EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0013
(INTERLOCUTORY APPEAL PURSUANT TO CPR 62.10)

BETWEEN:

KMG INTERNATIONAL NV

Appellant/Respondent

and

DP HOLDING SA
(a company incorporated under the laws of Switzerland)

Respondent/Applicant

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Rolston Nelson — Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley Smith, QC for the Applicant/Respondent
Mr. Alain Choo-Choy, QC with Mr. Mark Forte for the Appellant/Respondent

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2018: February 27;
April 16.

Interlocutory appeal – Commercial appeal – Section 168 of BVI Insolvency Act – Deemed dismissal of application to appoint liquidators – Whether application impliedly extended by court's order – Jurisdiction of Court of Appeal – Whether appeal rendered academic by findings of trial judge Whether Court of Appeal should give judgment on appeal argued and heard – Test to determine whether Court of Appeal should hear and give judgment on an academic appeal

The applicant, DP Holding SA ("DPH"), is a foreign company incorporated under the laws of Switzerland. Following arbitration proceedings between the parties, the Netherlands Arbitration Institute made a partial final award against DPH of US$200 million in favour of the respondent KMG International NV ("KMG") on 30th April 2016. DPH disputed the award and the full amount of the award is outstanding. On 11th October 2016, KMG filed

an originating application under sections 159 (1) and 163(1) of the British Virgin Islands ("BVI") Insolvency Act (the "Act") for the appointment of liquidators of DPH.

Immediately following the filing of the originating application KMG applied ex parte for permission to serve the originating application on DPH outside the jurisdiction, and for the appointment of provisional liquidators of DPH. Both applications were granted. In November 2016 DPH applied to set aside the two ex parte orders. The hearing of DPH's application took place on 28th February and 1st March 2017. On 10th May 2017, the learned judge set aside his previous order granting permission to serve the originating application outside the jurisdiction but continued the appointment of the provisional liquidators pending the determination of an appeal from his decision ("the Wallbank Order").

On 6th June 2017, KMG was granted leave to appeal against the Wallbank Order. The notice of appeal was filed on 8 June 2017. This was followed by the filing of a counter notice of appeal by DPH seeking to uphold the decision of Wallbank J to set aside the order giving permission to serve the originating application outside the jurisdiction and counter appealing against the learned judge's refusal to set aside the appointment of the provisional liquidators. The appeal and counter-appeal were heard by the Court of Appeal over three days on the 20th, 22nd and 23rd November 2017. The Court of Appeal reserved its decision.

Section 168 of the Act provides that an application for the appointment of liquidators must be determined within six months after filing or within any extension of that period granted by the court under section 168(2), failing which it is deemed to be dismissed. The originating application, having been filed on 11th October 2016, would have been deemed to be dismissed on 11th April 2017 unless KMG had applied for and obtained an extension of the six-month period. On 10th February 2017, prior to the expiration of the six-month period, KMG applied to a judge of the Commercial Court for an extension of the time to determine the application. On 13th February 2017 Kaye J extended the time "… for three (3) months to the next available liquidation day after 11 July 2017, or until further order in the meantime" ("the Kaye Order"). It was agreed by counsel at the hearing that the Kaye Order meant that the last effective date of the originating application was 11th July 2017. Any extension after that date would have been possible only if KMG made another section 168(2) application on or before 11th July 2017, and none was made.

It follows that when the appeal and counter-appeal against the Wallbank Order were heard by the Court of Appeal in November 2017 the originating application was already deemed to have been dismissed but this was not brought to the attention of the Court. Both sides presented full written and oral submissions on the appeal and counter-appeal. All that remained was the delivery of the judgment.

Following the exchange of correspondence between the attorneys for the parties on the effect of the deemed dismissal of the originating application, KMG filed a new originating application for the appointment of liquidators of DPH on 20th December 2017.

On 19th January 2018, DPH applied to strike out the appeal and counter-appeal.

Held: dismissing the application to strike out the appeal and counter-appeal and awarding costs to the appellant to be assessed by a judge of the Commercial Court if not agreed within 28 days; that**:**

1. The wording of section 168 of the Act is clear and reflects Parliament's obvious intention that applications to appoint liquidators under the Act must be dealt with expeditiously. The application must be determined within six months after filing or within any extension of that period granted by the court under section 168(2). The Court has power under section 168(2) to extend the six-month period by one or more periods not exceeding three (3) months each, such application to be made before the expiry of the original period or extended period, as the case may be. If the application is not determined within the six-month period or any extension thereof granted in accordance with section 168(2), it is deemed to be dismissed.

   Section 168 of Insolvency Act, No. 5 of 2003 Revised Laws of the Virgin Islands applied.

2. In view of the very clear language of section 168 requiring an application for extension of time to be made within the six month period showing special circumstances to justify the extension KMG could not benefit from an implied extension of time to determine the originating application based on the other order made by Wallbank J extending the appointment of the joint provisional liquidators to a time that was outside the six month period as extended by the Kaye Order. The originating application filed on 11th October 2016 was therefore deemed to be dismissed pursuant to section 168 of the Act on 11th July 2017.

   Decisions of Hariprashad-Charles J in Safe Solutions Accounting Ltd (in administration) and another v French Connections Ltd BVIHCV2005/0242 (delivered on 24th May 2006, unreported) and **Citco Global Custody NV v Y2K Finance Inc.** BVIHCV2008/0146 (delivered 10th February 2009, unreported) approved.

3. The Court of Appeal, having had jurisdiction when the appeals were commenced, did not lose jurisdiction merely because the operation of section 168 caused the originating application to be deemed to be dismissed. Section 168 is not directed to the jurisdiction of the Court at all but merely directs that an originating application which has not been determined within the six-month period is to be treated by the Court as having been dismissed by the deeming provision of section 168. It follows that the lower court would have retained jurisdiction to declare this to be the case. The Court of Appeal had jurisdiction to deal with all issues in the appeal from the date of the filing of the notice of appeal on 8th June 2017, and it maintained that jurisdiction to deal with the hearing and determination of the appeal.

4. A court of appeal may exercise its discretion by declining to hear an appeal, or to deliver its judgment on an appeal already heard where the underlying proceeding has been dismissed or has become academic. However, in all the circumstances of this case, the Court exercises its discretion in favour of delivering its judgment on the appeal and counter-appeal heard in November 2017.

JUDGMENT

[1] **WEBSTER JA [AG.]:** In November 2017 the Court of Appeal heard an appeal and counter-appeal against orders made by the learned trial judge in the Commercial Court in an originating application by the appellant, KMG International NV ("KMG"), for the appointment of liquidators of the respondent, DPH Holding SA ("DPH"). The Court reserved its judgment. On 19th January 2018 DPH applied to this Court for an order striking out the appeal and counter-appeal on the basis that the Court did not have jurisdiction to hear the appeal and counter-appeal when it did following the deemed dismissal by operation of section 168 of the **Insolvency Act** [1] ("the Act") of the underlying application to appoint liquidators. Alternatively, if the Court had jurisdiction it should not exercise its jurisdiction to determine the appeal and counter-appeal by delivering its judgment. This is our decision on the strike out application.

Background

[2] The background to this application is short and uncontroversial. DPH is a foreign company incorporated under the laws of Switzerland. Following arbitration proceedings between the parties, the Netherlands Arbitration Institute made a partial final award against DPH of US$200 million in favour of KMG on 30th April 2016. DPH disputed the award and the full amount of the award is outstanding. On 11th October 2016, KMG filed an originating application under sections 159 (1) and 163(1) of the Act for the appointment of liquidators of DPH.

[3] Immediately following the filing of the originating application KMG applied ex parte for permission to serve the originating application on DPH outside the jurisdiction, and for the appointment of provisional liquidators of DPH. Both applications were granted. In November 2016, DPH applied to set aside the two ex parte orders. The hearing of DPH's application took place on 28th February and 1st March 2017. On 10th May 2017 the learned judge set aside his previous order granting

[1] Act No. 5 of 2003 Revised Laws of the Virgin Islands.

permission to serve the originating application outside the jurisdiction but continued the appointment of the provisional liquidators pending the determination of an appeal from his decision ("the Wallbank Order").

[4] On 6th June 2017 KMG was granted leave to appeal against the Wallbank Order. The notice of appeal was filed on 8th June 2017. This was followed by the filing of a counter notice of appeal by DPH seeking to uphold the decision of Wallbank J [Ag.] to set aside the order giving permission to serve the originating application outside the jurisdiction and counter appealing against the learned judge's refusal to set aside the appointment of the provisional liquidators. The appeal and the counter-appeal were heard by the Court of Appeal over three days on the 20th, 22nd and 23rd November 2017. The Court of Appeal reserved its decision.

The deemed dismissal of the application

[5] The time that it took between the filing of the originating application on 11th October 2016 and the hearing of the appeal in November 2017 with judgment reserved brought into play section 168 of the Act which provides-

> "1) Subject to subsection (2), an application for the appointment of a liquidator shall be determined within six months after it is filed.
>
> (2) The Court may, upon such conditions as it considers fit, extend the period referred to in subsection (1) for one or more periods not exceeding three months each if
>
> (a) it is satisfied that special circumstances justify the extension; and
>
> (b) the order extending the period is made before the expiry of that period or, if a previous order has been made under this subsection, that period as extended.
>
> (3) If an application is not determined within the period referred to in subsection (1) or within that period as extended, it is deemed to have been dismissed.
>
> (4) Section 496(1)(a) shall not apply to the time periods specified in this section"

The wording of the section is clear and reflects Parliament's obvious intention that applications to appoint liquidators under the Act must be dealt with expeditiously.

The application must be determined within six months after filing or within any extension of that period granted by the court under section 168(2). The Court has power under section 168(2) to extend the six-month period by one or more periods not exceeding three (3) months each, such application to be made before the expiry of the original period or extended period, as the case may be. If the application is not determined within the six-month period or any extension thereof granted in accordance with section 168(2), it is deemed to be dismissed.

[6] The originating application, having been filed on 11th October 2016, would have been deemed to be dismissed on 11th April 2017 unless KMG had applied for and obtained an extension of the period. On 10th February 2017 prior to the expiration of the six-month period, KMG applied to a judge of the Commercial Court for an extension of the time to determine the application. On 13th February 2017 Kaye J extended the time "… for three (3) months to the next available liquidation day after 11 July 2017, or until further order in the meantime" ("the Kaye Order"). Despite the opacity of the Kaye Order, it was agreed by counsel at the hearing that it meant that the last effective date of the originating application was 11th July 2017. Any extension after that date would have been possible only if KMG made another section 168(2) application on or before 11th July 2017, and none was made.

[7] When Wallbank J [Ag.] made his order on 10th May 2017 refusing leave to serve out and appointing provisional liquidators pending an appeal, no mention was made of section 168 of the Act. Neither counsel nor the judge adverted to the need to extend the Kaye Order for a further three (3) months from July 12, 2017.

[8] It follows that when the appeal and counter-appeal against the Wallbank Order were heard by the Court of Appeal in November 2017 the originating application was already deemed to have been dismissed but this was not brought to the attention of the Court. Both sides presented full written and oral submissions on the appeal and counter-appeal and the Court reserved its judgment.

[9] In early December 2017 the attorneys for DPH became aware of the fact that the period for determining the originating application as extended had expired on 11th July 2017 and that KMG had not applied to extend the life of the originating application. The attorneys for the parties then engaged in correspondence regarding the status of the application. The upshot of this correspondence was that on 20th December 2017, KMG filed a new originating application for the appointment of liquidators of DPH. This led to the filing on 19th January 2018 of the application that is now before the Court by DPH to strike out the appeal and counter-appeal.

Submissions

[10] Mr. Stephen Moverley Smith, QC, who appeared for DPH submitted that the Court of Appeal's jurisdiction to hear an appeal is parasitic on the underlying proceedings in the court below and the effect of the deemed dismissal of the originating application is that there is no order for this court to uphold or overturn. He relied on two decisions of the lower court in **Safe Solutions Accounting Ltd (in administration) and another v French Connections Ltd**[2] and **Citco Global Custody NV v Y2K Finance Inc**[3] to support his submission that the time for determining KMG's originating application ended on 11th July 2017 and was not extended by implication arising out of Wallbank J's order extending the appointment of the joint provisional liquidators until the determination of the appeal from his judgment.[4] The application was therefore deemed to be dismissed as of the 12th July 2017.

[11] Mr. Moverley Smith, QC submitted further that the deemed dismissal of the originating application means that the Court of Appeal did not have jurisdiction to take any further step in the appeal, meaning that the Court could not deliver its judgment. He relied on several cases for this proposition which will be dealt with as necessary later in this judgment. Alternatively, even if the Court has jurisdiction

[2] BVIHCV2005/0242 (delivered on 24th May 2006, unreported).
[3] BVIHCV2008/0146 (delivered on 10th February 2009, unreported).
[4] See paras. 14 -21 below.

to deliver the judgment, it should not do so because there is no longer a lis between the parties.

[12] Learned counsel for KMG, Mr. Alain Choo-Choy, QC, submitted the following points in response:

(a) The dispute between KMG and DPH regarding the effect of section 168 of the Act should be litigated in the Commercial Court and not by means of a strike out application in the Court of Appeal.

(b) The originating application was actually determined within the period permitted by section 168 when Wallbank J [Ag.] set aside the service out order because that order effectively determined the application and no question of extending the time for the purposes of section 168 arose.

(c) Alternatively, the effect of the Wallbank Order extending the appointment of the provisional liquidators until the determination of the appeal from his order was to impliedly extend the life of the originating application beyond the cut-off date of 11th July 2017.

(d) Assuming that the originating application was deemed to be dismissed under section 168(3) of the Act, the Court of Appeal retained jurisdiction to hear and determine the appeal and should do so on the facts of this case.

Issues

[13] The issues that arise for consideration in this application are:

(1) The effect of the setting aside of KMG's permission to serve the originating application outside the jurisdiction

(2) The effect of the continuation of the appointment of the provisional liquidators by the Wallbank Order

(3) The Court of Appeal's jurisdiction to hear this strike out application and the appeal and counter-appeal

(4) If the Court has jurisdiction to hear the appeal, how should it exercise that jurisdiction.

Mr. Choo Choy's submission in subparagraph A in the preceding paragraph that the strike out application should be heard in the first instance by the lower court will be dealt with under issue 3.

Issue 1: Effect of the order setting aside service out of the jurisdiction

[14] Mr. Choo-Choy, QC, submitted that the originating application was determined within the six-month period when Wallbank J [Ag.] set aside the service out order because that order effectively determined the application and no question of extending the time for the purposes of section 168 arose. The weakness of this submission is that the Wallbank Order was made on 10 May 2017, within the six-month period as extended, and it was still open to KMG, in appropriate circumstances, to renew the application for service out, or make a fresh application based on changed circumstances or new information. The setting aside of the service out order did not have the effect of determining the originating application.

Issue 2 - Effect of the order continuing the appointment of the provisional liquidators

[15] KMG submitted that the effect of the Wallbank Order continuing the appointment of the provisional liquidators pending the determination of any appeal from his order would necessarily extend their appointment to a time outside the six-month period with the result that the life of the originating application was, by implication, extended beyond the six-month period as extended by the Kaye Order. The issue of implied extensions under section 168 was considered in the two BVI High Court decisions mentioned above: **Safe Solutions Accounting Ltd (in administration)**

and another v French Connections Ltd[5] and **Citco Global Custody NV v Y2K Finance Inc**.[6]

[16] In **Safe Solutions**, the applicants filed an application for the appointment of liquidators of the company on 25th October 2005. The following day the Court ordered the appointment of provisional liquidators over the company. On 23rd February 2006 directions were given for the filing of evidence. By order dated 12th April 2006 the time for filing evidence was extended and the hearing date was fixed for 24th May 2006. The six-month time limit expired on 24th April 2006. On 12th May 2006 the company sought a declaration that the application of 25th October 2005 was deemed to have been dismissed on 25th April 2006 pursuant to section 168(3). Hariprashad-Charles J granted the declaration.

[17] In **Citco Global**, the application for the appointment of liquidators was filed on 21st May 2008. Thereafter the Court made three consent orders. The first provided that the date of hearing was to be fixed by the parties in agreement with the Court but not before 1st September 2008. The second consent order varied some of the earlier directions and the third extended the time for disclosure. On 23rd October 2008, the Court ordered a new trial date of 12th January 2009. On 22nd November 2008 the six-month limit expired. On 13th January 2009 the company filed an application for a declaration that the application to appoint liquidators was deemed to have been dismissed on 22nd November 2008. Hariprashad-Charles J granted the declaration, rejecting a submission that the three consent orders had the effect of impliedly extending the time for determination of the application of May 21, 2008.

[18] Leading counsel for DPH relied on dicta of Hariprashad-Charles J in **Safe Solutions** at paragraph 18 where the learned judge said:

> "The language of section 168 is clear and the court has no jurisdiction to entertain applications falling outside of the statutory time frame unless the

[5] Supra note 3.
[6] Supra note 4.

> Court, acting pursuant to section 168(2) extends the period in special circumstances. The Court may only extend the 6 month period for an aggregate period of 3 months."[7]

[19] In view of the very clear language of section 168 requiring an application for extension of time to be made within the six month period showing special circumstances to justify the extension, I am of the view that Hariprashad-Charles J was correct in finding that the applicants in both cases could not benefit from an implied extension of time to determine the originating applications based on orders made during the six month period for taking steps outside the period. Adopting and applying the learned judge's phrase, KMG cannot "piggyback" an application for extension of time under section 168 to the other order made by Wallbank J [Ag.] extending the appointment of the joint provisional liquidators to the determination of an appeal against his orders.

[20] Learned counsel for DPH also made the point, rightly in our view, that section 168(4) of the Act expressly precludes the use of section 496(1)(a) of the Act to procure an extension of time fixed by the Act. Section 496(1)(a) provides that except where the Act or the Rules provide otherwise the court has power to extend the time for taking any action specified in the Act or the Insolvency Rules, either before or after the time has expired. However, KMG cannot rely on section 496(1)(a), and they have not sought to do so, because section 168(4) is one of the sections dealing with time limits that expressly forbids reliance on the general power to extend time in section 496(1)(a).

[21] To sum up the effect of the deemed dismissal of the originating application, we find that section 168 does not allow implied extensions of the period for determining an originating application, and even if it did, there was no implied extension in this case. The originating application to appoint liquidators of DPH filed on 11th October 2016 was therefore deemed to be dismissed pursuant to section 168 of the Act on 11th July 2017.

[7] See also Citco Global at para. 16 to similar effect.

Issue 3 - Jurisdiction of the Court of Appeal

[22] There are two issues relating to the jurisdiction of the Court of Appeal to be resolved in this application.

[23] Firstly, KMG disputed this Court's jurisdiction to hear the strike out application. Mr. Choo-Choy, QC posited that all issues relating to the meaning and effect of section 168 of the Act should be determined firstly by the lower court and then there can be an appeal from the lower court's decision. Further, he argued that KMG has leapfrogged the first step by applying directly to the Court of Appeal to strike out the appeal based on the deemed dismissal of the originating application. However, the submission does not take account of the fact that at the heart of the current application is whether this Court, having heard submissions on the appeal, should strike out the appeal and counter-appeal on a finding that the originating application was deemed to be dismissed, or proceed to deliver its judgment on the appeal. While the resolution of this dispute involves considering the effect of section 168 which, in isolation, could have been done by the lower court as in the **Safe Solutions** and **Citco Global** cases, the Court of Appeal is seised of the appeal and can determine whether it should strike out the appeal or proceed to judgment. And even if the court below were to declare the effect of section 168 on the underlying originating application, that declaration would not bind the Court of Appeal in respect of the matters before the Court.

[24] In our opinion, DPH's application to strike out the appeal and counter-appeal is properly before this Court for it to determine the ultimate disposal of the appeal proceedings.

[25] DPH's other objection to the jurisdiction of the Court of Appeal relates to the Court's ability to complete the appeal by delivering its judgment. Section 30(1)(b) of the **West Indies Associated States Supreme Court (Virgin Islands) Act**,[8]

[8] Cap. 80, Revised Laws of the Virgin Islands 1991.

sets out the jurisdiction of the Court of Appeal. So far as is relevant, the section provides:

> "(b) an appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court and for the purposes of, and incidental to, the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon: the Court of Appeal shall have all the powers, authority and jurisdiction of the High Court."

Any derogation from section 30(1)(b) must be clear and express. More particularly, this is so where it might otherwise be thought that an appeal that is actually before the Court (as in this case) could be determined by removing it from the scrutiny of the judges by a statutory provision.

[26] Mr. Moverley Smith, QC, submitted that the deemed dismissal of the originating application means that there is no longer a proceeding in the lower court on which the appeal and counter-appeal can be maintained and therefore the Court of Appeal did not have jurisdiction to deal with the appeal and counter appeal. Further, the deemed dismissal of the originating application means that there is no longer a lis between the parties and the Court of Appeal should not have entertained the appeal. The latter point goes more to the exercise of the Court's jurisdiction rather than the existence of the jurisdiction and I will deal with it below when I consider the issue of discretion.

[27] DPH's submission that the Court of Appeal does not have jurisdiction to hear the appeal does not deal with the obvious fact that the appeal against the Wallbank Order was filed on 8th June 2017 while the originating application was still alive in the lower court. The Court of Appeal undoubtedly had jurisdiction to entertain the appeal at that stage and up to 11th July 2017. In theory, had the appeal been heard and determined by the latter date there could be no issue as to the Court of Appeal's jurisdiction. Why should the Court of Appeal lose its jurisdiction as a result of the supervening event of the deemed dismissal of the originating application? Counsel for DPH did not cite any authority in support of this

proposition. But the logical extension of his argument would mean that in the cases of **Safe Solutions** and **Citco Global** on which DPH relies, the lower court would have similarly lost its jurisdiction to make the declaratory and costs orders therein made, all having been made after the six-month period had expired.

[28] Yet it can hardly be doubted that the Court had jurisdiction to make the declaratory orders and the consequential orders made in those cases. Similarly, the Court of Appeal having had jurisdiction when the appeals were commenced does not thereby lose jurisdiction merely because the operation of section 168 caused the originating application to be deemed to be dismissed. To my mind section 168 is not directed to the jurisdiction of the court at all but merely directs that an originating application which has not been determined within the six-month period is to be treated by the Court as having been dismissed by the deeming provision of section 168. It follows that the Court would have retained jurisdiction to declare this to be the case. I am satisfied that the Court of Appeal had jurisdiction to deal with all issues in the appeal from the date of the filing of the notice of appeal on 8 June 2017, and it maintained that jurisdiction to deal with the hearing and determination of the appeal.

[29] I accept the argument of leading counsel for KMG that there is a dichotomy between jurisdiction and discretion. That said, the real issue in this case is whether the Court of Appeal, having heard full argument on this appeal over three days, should, in the exercise of its discretion, rule on the appeal and counter-appeal, or simply strike it out or dismiss it as serving no useful purpose since the originating application for which permission to serve out was sought no longer exists. I will now deal with this issue.

Issue 4 - Discretion

[30] DPH's position on how this Court should exercise its discretion in this case revolves around the fact that the originating application was deemed to be dismissed as of 11th July 2017 and therefore there is no longer a lis between the

parties in the proceedings in the lower court to be resolved. There being no lis the Court of Appeal, whose raison d'etre is to resolve disputes between parties and not to pronounce on abstract or academic issues, should not exercise its discretion in this case by delivering the judgment on the appeal and counter-appeal. Mr. Moverley Smith, QC relied on **Sun Life Assurance Company of Canada v Jervis**[9] where the appellant, an insurance company, sought leave to appeal to the House of Lords from an unfavourable decision of the Court of Appeal. The Court of Appeal granted leave to appeal on terms that the appellant undertook to pay the respondent's costs and not ask for the repayment of any monies paid to the respondent prior to the appeal, regardless of the outcome of the appeal. The matter was therefore of complete indifference to the respondent but the insurance company was anxious to get a reversal of the unfavourable decision of the Court of Appeal for purposes of dealing with similar claims in the future. Since there was no issue to be decided between the parties, the House of Lords, in their undoubted discretion, declined to hear the appeal. At page 113 of the judgment of their Lordships Viscount Simon LC said:

> "I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way… I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter of actual controversy which the House undertakes to decide as a living issue."

[31] **Sun Life Assurance Company of Canada v Jervis**[10] was considered by the House of Lords in **Ainsbury v Milligan**[11] where their Lordships declined to hear an appeal about an injunction which had been resolved by the parties by the time of the hearing of appeal and both parties were legally aided so there was no issue as to the costs between them. After referring to Lord Simon's dicta in the **Sun Life Assurance** case, Lord Bridge of Harwich said at page 381:

> "Different considerations may arise in relation to what are called "friendly actions" and conceivably in relation to proceedings instituted specifically

[9] [1944] AC 111.
[10] Ibid.
[11] [1987] 1 WLR 379.

> as a test case. The instant case does not fall within either of those categories. Again, litigation may sometimes be properly continued for the sole purpose of resolving an issue as the costs when all other matters in dispute have been resolved."

Ainsbury v Milligan shows that the court's hands are not tied if there is no lis between the parties and there are limited circumstances such as friendly actions and test cases where the appeal court will proceed to hear the appeal.

[32] Mr. Choo-Choy, QC, submitted that the English authorities post-dating **Ainsbury v Milligan** show a greater willingness to deal with appeals that raise only academic or hypothetical points in the public interest. He referred to the following passage in the **English Supreme Court Practice 2017 Volume 2** at paragraph (A – 2499):

> "In modern times the appellate courts have indicated a greater willingness to entertain proceedings which raise points of law which, although "academic" or "hypothetical", are points of general public interest."

[33] The modern approach is also illustrated by the learned editors of **Zuckerman's Civil Procedure 3rd edition** at para 24-2013 where they state:

> "In sum, the hearing of appeals that are no longer determinative of the rights of the parties will depend on whether the matter is of general public interest and whether entertaining an appeal is the most effective way of resolving the issue and promoting the overriding objective."

This passage was quoted with approval by Sir Anthony Clarke MR in **Michael Victor Gawler v Paul Raettig**[12] and the discussion by Zuckerman of the issue of hearing appeals where there are no live issues was said to be of "great assistance" by Brooke LJ in **Bowman v Fels**.[13] The latter case involved issues in a private dispute relating to the disclosure of accounting information by a member of the legal profession pursuant to certain provisions of the Proceeds of Crime Act 2002. By the time the matter got to the Court of Appeal the parties had resolved the issues in the underlying private litigation. Nevertheless, the Court of Appeal proceeded to hear the appeal and deliver its judgment because of the

[12] [2007] EWCA Civ 1560 at para. 36.
[13] [2005]1 WLR 3083 at para. 17.

public importance of the issues in the appeal. In delivering the judgment of the Court, Brooke LJ said at paragraph 15:

> "If it is in the public interest for this court to decide an important and difficult point of law arising out of the interpretation of a recent statute, when both the parties to the case and three intervenors of the status of those who appeared before the court are anxious that the court should do so, it is in our judgment unnecessary for the court to resort to artificial devices on which to found its jurisdiction."

The principles in this case are important to the extent that they show the court's willingness to hear appeals where there are no live issues between the parties if the appeal involves issues of public importance relating to the interpretation of a statute.

[34] We refer finally to the case of **Hutcheson v Popdog Ltd (Practice Note)**[14] where at paragraph 15, Lord Neuberger MR laid out a test that the appeal courts should consider in determining whether to hear an academic appeal:

> "Both the cases and the general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean "may") be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

I agree in general terms with this test but as we are dealing with the exercise of a discretion that can arise in a wide variety of circumstances, in the final analysis, each case must be judged on its own facts.

[35] In considering how to exercise discretion in this case, I take into consideration the following:

(i) This is not a case where the parties have resolved their differences and the appeal is a formality or is academic. The lis remains and

[14] [2011] EWCA Civ 1580.

KMG has filed a fresh application between the same parties and on the same subject matter, there having been no disposal of the originating application on the merits.

(ii) The appeal and counter-appeal were fully argued over three days. All the evidence contained in several boxes of lever arch files was placed before the Court.

(iii) There has been a considerable outlay of public financial resources with the result that the public has an interest in the outcome.

(iv) The question as to what should be the proper approach of a BVI court when faced with a claim for the liquidation of a foreign company in the BVI is still a live issue. A section 163 application is a statutory application that can only be made in the BVI. Can any court other than a BVI court exercise the power given under section 163 of the Act? Is forum non conveniens a bar to an application for permission to serve out? These are important issues raised by the originating application.

(v) There has been a substantial delay in making the present application. KMG's failure to raise the issue of the deemed dismissal of the originating application until after the appeal and counter-appeal were heard and after all the costs, time and effort were fully expended in achieving the hearing of the appeal, is regrettable. Nothing further needs to be done in the appeal other than the delivery of the Court's judgment.

[36] Applying the test laid out by Lord Neuberger in **Hutcheson v Popdog Ltd**, I am satisfied that:

(a) Even though the appeal involves a dispute between private persons, the issues in the appeal relate to matters of public importance relating to the

application of the forum non conveniens principles to an application by a creditor exercising its statutory right under sections 159 and 163 of the Act to appoint liquidators of a foreign company that has assets within the jurisdiction.

(b) The second limb of the Neuberger test requires the respondent to agree to the appeal proceeding. One of the main reasons for securing the respondent's consent to the appeal proceeding is the issue of costs. If the respondent has nothing to gain or lose by the decision in the appeal as in the **Sun Life Assurance** case there is no reason why he should be exposed to an adverse costs order in the appeal. In those circumstances, the consent of the respondent is important. However, in this case, DPH has consented to the appeal by its full and enthusiastic participation in the proceedings including its filing and pursuit of the counter-appeal. DPH could have taken the deemed dismissal point before the appeal was filed or later in the proceedings and so avoid at least some of the substantial costs and time that have already been incurred. The only additional costs of the appeal will be the attendance in the Court of Appeal to receive the judgment. I do not think that the absence of consent by DPH to the delivery of judgment in the appeal should be an obstacle to allowing the appeal to continue to finality. It would have been a completely different matter if the section 168 point had been taken before the appeal was heard.

(c) The appeal having been heard the third limb of Neuberger test is satisfied in that both sides of the dispute have been fully ventilated in the Court of Appeal.

Conclusion

[37] Section 168 of the Act does not affect the jurisdiction of the Court of Appeal to hear and determine valid appeals filed when an originating application was extant. The Court of Appeal has such jurisdiction but may refrain from exercising its

discretion to rule on an appeal where the underlying originating application has been dismissed or has become academic. In the present appeal, the Court exercises its discretion on account of the compelling factors listed above and will deliver its decision on the appeal and counter-appeal heard on November 20, 22 and 23, 2017. The present application dated 19th January 2018 is dismissed with costs.

Order

[38] The application to strike out the appeal and counter-appeal is dismissed with costs to the appellant to be assessed by a judge of the Commercial Court if not agreed within 28 days.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Rolston Nelson
Justice of Appeal [Ag.]

By the Court

Chief Registrar