Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) *v* Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)
[2011] SGHC 207

Case Number : CWU No 196 of 2010

Decision Date : 16 September 2011

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Herman Jeremiah and Loh Jen Wei (Rodyk & Davidson) for the plaintiff; Chopra Sarbjit Singh (Lim & Lim) for the defendant

Parties : Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) — Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)

Insolvency Law

16 September 2011

Quentin Loh J:

Introduction

1 The defendant, Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) ("Ultrapolis"), owes the plaintiff, Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) ("DSK"), €686,693.30 plus interest at €300.30 per day from 17 September 2007 ("the undisputed debt") pursuant to an arbitration award issued in Copenhagen on 16 April 2009. DSK's application to register this award as a judgement under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), was vigorously contested by Ultrapolis, unsuccessfully, before Belinda Ang J (on 17 August, 26 October, 24 November 2009, 22 January and 9 April 2010; see *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments* [2010] 3 SLR 661("*DSK (No.1)*")), and the Court of Appeal (on 8 September 2010, CA 75/2010/A).

2 On 16 September 2010, with its hard won judgment in hand, DSK served a statutory demand on Ultrapolis requiring payment for the undisputed judgement debt within three weeks. As Ultrapolis did not comply with the statutory demand, DSK applied to the court on 20 December 2010 for Ultrapolis to be wound up.

3 On 26 May 2011, after hearing both parties on 21 January, 30 March, 11 and 19 April, 4 May 2011, I gave the following orders:

(a) Ultrapolis be wound up;

(b) Mr Chia Soo Hien and Mr Leow Quek Shiong be appointed as joint and several liquidators of Ultrapolis; and

(c) DSK's costs in these proceedings to be agreed or taxed and to be paid to DSK out of the assets of Ultrapolis.

4 Ultrapolis has appealed against my decision and I now set out the grounds for my decision.

Background facts

5 Ultrapolis has a 95% shareholding in Privilege Fleet Co. S.P.A ("Privilege Fleet"), a company incorporated in Italy and previously known as Sea Charter Co. S.P.A ("Sea Charter"). On 16 May 2005, Sea Charter entered into a contract ("the Turn-Key Contract") with Waymax International Limited ("Waymax"), a company incorporated in the British Virgin Islands, to design and construct a 90 meter mega yacht ("the vessel").

6 DSK is a Danish company specialising in providing services for ship design. As Sea Charter did not possess sufficient expertise in designing mega yachts, Ultrapolis entered into a written agreement dated 29 August 2005 with DSK, ("the First Agreement") for professional design services in respect of the vessel. Enclosed in the First Agreement were DSK's Standard Conditions of Sale, Work and Delivery (July 2001 version) ("the Standard Conditions") which contained an arbitration clause. Thereafter, in an effort to resolve differences that had arisen, the parties mutually rescinded the First Agreement in favour of a new agreement for design services for a 100 meter mega yacht ("the New Agreement"). This was concluded on 21 December 2005.

7 DSK maintained that it completed and delivered 95% of the professional design work to Ultrapolis and duly sought 95% of the remuneration. However, Ultrapolis refused to pay. DSK then referred the matter to arbitration before three members of the Danish Arbitration Institute ("the Tribunal") on 24 November 2006 ("the first arbitration proceedings"). Ultrapolis challenged the Tribunal's jurisdiction on the ground that there was no agreement to arbitrate as the New Agreement did not incorporate the arbitration clause found in the Standard Conditions. After a contested hearing on 18 January 2008 on the preliminary issue of jurisdiction, the Tribunal held on 28 February 2008, that it had jurisdiction to hear the dispute on the grounds that the Standard Conditions, including the arbitration clause, formed part of the New Agreement, and that the wording of the arbitration clause clearly referred to the Tribunal.

8 Ultrapolis did not challenge the Tribunal's decision on jurisdiction in the Danish Court, as it was entitled to (see *DSK (No.1)* at [4]). Instead, on 25 April 2008, Ultrapolis issued a Writ of Summons in Singapore, in Suit No. S300/2008/H ("Suit 300") cross-claiming for DSK's negligent work. The claim for damages was not quantified in the Statement of Claim. On 26 May 2008, Ultrapolis' Danish lawyer informed the Tribunal by email that he no longer represented Ultrapolis and that Ultrapolis had instituted legal proceedings instead in Singapore for loss and damages for DSK's alleged failure to deliver a proper design in a timely manner.

9 Two things then happened. First, the Tribunal in Denmark went on with the main oral hearing of the disputes before it on 5 December 2008. Ultrapolis chose to allow the hearing to proceed by default. The Tribunal duly published its award on 11 February 2009 ("First Award") and subsequently, a corrected award on 16 April 2009 ("Corrected Award"). This Corrected Award rectified the First Award so that it specified the date from which interest started to accrue and reflected the change in the claimant's name from Knud E Hansen A/S to DSK. Secondly, on 12 June 2009, DSK successfully applied before an Assistant Registrar to have Suit 300 set aside on the basis that Ultrapolis failed to provide full and frank disclosure of, *inter alia*, the first arbitration proceedings and the New Agreement. Ultrapolis' appeal against this decision was dismissed on 29 August 2009 by Chan Seng Onn J in Registrar's Appeal No. 239/2009/H.

10 On 14 July 2009, DSK duly applied for leave to enforce the Corrected Award in Singapore in OS 807/2009/N ("OS 807"), under s 29 of the IAA. Ultrapolis resisted OS 807. On 9 April 2010, Belinda Ang J held that Ultrapolis's challenge to the enforcement of the Corrected Award was without merit. Accordingly, leave was granted to DSK to enforce the Corrected Award (see *DSK (No.1)*). Ultrapolis appealed and the Court of Appeal in CA 75/2010/A dismissed its appeal on 8 September 2010.

11 As noted above at [2], on 16 September 2010, DSK served a statutory demand pursuant to s 254(2)(a) of the Companies Act (Cap 50, 1994 Rev Ed) ("CA") on Ultrapolis demanding payment of the judgment debt.

12 Two events took place before the filing of the winding up application by DSK on 23 December 2010.

13 First, on 20 October 2009, Ultrapolis issued a Writ of Summons in Suit No. S886/2009/L ("Suit 886") against DSK cross-claiming €1.5 million. However, Suit 886 was discontinued on 21 September 2010 as it had already been found in *DSK (No.1)* that the New Agreement had incorporated a valid arbitration clause (see *DSK (No.1)* at [25] and [45]).

14 Secondly, on 4 October 2010, shortly after DSK served the statutory demand, Ultrapolis instituted arbitration proceedings against the DSK in Denmark for a claim amounting to €927,850 ("the second arbitration proceedings").

15 I first heard the matter on 21 January 2011 at the end of which, Mr Singh, Counsel for Ultrapolis, made an impassioned plea to allow his client to file an affidavit to enable him to raise further arguments; I granted a three week adjournment for both parties to file further affidavits. When the matter came before me again on 30 March 2011, after submissions, Mr Singh sought a further adjournment as he claimed to have been caught unaware by DSK's counsel's supplementary submissions that had just been handed to him. Again, I granted an adjournment. There were two more short hearings before me and leave was sought by Ultrapolis to file yet another affidavit on 19 April 2011. The giving of security was raised by counsel at the second of these short hearings.

16 After hearing both parties on 4 May 2011, I ordered Ultrapolis to provide security to be furnished by a Singapore registered insurer or bank within 21 days, failing which Ultrapolis would be wound up. Ultrapolis failed to do so.

17 On 26 May 2011, Mr Singh asked for more time to provide security. He stated that the well known insurance broker, Marsh S.p.A., was arranging for security for Ultrapolis and required more time to do so. However, the letter from Marsh S.p.A. dated 9 May 2011 was wholly unconvincing. It said that issuing of such international bonds required at least 60 days. Ultrapolis themselves acknowledge that Marsh S.p.A. was part of the Marsh & McLennn Group and they are one of, if not the, largest insurance brokers in the world. They have a very substantial operation in Singapore and back-to-back confirmation from one Marsh entity to another in Singapore does not take 60 days to be put in place. And especially not for such a modest sum. Mr Jeremiah, Counsel for DSK, suggested this was merely a delay tactic as the preliminary issue hearing for the second arbitration proceeding was set for 8 June 2011 and the reason for Ultrapolis to stretch this out was clear. DSK's request for arbitration was first made on 24 November 2006. Ultrapolis could have put forward its cross or counterclaim in the first arbitration proceedings but it chose instead to let the claim go by default. After resisting this claim at every possible step, and after judgment on the Corrected Award was confirmed by the Court of Appeal on 8 September 2010, Ultrapolis belatedly decided to pursue a cross-claim arising from the same set of facts and had asked for yet more time. I took the view that they had stretched matters out to breaking point. DSK had in hand a hard won judgement. Ultrapolis were given an opportunity to

provide security but they had failed to do so. I accordingly ordered Ultrapolis to be wound up.

Ultrapolis' case

18 Ultrapolis averred that the winding up petition should fail because:

(a) Ultrapolis had a genuine cross-claim against DSK;

(b) DSK had a collateral purpose in bringing the winding-up application, namely, to circumvent the second arbitration proceedings; and

(c) The granting of the winding up application would cause irreparable harm to Ultrapolis's business.

19 Before considering the substantive merits of these defences, it is first necessary to examine the requisite standard of the proof which Ultrapolis had to meet.

Issue 1: The applicable standard of proof

20 In the English Court of Appeal case of *Bayoil SA, In re* [1999] 1 WLR 147 ("*Bayoil*"), Nourse LJ at 150D-G sub-divided winding-up petitions into two categories: "disputed debt" cases and "cross-claim" cases. With respect to "disputed debt" cases, Nourse LJ held that where the petition debt is disputed in good faith on substantial grounds, the practice to dismiss a petition is not, initially, a matter for the discretion of the court but founded on the creditor's inability to establish his *locus standi* to present the petition.

21 With respect to the "cross-claim" cases, *viz*, where there is an undisputed debt with a genuine and serious cross-claim, the dismissal or stay of the winding up petition is a matter for the discretion of the court. This distinction was followed by the Court of Appeal in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") at [64].

22 *Metalform* was a "cross-claim" case where the debtor company had applied for an injunction to restrain a winding-up petition *before* the latter had been filed. In that scenario, the Court of Appeal held that the debtor company did not have to show that the winding-up petition was "bound to fail". Instead the debtor company merely had to prove that there was a likelihood that the winding-up petition might fail or that it was unlikely to succeed (see *Metalform* at [86]).

23 Pertinent to the present case, the Court of Appeal implicitly affirmed at [87] that in "cross-claim" cases, this same standard is also applicable where a defendant wishes to dismiss a winding-up petition *after* it has been filed:

> This standard of proof [ie the "bound to fail" test] is also inconsistent with the standard that is applicable *where the application is to stay the petition after it has been filed*. *The standard of proof in a stay application founded on a serious cross-claim on substantial grounds is that the petition is unlikely to succeed or that it is likely that the court will hold over the petition in order to allow the cross-claim to be determined first*. There is no particular reason why the standard of proof should be higher in the first case [*ie* before the petition is filed] than in the second case [*ie* after the petition is filed]. *Moreover, it is ironic that in the second case, irreparable damage might well have been done to the company by the filing of the petition, and yet the standard of proof in staying the petition is lower than the "bound to fail" standard*. We therefore conclude that it is inappropriate to apply the "bound to fail" test in cross-claim cases.

[emphasis added.]

24 In *Pacific Recreation Pte Ltd v S Y Technology Inc and anor* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"), the Court of Appeal held at [23]-[24] that the standard of proof for "disputed debt" cases was no more than that for resisting a summary judgment application, *ie*, the debtor company need only raise triable issues:

> *With regard to the applicable standard for determining the existence of a substantial and bona fide dispute, it was our view that the applicable standard was no more than that for resisting a summary judgment application, ie, the debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application*. We agreed with the approach adopted by the High Court in *De Montfort University v Stanford Training Systems Pte Ltd* [2006] 1 SLR(R) 218 ("*De Montfort University*"), where the petitioning creditor contended that even if leave to defend were granted in summary judgment proceedings, the judge hearing the winding-up petition could still revisit the issue of whether there was a substantial and bona fide dispute [...]
>
> Tay Yong Kwang J rightly rejected the petitioning creditor's argument in *De Montfort University*. He held at [28]:
>
> > [...] I prefer the view that once unconditional leave has been granted to a defendant and the order stands, either because the plaintiff decides not to appeal or because the order is affirmed on appeal, another forum should not revisit and reopen the same issues. *If unconditional leave to defend has been given to a defendant in a claim on a debt, surely that means that there is a bona fide or a genuine dispute*.
> >
> > [emphasis added]

25 Conversely, a defendant who is granted unconditional leave to defend in summary judgment proceedings upon demonstrating a triable cross-claim should not be twice vexed by allowing the petitioning creditor to re-litigate the same issue at the hearing of the winding-up petition. This rationale applies equally to *all* "cross-claim" and "disputed debt" cases regardless of whether the defence was mounted before or after the winding-up petition was filed. This provides a more sound justification that the standard of proof for *all* "cross-claim" cases is no more than that for resisting a summary judgment application, *ie*, the debtor company need only raise triable issues.

26 I would also add that any linguistic divergence between the "triable issue" test (see *Pacific Recreation* at [23]-[24]) and the "unlikely to succeed test" (see *Metalform* at [86]-[87]) is a distinction without difference. As Lawrence Collins LJ remarked in *Ashworth v Newnote Ltd* [2007] EWCA Civ 793 ("*Ashworth*") at [33]:

> It seems to me that a debate (see e.g. *Kellar v BBR Graphic Engineers (Yorks) Ltd* [2002] BPIR 544, 551) as to whether there is a distinction between the "genuine triable issue" test for cross-claims and "real prospect of succeeding on the claim" (i.e. on the cross-claims) involves a sterile and largely verbal question, and that there is no practical difference between "genuine triable issue" and "real prospect" of success and certainly not in this case.

27 Accordingly, in the present case, Ultrapolis could not dispute the judgment debt claimed by DSK. It was thus for Ultrapolis to prove the existence of any triable issues by virtue of its cross-claim, an issue to which I now turn.

Issue 2: Whether Ultrapolis had a genuine and serious cross-claim in excess of the

Issue 2: Whether Ultrapolis had a genuine and serious cross-claim in excess of the petitioner's debt

28 In *Bayoil*, Nourse LJ held at 154B-D and 155D-G that the court would, in the absence of special circumstances, exercise its discretion by dismissing or staying the petition where:

(a) There was a genuine and serious cross-claim;

(b) The cross-claim was greater than the claim of the petitioning creditor; and

(c) The cross-claim was one which the company had been unable to litigate.

29 These propositions were accepted by the Court of Appeal in *Metalform* at [77] as representing the current practice in England, Australia and Singapore albeit that only the first two propositions were relevant to the facts in that case.

Abuse of process and Res Judicata

30 However, in *Montgomery v Wanda Modes Ltd* [2002] 1 BCLC 289, Park J disagreed with Nourse LJ's third proposition in *Bayoil* and held that a debtor company is *not* precluded from relying on a cross-claim simply because it could reasonably have litigated the cross-claim before the petition was presented. Park J astutely noted at [31]-[33] that:

> The requirement that the debtor must not have been able to litigate his (or, in a case like this one, its) cross-claim was not part of the *ratio decidendi* of Bayoil: in that case there was no dispute that, because (I infer) the whole dispute between the two parties was governed by an arbitration clause, the debtor had not been able to litigate its cross-claim. Therefore there was no issue on this particular point. So where does the proposition stated by Nourse LJ come from? I respectfully agree with Rimer J [in *re a Debtor* (No 87 of 1999) [2000] BPIR 589] that there is no other case which establishes it. The wider principle enunciated in *Bayoil* was that a cross-claim could be a ground for dismissing a winding-up petition based on an undisputed debt. The court derived that principle largely from the earlier decision of the same court in *re Portman Provincial Cinemas Ltd*, decided in 1964 but only reported at the same time as *Bayoil* at [1999] 1 W.L.R. 147. The *Portman* case certainly did not decide that a debtor company could not rely on a cross-claim after all if it could have litigated it earlier but had not done so. If that had been the view of the court it would almost certainly have acceded to the winding-up petition instead of dismissing it: the cross- claim started to accrue in 1957 but the company did not start proceedings in respect of it until 1963, by which time (as I infer from the judgments) enforcement action — eventually a winding- up petition — in respect of the debt owed by the company was clearly imminent.
>
> There has been one other directly relevant Court of Appeal case after Portman and before Bayoil. It is *re LHF Wools Ltd* [1970] Ch 27. A winding-up petition against the company was dismissed on the ground that it had a cross-claim which, if it succeeded, would exceed the debt. As in *Bayoil* there was no issue about the company having been able to litigate its cross-claim but not having done so. The cross-claim would have to be litigated in Belgium and under Belgian law could not yet have been commenced. The headnote does however contain these words: *'the modern practice that where a company had a genuine and serious cross-claim against the petitioner* which it had not reasonably been able to litigate, *the petition should usually be stayed or dismissed.'* I think that, as Rimer J suggested, the words which I have emphasised are likely to have been the origin of the words in Nourse LJ's judgment which I am considering here. However, the problem is that there is nothing to support them in the judgments in the *LHF Wools* case.

> Although it was true that the company could not have litigated its cross-claim, none of the three members of the court says anything to suggest that that was important, or that the result would or might have been otherwise if the company could already have litigated its cross-claim. Indeed, Harman LJ said that the company appealed on the ground that *'according to modern practice if there is a genuine cross-claim, it is just as good as if there was a disputed debt'*, making no reference to whether or not the cross-claim could reasonably have been litigated already. I can only conclude that the headnote writer went beyond what the court had decided, and that his expansion may have found its way into the judgment of Nourse LJ in *Bayoil*.
>
> In the circumstances I do not consider that I am bound by what Nourse LJ said to reject WML's argument on the ground that it could have litigated its cross claim against Mr Montgomery but had not done so. As a matter of principle I would not myself think it right to decide against WML on that ground. *I do not think that there is anything objectionable in a company which believes that it has a claim against another party holding back from pursuing it, but then, if the other party starts to threaten it with winding-up proceedings if it does not pay a debt owed in the other direction, deciding that it must pursue its cross-claim after all. A decision in favour of Mr Montgomery on this issue would have the undesirable effect of penalising a company for refraining from litigating an issue when it first could have done, and encouraging parties to litigate their possible claims sooner rather than later*.
>
> [emphasis added]

31 I agree with Park J's observations that Nourse LJ's requirement that the debtor must not have been able to litigate his cross-claim was not part of the *ratio decidendi* of *Bayoil*. Moreover, it seems to rest on unsure foundations having been borrowed from the headnote of *LHF Wools Ltd, Re* [1970] Ch 27 which went beyond what the court in *LHF Wools Ltd, Re* had decided. However, this is not to say that the question of whether Ultrapolis was previously able to litigate its cross-claim is irrelevant. Rather, it remains a highly persuasive factor in determining whether the cross-claim is a genuine one.

32 Indeed, this is the approach that the more recent English Court of Appeal authorities have adopted. In *Dennis Rye Ltd v Bolsover District Council* [2009] EWCA Civ 372 ("*Dennis Rye*"), Mummery LJ, delivering the leading judgment (with which Elias LJ concurred) stated at [19] that:

> Cases familiar to practitioners in the Companies Court were cited: *Re Bayoil SA* [1998] B.C.C.988 at 994; [1999] 1 W.L.R. 147 at 155 per Nourse L.J.; *Re a Debtor (No.87 of 1999)* [2000] B.P.I.R. 589 at 592H–594G (Rimer J. in a bankruptcy case); *Montgomery v Wanda Modes Ltd* [2003] B.P.I.R. 457 at [28]–[36] (Park J.). The authorities are illustrations of the well established practice of the Companies Court that, if a company has a genuine and serious cross-claim, which is likely to exceed the petition debt, the court will normally exercise its discretion by dismissing the winding-up petition and allowing the company the opportunity to establish its crossclaim in ordinary civil proceedings. *A company is not prevented from raising a cross-claim in winding-up proceedings simply because it could have raised or litigated the claim before the presentation of the petition or it has delayed in bringing proceedings on the cross-claim. The failure to litigate the cross-claim is not necessarily fatal to a genuine and serious cross-claim defeating a winding-up petition. However, in deciding whether it is satisfied that the cross-claim is genuine and serious, the court is entitled to take into account all the relevant circumstances, such as the fact that a company has not even attempted to litigate the cross-claim, or that there are reasons why it has not done so*.

33 Mummery LJ's statement of the law in *Dennis Rye* was reproduced in the later case of *The Accessory People Ltd v Rouass* [2010] EWCA Civ 302 at [19]. In that case, Arden LJ noted at [20]

that:

> In my judgment, what Mummery LJ said [in *Dennis Rye* at [19]] clearly supports what Mr Clegg [counsel for the appellant] submits on this point, that the fact that there has been a failure to litigate a claim is simply a matter to be taken into account in deciding whether or not the cross-claim is a genuine one and one which would cause the court to exercise its discretion positively to stay or dismiss the petition.

34 Furthermore, this flexible approach is merely the specific application of the doctrine of abuse of process in the winding up context. In *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 ("*Bradford & Bingley*"), Auld LJ said at p 1490:

> In my judgment, it is important to distinguish clearly between *res judicata* and abuse of process not qualifying as *res judicata* ... The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances' ... The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, *the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter*.
>
> [emphasis added]

35 This "balancing approach" was followed by Sundaresh Menon JC in *Goh Nellie v Goh Lian Teck and anor* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [53]:

> To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are bona fide reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. *In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant*. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been.
>
> [emphasis added]

This is based on the well known rule formulated more than 160 years ago by Sir James Wigram VC in Henderson v Henderson (1843) 3 Hare 100 at 115-116 and followed in subsequent cases like Barrow v Bankside Agency Ltd [1996] 1 WLR 257, Johnson v Gore Wood & Co [2001] 2 WLR 72 and in Singapore in *Abacus Realty Pte Ltd anors v Indian Overseas Bank* [1998] 3 SLR(R) 720.

36 Consequently, the fact that there has been a failure to litigate a claim is simply one factor, albeit a weighty one, amongst others to be balanced in deciding whether the cross-claim is a genuine one or an abuse of process or a collateral attack on a previous decision.

37 As a caveat, I see no reason why this factor in particular and the doctrine of abuse of process in general should not be extended to encompass previous *arbitration proceedings*. This is borne out by the preponderance of both authority and principle.

38 In *Pacific King Shipping Pte Ltd and anor v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413, Pillai J noted at [26], in the context of a similar "cross-claim" case, that:

> I find little merit in the plaintiffs' case for a cross-claim as *quite apart from it not having been hitherto raised in the arbitration proceedings there is further absent in these proceedings*, any substantiated quantification of the cross-claim as would reveal that it is likely to approximate or exceed the statutory demand debt. I am not satisfied that the plaintiffs have made their case that the statutory demand debt has not been properly established and/or that there is a bona fide dispute of the debt on substantial grounds. The presumption of insolvency under s 254(2)(a) of the Companies Act operates so long as the debtor does not pay a sum which is not in dispute and that sum exceeds the minimum prescribed therein (see *Re Makin Nominees Pte Ltd* [1994] 2 SLR(R) 848).
>
> [emphasis added]

Pillai J's remarks suggest, albeit indirectly, that the fact that a cross-claim could have been raised in *previous arbitration proceedings* is relevant in determining whether the debtor has a geuine cross-claim.

39 More explicitly in *Sallal v Bank Mellat* [1986] 1 QB 441 ("*Sallal*"), Hobhouse J found that it would be an abuse of process to commence judicial proceedings on an issue that had previously been raised or should with reasonable diligence have been raised in a court *or tribunal of competent jurisdiction*. In *Sallal*, it was held that the plaintiff's cause of action in English judicial proceedings was an abuse of process since it had arisen out of the same transaction which had formed the basis of his claim before the Iran-United States Claims Tribunal which conducted its business in accordance with UNCITRAL rules. As Hobhouse J noted at 461H-462A:

> ...international comity requires that the courts of England should recognise the validity of the decisions of foreign tribunals whose competence is so derived. It would be anomalous and contrary to justice and comity if I were to decline to recognise the decision of the tribunal between the present parties.

40 In my judgment, the framework of the International Arbitration Act (Cap 143A) ("IAA") supports the contention that the re-litigation in a Singapore court of an issue which could have been raised in an earlier arbitration can amount to an abuse of process. This is because an arbitral award, with leave of the High Court, "is enforceable in the same manner as if it was an order made by a court" (see s 12(6) IAA). It is, of course, another matter altogether if the *lex arbitri* somehow prevented the bringing of a claim in abatement or refused to allow cross-claims, but that is certainly not the case here.

41 In the present case, Ultrapolis could and should have brought the cross-claim as early as 2006, some four years ago, during the first arbitration proceedings where the Corrected Award was made. Its cross-claim arises out of the same facts and transaction. Instead, Ultrapolis voluntarily restricted itself to contesting the preliminary issue of jurisdiction before withdrawing from the main oral hearing of the substantive dispute before the Tribunal. Ultrapolis also chose not to challenge the Tribunal's decision on jurisdiction in the Danish Court, which it was entitled to do (see above at [8]).

42 Additionally, Ultrapolis did not provide any explanation as to why a cross-claim was not raised in the first arbitration proceedings.

43 First, none of the six affidavits of Romani Rinaldo ("Mr Rinaldo"), a director of Ultrapolis, disclosed fresh evidence that came to light after the Corrected Award was issued on 16 April 2009. For instance, the Project Manager's report [note: 1], which detailed the alleged serious omissions arising out of the work done by DSK, was dated 26 May 2008. This was well before the main oral hearing of the substantive dispute before the Tribunal on 5 December 2008. It was therefore open for Ultrapolis to have made this report available to the Tribunal in support of a possible counterclaim or cross-claim or even a defence of abatement.

44 Similarly, the report by Salvatore Russo [note: 2], a naval architect, which was commissioned by Ultrapolis to detail the costs of rectification of the deficiencies in DSK's work ("the Russo report"), was originally prepared on 19 April 2006 but was allegedly affirmed much later on 4 February 2011. [note: 3] Once again, this report, which valued the costs of rectification at €280,000, could have been placed before the Tribunal during the main oral hearing on 5 December 2008.

45 Secondly, both parties overlooked the fact that in Suit 300 the Assistant Registrar had already found on 12 June 2009 that Ultrapolis's cross-claim was an abuse of process since it was *res judicata* that the Tribunal had jurisdiction to hear the dispute. This finding went undisturbed as Ultrapolis's appeal before Chan Seng Oon J was dismissed in Registrar's Appeal No. 239/2009/H (see above at [8]-[9]).

46 Accordingly, I would not agree with Mr Singh's submission that Ultrapolis had at all material times sought to pursue the cross-claim expeditiously. [note: 4] On the contrary, the present cross-claim appeared to be a thinly veiled collateral attack on the Corrected Award and OS 807. Consequently, the intervening steps taken by Ultrapolis between the serving of the statutory demand on 16 September 2010 and the filing of the winding up petition on 23 December 2010, *viz*, instituting a second arbitration and discontinuing Suit 886, appeared to be no more than ill-conceived ploys to stave off liquidation (see above at [12]-[14]). When viewed against the entire backdrop of this protracted dispute, this failure to litigate the cross-claim clearly showed that the cross-claim was not a genuine one.

Genuine and serious cross-claim that was greater than the claim of the petitioning creditor

47 It accords with both commonsense and the rules of evidence that to establish a genuine cross-claim, a defendant must do more than baldly assert the fact that a cross-claim exists (see *Pacific Recreation* at [17]). The corollary of this is that it is "open to the court to reject evidence because of its inherent implausibility or because it is contradicted by or not supported by the documents" (*per* Lawrence Collins LJ in *Ashworth* at [34]).

48 In the present case, the sums cross-claimed by Ultrapolis fluctuated throughout this chequered litigation. This points to the conclusion that the cross-claimed sums were conjured up to trump the Corrected Award in order to stave off this winding up petition.

49 The cross-claims were not only inconsistent but unsubstantiated. To begin with, Ultrapolis' cross-claim for damages in Suit 300 was *not quantified* in its Statement of Claim dated 25 April 2008 (see above at [8]). It was only after DSK served a statutory demand on 16 September 2010 demanding payment of *€686,693*.30 plus interest at €300.30 per day from 17 September 2007 that the cross-claimed sum began to take shape.

50 On 4 October 2010, Ultrapolis made a request for arbitration to the Tribunal cross-claiming *€927,850 plus interest at 1.5% per month from 25 April 2008*. Shortly after on 20 October 2009, Ultrapolis commenced Suit 886 cross-claiming *€1.5 million*. In contrast, in Mr Rinaldo's affidavit filed on 11 February 2011, the cross-claim was quantified at *€930,000*.

51 Further, according to Mr Romani's affidavit filed on 11 February 2011, the cross-claimed sum of €930,000 consisted of:

(a) €650,000 in respect of a contractual penalty payment made to Waymax by Sea Charter as a result of delays and errors committed by DSK in respect of the design of the vessel; and

(b) €280,000 in respect of costs incurred by Ultrapolis in an attempt to rectify the errors of DSK in respect of the vessel.

This breakdown is problematic for a number of reasons.

52 First, the €650,000 was a contractual penalty paid by Sea Charter to Waymax under the Turn-Key Contract. Mr Rinaldo's affidavit filed on 11 February 2011 submitted at [94]-[96] that: (a) Sea Charter was treated as a subsidiary of Ultrapolis; (b) DSK was dealing with both Sea Charter and Ultrapolis on a practical and logistical basis; and (c) the benefits of the Turn-key contract would ultimately flow to Ultrapolis. [note: 5]

53 While hardly any evidence was provided to support these assertions, Ultrapolis argued that it should be entitled to cross-claim from DSK the contractual penalty that Sea Charter paid to Waymax. Yet, the crux of the matter was that Ultrapolis was not a party to the Turn-Key contract. Given that there was no privity between Ultrapolis and Wymax as well as between Sea Charter and DSK, it was doubtful that Ultrapolis had the *locus standi* to bring the €650,000 cross-claim.

54 Mr Rinaldo's position underwent a *volte face* in his affidavit filed 28 March 2011. There, he exhibited an assignment agreement dated 1 February 2007 that purported to "unconditionally and irrevocably" assign all of Sea Charter's rights, title and interests under the Turn-Key contract to Ultrapolis ("the assignment agreement"). [note: 6] I failed to understand why this had not been mentioned in his earlier affidavit since it might have been beneficial to his case. Indeed, I found that Mr Rinaldo's affidavits had the uncanny habit of curing the deficiencies or discrepencies or flaws in Ultrapolis' case, each time DSK pointed them out, by generating documents of questionable vintage (see also at [57]). In this respect, I found Mr Rinaldo's explanation that he had "just received" a copy of the assignment agreement from his in-house counsel [note: 7] disingenuous.

55 Secondly, the €280,000 was derived from the Russo report which, if Mr Rinaldo is to be believed, was originally prepared on *19 April 2006* (see above at [44]). Likewise, the €650,000 was allegedly paid by Sea Charter to *Waymax* on *2 0 April 2006* via telegraphic transfer. [note: 8] Accordingly, the details of the €930,000 cross-claim had sufficiently crystallised well before: (a) the main oral hearing of the substantive dispute before the Tribunal on 5 December 2008; and (b) the Statement of Claim in Suit 300 which was filed on 25 April 2008.

56 Thirdly, the basis of the cross-claim in this petition deviated significantly from that in Suit 300 and Suit 886 where it was for "expense and costs in engaging a proper party to complete satisfactorily the scope of works of Ultrapolis under the 2nd Agreement". In contrast, the €650,000 cross-claim arose from the Turn-Key contract that DSK was not a party to. While the €280,000 cross-claim was based on an estimate for the rectification works that appeared never to have been

done.

57 In light of these facts it was incumbent on Ultrapolis to explain why its cross-claim for damages in Suit 300 was not quantified and why it chose not to raise its €930,000 cross-claim before the Tribunal. Ultraopolis' failure to provide a plausible explanation left me with the impression that the assignment agreement dated 1 February 2007, the Russo report dated 19 April 2006 and the telegraphic transfer of 20 April 2006 had all too conveniently surfaced during the course of this petition after lying dormant and hidden for the past four years. Consequently, I found that this was not a *genuine* cross-claim.

58 Fourthly, Ultrapolis was not able to provide a convincing explanation for the significant variation in the €1.5 million cross-claim in Suit 886 and €930,000 cross-claim in this petition. Mr Rinaldo's affidavit filed on 11 February 2011 explained that the initial quantification of the cross-claim of €1.5 million contained travel, other miscellaneous expenses and damages. These damages included the loss of profits to Sea Charter and damage to Sea Charter's reputation from Waymax informing the "entire vessel market of the Sea Charter's failure to perform the Turn-Key contract" [note: 9]. According to Mr Rinaldo [note: 10]:

> This was very damaging to Sea Charter and the company was unable to recover from the damage to its reputation. This was the reason why the company is currently in liquidation.

59 Apart from the fact that it was questionable whether Ultrapolis possessed the *locus standi* to bring a cross-claim for damages suffered to Sea Charter (see above at [53]), Mr Rinaldo did not provide any evidence of those losses suffered by Sea Charter. Significantly, it was after the first hearing before me that Mr Jeremiah brought to my attention that *Wymax is the ultimate holding company of defendant and Sea Charter*. [note: 11] This was supported by Ultrapolis' audited accounts for 2005, 2008 and 2009. I fail to understand why a parent company would launch a smear campaign against its own subsidiary thereby causing it to go into liquidation. Not to mention the fact that the subsidiary had allegedly paid €650,000 to the parent as a contractual penalty. Somewhat predictably, this flaw was swiftly cured in Rinaldo Romani's subsequent affidavit filed on 24 May 2011 where he averred that the entire shareholding of Ultrapolis was transferred to a Ms Yuan Du on 2 February 2005 who then transferred it to Old Crown Trust, as trustees of a settlement named "Five Trust" on 7 February 2005. [note: 12] In my judgment, these transfers had taken place all too conveniently before the Turn-Key contract was entered into on 16 May 2005. More unbelievable still was Mr Romani's explanation, at [12] of the same affidavit, that the errors in Ultrapolis' audited accounts were caused by the fact that he was not informed by Ultrapolis' immediate holding company, Ultrapolis (UP) 3000 Holding Bermuda Ltd,that the ownership of Ultrapolis had changed.

60 Finally, even if these objections still left the €280,000 counter-claim intact, this could not be said to be greater than the undisputed debt of € 686,693.30 plus interest (see above at [1]).

Issue 3: Whether DSK had a collateral purpose in bringing the winding-up application, namely, to circumvent the second arbitration proceedings

61 Ultrapolis' arguments on this issue can be summarised as follows:

(a) DSK is in voluntary liquidation which was publicly announced on 26 September 2008;

(b) Carsten Ceutz ("Mr Ceutz") is both a partner in the law firm that represents the interests of DSK as well as the liquidator of DSK. This gives rise to serious concerns over a conflict of

interest; and

(c) DSK has agreed to submit their Statement of Defence to the Tribunal by 31 January 2011 and is therefore participating in the second arbitration proceedings. However, by commencing this petition, DSK is seeking to circumvent the second arbitration proceedings by rendering Ultrapolis unable to pursue the arbitration.

62 I found these arguments to be without merit. First, the bare fact that DSK is in liquidation *per se* cannot qualify as a collateral purpose for bringing this petition. Moreover, this is a voluntary liquidation. Equally, the bald assertion that Mr Ceutz is both a partner in the firm that represents the interests of DSK as well as the liquidator of DSK cannot be a sufficient basis for alleging a collateral purpose. In any case, the interests of the law firm, DSK and the liquidator appear to be aligned in the bringing of this petition.

63 It is also unclear why winding up Ultrapolis would necessarily prevent it from pursuing the second arbitration. Perhaps Ultrapolis was alluding to the remarks made by Nourse LJ in *Bayoil* at 155E:

> [A]n order that a company be wound up, unlike a bankruptcy order, is often a death knell. *Nor can it be certain that a liquidator, even with security behind him, will prosecute the company's claims with the diligence and efficiency of its directors*.
>
> [emphasis added]

64 In the present case, Ultrapolis' fears that the liquidators would prosecute its claims with less vigour were somewhat ironic in light of Ultrapolis' directors' tardy conduct in allowing the cross-claim to lie dormant for close to four years.

65 Ultrapolis' argument that DSK was seeking to circumvent the second arbitration proceedings by commencing this petition ignores the chronology of events. To be clear, the second arbitration proceedings were only brought by Ultrapolis *after* the statutory demand was served (see above at [11] to [12]). This fact alone suggests that it was Ultrapolis and not DSK who were trying to stymie the proper resolution of this dispute.

Issue 4: Whether the granting of the winding up application would cause irreparable harm to Ultrapolis' business

66 Ultrapolis argued that the winding up application would cause irreparable harm because Ultrapolis is not insolvent and there are other means whereby DSK could get Ultrapolis to pay the undisputed debt, namely the second arbitration proceedings. Mr Singh cited *Metalform* at [59] in support of its arguments:

> *Irreparable harm is only one factor, albeit a significant factor, that a court takes into account in exercising its discretion* whether or not to restrain a creditor from presenting a winding-up petition, or to restrain the advertising of such a petition or to stay such a petition. *But it may be neutralised by other factors, such as that the company is insolvent, or that a winding-up petition is the only means whereby a creditor could get the company to pay the debt or any part thereof*. In *Bayoil*, the UK Court of Appeal explained that in cross-claim cases, irreparable damage to the company is only one of the considerations that justify the practice of the English courts in restraining a creditor from filing a winding-up petition.

67 It is difficult to see how this passage supports instead of undermines Ultrapolis' case. After all, *irreparable harm* is "only one factor" that the court takes into account. In my judgment, this factor was clearly outweighed by my finding that Ultrapolis did not have a serious and genuine counter-claim (see issue 1). In any case, any irreparable harm was "neutralised" by the fact that Ultrapolis was deemed to be insolvent under s 254(2)(a) of the CA after failing to pay the judgment debt within three weeks of the statutory demand. Further, Ultrapolis was given the opportunity to provide security to obtain a stay, but they failed to avail themselves of this opportunity (see above at [16] to [17]).

Conclusion

68 In summary, Ultrapolis failed to persuade me that this was a case in which I should exercise my discretion to either stay or dismiss DSK's petition. Accordingly, I held that:

(a) Ultrapolis be wound up by the court;

(b) Mr Chia Soo Hien and Mr Leow Quek Shiong be appointed as joint and several liquidators of Ultrapolis; and

(c) DSK's costs in these proceedings to be agreed or taxed and to be paid to DSK out of the assets of Ultrapolis.

[note: 1] Affidavit of Romani Rinaldo dated 12 January 2011 at 74-102.

[note: 2] Affidavit of Romani Rinaldo dated 11 February 2011 at 138-147

[note: 3] Affidavit of Romani Rinaldo dated 11 February 2011 at [100]

[note: 4] Defendant's Submissions dated 21 January 2011 at [36]

[note: 5] Affidavit of Romani Rinaldo dated 11 February 2011 at [94]-[96]

[note: 6] Defendant's Bundle of Documents at 1-2

[note: 7] Affidavit of Romani Rinaldo dated 28 March 2011 at paras [15]-[17]

[note: 8] Affidavit of Romani Rinaldo dated 11 February 2011 at p 135

[note: 9] Affidavit of Romani Rinaldo dated 11 February 2011 at [103]-[110]

[note: 10] Affidavit of Romani Rinaldo dated 11 February 2011 at [107]

[note: 11] See the Defendant's audited accounts for 2005, 2008 and 2009 exhibited in the Affidavit of Carsten Ceutz dated 7 March 2011 at 34-67

[note: 12] Affidvait of Rinaldo Romani filed on 24 May 2011 at paras 6-13