HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CHANCERY DIVISION
LEHMAN BROTHERS INC v NAVIGATOR GAS MANAGEMENT LIMITED
31 May 2005
His Honour Deemster Kerruish

IN THE MATTER of the Companies Acts 1931 to 2004
and
IN THE MATTER of NAVIGATOR GAS TRANSPORT PLC
and
IN THE MATTER of NAVIGATOR GAS (IOM I-A) LTD
and
IN THE MATTER of NAVIGATOR GAS (IOM I-B) LTD
and
IN THE MATTER of NAVIGATOR GAS (IOM I-C) LTD
and
IN THE MATTER of NAVIGATOR GAS (IOM I-D) LTD
and
IN THE MATTER of NAVIGATOR GAS (IOM I-E) LTD
and
IN THE MATTER of the Winding-Up Petitions of LEHMAN BROTHERS INC. ("the Petitioner") dated the 14th day of December 2004
and
IN THE MATTER of the Notice of Motion of NAVIGATOR GAS MANAGEMENT LIMITED (the "Noticed Party") dated the 31st day of May 2005

Petitions

[1] By Petitions each dated the 14th December 2004, Lehman Brothers Inc. (the "Petitioner") pleads that Navigator Gas Transport plc (Navigator Transport) Navigator Gas (IOM1-A) Limited, Navigator Gas (IOM1-B) Limited, Navigator Gas (IOM1-C) Limited, Navigator Gas (IOM1-D) Limited and Navigator Gas (IOM1-E) (the Subsidiaries which together with Navigator Transport are collectively referred to as the Debtor Companies) are each unable to pay their debts, and in such circumstances, and further on the grounds that it is just and equitable, each such company be wound-up under the Companies Acts 1931 – 1992 (the Act).

Background

[2] The factual background to these proceedings may be briefly summarised.

[3] Navigator Holdings plc (Holdings) is the registered or beneficial owner of the whole of the issued share capital in Navigator Transport, a company incorporated in the Isle of Man, which company in turn is the registered holder of the whole of the issued share capital in the Subsidiaries, each of which is incorporated in the Isle of Man.

[4] Navigator Transport is engaged in the business of ship owning and chartering.

[5] In or about August 1997, Navigator Transport raised in excess of US$300,000,000 by issuing 10.5% First Priority Ship Mortgage Notes, and 12% Second Priority Ship Mortgage Notes. The monies raised were used, amongst other things, to fund the construction of five ships, one such ship being owned by each of the Subsidiaries. Construction of the ships was completed in or about December 2000. Thereafter, Navigator Transport and the Subsidiaries commenced to trade.

[6] On 31st December 2002, Navigator Transport failed to make the interest payments due under the Priority Ship Mortgage Notes, and certain payments due under a Letter of Credit issued by Credit Suisse First Boston. As a consequence of such failures, notices of default were issued.

[7] On 27th January 2003, Holdings, and the Debtor Companies commenced voluntary proceedings under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court).

[8] Chapter 11 of the Bankruptcy Code permits a debtor to reorganise, or liquidate its business in order to maximise recoveries for the holders of claims against, and equity interests in the debtor, according to their respective priorities, which priorities may be viewed as generally debt before equity. A Chapter 11 plan sets forth the proposals for, and means of reorganising the debtor, and satisfying claims against the debtor and any interests, such as shareholders in the debtor. Under United States law, confirmation by the Bankruptcy Court of a Chapter 11 plan makes that plan binding upon the debtor, and all holders of claims against, or interests in the debtor.

[9] The principal creditors of the Debtor Companies are mostly resident in the United States of America.

[10] On 6th February 2003, the United States Trustee appointed an Official Committee of Unsecured Creditors (the Committee) to serve in the Chapter 11 proceedings. The members of the Committee are MacKay Shield LLC, Hanseatic Corporation, T.A. MacKay & Co. Inc., Ionian Management Inc., Alpine Associates, JP Morgan Chase Bank (Institutional Trust Services), The Bank of New York, and the Petitioner.

[11] On 14th November 2003, the Debtor Companies and the Committee each filed a proposed Chapter 11 plan of reorganisation for the Debtor Companies. In effect, such plans were competing plans of reorganisation, each of which proposed a different form of reorganisation of the Debtor Companies for consideration both by the Debtor Companies' creditors through voting and by the Bankruptcy Court.

[12] The Debtor Companies' Chapter 11 plan of reorganisation proposed a liquidation and sale of the Debtor Companies to the highest, or best bidder at a bankruptcy auction.

[13] The Committee's Chapter 11 plan proposed a reorganisation, in which the shares in Holdings would be distributed to the creditors in satisfaction of their claims. The Debtor Companies, under the new ownership, would then continue operating as a reorganised going concern.

[14] Creditors were entitled to vote on the two competing plans of reorganisation.
On 2nd March 2004, creditors voted overwhelmingly to reject the Debtor Companies' Plan and to accept the Committee's Plan.

[15] Subsequently, on 10th March 2004 the Honourable Judge Blackshear , the United States Bankruptcy judge presiding over the Chapter 11 proceedings, ordered that the Debtor Companies' Plan be "cancelled" .

[16] Following a further hearing on 16th March 2004, Judge Blackshear approved the Committee's Plan by Order dated 17th March 2004 (the "Confirmation Order").

[17] Under the Confirmation Order, ownership of the shares in Holdings was deemed to vest automatically in certain interim shareholders on behalf of the Debtor Companies' creditors. Such interim shareholders were required to give effect to the Committee's Plan with the result that upon the passing, and implementation of the requisite resolutions, the shares in Holdings would then ultimately be beneficially owned as to 92.75% by holders of "allowed First Priority Notes claims" , and as to 7.25% to holders of "allowed Second Priority Notes claims" . The claims of the principal creditors of the Debtor Companies, that is the holders of the First and Second Priority Mortgage Notes, would be deemed satisfied by their respective ownership of such shares.

[18] The Debtor Companies filed an appeal against the Confirmation Order. Such appeal was dismissed.

[19] Paragraph 30 of the Confirmation Order provided for the sending of a Letter of Request (Letter of Request) by the Bankruptcy Court to the High Court of Justice of the Isle of Man.

[20] The Letter of Request referred to the Confirmation Order, and recited, inter alia, the Bankruptcy Court's determination that title to Holdings' shares vests in certain interim shareholders, and that, subject to an increase in, and issuance of share capital, all shares in Holdings were to be distributed in accordance with the Committee's Plan.

[21] The Letter of Request requested, inter alia, that the court exercised its jurisdiction under Section 101 of the Companies Act 1931 to give effect to the Committee's Plan and to the Confirmation Order by making certain orders.

[22] By Petition dated 24th March 2004, the Committee sought certain orders in furtherance of its Plan, the Confirmation Order, and the Letter of Request. I shall refer to such proceedings as the "Letter of Request Proceedings" .

[23] On 31st March 2004, Cambridge Gas Transport Corporation (Cambridge) a company incorporated in the Cayman Islands and being the registered, or beneficial shareholder of approximately 60 percent of the issued share capital in Holdings in general terms opposed the Committee's Petition.

[24] By Judgment delivered on 14th October 2004, I found, inter alia, that in the circumstances of that case this Court could not and should not accede to the Letter of Request and that there was no cause for the Court to exercise its powers under Section 101 of the Act. The Committee being aggrieved by such Judgment appealed to the Staff of Government Division. There was also a cross-appeal by Cambridge.

[25] By its Judgment delivered on 21st March 2005, the Staff of Government Division determined, inter alia, at paragraphs 82 and 87:-

"82. In the interests of the ordinary administration of the Debtor Companies' assets and business it is appropriate that the Manx High Court should grant the assistance which is sought by the Bankruptcy Court to implement the Committee's plan…
…..
87. Thus the Court is able to grant the assistance requested by the Bankruptcy Court by exercising its powers under Section 101(1) and (3) of The Companies Act 1931."

[26] At the hearing of these proceedings, I was informed that Cambridge had appealed against such Judgment to Her Majesty in Council and that such appeal was scheduled to be heard on 20th and 21st March 2006.

These Proceedings

[27] Having given a brief factual background, I now turn to the present proceedings.

[28] The Petitions were supported by an affidavit (Mr. Butters' first affidavit) with exhibits thereto sworn on 14th December 2004 by David Butters, Managing Director of the Petitioner.

[29] Exhibited to Mr. Butters' first affidavit was a copy of an affidavit (Mr. Tziras' first affidavit) sworn on 26th January 2003 by Apostolas -Michel Tziras , then a director of Holdings, Navigator Transport and each of the Subsidiaries. Such affidavit was filed in support of the Chapter 11 proceedings. At paragraphs 5-10, 12 and 13 Mr. Tziras deposed:-

"5. Each of the Subsidiaries owns a LPG /petrochemical gas carrier (collectively, the "Vessels") for use in transporting liquefied petroleum gas ("LPG") including propane and, butane, and petro - chemical gases such as propylene, butadiene , ammonia, vinyl chloride monomer and ethylene pursuant to charter arrangements. The shipping of LPG and petrochemical gases is a highly specialized segment of the global shipping industry that involves the seaborne transportation of these gases.

6. Each Subsidiary receives management services from a manager, Navigator Gas Management Ltd. ("NGM"), who is not a debtor in this proceeding, pursuant to a commercial management contract, a technical management contract and an administrative management contract (collectively, the "Management Contracts") between each of the Subsidiaries and NGM . The management services provided by NGM to the Subsidiaries and Vessels include all aspects of the commercial, technical, administrative and financial management services required for the operations of each Vessel. Because almost all of the Debtors' activities are conducted through the Management Contracts, the Debtors do not have any employees.

7. As of December 31, 2002, on a consolidated basis, the Debtors' financial books and records reflected assets with a book value totalling approximately $197,243,082 and liabilities totalling approximately $384,314,744. [Holdings and the Debtor Companies] operating revenues for 2002 were approximately $25,045,456.

THE DEBTORS' INDEBTEDNESS

8. [Navigator Transport,] Holdings and each of the Subsidiaries entered into the Letter of Credit Reimbursement Agreement and Guarantee dated August 7, 1997 (the "Letter of Credit") with Credit Suisse First Boston ("CSFB") as administrative and funding bank. The Letter of Credit provides for indebtedness of the Debtors up to the amount of $50 million, $45.5 million of which may be utilized for payment of interest under the First and Second Notes (defined herein) and the remaining $4.5 million of which may be utilized for the working capital needs of [Holdings and the Debtor Companies], if required.

9. Substantially contemporaneous with the issuance of the Letter of Credit, Navigator issued 10.5% First Preferred Ship Mortgage Notes due 2007 in the aggregate principal amount of $217,000,000 (collectively, the "First Notes") pursuant to an indenture dated as of August 1, 1997 (the "First Indenture") with Bank of New York ("BONY"), as successor to US Trust Company of New York, as indenture trustee. Pursuant to an indenture dated as of August 1, 1997 (the "Second Indenture") with JP Morgan Chase, as indenture trustee, Navigator issued 12% Second Priority Ship Mortgage Notes due 2007 (in two series) in the aggregate principal amount of $107,900,000 (collectively, the "Second Notes") (together, BONY and JP Morgan Chase are the "Indenture Trustees"). The proceeds of the First and Second Notes were utilized to purchase the Vessels which were built specifically for [Holdings and the Debtor Companies].

10. [Navigator Transport's] obligations under the First and Second Indentures (collectively, the "Indentures") and the First and Second Notes (collectively, the "Note Obligations") are guaranteed by Holdings and each of the Subsidiaries. Pursuant to the Collateral Agency and Intercreditor Agreement dated August 1, 1997 (the "Intercreditor Agreement"), [Holdings and the Debtor Companies] granted to BONY, as collateral agent (the "Collateral Agent"), for the benefit of the holders of the First and Second Notes and the participating banks under the Letter of Credit (collectively, the "Institutional Creditors") a first priority security interest in substantially all of [Holdings and the Debtor Companies] assets, including each Vessel pursuant to terms of mortgages; the Management Contracts; charterhire , freights and other income of property subject to the liens pursuant to the terms of an Assignment of Earnings and Insurances; moneys and securities; and income or proceeds of the foregoing. To secure the Note Obligations [Navigator Transport] pledged its stock interests in each of the Subsidiaries and Holdings pledged its stock interests in [Navigator Transport] to the Collateral Agent… ..

…

12. [Holdings and the Debtor Companies] failed to make the interest payment due on December 31, 2002 with respect to the First and Second Notes. Additionally, on that same date, notwithstanding [Holdings and the Debtor Companies] direction to the Collateral Agent to pay CSFB and to fund the operations of the Vessels, the Collateral Agent, on behalf of [Holdings and the Debtor Companies] did not make certain interest payments due to CSFB under the Letter

of Credit. On or about January 2, 2003, (the “Sweep Date”), the Collateral Agent swept all of [Holdings and the Debtor Companies] accounts and made certain payments under the First and Second Notes to cover a portion of such indebtedness. In addition, since such time, [Holdings and the Debtor Companies] have been denied access to the funds in their accounts in order to continue to fund their operations.

13. Although the failure to pay the interest payment on the First and Second Notes on December 31, 2002 did not constitute an “Event of Default” under the Indentures until the expiration of the 30-day grace period on January 30, 2003, it caused an Event of Default under the Letter of Credit. On January 10, 2002, CSFB notified the Collateral Agent that such Event of Default had occurred. On January 17, 2002, CSFB notified [Holdings and the Debtor Companies] of the termination of the Letter of Credit. [Holdings and the Debtor Companies] have been in contact with CSFB and the Collateral Agent in an attempt to obtain access to funds located in the Operating Accounts in order to make urgent payments necessary over the next several days. However, [Holdings and the Debtor Companies] understand that absent an order of the court the release of such amounts under the Indentures, the Letter of Credit, and/or the Collateral Agreement (the “Debt Instruments”) may not be possible by the time such amounts are needed.”

[30] In Mr. Butters’ first affidavit, he deposed, inter alia, that the Petitioner is the holder of US$63,875,000 of 10.5% First Priority Ship Mortgage Notes due 2007 issued by Navigator Transport pursuant to an indenture dated 1st August 1997 with Bank of New York as indenture trustee; that the Petitioner is also the holder of US$60,237,964 of 12% Second Priority Ship Mortgage Notes due 2007 issued by Navigator Transport pursuant to an indenture dated 1st August 2007 with JP Morgan Chase as indenture trustee; each of the Subsidiaries guaranteed the payment obligations of Navigator Transport under the First Priority Ship Mortgage Notes and the Second Priority Ship Mortgage Notes; and that the Petitioner is thus a creditor of each of the Debtor Companies.

[31] In response to the Petitions, Navigator Gas Management Limited (Navigator Gas) a company incorporated in the Isle of Man served Notices of Intention to appear and subsequently filed its Answer by which it admitted, inter alia, the Petitioner’s holdings of the First and Second Priority Ship Mortgage Notes; that on 31st December 2002, Navigator Transport failed to make the interest payments due under the First Priority Ship Mortgage Note and the Second Priority Ship Mortgage Note, which failure was an event of default under each such Note and that notices of default were issued to Navigator Transport on 2nd and 3rd January 2004. Such Answer further admitted that on 27th January 2003, each of the Debtor Companies commenced voluntary Chapter 11 proceedings in the Bankruptcy Court by filing a voluntary petition; that each such filing was a further event of default under the First Priority Ship Mortgage Note and the Second Priority Ship Mortgage Note, which caused the principal and interest on such Notes and the guarantees passed by the Subsidiaries to become immediately due and payable; that Navigator Transport had up to the time of the Petitions filed in these proceedings made no payment due to the Petitioner of principal and interest due under the Notes; and that the guarantees remain outstanding. Navigator Gas put the Petitioner to proof that the Debtor Companies are insolvent; denied that any findings as to the Debtor Companies themselves had been made during the hearing at first instance of the Letter of Request Proceedings, which led to my Judgment of 14th October 2004; and put the Petitioner to proof as to the current financial position of the Debtor Companies. Navigator Gas made no

admissions as to the solvency or otherwise of the Debtor Companies, but, in the event that such insolvency is proven, pleaded that it would be unjust and inequitable to grant winding-up orders and that the relief sought by the Petitioner should be dismissed or struck out.

[32] By its Answer, Navigator Gas further pleaded that the Petitioner seeks to utilise the winding-up jurisdiction of this Court for an improper purpose; a form of collateral attack upon this Court's order of 14th October 2004; that the utilisation of such jurisdiction amounts to an abuse of process and would fall to be struck out as such; and/or amounts to a proceeding which is not necessary, scandalous or tends to prejudice, embarrass or delay matters; that the Petitions would fall to be struck out in terms of Order 19 Rule 4 of the Rules of the High Court of Justice of the Isle of Man by virtue of the matters pleaded in the Answer; that the Petitions are, on their face, frivolous and/or vexatious; that the Court should strike out the Petitions for each of the foregoing matters and/or under the principals of res judicata , and/or issue estoppel flowing from this Court's determination of matters, at the hearing on 26th/27th August 2004 which led to my Judgment of 14th October 2004.

[33] Navigator Gas also pleaded that the omission by the Petitioner to seek a winding-up order in respect of Holdings "further evidences the inappropriate tactical step being adopted by the Petitioner directly and/or on their behalf or on behalf of the Committee to seek to achieve exactly the same result" as the Letter of Request Proceedings which are presently the subject of appeal to the Privy Council.
Navigator Gas further pleaded that by reason of matters set out and referred to in the Answer "the Liquidation is not being sought to provide a situation where a Liquidator would collect in and sell, (and ultimately Liquidate) the relevant assets held under his office [as] Liquidator, rather that the Petitioner are seeking the effective rubber stamping of a Chapter 11 plan" .

[34] By Notice of Motion dated 31st May 2005, Navigator Gas sought that these proceedings be stayed pending the determination of the appeal in the Letter of Request Proceedings before the Privy Council or until further order. Following a hearing, I ordered that such application be adjourned to the hearing of the Petitions which had then been scheduled to commence on 3rd August 2005. I record that, during the hearing of the Petitions, Mr. Arrowsmith , who appeared for Navigator Gas, addressed the stay application as well as Navigator Gas' opposition to the Petitions.

Issues

[35] At the commencement of the hearing, Mr. Long who appeared for the Petitioner identified the following issues: namely the status of the Petitioner; the insolvency of the Debtor Companies; if it is found that the Petitioner has due status as a creditor, and that the Debtor Companies are insolvent, are there special grounds or exceptional circumstances why the relief sought by the Petitioner should not be granted; and if special grounds or exceptional circumstances are found to exist, ought the Court to order the Petitions to be dismissed, adjourned or stayed? The identification of such matters as the material issues was not challenged.

[36] Mr. Long referred to the challenges raised by the Petitioner to the status of Navigator Gas to oppose the Petitions, which challenges he maintained had not received response. Mr. Long indicated that, for the purposes of the matters currently before me, the Petitioner would not progress such challenges, but that in adopting such course, it did so without

prejudice to and reserving its right to raise the issue and any such challenge at any time in the future, including but not limited to challenge(s) to Navigator Gas' claim to be a creditor and/or the amount of indebtedness alleged by Navigator Gas to be due to it from the Debtor Companies or any one or more of them.

Status of the Petitioner

[37] Mr. Arrowsmith for Navigator Gas recorded that he did not take issue that the Petitioner has the requisite status to bring the Petitions. The Petitioner is a creditor of the Debtor Companies in an amount exceeding US$120,000,000. I find that as a very substantial creditor, the Petitioner has the requisite standing to bring the Petitions and each of them.

[38] Mr. Long also indicated that he acted on behalf of all members of the Committee and recorded that they supported the Petitions. He further indicated that collectively the members of the Committee are creditors of the Debtor Companies for approximately US$420,000,000.

The Insolvency of the Debtor Companies

[39] With reference to this particular issue, Mr. Arrowsmith referred to Navigator Gas putting the Petitioner to proof of the same.

[40] On the evidence, I find that Navigator Transport and the Subsidiaries are each insolvent. Each of the Debtor Companies, having resolved that it is desirable and in the best interests of the relevant company, its creditors and other interested parties, filed voluntary petitions dated 26th January 2003 with the Bankruptcy Court seeking relief under Chapter 11 of the Bankruptcy Code (United States of America) based on their own admitted and pleaded insolvency. On a consolidated basis, each such petition showed total assets of US$197,243,082 and total liabilities of US$384,314,744 – see Mr. Butters' first affidavit – exhibits 10-15. Such amounts were confirmed by Mr. Tziras' first affidavit.

[41] Holdings, which on the evidence before me, does not carry out any other trade or business or have any other material asset other than its shares in Navigator Transport, its wholly owned subsidiary, also filed for Chapter 11 proceedings at the same time.

[42] In his second affidavit (Mr. Tziras , second affidavit) sworn on 22nd April 2004, Mr. Tziras deposes that he served as a Director of each of the Debtor Companies and Cambridge until 29th March 2004; that he was then Chief Executive Officer of Navigator Gas, which continued to be the manager of the Debtor Companies operations; and that for their fiscal year ended 31st December 2002 there was a year end loss of approximately US$226,000,000.

[43] Under the Chapter 11 proceedings, Holdings and the Debtor Companies are required to file monthly operating reports. Such reports are reviewed and verified, apparently under penalty of perjury, by Navigator Gas. The monthly report dated 25th January 2005 for the calendar month ended December 2004 showed an accumulated deficit as at 1st December 2004 of US$241,773,663 and as at 31st December 2004 of US$243,453.851. Note 5 to the consolidated financial statements for the year ended 31st December 2004 reads:-

“Note 5 – Ship Mortgage Notes

The Issuer placed, on August 7, 1997, through a private placement, $217,000,000 aggregate principal amount of 10½% First Priority Ship Mortgage Notes Due 2007 (the “First Priority Notes”) and together with Holdings placed 87,000 units (“Units”), each Unit consisting of one of the Company’s 12% Second Priority Ship Mortgage Notes Due 2007 (the “Second Priority Notes”), in a principal amount of $1,000 and 7.66 Warrants (each a “Warrant”). In addition, as permitted by the indenture agreement, the Issuer issued additional Second Priority Notes (payments-in-kind) amounting to $20,900,000 by December 31, 2001 (the maximum permitted) because of insufficient cash to pay the accrued interest.

At November 30, 2004, the balance of the Notes has been adjusted to the estimated allowed amounts and is comprised of the following:

First Priority Second Priority
Notes Notes

Original unpaid principal balance $217,000,00 $ 87,000,000
Additional second priority notes 20,900,000

Pre-petition unpaid accrued interest allowed:

2002 8,299,173 6,743,750
2003 1,723,944 974,097

Estimated allowed amounts $227,023,117 $115,617,847

The Notes are unconditionally and irrevocably guaranteed by each subsidiary of Holdings (collectively, the “Guarantors”). From the Petition Date, no interest has been accrued on the Notes. The total contractual interest on the Notes for the twelve months ended December 31, 2004 (which has not been recognized), amounts to $37,357,500 and consists of the following components (which include the additional ½% penalty for failure to register the Notes with the SEC): First Priority Notes $23,870,000 and Second Priority Notes $13,487,500. The comparative total recognized contractual interest amount for 2003 is $34,659,459.

The Notes are junior in priority to the bank funding the letter of credit, and are collateralized by ship mortgages covering each Vessel.”

[44] The operating report filed on 22nd July 2005, again reviewed and verified by Navigator Gas, showed an accumulated deficit for the period 1st January 2005 up to 30th June 2005 of US$238,968,215. Whilst this appears to be a reduction from the December 2004 year end deficit of approximately US$4,500,000, such report again records that from 27th January 2003, being the date of the filings of the various Chapter 11 petitions, no interest has been accrued on the First Priority Ship Mortgage Notes or the Second Priority Ship Mortgage Notes, that “the total contractual interest on the Notes for the six-month ended June 30th 2005 (which has not been recognised) amounts to

US$18,678,750…..The total unrecognised contractual interest amount for 2004 was US$37,357,305".

[45] I remind myself that Navigator Transport issued the 10.5% First Priority Ship Mortgage Notes in the aggregate principal amount of US$217,000,000 and the Second Priority Ship Mortgage Notes in the aggregate principal amount of US$107,900,000 and that Navigator Transport's obligations under such Notes are guaranteed by Holdings and each of the Subsidiaries.

[46] Such referred to reports to the Bankruptcy Court were not challenged by Navigator Gas. Whilst I accept that such reports include Holdings, I agree with Mr. Long that by their own admission, and on their own evidence, the Debtor Companies and each of them are "distressingly insolvent" .

[47] If further support of my finding as to the Debtor Companies' and each of their insolvency is required, then I consider that I need look no further than certain findings made by Judge Blackshear in the Chapter 11 proceedings before the Bankruptcy Court. I remind myself that the Chapter 11 proceedings were commenced by voluntary petitions by Holdings and each of the Debtor Companies and that, inter alia, the Petitioner was party to such proceedings. In such proceedings, Judge Blackshear has found, inter alia, that the difference between Holdings, Navigator Transport and Subsidiaries' assets and liabilities demonstrated "woeful insolvency" , see Order of the Bankruptcy Court of 16th April 2004 – paragraph v.

[48] Also in an unsworn "affidavit" (the Mahler document) dated 28th June 2005,

Giovanni Mahler a director of Navigator Gas – at paragraphs 8 and 9 states:-

"8. There has been an improvement in the finances of the Debtor Companies between the time of the last audited consolidated balance sheet in December 2003 and the last Management Accounts submitted to the Committee at the end of May 2005. The accumulated deficit of the company at the end of 2003 stood at about US$240 million whereas at the end of May 2005, it stood at US$238 million. Moreover, most of this improvement occurred during 2005.

9. Furthermore, the calculation of the deficit in the consolidated balance sheet is based upon a depreciated (book) value of the vessels. If the vessels are valued at their present-day value, as determined by reference to the recent valuation certificates, the deficit is reduced by US$57 million to an overall group deficiency of US$182.3 million."

[49] As with the monthly reports' figures, such group deficiency is without payment of any interest under the Mortgage Notes.

Law Relevant to the Petitions

[50] Section 162(5), and (6) Companies Act 1931 provides:

“162 Circumstances in which company may be wound up by court
A company may be wound up by the court if-
…… ..
(5) the company is unable to pay its debts;
(6) the court is of opinion that it is just and equitable that the company should be wound up.”

[51] Section 165 of the Act provides:

“165 Powers of court on hearing petition

On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.”

[52] Thus, if the Court is satisfied under one or more of the provisions of section 162, the Court has a discretion whether to make a winding-up order.

[53] I refer to that part of the Judgment of Park J. in Re. Lummus Agricultural Services Limited [1999] BCC .953, at 956H-957A which reads:-

“Decision

I begin with the basic proposition that, although both s.122 (which uses the word “may”) and s.125 give the Court a discretion whether to make a winding-up order, it is well-settled that, if a creditor with standing to make the application wants to have the company wound-up, and if the court is satisfied that the company is unable to pay its debts, a winding-up order will follow unless there is some special reason why it should not. It is sometimes said that, in such a case, a petitioning creditor is entitled to a winding-up order “ex debito justitiae” . I therefore start with the assumption that such an order should be made in this case and the burden or argument rests on Mr. Lightman to show me why it should not” .

[54] It is well settled in law that if a creditor with standing makes application to have a company wound-up, and if the court is satisfied that such company is unable to pay its debts, a winding-up order will follow unless there is some special reason to the contrary. Further, in such circumstances and being so satisfied, the court would assume that a winding-up order should be made. The burden rests with any objector to show special reasons why such an order should not be made.

[55] In this case, accepting for my purposes that Navigator Gas is a creditor, there is disagreement between creditors: the Petitioner with, so I am informed by Mr. Long, also their advocate, the rest of the members of the Committee in support, seeks that winding-up orders are granted; Navigator Gas opposes any such orders. I refer to that part of the judgment of Neuberger J in Re Demaglass Holdings Limited [2001] 2BCLC 633 at pages 637-640 which reads:

“The correct approach

There have been a number of cases where the court has had to consider whether or not to make a winding-up order against the opposition of creditors, receivers appointed by secured creditors, or others. The law in relation to such a case appears to me to be as follows:

First, the foundation of the court’s jurisdiction to deal with a winding-up petition is to be found in s.125(1) of the 1986 Act. That provides as follows:

‘On hearing a winding-up petition the court may dismiss it or adjourn the hearing conditionally or unconditionally or make an interim order or any other order it thinks fit but the court shall not refuse to make a winding-up order on the ground only that the company’s assets have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.’

Secondly, at least in the case of an opposed petition, the petitioning creditor has to establish the possibility of the prospect of some sort of benefit from a winding up. The test, however appears to be a low one. In Re Crigglestone Coal Co Ltd [1906] 2 Ch 327 at 333 Collins MR appears to have thought that the petitioner need only show a reasonable possibility of some advantage. The other two members of the Court of Appeal seem to have considered that the test was even lower than that. Romer LJ (at 338) observed that he could not say that the prospect was ‘hopeless’ . Cozens-Hardy LJ said (at 339) the evidence against the petitioners ‘did not support the contention that there is no possibility’ of a dividend being paid to the unsecured creditors.

Third, at least in the absence of a good reason a creditor of a company who has not been paid is entitled to a winding-up order virtually as of right. Thus in a classic statement made in Bowes v Directors of Hope Life Insurance and Guarantee Co. (1865) 11 HL Cas 389 at 402 Lord Cranworth said:

‘…it is not a discretionary matter with the Court when a debt is established, and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the Court to direct the winding up’

Fourthly, where, as here, the battle is between the creditors of the company, some in favour of a winding-up order being made and others against, there is authority for the proposition that a winding-up order will be made if the majority of creditors support the petitioner, and can only be refused if the majority support the opposition. In this connection see the discussion in

the judgment of Brightman J in Re Southard & Co Ltd [1979] 1 All ER 582 at 585-586, [1979] 1 WLR 546 at 550 where he said:

'As has often been said, the decision in a case such as the present is a matter for the discretion of the judge. However, it is clear that the court ought not to deprive the petitioning creditor of his prima facie right to a winding-up order unless there is an opposing majority, and, if there is no voluntary liquidation in existence or in contemplation, unless there are good reasons for such opposition. I have been told that there is no reported case where the court has denied a creditor its prima facie right to a winding-up order ex debito justitiae at the instance of a minority of opposing creditors.' (My emphasis.)

For my part, I would not accept that the mere fact that a majority of creditors support the making of a winding-up order would be an absolute bar in all circumstances to the court refusing a winding-up order. The wording of s 125(1) of the 1986 Act is such, and the nature of the winding-up jurisdiction is such, that, as Brightman J himself recognised in the passage I have quoted, the discretion of the court is to be regarded as untrammelled by any absolute rule. Furthermore, in Re Palmer Marine Surveys Ltd [1986] BCLC 106 at 110 Hoffman J said:

'Even if the creditors in favour of the continuation of the voluntary liquidation are a minority in value, the court may refuse a compulsory order if there appears to be no advantage to creditors in making one…'

None the less, I think it would require a wholly exceptional case before the court would deny a petitioning creditor a winding-up order in circumstances where the majority of creditors supported the making of a winding-up order. In this connection there is force in Mr. Adamyk's reference to the provisions of s 195 of the Insolvency Act 1986, sub-s (1) of which enables the court to 'have regard to the wishes of creditors or contributories as to all matters relating to the winding up of a company' and indeed "to direct that meetings be called for the purpose of finding out their wishes' . In this connection I note with interest that s 195(2) is in these terms. 'In the case of creditors regard shall be had to the value of each creditor's debt.'

Fifth, when considering the views of the creditors on the question of whether to wind up a company or not: (a) the court will give little, if any, weight to the views of the secured creditors, at least in so far as their debts are secured (see Bell Group Finance Ltd v Bell Group Holdings Ltd [1996] 1 BCLC 304). This is because the secured creditors are protected in any event, at least to the value of their security, and to that extent they have no interest in whether the company is would up or not, save perhaps in unusual circumstances, for instance, if the value of the security would be affected by the making of a winding-up order; (b) the court will have

greater regard to the views of independent creditors as opposed to creditors connected with the company (see Re Palmer Marine Surveys Ltd [1986] BCLC 106); (c) the exercise of the court's discretion will not, as was pointed out by Brightman J in Re Southard & Co Ltd [1979] 1 All ER 582, [1979] 1 WLR 546, normally be dependent on mathematical niceties.

I should add that these points tend to underscore my view that the fact that the majority of creditors in value support the making of a winding-up order is not necessarily decisive on the issue in every case.

Sixthly, as was emphasised by Brightman J in the passage I have quoted from Re Southard & Co Ltd [1979] 1 All ER 582 at 585-586, [1979] 1 WLR 546 at 550, it is not enough if the majority of creditors oppose the making of a winding-up order in the normal case. The court must also be satisfied that they have good reason for refusing to wind up the company. The requirement of there being good reasons is emphasised by the decision of the Court of Appeal in Re P & J Macrae Ltd [1961] 1 All ER 302, [1961] 1 WLR 229, especially per Willmer LJ in a passage which includes the following ([1961] 1 All ER 302 at 307, [1961] 1 WLR 229 at 235-236):

'…I am certainly not prepared to accept the view that the bare fact of the opposing creditors being in a majority is of itself sufficient, still less conclusive. So to hold would be to leave the court with virtually no judicial function to perform, and to take away from it the discretion which the words of the Act plainly confer.'

Seventhly , where the court is satisfied that the opposition to the making of a winding-up order is supported by a majority and is justified, but that the desire of the petitioning creditor to have a winding-up order made is also justified, it has to carry out a balancing exercise. Once one gets to that point, it is impossible to lay down any general principles as to the correct approach. It must inevitably depend on all the circumstances of, and arguments in relation to, a particular case. However, I would suggest that the court should in every case of this sort bear in mind the principle expounded by Lord Cranworth and also ask itself whether there are any other procedures by which the petitioner or the opposers could be adequately protected rather than by having the petition respectively dismissed or granted."

[56] Sections 165 and 270(1) of the Act are respectively equivalent to sections 125 and 195(1) Insolvency Act 1986 (of Parliament).

[57] It is well established that the courts will have greater regard to the views of independent creditors, as opposed to creditors, who are subsidiaries or otherwise connected to the subject company or companies. However, even if a petition for winding-up is opposed by a majority of creditors, which it is not in this case, the courts must still be satisfied that there is good reason to refuse to grant a winding up order. It must follow that if the opposition to a winding-up order is from a minority of creditors or, as in this case, one creditor, which at best has a relatively modest claim in

value, the need for a good reason to refuse to grant a winding-up order must be the greater.

[58] Also, in the case of an opposed petition, the petitioning creditor has to establish the possibility of some sort of benefit deriving from a winding-up order. However, the test is a low one, in that at most such creditor need only show a reasonable possibility of some advantage.

[59] In this case, the Petitioner is a creditor, which is owed substantial sums, in excess of US$120,000,000. At a hearing on 10th December 2004 before Judge Blackshear , Mr. Kornberg of Paul Weiss Rifkind Wharton & Garrison appeared for the Committee and sought that court's approval to permit the commencement of winding-up proceedings in this jurisdiction against some or all of the Debtor Companies. The transcript indicates clearly that the Committee believed it prudent to pursue winding-up proceedings and that, inter alia, the Debtor Companies, who were represented at such hearing, raised no objection "to the winding-up relief."
Mr. Novick , attorney for "the Debtors" is recorded at page 14, line 20 to page 15, line 3 of the transcript as stating:-

"In reliance on the representation made by the Committee and their papers and here today that proceeding in the Isle of Man for a winding up proceeding will advance the shared objective of effectuating the plan confirmed in this court, we have no objection as the order - - as the proposed order has been modified to resolve all the other issues we raised."

[60] At the end of such hearing Judge Blackshear granted the Committee's application and made an order accordingly.

[61] There is one known objector to the Petitions, namely Navigator Gas, which without prejudice to any argument as to its claimed status of creditor, is owed in aggregate approximately US$3,000,000 with continuing fees and interest.

[62] In this case, the monies due to the Petitioner far exceed those due or claimed to be due to Navigator Gas. Mr. Long informed me that he represented the remaining members of the Committee and that they are supportive of the Petitions. Be that as it may, it appears to me that even if one considered that the Petitioner was the sole creditor seeking the winding-up of the Debtor Companies, the only creditor in opposition is Navigator Gas, whose value as a creditor is far less than that of the Petitioner.

Arguments and submissions of Navigator Gas in opposition to the Petitions and in support of the application to stay.

[63] Mr. Arrowsmith referred to the discretion given to the court under section 165 of the Act, if it is satisfied under section 162 and to Order 13, rule 30 and Order 19, rule 4 of the Rules which respectively provide:-

Order 13 r30

“30 Striking out pleadings
The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if the Court shall think fit, order the costs of the application to be paid as between attorney and client.”

Order 19 r4

“4 Striking out pleading where no reasonable cause of action disclosed
The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”

[64] Mr. Arrowsmith submitted, with which I agree, that the inherent jurisdiction of the court to strike out on such grounds as provided in the Rules is well established, see Macdonald - v – FSL Services Limited Ch .D (1999-01) MLR 528; Chaldan Limited, B. Edwards and A. Edwards - v – Coroner (Middle Sheading) and 11 Others Ch .D (1999-01) MLR ; Barlow Clowes International Trust Corp. (IOM) Ltd CLD (1996-98) MLR 222; and Jeremy Harben James – v – Dickinson Cruickshank & Co. (CLD) 8th September 2004.

[65] As to the application to stay, the court has a discretion, which will be exercised sparingly, and generally only in “a very clear case” see Shackleton - v – Swift [1913] 2KB 304, Vaughan -Williams LJ at 311.

[66] With reference to the court’s approach to strike out applications, Mr. Arrowsmith referred to R. Davis and J. Davis – v – Radcliffe and Seven Others
[1987-89] MLR 341 and that part of the judgment of Acting Deemster Wingate -Saul at page 350 which reads:-

“The striking-out application

In relation to this application by the defendants, it is first necessary to determine the correct framework and in particular the test which a court must apply.

….

Those authorities, in my opinion, are authority for the following approach:

(a) a judge should make an early review of the case when presented with an application to strike out and if he regards it as unsuitable due to complexity or length should decline to follow that procedure;

(b) a judge who has embarked on a striking out may review his initial decision to embark upon the procedure at any time during the hearing to strike out;

(c) whether or not a judge embarks upon or continues to hear such an application, especially if prolonged argument is involved, may to a considerable degree depend upon

the advantage of such a procedure to the parties in the context of the issues raised and how they would be dealt with if the action continued;

(d) the standard to be applied is that an action should not be struck out unless the plaintiffs' claim is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case. (The many words used to describe this standard may be found in the judgment of Stephenson, L.J. in McKay v. Essex Area Health Auth . (14) ([1982] 1 Q.B. at 1176)). "

[67] Such approach was affirmed by the Staff of Government Division in Liggins and Blythe Liggins & Co. –v - Lumsden Ltd, Pebblestone Ltd and Royal Bank of Scotland (1999-01) MLR 601.

[68] Mr. Arrowsmith referred to In Re A Company (1894) 2 Ch 349, and that part of the judgment of Vaughan -Williams J at page 350 which reads:-

"In my Judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding-up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company …"

[69] He also referred to Johnson –v - Emmerson and Sparrow [1870-71], LR6EX 329 an action concerned with maliciously procuring an adjudication of bankruptcy where it was held that there was evidence of malice where proceedings were taken not to procure equal distribution of the debtor's assets, but for some other purpose, in that case to procure the debtor into the admission of a debt. Mr. Arrowsmith then referred to Mitchell - v – Jenkins [1833] 5B & Ad 588 in which the court determined that malice, which is a question of fact, may be inferred in the absence of reasonable or proper course.

[70] Mr. Arrowsmith argued that the Petitions had been brought for an improper or ulterior motive or purpose and/or were a form of collateral attack in that they had not been brought to procure equal distribution of the assets of the Debtor Companies, but to achieve an effective transfer of control and shares in Holdings in pursuance of the Confirmation Order and the Letter of Request.

[71] Mr. Arrowsmith referred to the Motion for a Contempt Order dated 16th February 2005 to the Bankruptcy Court by Paul Weiss Rifkind Wharton & Garrison LLP ., U.S. Counsel for the Committee in the Chapter 11 proceedings and in particular to paragraph 11 on page 5 of such motion, in which it is stated:-

"On December 1, 2004, as an alternative to the Appeal [(referring to the Staff of Government proceedings in respect of the Letter of Request Proceedings)] and without prejudice to its position as to the Letter of Request or the Appeal, the Committee filed a motion with this Court seeking authority to commence and particular in "winding -up" proceedings before the Manx Court in an effort to consummate the form of the re-organisation contemplated by the Committee's Plan and the Confirmation Order through "winding -up" petitions and schemes of arrangement presented to the Manx Court

…"

And to paragraph 13 on page 6, in which it is stated:-

"On December 10, 2004, this Court entered the Winding Up Order and on December 15, 2004 [the Petitioner] as a creditor and Chair of the Committee commenced the Winding-Up Proceedings in the Isle of Man as authorised by the Winding-Up Order."

[72] Mr. Arrowsmith submitted that it was obvious that these proceedings seek to achieve "the same economic result" as the Letter of Request Proceedings currently extant before the Privy Council. The Court should be astute to prevent multiplicity of proceedings, in particular where, as in this case, the proceedings seek to avoid the true effect of the appeal process in the Letter of Request Proceedings and are desired simply to exert financial and tactical pressure upon Cambridge within those proceedings by seeking to circumvent the appeal process. In the context of this submission, Mr. Arrowsmith referred to section 32 High Court Act 1991.

[73] Mr. Arrowsmith referred also to the above cited part of Davis and Davis - v - Radcliffe et al and argued that the Petitions ought to be dismissed or struck out since they disclosed no reasonable cause of action. Whilst Mr. Arrowsmith accepted that these proceedings are not without complexities, he maintained that there is a clear issue to which the Court can apply the proper test as to whether the Petitioner's case is effectively unarguable with no chance of succeeding.

[74] Mr. Arrowsmith argued that the issue is not one of duty of care, but whether these proceedings should be allowed to be brought, where they are being brought with a view to effecting "a wholly flawed, Letter of Request and US Court Order that was made without jurisdiction ….. and not in good faith for the benefit of all creditors and with a view to equal distribution of assets" . He submitted that the Petitioner has no reasonable cause of action, and as such it is a plain and obvious case for striking out.

[75] Mr. Arrowsmith referred to that part of the judgment of Lindley LJ in Attorney General of Duchy of Lancaster – v – London and North Western Railway Co. [1892] 3 Ch 274 at 277, where, referring to the meaning of frivolous and vexatious, the learned Law Lord stated:-

"… .it appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable ;…."

[76] The expression "frivolous and vexatious" includes proceedings which are an abuse of process, see E T Mailen Ltd – v – Robertson [1974] ICR 72 cited with approval in Ashmore -v- British Coal Corp. [1990] 2 QB 338.

[77] In considering whether any proceedings are vexatious, the court must look at the whole history of the matter – see Re.Vernazza [1959] 2 All ER 200.

[78] Mr. Arrowsmith argued that the Petitions are frivolous and vexatious and an abuse of process, primarily because the Committee, via the Petitioner, is essentially seeking relief, which it has already sought under a different guise before this Court, and also for the reasons raised by him in support of his other arguments. Mr. Arrowsmith submitted that Navigator Gas ought not to be put to expense by frivolous, vexatious or hopeless litigation such as these proceedings. Further, if the Court is not minded to dismiss or strike out the Petitions, the court should grant the stay application in the interests of justice.

[79] Mr. Arrowsmith then referred to the doctrine of res judicata , and that it is a fundamental doctrine of all courts that there must be an end to litigation. Mr. Arrowsmith cited Volume 16 Halsbury's Laws of England (Fourth Edition Re-Issue) at paragraph 975 which reads:-

"In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point has been actually decided between the same parties

….. It is not enough that the matter alleged to be estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

[80] Mr. Arrowsmith submitted that the cause of action on which the Petitions and the Letter of Request Proceedings are founded are one and the same, namely, the Confirmation Order to transfer the shares in Holdings to a trustee in bankruptcy. Further, the Committee, which includes the Petitioner, has had an opportunity of recovering that which is now masked in the form of the Petitions: the transfer of control and shares in Holdings. In essence, both the proceedings presently before the Privy Council and these proceedings seek an "equity swap" .

[81] Mr. Arrowsmith then cited Volume 16 Halsbury's Fourth Edition (paragraph 976) which reads:-

"In all cases where the cause of action is really the same and has been determined on the merits, and not on some ground (such as the non-expiration of the term of credit) which has ceased to operate when the second action is brought, the plea of res judicata should succeed. The doctrine applies to all matters which existed at the time of the giving of a judgment and which the party had an opportunity of bringing before the court."

[82] Mr. Arrowsmith submitted that Navigator Gas' arguments of res judicata should succeed: the cause of action in the Letter of Request Proceedings is really the same as these proceedings and has been determined on its merits at first instance and on appeal. The matters that have caused the Petitions to be brought existed at the time that the Letter of Request Proceedings were brought, and at the time of the judgments at first instance and at appeal in those proceedings were pronounced and they will inevitably still exist at

the time of the judgment of the Privy Council. The Petitioner and/or the Committee had an opportunity of bringing the Petitions prior to commencing the Letter of Request Proceedings. To allow the Petitions would be to render the Letter of Request Proceedings unreasonable, unnecessary, frivolous and/or vexatious and an abuse of process. It can be an abuse of process to raise in subsequent proceedings, matters which could and should have been litigated in earlier proceedings – per Acting Deemster King in James – v – Dickinson Cruickshank & Co. (CLD) 8 September 2004.

[83] Mr. Arrowsmith then referred once more to Volume 16 Halsbury's Fourth Edition and that part of paragraph 977 which reads:-

"… issue estoppel may arise where a plea of res judicata could not be established because the causes of action of action are not the same"

[84] He argued that although this may appear to be an alternative argument to that of a plea of res judicata where the claimant seeks to show that the causes of action are the same, it is perhaps best stated as in Liggins as being "relitigation falling short of res judicata" . In other words, issue estoppel is not an alternative claim to res judicata , so that a party may claim both, but rather a concurrent one. Mr. Arrowsmith then referred again to paragraph 977 and that part which reads:-

"A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies …… .. Where a cause of action is held not to fall within the scope of issue estoppel it may nonetheless be struck out as vexatious or frivolous; to re-litigate a question which in substance has already been determined is an abuse of process."

[85] Mr. Arrowsmith then referred to the headnote In the matter of Epitome Investments Limited (1996-98) MLR page 579, which headnote reads:-

"Held , ordering the petition to be struck out:
The case was one of issue estoppel . Although both sets of proceedings had taken place in a different country and between different parties, there was no real or practical difference between the issues already decided and those to be litigated in the present action. Those issues had been finally determined against the petitioner on the merits in courts of competent jurisdiction, in proceedings which were not trivial in character, and no new evidence had become available since then. His petition would therefore be struck out as vexatious and an abuse of process (page 584, line 32 – page 585, line 2; page 586, line 24-page 587, line 17)."

[86] The referred to page 584, line 32 to page 585 line 2, cites paragraph 977 of Halsbury's and page 586, line 24 to page 587, line 17 cites part of a judgment of Lord Reid in Carl Zeiss Stiftung – v – Rayner Keeler Ltd (No. 2) (1966) 2 All ER 536 at 555. Mr. Arrowsmith also referred to the headnote in North West Water Ltd - v- Binnie & Partners (a Firm) (1990) 3 All ER 547 at 548.

[87] Mr. Arrowsmith submitted that the Petitions are an abuse of process. The intention of the Petitioner is to achieve the same economic result as the Letter of Request Proceedings, that is "an equity swap" . The Petitioner's intention is relevant to consideration of the dismissal, strike-out or stay of the Petitions and to each and every reason therefor. Further, if the Court determined that special reasons or exceptional circumstances have to be shown by Navigator Gas as to why the winding-up orders should not be granted, then the Court could rely upon all and any of the arguments and submissions of Navigator Gas to deny the Petitioner its desired relief: the matters which may lead to special reason or exceptional circumstance are not closed and include matters such as abuse of process.

[88] Mr. Arrowsmith reminded the Court that in exercise of its jurisdiction with reference to staying proceedings under an order of the winding-up of a company, the Court should, as far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receding order or annul an adjudication in bankruptcy against an individual, in which cases the court refuses to act upon the mere assent of the creditors in the matter and considers not only what is proposed for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large – see Re. Telscriptor Syndicate Ltd (1903) 2 Ch . 174.

[89] With further reference to the application to stay, Mr. Arrowsmith submitted that these proceedings should be stayed pending determination of the Letter of Request Proceedings by the Privy Council in order that unnecessary costs both for Navigator Gas, and the Petitioner be not incurred: the outcome of the Letter of Request Proceedings, whatever the result will be material to and have consequential affect upon these proceedings.

[90] Mr. Arrowsmith further submitted that any stay of these proceedings would not prejudice the Petitioner or the Committee, if these proceedings were taken in the context of the time scale of the Chapter 11 proceedings and bearing in mind that the Subsidiaries continue to trade. Likewise, any urgency expressed on the part of the Petitioner or the Committee is entirely of their own making and simply reflected the pursuit of the Letter of Request Proceedings by the Committee which Mr. Arrowsmith argued "are wholly flawed and cannot ultimately succeed" .

[91] Mr. Arrowsmith referred to the Mahler document. At paragraphs 3-6 of such document, Mr. Mahler refers in general terms to "the overwhelming majority of the present holders [of the First Priority Ship Mortgage Notes and the Second Priority Ship Mortgage Notes] being distressed debt buyers who bought the Notes from their original holders and that most of such holders "bought their Notes during the year 1998 when the value of the Notes was very low and when it was apparent that the Debtor Companies were encountering financial difficulty" . Mr. Mahler then proceeds to make "reasonable assumptions" which lead him to conclude as to the annual return of the First Priority Ship Mortgage Notes and the Second Priority Ship Mortgage Notes.

[92] Paragraphs 8 and 9 of the Mahler document are cited above, see paragraph [48]. At paragraph 10 Mr. Mahler states:-

"10. The Debtor Companies have been accumulating cash at the rate of US$2.5 million per month during 2005, which yields an annualised gross operating profit of US$29.5 million. As a result of this, and notwithstanding the very heavy legal expenses occasioned by the dispute between the creditors and the shareholders, the Debtor Companies have accumulated cash to the sum of US$31.5 million by the end of May 2005. Accordingly, they are in the process of repaying to the First Priority Creditor, [Credit Suisse First Boston] the sum of US$20 million reducing the liability to that Bank from US$47.6 million to US$27.6 million with the consequential saving of interest payments. Furthermore, with the exception of the debt to [Credit Suisse First Boston] and the Note holders, the Debtor Companies are paying all their other obligations as they fall due. Accordingly, the position of the Note holders, as creditors, is not deteriorating further with the passage of time. To the contrary, their position is improving."

[93] Having assumed that the value of the vessels will remain constant with age, that the market will continue "to deliver the same high returns for the next five years" , and that the expenses of the Debtor Companies will remain constant over the next five years, Mr. Mahler concludes that "it can be shown that the [Debtor Companies] will cover the outstanding deficiency during the year 2011".

[94] In answer to the Mahler document, Mr. Butters filed his third affidavit sworn on 4th July 2005 in which he responds, fully and comprehensively, to each and every assertion, claim and assumption made by Mr. Mahler. By way of example, Mr. Butters calculates that the alleged improvement in the Debtor Companies' balance sheet during the then preceding seventeen months equates to approximately 0.8% of the total deficiency; that there has been an overall deterioration in the Debtor Companies' financial position throughout 2003 and 2004; reviews the Debtor Companies' monthly operating reports for the period December 2004 to May 2005 and challenges the accuracy of Mr. Mahler's calculations; challenges the correctness of Mr. Mahler making a direct link between cash and operating profit; points out that no interest has accrued on the First Priority Ship Mortgage Notes and the Second Priority Ship Mortgage Notes consequent upon the filing by the Debtor Companies of the Chapter 11 proceedings and that if such interest had accrued then the total contractual interest on such Notes for the five months ended 31st May 2005 would amount to US$15,565,624 with the total contractual interest for 2004 amounting to US$37,375,500. Mr. Butters challenges Mr. Mahler's assumption that the Debtor Companies will cover the outstanding deficiency by the year 2011 and challenges, successfully to my mind, the assumptions made by Mr. Mahler as to the value of the vessels remaining constant with age; and income and expenses likewise remaining constant.

[95] Having considered the Mahler document and Mr. Butters' third affidavit, I unhesitatingly prefer Mr. Butters' evidence. Mr. Mahler ignores the fact that interest on the First Priority Ship Mortgage Notes and the Second Priority Ship Mortgage Notes, which are not insignificant annual amounts, continue not to accrue because of the Chapter 11 proceedings. Mr. Mahler's calculations, assumptions and assertions do not withstand analysis and as to his assumptions fly in the face of reality. As to paragraphs 3-6 of the

Mahler document, none of Mr. Mahler's comments therein affect the Petitioner's status as a substantial creditor. I give no weight to the Mahler document.

Conclusions

[96] Navigator Gas complains that the Petitioner's purpose in bringing these winding-up proceedings is that it wishes to promote a scheme of arrangement in the liquidation of the Debtor Companies to try to achieve in the Isle of Man the same economic result as the Committee's Plan and that such purpose is an improper purpose. Further, Navigator Gas complains that such purpose constitutes a collateral attack on my judgment of 14th October 2004 in the Letter of Request Proceedings and amounts to an abuse of process.

[97] I reject such complaints and any allegation of improper purpose. The Committee's Plan has previously been confirmed by the Bankruptcy Court as being in the best interests of all concerned, including the Debtor Companies. Such Plan represents the wishes of the majority of creditors. The Debtor Companies have stated unequivocally to the Bankruptcy Court in filings for the hearing on 10th December 2004 before Judge Blackshear , whereat the Committee successfully applied for permission to commence these winding-up proceedings, that it was "undoubtedly in the best interests of the debtors estates for the plan to be consummated as expeditiously as possible" . Further, at the hearing on 10th December 2004 before Judge Blackshear the Debtor Companies' Counsel indicated that the Debtor Companies shared "the same objectives as the Committee and would like to see the (Bankruptcy) Court's Order and the Plan become effective as soon as possible" . In its judgment of 21st March 2005, the Staff of Government Division indicated that implementation of the Plan made "obvious sense" (see paragraph 82 of the judgment).

[98] The proposed use of the winding-up procedure to obtain the appointment of a liquidator in the hope that any such liquidator might promote a scheme of arrangement under Section 152 of the Act is a perfectly proper, legitimate and beneficial use of the winding-up process, especially when it is what the majority of creditors desire.

[99] I also reject the arguments and submissions that these proceedings are a collateral attack on this court's judgment of 14th October 2004 in the Letter of Request Proceedings. By its judgment of 21st March 2005, the Staff of Government Division upheld the Committee's Appeal against my judgment: the Staff of Government Division's judgment is currently the extant judgment in the Letter of Request Proceedings. The winding-up proceedings cannot be viewed as a collateral attack. Indeed, these proceedings could be viewed as entirely consistent with my judgment in the Letter of Request Proceedings (see paragraph 185 of such judgment).

[100] Further, the winding-up proceedings have not been brought to achieve a transfer of the shares in Holdings, which company is not the subject of a winding-up petition in this jurisdiction, and indeed is not party to these proceedings.

[101] I cannot find any ground whatsoever to support Navigator Gas' arguments and submissions as to res judicata and/or issue estoppel . The Petitions are distinct proceedings from the Letter of Request Proceedings. The issues in the two sets of proceedings are entirely different. The issue in these proceedings is whether the Debtor Companies should be wound-up by this Court. The issues in the Letter of Request Proceedings argued before this Court and subsequently before the Staff of Government

Division and which presumably will be argued before the Privy Council are entirely irrelevant to the issues raised by the Petitions.

[102] The basis of the two sets of proceedings are also plainly different. The Letter of Request Proceedings are based upon a judicial Letter of Request from the Bankruptcy Court to these courts; the Petitions are based upon the Petitioner's statutory right as a creditor to apply to wind-up the Debtor Companies. The parties are different. Navigator Gas was not and is not a party to the Letter of Request Proceedings. There is no petition to wind-up Holdings. Whilst it has been indicated that the members of the Committee support the Petitions, neither the Committee nor Cambridge are parties to the Petitions. The Committee is "involved" only to the extent of providing support to the Petitioner. Further, Cambridge itself has argued that the Petitions are irrelevant to the issues before the courts in the Letter of Request Proceedings (see transcript of Staff of Government hearing dated 14th January 2005). In response to the Committee's application for security for costs in the Letter of Request Proceedings before the Privy Council, Mr. Cairns, a director of Cambridge, Navigator Gas and all the Debtor Companies, swore an affidavit dated 20th May 2005 indicating that difficulties and delays which the Committee had faced in respect of the Letter of Request Proceedings, by way of opposition of Cambridge, could have been avoided if the Committee had adopted "proper domestic procedures such as a winding up" . (see paragraph 14).

[103] I reject Navigator Gas' arguments and submissions that the proceedings disclosed no reasonable cause of action, that they are frivolous, vexatious, unnecessary, scandalous, or otherwise an abuse of process.

[104] I have found that the Petitioner is a substantial creditor and has the requisite standing to bring the Petitions and each of them. I have further found that the Debtor Companies are each insolvent. I have rejected the arguments and submissions as to improper purpose, collateral attack, res judicata and issue of estoppel . In bringing these proceedings, the Petitioner is exercising its statutory rights to seek a winding-up of each of the Debtor Companies and, subject to satisfying this Court that there is a possibility of a prospect of some sort of benefit from the winding-up of the Debtor Companies, in the absence of good reason, a creditor of a company who has not been paid is entitled to a winding-up order "virtually as of right" .

[105] I can find no ground or merit in Navigator Gas' arguments and submissions, which would lead me to conclude that these proceedings, taken by a bona fide substantial creditor, are without reasonable cause of action, frivolous, vexatious, unnecessary, scandalous or in any way contrary to justice, commercial morality or an abuse of process.

[106] I refer to that part of the judgment of Neuberger J in Re Demaglass Holdings Limited cited at paragraph [55] above.

[107] This Court has jurisdiction to grant the relief sought in the Petitions, to strike out or dismiss the Petitions and/or to order a stay of these proceedings. Such jurisdiction requires the Court to exercise its discretion, having considered all relevant matters. As to Navigator Gas' application to stay these proceedings, it is recognised that discretion to grant the same ought to be exercised sparingly and only in a 'very clear case' .

[108] I am satisfied, albeit that the test is a low one, that the Petitioner has established "the possibility of the prospect of some sort of benefit for a winding-up order" . The appointment

of a liquidator would place the assets of the insolvent Debtor Companies into the hands and under the control of an independent third party. Further, the appointment of a liquidator would enable the Petitioner and other members of the Committee to seek to persuade the liquidator to propose a scheme of arrangement under section 152 of the Act, which scheme it is envisaged by the Petitioner would comply with the "overwhelming wishes" of the creditors and the Debtor Companies themselves. If the scheme fails, it is likely that there will be an insolvent distribution of the assets among the creditors in accordance with the winding-up process, again that would bring some benefit to creditors.

[109] The sole creditor to oppose the Petitions is Navigator Gas. Even taken at its best, the amount due to Navigator Gas is modest in comparison to the amounts due to the Petitioner. Further, it is clear that the Petitions are supported by the other members of the Committee, as evidenced by the application on their behalf to Judge Blackshear which sought and obtained the learned judge's consent to commence and participate in winding-up proceedings before this Court. The majority of creditors support the winding-up of the Debtor Companies.

[110] I accept Mr. Long's submission that the view of Navigator Gas ought not to be regarded as those of an independent creditor. The shares in Navigator Gas are held by a Luxemburg company, Arctic Gas SA . The majority shareholder of Arctic Gas SA is Vela Energy whose principals include Mr. Mahler. Vela Energy is the ultimate holding company of Navigator Gas, Cambridge and each of the Debtor Companies. Navigator Gas, Cambridge and each of the Debtor Companies all share common directors, who include Mr. Mahler and Mr. Cairns. Navigator Gas provides administration and management services to each of the Debtor Companies.

[111] The Petitioner is a substantial creditor, who has not been paid, and seeks a winding-up order in respect of each of the Debtor Companies on the grounds that each such company is unable to pay its debts and/or that it is just and equitable to order that each company be wound-up.

[112] Navigator Gas seeks that the Petitions be stayed. I cannot find any good reason to stay the Petitions.

[113] I have rejected each of the complaints and arguments raised by Navigator Gas in support of it seeking a stay of these proceedings. The Petitioner, as with other substantial creditors, continues to suffer prejudice by virtue of their inability to recover any of the substantial amounts due to them. The Debtor Companies are insolvent. Their financial position in reality continues to deteriorate, despite the fact that currently and for some considerable time past, no interest has accrued on the First Priority Ship Mortgage Notes or the Second Priority Ship Mortgage Notes. I find that there is no reasonable prospect that the Debtor Companies will be able to trade out of their situation within a significant number of years let alone a reasonable period. The Letter of Request Proceedings and determination thereof by the Privy Council do not directly affect the Debtor Companies. No justice would be served by granting a stay. I dismiss Navigator Gas' application for stay of these proceedings.

[114] As to Navigator Gas seeking that the Petitions be dismissed or struck out, I cannot find any reason, let alone any good reason, to dismiss or strike out the Petitions or any of them. I refer to my immediately above cited reasons for refusing to grant a stay of these proceedings. I have rejected each and every complaint, argument and submission made

by Navigator Gas in its opposition to the Petitions. I am aware that the making of a winding-up order is an order of last resort. I cannot find any reason not to grant the relief sought by the Petitions. On the evidence presented by the Petitioner, and indeed on the admissions contained in the Mahler document, and taking into consideration my findings, and all relevant matters and circumstances, I am satisfied that each of the Debtor Companies is insolvent and unable to pay its debts and further that it is just and equitable to grant the relief sought by the Petitioner. I shall therefore order that each of the Debtor Companies be wound-up.

[115] I await consequent and any further applications.