EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM No. BVIHC (COM) 2015/0017

BETWEEN:

INTEGRATED WHALE MEDIA INVESTMENTS INC

Applicant

and

HIGHLANDER MANAGEMENT LLC

Respondent

Appearances on 14 April 2015:

Mr. Paul Chaisty QC and Mr. Richard Evans for Applicant
Mr. Simon Mortimore QC, Mr. Brian Lacy and Ms. Arabella di Iorio for Respondent

Appearances on 11 February 2016:

Mr. Paul Chaisty QC and Mr. Richard Evans for Applicant
Mr. Simon Mortimore QC and Mr. Brian Lacy for Respondent

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2015: April 14
2016: February 11; 26
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JUDGMENT

Application pursuant to Sections 157 (1) and 157(2) of Insolvency Act, 2003 to set aside statutory demand – statutory demand set aside.

Respondent declared default of Applicant and accelerated payments due under three promissory notes (totaling just over $65.6 million*), issued pursuant to a purchase agreement of major interest (95%) in global media company for over $400 million and assigned to Respondent, when relatively small amount of interest ($46,459), being the first interest payable under the notes, was not paid on time or in the five-day 'cure' period –*

documents governed by Delaware law and courts of Delaware arguably, by contract, have exclusive jurisdiction over all disputes under purchase agreement and notes.

Applicant alleged waiver and estoppel by a subsequent oral agreement between the parties (made at breakfast meeting between principals of the parties and not committed to writing) that the first interest would be paid with the second interest payment – Respondent denied any such agreement – under Section 157(1) Applicant must establish a "substantial dispute" respecting the alleged debt being owing or due – Court has duty to carry out a preliminary investigation of the facts to determine whether the dispute is on genuine and substantial grounds – Court did so and found Applicant established dispute is on genuine and substantial factual and legal grounds (the applicable law of Delaware on waiver and estoppel in light of contractual provision being in dispute) – Court required to set aside statutory demand – statutory demand set aside.

Alternatively, Applicant asserted Court should exercise its discretion to set aside the statutory demand under Section 157(2) on the basis of being satisfied that substantial injustice would otherwise be caused – Court would not exercise its discretion under Section 157(2)(b) of Act in favour of setting aside statutory demand based on the exclusive jurisdiction clause (in favour of Delaware), applying Jinpeng Group Limited v Peak Hotels and Resorts Limited BVIHCMAP 2014/0025 Court of Appeal, 8 December 2015 (in the context of a liquidation application, where an arbitration clause applies to the dispute, while the court has a wide discretion, "'the appellant does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order."), citing and following C-Mobile Services Limited v Huawei Technologies Co. Limited BVIHCMAP 2014/0017, 15 September 2015 ("in winding up proceedings one is considering always a class remedy and not a private [one] between the petitioner and the company").

"Substantial injustice" ground advanced did not really include matters independent of issues raised on "substantial dispute' ground – were it to have been found there is no substantial dispute, these matters do not tend to assist in providing an independent reason for Court to exercise its discretion to set aside statutory demand.

[1] **LEON J [Ag.]:** By Originating Application dated 12 February 2015 ("**Application**") pursuant to Sections 157 (1) and 157(2) of the Insolvency Act, 2003 ("**Act**"), the Applicant Integrated Whale Media Investments Inc. ("**Integrated Whale**") applies to set aside a statutory demand ("**Demand**") served on it on 30 January 2015 by

the Respondent Highlander Management LLC ("**Highlander**"). The Demand was for payment of the sum of $65,625,000 ("**Demanded Amount**").

[2] Section 157 (1) of the Act provides as follows:

> *(1) The court shall set aside a statutory demand if it is satisfied that –*
>
> *(a) there is a substantial dispute as to whether:*
> *(i) the debt … is owing or due.*

Section 157(2) of the Act provides:

> *(2) The court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused-*
>
> *(a) because of a defect in the demand … or*
> *(b) for some other reason.*

[3] Integrated Whale contends, first, that there is a "substantial dispute" within the meaning of Section 157(1) of the Act whether the Demanded Amount is owing or due, and second, that there are other reasons why the Court should, in any event, exercise its discretion to set aside the Demand pursuant to Section 157(2)(b) of the Act, to avoid "substantial injustice".

[4] Highlander opposes the Application to set aside the Demand contending that there is no "substantial dispute" nor are there other reasons to set aside the Demand to avoid "substantial injustice".

Background

[5] On 16 July 2014 Forbes Media Holdings LLC, Forbes Media LLC[1] and Integrated Whale entered into a Membership Interest Purchase Agreement ("**Purchase**

[1] The global media company that was founded in 1917 as Forbes magazine by Bertie Charles Forbes.

Agreement") whereby Integrated Whale agreed to purchase a 95% interest in Forbes Media LLC. Integrated Whale is owned indirectly by a consortium of investors and was formed to acquire that interest in Forbes Media LLC.

[6] Integrated Whale paid $350,000,000 of the purchase price with the balance payable pursuant to three Promissory Notes ("**Notes**", and in the singular, "**Note**") each dated 12 September 2014 and each being in the amount of $21,875,000, payable in 18 months, five years and seven years, respectively.

[7] The Notes provided that they "shall be governed by and construed in accordance with the Laws of the State of Delaware".

[8] Highlander is the assignee of Notes. Integrated Whale was notified of the assignment by **Notice of Assignment** dated 12 September 2014. It was not a party to the Purchase Agreement. It is indirectly owned by a company that is owned by members of the Forbes Family.

[9] The Notes carried low interest rates on the sums due. The 18-month Note had an interest rate of 0.36% per annum and the other two notes had interest rates of 1.86% per annum. Interest was payable quarterly.

[10] The first interest payment was due on 1 October 2014 and amounted to $46,459 ("**1 October Interest**"). It was not paid on that date or within five business days thereafter.

[11] Highlander asserts that when Integrated Whale failed to pay the 1 October Interest on the date it was due or within five business days thereafter, an "Event of Default", as prescribed in the Notes, occurred and Highlander was entitled to give written notice to Integrated Whale in respect of the Notes that "all principal owing

hereunder, and interest hereon and all other amounts payable under or in respect hereof" had automatically become due and payable.

[12] Senior representatives of the parties had a breakfast meeting in Hong Kong on 26 October 2014. Integrated Whale alleges, and Highlander denies, that an arrangement (in the evidence and submissions sometimes referred to as an agreement or understanding) was made at the meeting that is central to whether there are consequences from the non-payment when due, or within five business days, of the 1 October Interest. The evidence and submissions respecting the meeting are discussed below.

[13] Highlander delivered to Integrated Whale on 15 November 2014, in respect of each Note, a **Notice of Default and Acceleration** dated 14 November 2014.

[14] Highlander contends that doing so gave rise to a liability on the part of Integrated Whale to pay to Highlander all of the sums due under the Notes, namely $65,625,000.

[15] Integrated Whale disputes that the acceleration could occur in light of the arrangement at the breakfast meeting or that the alleged accelerated sum became or is due.

[16] The 1 October Interest was paid on16 November 2014 and Highlander accepted the payment.

[17] The second interest payment (for the period between 1 October 2014 and 1 January 2015) was due on 1 January 2015. Integrated Whale paid and Highlander accepted the second interest payment of $223,826 on 29 December 2014.

[18] Highlander relied on a provision of the Notes to have been able to accept those payments of interests without affecting its acceleration and the Demand. In the Demand, Highlands put it as follows:

> 4. … Under the terms of the Notes, [Integrated Whale's] payment of interest following the acceleration of amounts due under the Notes does not undo or mitigate the automatic and irreversible acceleration of the Notes.

The provision in the Notes apparently being referred to in the Demand was the following:

> No delay or omission of [Highlander] in exercising any right or rights shall operate as a waiver of such right or any other rights. All rights of [Highlander] under this Note are cumulative and may be exercised concurrently and consecutively at [Highlander's] option.

[19] The main issues underlying the Application, and underlying whether there is a "substantial dispute" as to whether the alleged debt is owing or due, are the following:

(a) whether an arrangement with respect to the 1 October Interest was made between representatives of the parties during the breakfast meeting in Hong Kong on 26 October 2014, as alleged by Integrated Whale and denied by Highlander, and
(b) if there was such an arrangement, its legal consequences, if any.

[20] Integrated Whale contends that in any event this Court, and in the context of the procedure adopted by Highlander, should not seek to resolve any issue of dispute but should require Highlander to prove its claim, if it has one, first in the courts of

Delaware. As discussed below, it is not the role of this Court on this Application to resolve the dispute but to determine whether there is a substantial dispute (within the meaning of those statutory words in the case law).

Breakfast Meeting in Hong Kong

[21] The main factual issue as to whether there is a "substantial dispute" concerns the alleged arrangement with respect to the 1 October Interest made – or not made – between senior representatives of the parties during a breakfast meeting in Hong Kong on 26 October 2014.

[22] Integrated Whale asserts that it was led to believe by Highlander, and Highlander agreed, that payment of the 1 October Interest would be rolled up and paid later with the interest due on 1 January 2015.

[23] The evidence in support of this assertion is in affirmations of Wong Siu Wa (also known as Sammy Wong) ("**Wong**")[2], the executive director of Integrated Whale ("**Wong Affirmations**").

[24] Integrated Whale asserts that it was at all times able to pay the 1 October Interest if it had been so required. It points out that the amount of interest was, in the context of the transaction, nominal, and it would have made no commercial sense for it to risk acceleration if Highlander actually had been insisting on payment or indicating that it would or might trigger acceleration.

[25] Wong's evidence is that Integrated Whale "was positively led to believe by [Highlander] that late payment [of the 1 October Interest] was not an issue, and

[2] Wong Affirmation 1 – Affirmation 5 dated 12 February, 2 April and 20 November, 2015 and 19 January and 5 February 2016, respectively.

certainly was not a matter that would lead to an acceleration of the entire principal due under the Notes."[3]

[26] Initially, Timothy Forbes ("**Forbes**"), a member of the Forbes Family and an equity holder in the ultimate parent company of Highlander and its main representative in respect of the matters in issue between the parties, appears to have caused some confusion when he requested that the 1 October Interest be paid together with a management fee (which was payable by Forbes Media LLC to the Forbes Family, not by Integrated Whale to Highlander).

[27] This was followed by emails between Integrated Whale and Highlander (mostly between Forbes and Wong) in which Highlander sought payment of the 1 October Interest. Meanwhile, Wong and Forbes arranged to meet over breakfast in Hong Kong on 26 October 2014. Subsequent to the breakfast meeting, Integrated Whale and the Forbes Family companies were to have a week of meetings and events in Hong Kong and Singapore, the first of their kind since the purchase.

[28] While Forbes did refer to the 1 October Interest in emails to Integrated Whale in the first half of October 2014, Wong says that Integrated Whale and its investors "had been very heavily occupied with the just completed acquisition" and "completely tied up in the preparation of the strategic plans and the presentations for the scheduled meetings in Hong Kong and Singapore as requested by and/or agreed with [Forbes]. This [non-payment] was purely an oversight on the part of [Integrated Whale" which was "fully able to discharge this modest sum [the 1 October 2014 Interest]."[4]

[3] Wong Affirmation 1, paragraph 16.
[4] Wong Affirmation 1, paragraph 20.

[29] Wong says that after the series of emails in the first part of October, there were no further reminders raising or mentioning the 1 October Interest prior to a breakfast meeting with Forbes in Hong Kong on 26 October 2014. Highlander was not asserting that it would serve an acceleration notice if the 1 October Interest was not paid.

[30] At the breakfast meeting, "amongst other things" the 1 October Interest was "briefly discussed", says Wong.

[31] Wong proposed that they combine the 1 October Interest "together with our next interest payment to [Highlander] (i.e. the December interest)". Wong asserts that Forbes "explicitly approved and/or consented with this proposal". He goes on to say that "[g]iven that this interest issue was so minor and based on what I genuinely believed to be [Forbes'] assent to this arrangement, I did not manage to record this agreement or discussion in writing afterward."[5]

[32] "I state categorically", says Wong, "that if [Integrated Whale] had not understood the position to be that [Highlander] was entirely content to allow both interest payments to be made together, and later, it would have immediately settled to [sic. the] [1 October Interest]. The only reason it did not, was on account of the agreement to roll this payment up with the December payment."[6]

[33] There were various business meetings that Forbes and Steve Forbes had with Wong and other representatives of Integrated Media in Hong Kong and Singapore during 26 – 30 October 2014. Wong's evidence is that the 1 October Interest "was

[5] Wong Affirmation 1, paragraph 23.

[6] Wong Affirmation 1, paragraph 24. See also Wong Affirmation 2, paragraph 8. There are various other similar statements by Wong, all to the effect that it would not have made sense to Integrated Whale to jeopardize everything and risk accelerating the Notes over a relatively very small sum, and particularly when it was able to pay it, and shortly thereafter did pay it.

not further raised, mentioned and/or discussed by [Forbes] with any of the representatives of [Integrated Whale], including myself, after the breakfast meeting." Nor was it raised in "a long complimentary email to me" on 3 November 2014 in which he "indicated his great appreciation".[7]

[34] According to Wong, the first indication to Integrated Whale of a different position by Highlander was its receipt on 17 November 2014 of the Notices of Default and Acceleration.[8]

[35] At that point, says Wong, he "considered that the cooperation with the Forbes Family should be long term so I did not confront [Forbes] for his breach of the agreement …" Instead, the next day he emailed Forbes to advise that the 1 October Interest had been wired and provided him with a copy of the wire confirmation.[9]

[36] Thereafter, starting with an email from Forbes to Wong on 19 November, Highlander said "we intend to follow through on them [Notices of Default and Acceleration][10], and clearly it did so.

[37] Wong says that in communications thereafter, Forbes requested a "proposal" from Wong, which Wong understood to be a desire by Forbes for an early partial redemption of the Notes or the release of the "retention money which have been withheld pursuant to the Purchase Agreement".[11]

[38] In summary, Wong says Integrated Whale relied on what Forbes said in, and what was arranged at, the breakfast meeting and the overall conduct of Highlander in

[7] Wong Affirmation 1, paragraphs 25 – 28.
[8] Wong Affirmation 1, paragraph 30.
[9] Wong Affirmation 1, paragraph 31.
[10] Wong Affirmation 1, paragraph 32.
[11] Wong Affirmation 1, paragraphs 33 – 35 and 39 – 40.

the context (all that was said or not said; done or not done), did not pay the 1 October Interest before or right after the breakfast meeting, and that in breach of the arrangement, Highlander served the Notices of Default and Acceleration.

[39] In legal terms, Integrated Whale asserts a waiver and estoppel, which are doctrines recognized under Delaware law (as explained in expert evidence discussed below). Whether those doctrines apply in the circumstances of the contractual provisions is in issue.

[40] In Wong Affirmation 1, Wong confirms "that Integrated Whale is solvent and is able to pay the principle sums and interests that fall due under the Notes pursuant to the timing as prescribed in the Notes."[12] While that may not be entirely relevant to this Application, it is supportive of the position of Integrated Whale that it is illogical that a company with funds to pay a relatively small amount of interest would not do so for no sound reason and put in jeopardy a substantial transaction and relationship. It lends support to the alleged breakfast meeting arrangement.

[41] At a trial, Integrated Whale and Wong will have some explaining to do – its explanations for certain things will need to be asserted to and accepted by the court hearing the dispute. Among those things for which explanations may need to be found credible are why it's 'paper trail' of responding to written communications from Highlander is weak, and why its assertion to Highlander of the breakfast meet arrangement was not made on a timely basis. On the other hand, the explanations proffered may be understandable and may be accepted. They are not "inherently implausible".

[42] Indeed, as referenced earlier, a compelling part of Integrated Whale's factual position on this Application is that it is illogical that Integrated Whale would let the

[12] Wong Affirmation 1, paragraph 42.

Notes be accelerated given the relatively small amount of the 1 October Interest and that it was able to pay it, and that the essential logic of its position is compelling.

[43] After reading Forbes' first affidavit (Forbes Affidavit 1, as defined below), Wong delivered Wong Affirmation 2 in which he stated "I do not accept much of what is said in [Forbes Affidavit 1], and I reassert the account, which I believe to be accurate, set out in my [Wong Affirmation 1]." He then goes on to respond to certain specific statements in Forbes Affidavit 1.

[44] The actions and inactions of Wong and Integrated Media, and their explanations, may well be found by a court hearing the witnesses, including cross-examinations, to be credible and more likely true than the evidence on behalf of Highlander.

[45] This Court focuses on that because in this case it is a fundamental part of demonstrating a substantial dispute.

[46] Forbes, in his two affidavits[13], disputes any such arrangement was reached. He states in strong terms as follows:

> Mr. Wong's characterization of the breakfast meeting is categorically untrue. At no time during the breakfast meeting, or at any other time, did I agree to allow Integrated Whale to defer its overdue interest payment.[14]

[47] Also Forbes refers to email exchanges between the parties, which are exhibited, and seeks to bring context and explanations to them.[15]

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[13] Forbes Affidavit 1 and Forbes Affidavit 2, sworn 25 February 2015 and 2 February 2016, respectively.
[14] Forbes Affidavit 1, paragraph 29.
[15] Forbes Affidavit 1, paragraphs 19, 20, 23 – 25 and 33.

[48] In addition, Highlander asserts that provisions of the Purchase Agreement and Notes preclude, as a matter of law, reliance on the alleged arrangement.

[49] A repeated theme in Forbes' evidence it that even though the amount of the 1 October Interest was low, he "considered the timely payment of interest to be extremely important both as a matter of principle and to set the right tone for the business relationship" and that he considered Integrated Whale's "continued refusal to pay the overdue interest to be a sign of disrespect and an ominous harbinger of our future dealing".[16] He says that "I was concerned that showing forbearance would set the wrong tone"[17] and that "his failure to pay the overdue interest was 'a disrespect to the agreement, a disrespect to my family, and a disrespect to me personally'".[18] He says that Wong said "I understand" and nodded.[19]

[50] Forbes says that between 1 October and 15 November, 2014, he "personally made repeated requests … that Integrated Whale honor its obligations and make the required interest payments [while he said of "payments", just one was due during that period – and presumably that is what he intended to say]."[20]

[51] While there were several emails prior to the breakfast meeting in which Highlander sought payment of the 1 October Interest, the sending of those emails is not inconsistent with the evidence of Wong that the subject of the 1 October Interest was arranged later to be discussed between Wong and Forbes at the Hong Kong breakfast meeting on 26 October 2014.

[16] Forbes Affidavit 1, paragraphs 8, 22, 24 and 26.
[17] Forbes Affidavit 1, paragraph 26.
[18] Forbes Affidavit 1, paragraph 27.
[19] Forbes Affidavit 1, paragraph 27.
[20] Forbes Affidavit 1, paragraph 11.

[52] On 3 November 2014, Forbes sent an email to Wong (referred to above by Wong as a complimentary email) headed "Meeting and CEO Conference Follow-Up".[21] The email is friendly (it begins "Hi Sammy") and constructive in tone, refers to the board meeting and CEO Conference ("I hope you and your colleagues were pleased with our first board meeting and with the CEO Conference, which I thought was a knock-out success …"). The next paragraph of the email begins "I also appreciated the opportunity to have direct conversations with you." It then goes on to discuss in some detail initiatives and a plan for the coming year.

[53] The next (last) three paragraphs are short and like what precedes them, make no reference to an importance of resolving the 1 October Interest for the future of the business relationship:

> We should plan a call to discuss these matters further and set regular conversation, as you suggested, to keep things moving forward and on track.
>
> I want to thank you and the investors again, particularly TC, for the confidence you have shown in the Forbes brand and the management team.
>
> Look forward to speaking.

There is no suggestion that the business relationship in in jeopardy, no reference to disrespect, no reference to any commitment at the breakfast meeting to pay the 1 October Interest soon, and no suggestion that the declaration of a default and an acceleration are on Highlander's radar screen. In other words, the first email following the breakfast meeting and subsequent meetings is consistent with Wong's version of events (save of course that importantly it does not acknowledge

[21] Forbes Affidavit 1, Exhibit SWW-8.

the alleged arrangement) and inconsistent with Forbes' strong themes in his affidavits. While that does not mean that Forbes will not be able to put this into a context in cross-examination, it adds to the evidence of a substantial dispute.

[54] While Wong did not write to Forbes after the breakfast meeting to confirm the arrangement, neither did Forbes write to Wong to confirm that payment was to be forthcoming. This is inconsistent with Forbes' conduct up to the breakfast meeting on 26 October. Until then, as he points out, he or others on behalf of Highlander repeatedly (it appears up to four times on 3,7,8 and 11 October 2014)[22] wrote to Integrated Whale about payment of the 1 October Interest.

[55] While some business people in Wong's position might have felt a need and seen a reason to confirm the arrangement in writing (if there was one), other business people would not. It is not known if Wong is "a man's word is his bond" type of person. Likewise, the fact that Forbes did not write to Wong after the breakfast does not mean his version of the breakfast meeting will not be found to be correct.

[56] Forbes, in Forbes Affidavit 1, strongly disagrees with Wong's evidence, swearing that Wong Affirmation 1 "grossly distorts the factual record" and that "at no time did I ever forgive Integrated Whale's default or agree to defer payment of its interest obligations."[23]

[57] Forbes points out that prior to this Application, Integrated Whale had never "suggested that there was an alleged agreement to defer Integrated Whale's payment of interest or otherwise disputed Integrated Whale's default under the Notes and its obligation, following the Notices of Default and Acceleration,

[22] Respondent's Chronology for Hearing on 14 April 2015.
[23] Forbes Affidavit 1, paragraph 16.

immediately to pay the entire [amount]."[24] As pointed out earlier, this may prove to be a significant weakness in Integrated Whale's case. So far it has not been explained by Wong or anyone else on behalf of Integrated Whale. However, neither alone nor in combination with the other evidence that favours Highlander's position, does it undermine the finding in this Judgment that there is a substantial dispute.

[58] While on what has been seen in the evidence of Wong and Forbes, it is hard to see at this point how the adage that "the truth lies somewhere in the middle" could apply to the breakfast meeting. However, a court hearing both men, and other witnesses, in person and under cross-examination, and seeing other documentation in the 1 October to mid-November 2014 period, could find that at least to some degree each was focused on what was most important in his mind at the time, and was hearing or thought he was hearing what he wanted to hear.

[59] A court may find the strong focus of Highlander and Forbes on "respect", "principle" and "tone" to be understandable as a significant motivator for the actions of Highlander, however, it also may find (as Integrated Whale suggests in its written submissions), opportunistic actions.

[60] To be clear, this Court is not determining or even suggesting how the issues of credibility will be determined by a court that has the opportunity to hear and see the witnesses in a full hearing of the issues – it is determining whether there is a substantial dispute.

[61] One other point, which was alluded to above. There has not been disclosure from either side beyond the exhibits in evidence on this Application. Wherever the

[24] Forbes Affidavit 1, paragraphs 16, 30, 32, 35 and 36.

dispute is litigated, there will be some level of disclosure of documents that may shed light on what was going on within both companies from the beginning of October through mid-November 2014. If the dispute is litigated in Delaware, as it appears will be the case, presumably there will be such disclosure and possibly depositions.

[62] None of that potential additional evidence is available to this Court. It must decide on the evidence that is available to it if it is satisfied that there is a substantial dispute. It is satisfied that there is.

Substantial Dispute Whether Alleged Debt is Owing or Due

[63] Integrated Whale's position is that there is a substantial dispute within the meaning of Section 157(1) of the Act about the alleged arrangement between the parties, first factually, and second, in respect of the legal consequences of such an arrangement if one was reached. It submits that for a proper resolution, the dispute requires a trial with cross-examination of witnesses, which should take place in proceedings in Delaware (which is the place of the governing law of the Notes, and the Purchase Agreement, and appears may be the beneficiary of exclusive jurisdiction clauses).[25]

[64] As indicated above, this Application does not require this Court to determine the dispute. That is not the role of the Court on an application to set aside a statutory demand.

[65] This Court only needs to determine if there is a "substantial dispute" within the meaning of Section 157(1) of the Act (as explained in the case law). If the alleged

[25] The latter part of this submission related more particularly to the Section 157(2)(b) ground of the Application.

substantial dispute does not meet a minimum threshold for a substantial dispute, factually or legally, the Demand should not be set aside. If it does meet that threshold, the Court "shall" set aside the Demand.

[66] To determine the matter, the Court has a duty to carry out a preliminary investigation of the facts to determine whether the dispute that the company has raised about the debt is on genuine and substantial grounds.[26]

[67] The minimum threshold for a substantial dispute has been set out and discussed in numerous judgments.

[68] It is clear that a mere assertion of a substantial dispute (or in some judgments under slightly differently worded statutes, an alleged debt that is "bona fide disputed on substantial grounds") is not sufficient.[27]

[69] To constitute of "substantial dispute", "the debt must be disputed on genuine and substantial grounds"[28]; the dispute must be "real as opposed to frivolous"[29]; the alleged debtor "has to produce some tangible evidence in support"[30]; "[t]here has to be something to suggest that the assertion is sustainable" (which could be a witness statement or document, unless the evidence asserted is "inherently implausible", "contradicted by or not supported by documents" or "not supported by contemporaneous documents"[31]).

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[26] BVIHCMAP 2014/0025 Jinpeng Group Limited v Peak Hotels and Resorts Limited ("**Peak Hotels**"), Court of Appeal, 8 December 2015, paragraph 27 http://www.eccourts.org/jinpeng-group-ltd-v-peak-hotels-and-resorts-ltd/, paragraph 29.
[27] Collier v P & MJ Wright (Holdings) ("**Collier**") [2008] 1 WLR 643, paragraph 38.
[28] Peak Hotels, following Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation, BVIHCVAP 2002/0010, Court of Appeal, 18 June 2003 (per Sir Dennis Byron CJ).
[29] Arena Corporation Ltd. v Schroeder [2004] EWCA Civ 371, paragraph 53.
[30] Collier, paragraph 38.
[31] Bryce Ashworth v Newnote Limited [2007] EWCA Civ 793, paragraphs 33 – 34; Collier, paragraph 21.

[70] This Court has carried out a preliminary investigation of the facts, as it is required to do on an application such as this, in order to determine whether the dispute raised by Integrated Whale about the alleged debt is on genuine and substantial grounds (within the meaning of that phrase discussed above). There was significant evidence of key witnesses filed on the Application[32] which has been considered and assessed, along with the documentary evidence filed, and the submissions of the parties respecting all such evidence. It also is the case, as noted above, that this Court has not had any cross-examination evidence or evidence from disclosure, which may shed much greater light on how the dispute may be resolved.

[71] This Court finds that Integrated Whale has met the requisite factual and legal requirement of showing a "substantial dispute" as to whether the debt alleged is owing or due (for the avoidance of doubt, that statutory phrase, when used throughout this Judgment, encompasses the concept's articulation that "the debt must be disputed on genuine and substantial grounds").

[72] It has shown that there is a substantial factual dispute respecting the asserted agreement or understanding allegedly made at the Hong Kong breakfast meeting between Wong and Forbes on behalf of Integrated Whale and Highlander, respectively.

[73] While Highlander points to factual reasons why Integrated Whale's evidence regarding the alleged arrangement may not be accepted at a trial – after a judge hears and sees Wong and Forbes, and other witnesses, including what they say about the meeting and the documents relevant to the issue, the other

[32] As noted above, in total there are five affirmations of Wong filed, including with respect to post-hearing developments (Wong Affirmation 1 – Wong Affirmation 5) and two affidavits of Forbes filed (Forbes Affidavit 1 and Forbes Affidavit 2, that latter being with respect to post-hearing developments.

communications between them before and after the meeting, and what their thinking was that led to their actions and/or inactions – Integrated Whale has satisfied this Court that there is a substantial dispute.

[74] Wong points out in Wong Affirmations 1 and 2, in support of his actions and inactions and those of Integrated Whale, that the relationship with Highlander/Forbes was very new, and the 1 October Interest was interest for less than one calendar quarter and was relatively a very small amount. He points out that "It would be illogical and wholly contrary to common sense … to take the risk of not making the October 2014 interest payment."

[75] With respect to the allegedly illogical aspects of Integrated Whale's evidence and position, it should be remembered that sometimes people do things or do not do things that may appear illogical, viewed in hindsight "objectively", clinically and under a microscope, by lawyers and judges with different backgrounds and sometimes from different cultures. Yet sometimes when one hears the person, sees the person, listen to his or her explanation of why he or she thought certain actions or inactions made sense at the time, one concludes that it is plausible and, more likely than not, understandable and true. In the case of Integrated Whale's non-response to emails from Highlander about payment of the 1 March Interest, for example, a judge hearing and seeing the witnesses may find the explanation not only understandable but true. There is nothing so incredible about the conduct of Integrated Whale as to undermine that there is a substantial dispute about the alleged arrangement.

[76] The disputed legal issues further support the existence of a substantial dispute.

[77] Integrated Whale submits that the alleged arrangement, if found to have been made and relied on by it in not paying the 1 October Interest within the period

required by the Notes, would give rise to waiver and estoppel such that Highlander would be precluded from relying on and enforcing its contractual right to accelerate.

[78] On the other hand, Highlander points to legal arguments, including based on expert evidence of Delaware law presented to this Court on the Application, why the alleged arrangement may be held under Delaware law not to override Highlander's contractual right to accelerate and preclude Highlander from requiring payment of the full amount from Integrated Whale based on its default, not cured within five days, in its payment of the 1 October Interest.

[79] Highlander submits that the alleged arrangement, even if found to have been made, can have no legal effect because of (a) an entire agreement or integration clause in the Notes[33], and (b) a clause in the Notes requiring any modification to be in writing[34].

[80] As explained below, this Court concludes that there is a substantial dispute about the arrangement, if established, having or not having legal effect under Delaware law.

Evidence Respecting Delaware Law

[81] Both Highlander and Integrated Whale submitted expert evidence, and other evidence, of Delaware law, the law which governs the Notes and the Purchase

[33] Each Note provides: "This Note and the Transaction Documents (as defined in the Purchase Agreement) embody the entire agreement and understanding between [Integrated Whale] and [Highlander] and supersedes all prior agreements and understandings relating to the subject matter hereof."
[34] Each Note provides: "This Note may only be modified in a written instrument executed by [Integrated Whale] and [Highlander]."

Agreement. Both experts on Delaware law are highly qualified. Indeed, both experts served as Chief Justices of the Delaware Supreme Court.

[82] Highlander's expert evidence was a report by Myron T. Steele ("**Steele**")[35], Delaware Supreme Court Chief Justice from May 2004 to October 2013 and now a partner in the law firm of Potter Anderson & Corroon LLP.

[83] In summary, Steele opined on the principal legal issue that the Notes would be enforced under Delaware law strictly in accordance with their terms even if Integrate Whale establishes that the arrangement alleged by Integrated Whale was in fact made.

[84] Integrated Whale's expert evidence was from E. Norman Veasey ("**Veasey**"),[36], Delaware Supreme Court Chief Justice from April 1992 to May 2014 and now special counsel to the law firm of Gordon, Fournaris & Mammarella, P.A.

[85] In summary, Veasey opined on the principal legal issue that "Delaware law establishes that the doctrines of waiver, estoppel, or contractual modification through course of conduct may be applied to the post-contracting conduct of the parties, even in the presence of integration and anti-waiver clauses in the underlying agreement."[37]

[86] On this issue he concluded by saying that he must "respectfully disagree with my former colleague's opinion regarding the unavailability of the defences of waiver and estoppel and contract modification based on a party's post-execution conduct

[35] Expert Report of Myron T. Steele dated 4 March 2015 ("**Steele Report**").
[36] Expert Report of E. Norman Veasey dated 9 April 2015 ("**Veasey Report**").
[37] Veasey Report, Opinion No. 3, summary and paragraphs 21 – 28.

and how a Delaware Court would interpret and apply Delaware law to such facts, including those expected to be offered by [Integrated Whale] in this matter."

[87] He also opined that the Delaware courts have exclusive jurisdiction over disputes arising under the Notes and Purchase Agreement and that as a matter of Delaware law, a foreign court purporting to adjudicate the outcome of disputes would improperly usurp the role of the Delaware courts where exclusive jurisdiction is vested. While that may be the case, and while this Court may defer to the Delaware courts if it were sought to have the dispute adjudicated in the Territory of the Virgin Islands, as explained in this Judgment, this Court is not being asked to determine the dispute but in a form of class proceedings for creditors is determining if there is a substantial dispute such that the Demand should be set aside or set aside under the discretionary ground in the Act.

[88] Steele confirmed in the Steele Report that in Delaware there is a doctrine of promissory estoppel that would be applied to construe Integrated Whale's claims respecting the arrangement. He outlines that to establish promissory estoppel, the person asserting it must establish "(i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise."[38]

[89] However, he opined as follows:

> Under Delaware law, the doctrine of promissory estoppel would have no application because the Purchase Agreement (including the Notes which were incorporated therein) is a fully-integrated agreement and the

[38] Steele Report, paragraph 23, and citing Chrysler Corp., (Del) v. Chaplake Hldgs., Ltd., 822 A.2d 1024, 1032 (Del. 2003) which in turn was quoting Lord v Souder, 748 A.2d 393, 399 (Del. 2000).

> Purchase Agreement and Notes each contain provisions requiring that modifications be in writing to be effective. Even if Integrated Whale's allegations concerning oral representations it received from [Forbes] were true, under Delaware law those oral representations would be without effect. As the representations concerning purported modification to the Purchase Agreement and Notes relied upon by Integrated Whale were oral rather than in writing, evidence of such purported representations would not be considered by a Delaware court. SIGA Techs, Inc. v Pharmathene, Inc., 67 A.3d 330, 348 (Del. 2013) ("Promissory estoppel does not apply, however, where a fully integrated, enforceable contract governs the promise at issue").[39]

[90] Veasey disagreed with Steele and opined that as follows:

> … the opinion expressed is [the Steele Report] is an overbroad generalization based on interpretations and applications of law to distinguishable facts peculiar to the cases that he cites. The holding of those case would not apply to this case if the Court having jurisdiction finds as true the facts expected to be offered by [Integrated Whale]. The Delaware cases I have cited, such as [Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., 297 A.2d 28 (Del. 1972)[40]] would control the present matter and would allow evidence of waiver, estoppel, or modification.
>
> The cases cited in the Steele Report are inapposite. The distinctions are as follows:[41]

Veasey then reviews eight cases cited by Steele, one by one, and distinguishes each of them.[42]

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[39] Steele Report, paragraph 24.
[40] Steele Report, paragraph 23 describing this judgment and stating that it "is dispositive in this matter".
[41] Veasey Report, paragraphs 26 and 27.
[42] Veasey Report, paragraph 27.

[91] In addition to Veasey's reasons for disagreeing with the Steele Report, this Court notes that there may be other bases to disagree with the Steele Report.

[92] Steele quoted the provisions in the Purchase Agreement that, first, any amendment must be by agreement in writing, and second, there can be "[n]o waiver of any provision" of the Purchase Agreement "unless in writing and signed by the Party to be bound". He therefore appears to make it clear that "amendment" and "waiver" are distinct concepts in the Purchase Agreement. He then quotes the Notes that "similarly provide" that they may "only be modified in a written instrument executed by the Borrower and the Lender".[43]

[93] However, importantly Steele does not speak to the difference between the two provisions – the provision in the Notes does not refer to "waiver", only "modified", which presumably is comparable to "amendment". In other words, the Notes do not preclude a waiver by the holder that is not in writing and signed by the party to be bound (in this case, Highlander).

[94] While the Notes have a provision dealing with waiver, the provision deals with two possible modes of waiver only. The Notes provide[44] only that "[n]o delay or omission of the Lender in exercising any right or rights under the Notes shall operate as a waiver of such right or any other rights."

[95] Here the allegation of Integrated Whale of a waiver is not based on Highlander not exercising or delaying acceleration of the Notes in respect of the 1 October Interest on or from the date when it was first entitled to do so; it is based instead on an alleged positive commitment by Highlander to permit Integrated Whale to

[43] Steele Report, paragraphs 11 and 12.
[44] Notes, page 2; Steele Report, paragraph 12.

pay the 1 October Interest with the next interest payment, and implicitly, not to accelerate based on the earlier non-payment of the 1 October Interest.

[96] As can be seen above, in giving his opinion, Steele states that "the Purchase Agreement and the Notes each contain provisions requiring that *modifications* be in writing to be effective" [emphasis added]. He does not deal with the fact that the assertion by Integrated Whale is of a "waiver" (at least as that term in understood by this Court) that is not of the types of waiver described above (failure to exercise or delay in exercising a right), and that only the Purchase Agreement – not the Notes – requires that a waiver of the type asserted here be in writing and signed by the party to be bound. Also he does not deal with a point that Highlander points out in its submissions on a different provision of the Purchase Agreement, that Highlander was not a party to the Purchase Agreement – it only is an assignee of the Notes.

[97] Even leaving aside that last point, while not addressed in the expert evidence, one might anticipate that if subject areas (modification/amendment and waiver) were dealt with in both the Purchase Agreement and the Notes, albeit in different manners, one may look to the treatment of the subject area in the Notes only, or at least there is a substantial issue of construction of the Notes. While this Court does not have clear Delaware law evidence on that point (and the Veasey Report suggests otherwise), the point lends support to their being a substantial dispute on the legal effect of the alleged arrangement.

[98] Furthermore, in relation to the waiver issue, Forbes states in a witness statement as follows:

> I also am advised by counsel (privileged in which I do not waive) that the doctrines of estoppel and waiver identified by [Wong] are not available

under Delaware law in light of the "no oral modification" and "no waiver" provisions contained in each of the Notes.[45]

[99] It appears that Highlander's counsel also may have proceeded under a misapprehension that there is a "no waiver" provision in the Notes applying to an affirmative waiver.

[100] There may be explanations that would be given if Steele delivered a reply report or if these points were raised in a cross-examination of Steele – or it might be accepted by Steele that there may be a weakness in his opinions in these respects.

[101] For the present purposes, it can be said that this demonstrates that there is at least a substantial dispute between Integrated Whale and Highlander about the legal consequences of the alleged arrangement.

[102] Integrated Whale submitted that there is a clear and fundamental disagreement of opinion on the estoppel question between two prominent experts on Delaware law. About that there is no doubt. There is at least a substantial dispute regarding the Delaware law of estoppel which is fundamental to the dispute between the parties if the factual support for Integrated Whale's position is established.

[103] Integrated Whale also submitted, as set out in the Veasey Report, that the 'entire agreement' or integration clause is irrelevant as there is no attempt by it to rely on prior or concurrent agreements or understandings and that there is a clear and fundamental disagreement of opinion on this question between two prominent experts on Delaware law. That may not be the case.

[45] Forbes Affidavit 1, paragraph 17.

[104] While Steele refers to and discusses the effect of the entire agreement or integration clauses in the Purchase Agreement and Notes under Delaware law[46], his opinion does not address the alleged arrangement in that context. He says those clauses would be enforced but he does not say that the alleged arrangement was such an agreement. As noted above, his focus is on the amendment/modification and waiver provisions in the Purchase Agreement and Notes.

[105] Further, the evidence of Kenneth J. Nachbar ("**Nachbar**"), a partner in the Wilmington, Delaware law firm of Morris, Nichols, Arsht & Tunnell, LLP, dated 13 April 2015 (the firm being Highlander's "local Delaware counsel") which was submitted by Integrated Whale also explains integration clauses, and that such a clause bars oral (parol) evidence to support a claim of prior, additional or different agreement. This is supportive of what Steele and Veasey state and seems non-controversial. While Nachbar's evidence does not comply with the expert evidence requirements, nothing turns on what he says.

[106] To the extent Integrated Whale needs to show more than "a clear and fundamental disagreement of opinion between two prominent experts on Delaware law", if this Court were called upon to opine upon the Delaware law issues, it would conclude that based on what is before it, and on the analysis it has done, Integrated Whale has a stronger legal position under Delaware law. To be clear, this is not a comment on its factual position, which is discussed elsewhere.

Delaware Court Proceedings

[46] Steele Report, paragraphs 10 and 20 – 21.

[107] Highlander more recently commenced proceedings in Delaware on the accelerated debt claim under the Notes and on two other claims arising from the parties' same business relationship. It was not inappropriate for Integrated Whale to bring those proceedings to the Court's attention, and at the end of the day, Highlander did not dispute that this Court could be informed.

[108] When Integrated Whale brought the proceedings to this Court's attention, it was on the basis that Highlander bringing its claim on the Notes in Delaware was an admission of a substantial dispute.

[109] This Court reviewed the Delaware court materials, which do not yet include a defence but include materials of both sides on a motion by Integrated Whale challenging the bringing on proceedings in Delaware at least in part on the basis of this Application and the Demand. This Court received both written and oral submissions on behalf of both parties respecting the effect, if any, of the Delaware proceedings on this Application.

[110] As was made clear above, this Application is not about determining the dispute respecting acceleration and the claim of Highlander for the accelerated amount. This Application is to determine if there is a substantial dispute. Highlander's evidence to the Delaware court fairly explains the nature of the statutory demand process under the Act, and this Application.

[111] The Court sees no admission of a substantial dispute in the Delaware court documents, or by the fact the proceedings were brought. Those proceedings are not a factor in this Court's determination that there is a substantial dispute.

Would Substantial Injustice Be Caused If Demand Not Set Aside?

[112] Integrated Whale also seeks to invoke this Court's discretion under Section 157(2)(b) of the Act to set aside a statutory demand if the Court is satisfied that "substantial injustice" would otherwise be caused (for a reason other than the reason in Section 157(2)(a) of a defect in the demand).

[113] In this regard Integrated Whale submits that that the dispute, for reasons outlined below, is subject to the exclusive jurisdiction of the Delaware courts, and this Court should give effect to the Delaware courts' exclusive jurisdiction by exercising its discretion in favour of setting aside the Demand under Section 157(2)(b) of the Act, so that the dispute can be determined in the Delaware, based on the judgment of the English Court of Appeal in Salford Estates (No. 2) Ltd. v. Altomart Ltd. [2014] EWCA 1575 ("**Salford Estates**") (which involved an arbitration clause, and the public policy favouring a stay of court proceedings in favour of arbitration, but to like effect in the case of an exclusive jurisdiction clause).

[114] While it is not necessary to determine the Section 157(2)(b) ground in light of the decision to set aside the Demand pursuant to Section 157(1), it may be desirable to have a determination of the alternative ground in the event this Court's judgment on the primary ground is not sustained in the event of an appeal.

[115] This Court would not exercise its discretion under Section 157(2)(b) of the Act in favour of setting aside the Demand based on an exclusive jurisdiction clause, even if its determination is, as appears to be the case based on the expert evidence, that there is an exclusive jurisdiction clause in favour of the courts of Delaware applicable to the dispute about the alleged accelerated debt.

[116] If there is an applicable exclusive jurisdiction clause, and even if there is not, all things being equal a dispute which is under Delaware law should be determined

by the courts of the Delaware. That would be the case whether there were or were not pending proceedings on that claim before the Delaware courts.

[117] Integrated Whale submits, with Veasey's evidence in support, that there is an exclusive jurisdiction clause in the Purchase Agreement which applies to the Notes, even though in the exclusive jurisdiction clause the Notes is only applicable to claims brought by Integrated Whale.

[118] The Purchase Agreement provided in Section 15.6 as follows:

> (a) any controversy, dispute, complaint, demand or claim arising out of or related to this Agreement, any other Transaction Document [each Note is a Transaction Document based on the definition in the Purchase Agreement] … shall be resolved in accordance with the procedures set forth in this Section 15.6.

[119] Section 15.6 goes on to provide for the "exclusive jurisdiction" of the Delaware courts.

[120] The Notes provide only that Integrated Whale is subject to the exclusive jurisdiction of the Delaware courts "in connection with any dispute that arises out of this Note or any of the transactions contemplated by this Note" and it agrees that "it will not bring any action relating to this Note in any court other than the aforesaid courts".

[121] Steele did not address whether under Delaware law the Purchase Agreement provision on exclusive jurisdiction applies to the Notes. Nachbar's evidence was that the jurisdiction clause in the Notes does not prevent Highlander bringing action wherever it chooses and goes on to point out that the Integrated Whale expert evidence does not dispute this but "asserts instead that the forum selection

clause in the Purchase Agreement controls and imposes mutual obligations." Nachbar neither agreed nor disagreed with this.[47]

[122] As noted earlier, Veasey opined that "the broad forum-selection provision contained in the Purchase Agreement expressly binds all parties (the Borrower and the Lender) and expressly encompasses any disputes or controversies arising out of the Notes."[48] He concluded his opinion on this issue as follows:

> … this dispute [by which he clearly means the acceleration claim and the defences to it, not the issues on this Application] must be resolved by the court having exclusive jurisdiction of this matter, and that court is the Delaware Court of Chancery or other such appropriate Delaware state or federal court.[49]

[123] Even if the exclusive jurisdiction clause in the Purchase Agreement applies to the Notes and requires both parties to litigate disputes in the Delaware courts, which is Veasey's evidence, it does not mean that the statutory demand process in the Act is ousted nor that this Court should exercise its discretion to set aside the Demand based on Delaware being the jurisdiction chosen by the parties for the resolution of disputes.

[124] While not dealing with a statutory demand, the Court of Appeal made this clear in Peak Hotels in the context of an arbitration clause.

[125] The Act provides collective remedies on behalf of all creditors – the statutory demand process, as with the just and equitable ground for the appointment of a liquidator under Section 162(1)(b) of the Act which was in issue there, are collective remedies. The Court cited and followed its earlier decision in that regard

[47] Nachbar evidence, paragraphs 4 and 5.
[48] Veasey Report, paragraph 12 and also see summary of Opinion No. 1 and paragraphs 14 – 17.
[49] Veasey Report, paragraph 17.

in C-Mobile Services Limited v Huawei Technologies Co. Limited[50], in particular the statement of the Chief Justice on the nature of a creditor's winding up application, where she wrote:

> It is important to bear in mind that in winding up proceedings one is considering always a class remedy and not a private [one] between the petitioner and the company.

[126] Peak Hotel then goes on to note that arbitration clauses are designed to resolve disputes between contracting parties and that once the dispute was submitted to the court as a basis of a creditor's winding up application "it became an issue between the [company] and its creditors over the company's ability to pay its debts as they fall due" and accordingly a stay should not be granted under section 18(1) of the Arbitration Act, 2013.[51]

[127] In Peak Hotels, the Court of Appeal went on to consider the discretion under Section 162 of the Act and the judgment in Salford Estates.

[128] The Court of Appeal disagreed with the holding in Salford Estates that a winding up application based on a debt that is covered by an arbitration agreement should be stayed unless there are "exceptional circumstances", holding that the creditor should not have to prove exceptional circumstances to avoid a stay of the winding up application. In Salford Estates the court had found that the debt was not disputed on genuine and substantial grounds but went on to grant a stay of the petition in favour of arbitration. The Court of Appeal in Peak Hotels held that while the court has a wide discretion "the appellant does not have to prove exceptional

[50] BVIHCMAP 2014/0017, 15 September 2015, paragraph 9 cited in Peak Hotels, paragraph 44.
[51] Peak Hotels, paragraph 45.

circumstances to invite the court to exercise its discretion to make a winding up order."[52]

[129] C-Mobile and Peak Hotels appear to leave open the question of whether, when and how, if liquidation proceedings move forward, arbitration should be used under the direction of the court in relation to particular issues relating to the liquidation, such as determining and valuing creditors' claims. If unclear, those types of issues relating to arbitration and insolvency may need to be determined or clarified when they arise, and in light of the jurisprudence respecting arbitration and insolvency, where the policy and other considerations appear to be different, just as may be the case where a supervising court in insolvency proceedings permits ordinary court proceedings relating to a creditor's claims to proceed for a specific purpose.

[130] In the context of an application to set aside a statutory demand, which is a remedy on behalf of all creditors, if the Court had found that the debt was not disputed on genuine and substantial grounds, ordinarily it would not be logical to exercise its discretion to set aside the statutory demand and leave it to the demanding creditor to seek to have its debt claim determined either in another jurisdiction (even where the applicable law is the law of that jurisdiction) or in arbitration.

[131] In this case there were no proceedings in Delaware when the Demand was made or when the set aside Application was brought and was heard. As noted above, Highlander more recently commenced proceedings in Delaware on the accelerated debt claim under the Notes and on two other claims arising from the parties' same business relationship.

[52] Peak Hotels, paragraphs 46 -49.

[132] Had proceedings in Delaware been commenced earlier and were more advanced, it is possible that there would have been a prior determination there (perhaps on a summary judgment motion) of the strength on the defences of Integrated Whale, particularly on legal issues under Delaware law, and which this Court would have wanted to consider in dealing with the Application to set aside the Demand.

[133] Indeed, it would be possible that there would have been no such preliminary determination in Delaware at the time of the set aside Application here and yet the proceedings there would be close to their determination when the application to set aside a statutory demand came before this Court. It should be left open whether in any such circumstances, the exercise of the Section 157(2)(b) discretion or some other action would be appropriate.

[134] The "substantial injustice" ground advanced by Integrated Whale[53] did not really include matters that are independent of the issues raised on the "substantial dispute' ground. Were it to have been found that there is no substantial dispute, these matters do not tend to assist in providing an independent reason for this Court to exercise its discretion to set aside the Demand.

Costs

[135] The parties made written submissions on costs after reviewing the above part of this Judgment (in draft, which was substantially the same as it is now).

[136] Their costs submissions had regard to the outcomes on what may be seen as three aspect of this Application: (a) the 'substantial dispute issue', on which the Integrated Whale succeeded and obtained the central and important relief it sought, which is the setting aside of the Demand; (b) the alternative 'substantial

[53] Listed in paragraph 30 of Integrated Whale's Outline of Submissions of the Applicant dated 9 April 2015.

injustice issue' on which the Integrated Whale did not succeed and which was heard at the same time as the 'substantial dispute issue'; and (c) the 'Delaware proceedings aspect' of the 'substantial dispute issue', which was raised by the Integrated Whale more recently and resulted in a hearing with leading counsel on 11 February 2016, and which this Court found did not involve any kind of admission by Highlander of a substantial dispute, as Integrated Whale had asserted was the case.

[137] Highlander asserted in respect of costs that the three 'aspects' above were three issues upon which there was divided success. First it submitted that Integrated Whale should have its costs of the 'substantial dispute issue' but commencing only when Integrated Whale "articulated its position" on the 'substantial dispute issue'. Second it submitted that Highlander should have its costs of the 'substantial injustice issue' as it was more than an alternative, it materially added to the costs of the Application and occupied a significant percentage of the time, also necessitating a supplemental skeleton and supplemental evidence. Finally, it submitted that the 'Delaware proceedings aspect', which it terms an 'issue', was not merely informing the Court of the Delaware proceedings (which the Court found in this Judgment was not inappropriate) but was characterized aggressively and vigourously as a determinative factor on the 'substantial dispute issue' and led to three Wong affirmations, a Forbes affidavit, and a hearing with leading counsel attending in person.

[138] Integrated Whale asserted in respect of costs that it was entirely successful on the Application in that the Demand was set aside; there is no basis, and it would be wrong in principle, to penalise Integrated Whale (by way of any form of costs reduction) in respect of the Court electing not to choose to set aside the Demand on the 'substantial injustice' ground; and that there should be no reduction of

Integrated Whale's costs in respect of the 'Delaware proceedings hearing' on 11 February 2016, in part because "the costs of and incidental to the hearing of 11 February 2016 naturally arose out of the developments which are out of Integrated Whale's control." Also Integrated Whale seeks an interim payment of costs.

[139] The matter of interim payment of costs is left to be determined upon the handing down of this Judgment in the presence of counsel and after hearing Highlander on the matter.

[140] In determining costs, the Court has had regard to each of the provisions of the relevant rules, being CPR 69B.11(2) and CPR 64.6, and in particular but not limited to the fact that Integrated Whale is the successful party and as such is the beneficiary of the general rule that the unsuccessful party is to pay the costs of the successful party (CPR 64.6(1)); all of the circumstances of this Application which must be considered (CPR 64.6(5)); and the mandatory factors to be considered 'in particular', as set out in CPR 64.6(6).

[141] Also the Court has had regard to the step by step guide to awarding costs set out by Justice Jackson in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd.[54] It also has had regard to Verrecchia (t/a Freightmaster Commercials) v Metropolitan Police Comr[55], submitted by Integrated Whale for the proposition that a court should make an issue based order only if other forms of order cannot be made which sufficiently reflect the justice of the case.

[142] The Court concludes that, subject to what is said below, Highlander should pay Integrated Whale it's costs of the Application, which should include what is referred to above as the costs of the 'substantial injustice issue'. The two issues

[54] [2008] EHWC 2280 (TCC).
[55] [2002] EWCA Civ 605.

were sufficiently intertwined so that it would not be appropriate to treat them as discrete issues upon which there was divided success. Integrated Whale succeeded in setting aside the Demand and as such the general rule should apply.

[143] There is no basis to order, as Highlander asks, that Integrated Whale's costs should commence only when Integrated Whale "articulated its position" on the 'substantial dispute issue'. This is not a case in which Highlander, upon hearing the articulation of Integrated Whale's position, said that it would be withdrawing the Demand and would have done so earlier, and avoided the costs until then, if only it had known the position earlier. To the contrary, Highlander maintained throughout that there is no substantial dispute, and indeed that its position on the allegedly accelerated debt is the correct one.

[144] However, Integrated Whale should not have its costs, and instead Highlander should recover its costs from Integrated Whale, of the 'Delaware proceedings aspect' of the Application (being the hearing on 11 February 2016 and all related matters commencing with and including the correspondence asserting the Delaware proceedings constitute an admission of a substantial dispute).

[145] While it was not inappropriate, as this Court has stated in this Judgment, for Integrated Whale to bring the Delaware proceedings to the attention of this Court (which could have been done in writing, as in fact it was initially), it was inappropriate and a waste of this Court's time for Integrated Whale to take and pursue an aggressive and vigourous position that there was an not only an admission but a determinative admission of a substantial dispute by reason of the Delaware proceedings, insist that the Demand be withdrawn on that basis, and then act so as to escalate the matter and cause an hearing to be held with leading counsel attending, and attending in person.

[146] While after initially reading the diametrically opposed position of the parties on the effect of the Delaware proceedings, this Court did suggest a "short hearing", it assumed some credible assertion of an admission would be made - it never anticipated the escalation that took place for no apparent reason.

[147] If in any way the Delaware proceedings showed any kind of an arguable admission by Highlander of a substantial dispute, such as a position taken in a pleading, affidavit or submission to the Delaware court, or in some conduct of Highlander beyond simply making a claim for payment of the allegedly accelerated debt (along with two other claims), the situation might be different. The initial correspondence provided to this Court about the Delaware proceedings certainly led this Court to the view that the was some kind of credible argument that Integrated Whale had which went to the heart of whether there was a substantial dispute. There was no such credible argument when it was finally fully tabled. The aggressive and vigourous assertion fell flat on its face.

[148] Having generated costs for Highlander that should not have been generated, Highlander should recover those costs from Integrated Whale. While these costs, like all costs ordered in this Judgment, need to be reasonable and proportionate, it is made clear that those costs will include the costs of leading counsel (to avoid an assertion that leading counsel was not necessary, reasonable or proportionate for the 11 February 2016 even though Integrated Whale announced first that it was going that route).

[149] There should be a set off of the amount payable by Integrated Whale to Highlander against the amount payable by Highlander to Integrated Whale.

Orders

[150] Accordingly, there will be an order setting aside the Demand.

[151] There also will be an order that Highlander shall pay Integrated Whale's costs of the Application, less Integrated Whale's costs of the 'Delaware proceedings aspect' of the Application (being the hearing on 11 February 2016 and all related matters commencing with and including the correspondence asserting the Delaware proceedings constitute an admission of a substantial dispute), and Integrated Whale shall pay Highlander's costs of the 'Delaware proceedings aspect' of the Application (including the costs associated with leading counsel attending in person), to be assessed if not agreed, and with a set off of the amount payable by Integrated Whale to Highlander against the amount payable by Highlander to Integrated Whale.

[152] The application of Integrated Whale for an order for an interim payment of costs shall be left to be heard and determined upon the handing down of this Judgment in the presence of counsel.

Justice Barry Leon
Commercial Court Judge
26 February 2016