even though the plaintiff did not necessarily, or indeed generally, go on to suffer mesothelioma. Insurers thereafter regularly made payments to those with pleural plaques. It was only in *Rothwell* v. *Chemical & Insulating Co. Ltd.* that the Court of Appeal determined that pleural plaques, without more, were not actionable. That decision was upheld by the House of Lords.

29 In March 2006, after the *Rothwell* decision in the Court of Appeal, the current applicants intimated an intention to cancel the ATE policies they had issued to claimants with pleural plaques. This led to settlement negotiations between the applicants and FIDC. A settlement was reached, on June 27th, 2006, between the two applicants, FIDC and the company, but the terms of the settlement were subsequently disputed. Proceedings were issued in the English Commercial Court, under Claim 2006 Folio 946, by the applicants against FIDC and the company. There was then a further settlement, this time of the Commercial Court proceedings. As a result, in October 2006, the applicants entered a reinsurance agreement with the company. By this, the company reinsured, with effect from June 30th, 2006, 100% of the liabilities of the applicants under business introduced by FIDC under the 2001 and 2004 agreements up to an aggregate of £10m. The premium was £194,000.

30 The reinsurance treaty contained, in art. 7, an arbitration clause, providing for arbitration in accordance with the International Chamber of

Commerce rules. The seat of the arbitration was, in default of any other agreement, to be Gibraltar. There was a Gibraltarian law and jurisdiction clause.

31 Article 3 provided:

> "The liability of the reinsurer shall . . . be identical with that of the reinsured and shall follow . . . the fortunes of the reinsured in respect of all the business reinsured, save where liability results from an act or omission of the reinsured (whether to the original insureds or the reinsurer) or the reinsured are in breach of any applicable laws or regulatory requirements."

32 Various claims under the ATE policies, which have been reinsured by the company, are currently the subject of litigation. On July 3rd, 2014, His Honour Judge Behrens, sitting as a Judge of the (English) High Court, considered a claim brought by Beecham Peacock Solicitors LLP ("BPS") against the two current applicants and the company. BPS was seeking to recover £221,171.95, which represented disbursements made by it on behalf of personal injury claimants for whom it had acted and who had been introduced by FIDC. Judge Behrens, in *Beecham Peacock Solicitors LLP* v. *Enterprise Ins. plc* (2), refused the current applicants' application to strike out BPS's claim.

The current claim

33 The debt claimed in the statutory demand in the current application arises from the settlement of actions which were to be tried in the Bristol Mercantile Court by His Honour Judge Havelock-Allan, Q.C. under Claim Nos. 9BS40049, 8BS40935 and 8BJ00141. The original parties to these actions were first, as claimant, Industrial Disease Reports Ltd., as defendants, Robinson & Murphy Solicitors (A Firm) ("RMS"), as third parties, the current applicants and, as the fourth party, FIDC.

34 I do not have full details of the issues in this Bristol case. The claimant's claim against the defendant solicitors appears to have been for the cost of medical reports provided to personal injury claimants, introduced by FIDC. In turn, RMS sought reimbursement of those disbursements from the applicants.

35 The claim settled as between RMS and the applicants, pursuant to a consent order approved by the court on October 20th, 2014. RMS recovered against the applicants, by consent, £142,167, said to be damages, as well as £24,030 in interest and £50,000 in respect of costs. In addition, the applicants say that, in defending themselves against RMS's claim, they incurred legal costs of £108,781.50 plus VAT of £21,756.30 and disbursements of £12,904.70, a total of £143,442.50.

36 The company complains that the first it knew of the amount claimed against it was when the statutory demand was served. The applicants say that, whilst it is true that the company did not know the precise amount until the statutory demand was served, nonetheless, it had knowledge of the RMS litigation. The company also says that it has not had an opportunity to inspect any of the underlying documentation and that the applicants never sent *bordereaux* giving details of this claim. The company, in consequence, says that it is in no position at the moment to confirm what, if any, moneys might be owed to the applicants. Indeed, it raises substantive defences to the applicants' claim.

37 Mr. Bolton, a director of the company, has sworn an affidavit in opposition to the applicants' application. He is a chartered accountant and licensed insolvency practitioner in England. He has 25 years' experience of the reinsurance market and was a director of KPMG LLP. He regards the failure to send a claim advice or a settlement request "as truly bizarre practice and behaviour." He adds that "it raises immediate concerns that the applicants have something to hide by their failure to follow the proper procedures."

38 He points out that there are issues for investigation as to how the reinsurance agreement came to be written, since the premium of £194,000 was extremely low in relation to the risk underwritten (or purportedly underwritten). He raises the question of whether the first applicant, as an Isle of Man company, was entitled to write insurance in the UK market.

39 He says that there have been substantial disputes with RSM for some time. He suggests that the applicants, by settling with RSM and thus incurring a voluntary liability, have committed an "act or omission of the reinsured," which debars them from recovery under art. 3 of the reinsurance agreement. He suggests that the applicants have failed to exercise proper skill and care in their conduct of the RSM litigation. As regards this, Mr. Daniel Feetham relies on *Phoenix Gen. Ins. Co. of Greece S.A.* v. *Halvanon Ins. Co. Ltd.* (11) ([1988] Q.B. at 240) for the proposition that "the reinsured should accept the obligation to conduct the business involved in the cession prudently, reasonably carefully and in accordance with the ordinary practice of the market." Mr. Feetham also argues that the applicants' legal costs of the RSM claim are not recoverable under the reinsurance agreement.

40 Not all of these points have equal strength. However, I am quite satisfied that there are substantial disputes between the applicants, on the one hand, and the company, on the other. Since these matters may be subject to a reference to arbitration, it would be inappropriate for me to express any more definite views on the matters raised.

The arbitration clause

41 The company argues that the existence of the arbitration clause means that no liquidator should be appointed. Only once an undisputed debt is established by an arbitration award should insolvency proceedings be considered at the suit of the applicants, it says.

42 The leading case on this issue in England is now *Salford Estates (No. 2) Ltd.* v. *Altomart Ltd.* (14), handed down on December 8th, 2014 after preparation of the parties' initial skeletons in the current case. The Court of Appeal held that a winding-up petition is not "a claim" brought against the debtor, so the provision in s.9 of the (UK) Arbitration Act 1996 for an automatic stay of legal proceedings did not apply where a winding-up order was sought. Etherton, C. held ([2015] Ch. 589, at para. 41):

> "There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the lease. The debt is not admitted. In accordance with the decision in the *Halki Shipping* case [*Halki Shipping Corp.* v. *Sopex Oils Ltd.*, [1998] 1 W.L.R. 726], that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under section 122(1)(f) of the [(UK) Insolvency Act 1986], it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."

43 In order to determine the relevance of this decision to Gibraltar, it is necessary to look at some of the statutory history. Section 9 of the 1996 Act provides, so far as material:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> . . .
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

44 This is in different terms to s.1(1) of the (UK) Arbitration Act 1975 (now repealed) which provided:

> "If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

It can be seen that the key difference is that, under the 1975 Act, the court was not obliged to order a stay if there was "not in fact any dispute between the parties . . ." What this meant in practice was that, if a plaintiff would have been able to obtain summary judgment under what was then the Rules of the Supreme Court, O.14 (now Civil Procedure Rules, Part 24) in the event of ordinary civil proceedings being issued, then no stay would be ordered. Under the 1996 Act, the court could not refuse a stay on that ground.

45 Section 8 of the (Gibraltar) Arbitration Act 1895 provides:

> "If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

46 It will be seen that the 1895 Act refers to "any legal proceedings" rather than to "legal proceedings . . . (whether by way of claim or counterclaim)" as in the 1996 Act. The 1996 Act also contains a definition in s.82(1) that "'legal proceedings' means civil proceedings in the High Court or a county court . . ." This definition is lacking in the 1895 Act. Insofar as *Salford Estates* (14) restricts "legal proceedings" to those brought by claim or counterclaim, it is, therefore, arguable that this part of

the determination does not apply in Gibraltar, so that the 1895 Act does bite on applications for the appointment of a liquidator. I was not referred to any Gibraltarian authority on the construction of this section.

47 This leads to the second matter determined in *Salford Estates*. It held that, if there is no automatic stay of the winding-up proceedings, then the court, in exercising its discretion as to whether to make a winding-up order, should have regard to the provisions of the relevant Arbitration Act and exercise its discretion in accordance with the stay provisions of that Act. Thus, this court, in deciding whether to stay or dismiss the current application for the appointment of a liquidator, has, in my judgment, to apply the relevant test under s.8 of the 1895 Act either directly (because the application is a "legal proceeding") or indirectly (because the discretion has to be exercised in accordance with the principles of the 1895 Act).

48 I turn then to the question of whether to grant the application for the appointment of a liquidator or dismiss it so that the dispute can go to arbitration. Mr. Daniel Feetham referred to the old case of *Lury* v. *Pearson* (10) on s.11 of the (UK) Common Law Procedure Act 1854, which was in similar terms to the 1895 Act. The Court of Common Pleas stayed proceedings under a charterparty so that the differences could be arbitrated. The court, however, in a very laconic judgment, gave no indication as to the relevant test, for example, as to whether there was a requirement before a stay was ordered that there be a substantial dispute between the parties or whether a stay should be ordered even if the dispute was insubstantial. I do not find the case of assistance.

49 The 1895 Act was modelled on the (UK) Arbitration Act 1889, s.4 of which was in identical terms to s.8 of the 1895 Act. Soon after the UK legislation came into force, North, J. in *In re Carlisle* (3) held that, because the dispute in that case was solely on a point of law, he would exercise his discretion under s.4 against referring the dispute to arbitration, because the arbitrator would inevitably state a case for the determination of the High Court. This may suggest that the court, under the 1889 Act, had a wide discretion as to whether to grant or refuse a stay, which did not depend on whether or not there was a substantial dispute, but I have not had any full citation of authority. (It should be noted that, under the (English) Rules of the Supreme Court 1883, as originally enacted, there was no general provision for summary judgment. The only summary procedure was in respect of bills of exchange, a procedure which had existed since the (UK) Summary Procedure on Bills of Exchange Act 1855. Thus, the test applied later to the 1975 Act would not have been apposite in 1890.)

50 I do not need to determine finally what the relevant test under the 1895 Act is or whether an application for the appointment of a liquidator constitutes "legal proceedings" because, in my judgment, if ordinary

proceedings by way of claim form had been issued, this would be a plain case for granting a stay. It is a commercial case where there are substantial disputes. Reference to arbitrators specialized in insurance and reinsurance matters is wholly appropriate. In accordance with the second limb of *Salford Estates* (14), that is fatal to the applicants' claim for the appointment of a liquidator, as it would be if the application did constitute "legal proceedings."

51 Both parties referred to *In re Lemma (Europe) Ins. Co. Ltd.* (8). In that case, the debt on which the winding-up petition was founded was subject to an English arbitration clause and, therefore, subject to the 1996 Act. Dudley, C.J. considered the English and Irish case law which pre-dated *Salford Estates*. He decided that the 1996 Act did not prevent him deciding that the debt was not disputed on substantial grounds. In the light of *Salford Estates*, *Lemma* may need to be reconsidered in respect of arbitrations under the UK Act, but, in relation to arbitrations under the Gibraltarian Act, *Lemma* remains relevant authority. In my judgment, in the current case, there are substantial grounds for the company to dispute the debt, which should be referred to arbitration under Gibraltarian law.

52 This also allows me to distinguish *In re GBI Invs. Ltd.* (7), on which Mr. Cruz relied. In that case, Warren, J. held ([2010] 2 BCLC 624, at para. 113) that he could exercise a discretion to wind up the respondent company, because there had been no valid reference to arbitration. Insofar as it is a decision on the 1996 Act, it is impliedly overruled by *Salford Estates* (14). However, it is consistent with the view that, under provisions like the 1895 Act, the court has a discretion as to whether to appoint a liquidator or not. Thus, on the different facts of this case I can properly say that, in the exercise of my discretion, the dispute should go to arbitration.

Summary and conclusion

53 I can summarize my judgment as follows:

(a) The statutory demand served by the applicants on October 22nd, 2014 was invalid under the Insolvency Act 2011.

(b) The invalidity does not prevent the applicants from applying for the appointment of a liquidator, provided they have an undisputed debt of at least £750.

(c) There are substantial disputes between the applicants, on the one hand, and the company, on the other, as regards the debts on which the applicants' application for the appointment of a liquidator is founded. These differences cannot be determined summarily and should be referred to arbitration. There is, therefore, no undisputed debt of at least £750 owed by the company to the applicants.

(d) The fact that the debts should be referred to arbitration means that the court should, in any event, refuse the application for the appointment of a liquidator.

54 Accordingly, I dismiss the application for the appointment of a liquidator.

Application dismissed.
