8 The appeal is allowed, the refusal is set aside and I remit the matter to the Registrar for her to inquire into the merits of the case. That said, I understand from the Registry that a hearing in respect of the matter in which the appellant seeks legal assistance is scheduled for hearing tomorrow. In those circumstances, the appellant is to be issued with an emergency certificate such that he may have legal representation for the purposes of that hearing.

Appeal allowed.

[2010–12 Gib LR 323]

IN THE MATTER OF LEMMA (EUROPE) INSURANCE COMPANY LIMITED

SUPREME COURT (Dudley, C.J.): May 16th, 2012

Arbitration—stay of proceedings—agreement to arbitrate—no stay of winding-up proceedings in reliance on arbitration clause because proceedings not "action at law" requiring arbitration

Companies—compulsory winding up—inability to pay debts—disputed debt—dispute to be real not frivolous before injunction preventing winding-up petition can succeed

The respondent company sought the winding up of the applicant company pursuant to a statutory demand for payment.

The parties were insurance companies that entered into a contract of reinsurance, according to which the respondent was to provide the applicant with bordereaux at particular dates to enable it to assess risk. The contract made arbitration of any "dispute" a condition precedent to any "action at law" and contained claims assistance provisions by which the respondent was to provide details of major claims over a particular value to the applicant. An intermediary clause provided for another company ("Monitor") to pass communications between the parties. The applicant was entitled to cancel the agreement upon giving three months' notice.

A dispute arose when the respondent failed to provide a bordereau by the date specified and the applicant gave 30 days' notice to cancel the contract. The bordereau was provided to Monitor 25 days after the due date. The respondent did not treat the contract as at an end, but claimed

payment from the applicant under it. The applicant failed to reply and the respondent served a statutory demand for payment before seeking to wind up the applicant. The applicant then obtained, *ex parte*, an interim injunction to restrain the winding-up petition.

At the *inter partes* hearing, the applicant submitted that the injunction should be granted, as (a) there was a dispute and the arbitration clause barred the winding-up petition; (b) it could, if required, demonstrate a substantial dispute, as the applicant had breached the contract by failing to provide the bordereau on time, or at all, and had failed to provide it with details of a major claim ("the Majeed claim"); and (c) it was solvent.

The respondent submitted in reply that (a) arbitration was a condition precedent only to an "action at law," and not to a winding-up petition brought pursuant to a statutory demand for payment; (b) there was no substantial dispute, as the bordereau had been provided, albeit late, to Monitor as provided for in the intermediary clause, the applicant had demonstrated no loss arising from the delay, and the value of the Majeed claim was too low to trigger the claims assistance obligations; and (c) it was entitled to rely upon the Companies Act 1930, s.221 and ask the court to deem the applicant unable to pay its debt, as it had failed to satisfy a statutory demand, without evidence of its solvency being considered.

Held, dismissing the application:

(1) No injunction would be granted to restrain the winding-up petition, the applicant having failed to demonstrate a substantial dispute, meaning real as opposed to frivolous, about its liability to pay the debt claimed by the respondent. That test applied notwithstanding the clause making arbitration of any "dispute" a condition precedent to an "action at law," as that did not include winding-up proceedings brought after a statutory demand for payment. The applicant could not raise a substantial dispute based on the respondent's failure to provide the bordereau in time, nor its failure to provide details of the Majeed claim under the claims assistance provisions. The bordereau had been provided, albeit late, to the intermediary provided for in the contract, the applicant had demonstrated no loss arising from the delay, and the value of the Majeed claim was too low to trigger the claims assistance obligations. Accordingly, the debt was not disputed on substantial grounds and the application for an injunction would be dismissed (paras. 7–16).

(2) Further, it would be unnecessary to consider the applicant's evidence of solvency, as a petitioner was entitled to rely upon the Companies Act 1930, s.221 and ask the court to deem a company unable to pay its debt on the ground that it had failed to satisfy a statutory demand (para. 17).

Cases cited:

(1) *Abbey Natl. Plc* v. *JSF Fin. & Currency Exchange Co. Ltd.*, [2006] EWCA Civ 328, referred to.

(2) *Arena Corp. Ltd.*, *In re*, [2004] EWCA Civ 371, referred to.

(3) *City Hotel (Londonderry) Ltd.* v. *Stephenson & Co. Architecture*, [2003] NICA 47, followed.
(4) *Claybridge Shipping Co. SA*, *In re*, [1997] 1 BCLC 572, referred to.
(5) *Halki Shipping Corp.* v. *Sopex Oils Ltd.* (*The Halki*), [1998] 1 W.L.R. 726; [1998] 2 All E.R. 23; [1998] 1 Lloyd's Rep. 465, distinguished.
(6) *Mann* v. *Goldstein*, [1968] 1 W.L.R. 1091; [1968] 2 All E.R. 769, referred to.

Legislation construed:
Companies Act 1930, s.221: "A company shall be deemed to be unable to pay its debts—

> (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £500 then due, has served on the company . . . a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor . . ."

J.E. Triay and *D. D'Amato* for the applicant;
N. Cruz and *Ms. C. Borrell* for the respondent.

1 **DUDLEY, C.J.:** This matter first came before me on February 23rd, 2012 when the applicant ("Lemma") sought injunctive relief on informal notice to the respondent ("Enterprise"), who did not appear. At that hearing, I granted an interim injunction restraining Enterprise from presenting, serving and advertising a winding-up petition against Lemma until the return date or further order. On the return date the parties entered a consent order providing directions, leading to the *inter partes* hearing of the application.

Background

2 Both parties are registered and authorized by the Financial Services Commission to undertake insurance business. The present application arises in the context of a contract of reinsurance between the parties marked "MISL07X042," endorsed by Lemma on March 15th, 2010 ("the re-insurance agreement"), whereby Lemma provided cover to Enterprise in respect of liabilities incurred by Enterprise pursuant to, *inter alia*, certain home insurance policies. The period of agreement is stated to be from March 15th, 2010 to March 14th, 2011, with Lemma being entitled to cancel the agreement upon the giving of three months' notice. The agreement is subject to the laws of England and Wales and an arbitration clause makes arbitration "a condition precedent to the commencement of any action at law." Also of relevance is an intermediary clause, whereby

Monitor Insurance Services Ltd. ("Monitor") is recognized as the intermediary and provision is made for the passing of communications between the parties on the following terms:

> "[Monitor] is hereby recognized as the intermediary by whom this contract was negotiated and through whom all communications relating hereto (including but not limited to notices, statements, premiums, return premiums, commissions, taxes, losses, loss adjustment expenses, salvage and loss settlements) shall be transmitted to both parties. Notwithstanding the above, in case of a loss the Reassured has the option to refer directly to the Reinsurer for the purposes of submitting, settling and collecting the claim."

3 By e-mail dated October 18th, 2010 from Oliver Moss of Lemma to John Levett of Monitor, and consequent upon Enterprise's failure to provide the bordereau for August 2010, Lemma stated its position as follows: "As a consequence of this clear serious breach of condition we hereby give 30 days' notice of cancellation on the said agreement which is effective from today."

4 It is common ground that by October 18th, 2010, Enterprise had not provided the August bordereau which should have been given by September 30th, 2010. However, an e-mail dated October 25th, 2010 from Gul Daswani of Enterprise to Monitor appears to attach the August 2010 bordereau, 25 days after its due date. According to Lemma, it was not received by them and indeed an e-mail dated December 6th, 2010 from Oliver Moss of Lemma to John Levett of Monitor reflects that by that date Lemma had not received the bordereau for August through to November 2010. It is right to say, however, that when the matter came before me at the without notice hearing, the role played by Monitor as the conduit for communications was not brought to my attention.

5 Other than for certain communications in January 2011, upon which the parties do not agree whether they relate to the reinsurance agreement or another agreement, nothing else happened until November 8th, 2011 when Enterprise wrote to Lemma claiming payment of £180,128.14 pursuant to the reinsurance agreement. On the face of the letter, certain bordereaux and documents are said to be attached which were not; but the difficulty in providing these by virtue of volume is made clear in an e-mail dated November 10th, 2011, also from Enterprise to Lemma, and, therefore, to the extent that criticism is levied on Enterprise for failing to attach it to the November 8th letter, it is somewhat petty if not misconceived.

6 Lemma failed to reply to the November 8th, 2011 letter and on January 26th, 2012 Enterprise served a statutory demand for payment of the sum of £222,010 and interest.

The law

7 The parties are agreed as to the applicable principles of law and I draw liberally from Mr. Triay's skeleton in this regard. Under the court's inherent jurisdiction to prevent an abuse of its process it can, by injunction, restrain the presentation or advertising of a winding-up petition (*Mann* v. *Goldstein* (6)). The court will not make a winding-up order against a company where the debt which is the subject of the petition is genuinely disputed by the company on "substantial grounds." In this context, "substantial" means that the dispute must be "real as opposed to frivolous" (*In re Arena Corp. Ltd.* (2)). There must be sufficient evidence to persuade the court that objectively there is a genuine dispute as to the company's liability to pay the debt. Once it is established that there are substantial grounds for disputing the claim "the court should not go on to consider the prospects of success of either party to the dispute" (*Abbey Natl. Plc* v. *JSF Fin. & Currency Exchange Co. Ltd.* (1) ([2006] EWCA Civ 328, at para. 46)). However, the last proposition, as is made clear in *In re Claybridge Shipping Co. SA* (4), is a rule of practice and there are circumstances when the court should determine the dispute. Those circumstances do not arise in this case.

8 No dispute has been referred by either party to arbitration. However, Lemma relies upon the English law jurisdiction clause, by virtue of which the English Arbitration Act 1996 applies, and upon the arbitration clause, which provides that all disputes arising out of the reinsurance agreement are to be referred to arbitration and that "arbitration . . . shall be a condition precedent to the commencement of any action at law." The submission advanced for Lemma is that such a provision encompasses winding-up proceedings. It also relies upon the English Court of Appeal decision of *Halki Shipping Corp.* v. *Sopex Oils Ltd.* (5). The proposition for which that case is authority is summarized in the headnote to the case in *The Weekly Law Reports* ([1998] 1 W.L.R. 727):

> "(1) that 'dispute' in respect of a matter which under an arbitration agreement was to be referred to arbitration was to be given its ordinary meaning and included any claim which the other party refused to admit or did not pay whether or not there was any answer to the claim in fact or in law."

As I understand it, it is said that the interplay between the arbitration clause and *Halki* is to the effect that the court does not have to determine whether the debt is disputed on "substantial grounds," but rather the fact that Lemma disputes the debt is sufficient for the matter to have to go to arbitration.

9 It is instructive to note, however, that *Halki* (5) related to an application for the stay of an ordinary action. In *City Hotel (Londonderry) Ltd.* v. *Stephenson & Co. Architecture* (3), the Northern Ireland Court of Appeal,

on appeal from an order refusing an injunction restraining the presentation or advertising of a petition, and dealing with *Halki* and the submission that the Arbitration Act 1996 required a less onerous test of showing there was a dispute, dismissed the argument and held that "statutory demands" were not "legal proceedings" for the purposes of the Arbitration Act 1996, s.82(1), in respect of which a stay could be sought under s.9 of that Act. In the circumstances, I am of the view that the argument premised upon the English Arbitration Act 1996 and the arbitration clause does not assist Lemma, and I must therefore determine whether on the evidence the debt is disputed on substantial grounds.

10 Fundamentally, the debt is disputed by Lemma on two grounds: (a) the alleged failure by Enterprise to provide the August bordereau in time or at all; and (b) the failure by Enterprise to provide details of a major claim, referred to as the "Majeed claim" as required by the "claims assistance" provision in the reinsurance agreement.

11 The claims assistance provision is engaged "if the claim is larger than £200,000 (for 100% of the shares of all reinsurers participating in the reinsurance agreement)."

12 According to Lemma, the purpose of that clause was that in the event of a claim exceeding that sum, Enterprise was to co-operate with Lemma in arranging to settle it. For present purposes, I accept that interpretation. It is not in dispute that under the terms of the reinsurance agreement Lemma assumed liability for 100% of 90% in respect of claims for buildings and contents. It is also not in issue that the Majeed claim was one such claim. Therefore, the claims assistance provision would only be engaged if the claim exceeded £222,000. The evidence before me reflects that Enterprise was advised by its chartered loss adjuster to maintain a total reserve of £190,000 in respect of the Majeed claim and ultimately incurred a liability of £208,131, inclusive of £17,847 relating to professional fees. Those sums not exceeding £222,000, it is evident that the claims assistance provision was not engaged. Therefore, on the basis of the Majeed claim, the debt cannot be said to be disputed on substantial grounds.

13 The alleged failure to provide the August and subsequent bordereaux which led to the determination of the reinsurance agreement is the main platform upon which Lemma seeks to dispute the debt. On the evidence before me, it is clear that Enterprise failed to provide the August bordereau in timely fashion, but it equally shows that, albeit 25 days late, it did provide it to Monitor on October 25th, 2010. It is surprising, given that it is Lemma's application for injunctive relief, that it should have placed no evidence before the court as to whether or not the bordereau had, in fact, been received by Monitor. Instead, Lemma relies upon the evidence of one of its employees, Steven Blair, the legal officer of the company. His evidence is to the effect that even if the bordereau had been

provided to Monitor, it did not discharge Enterprise of its obligation because (a) Monitor was Enterprise's broker; and (b) there is no provision in the reinsurance agreement expressly providing that communication by one party to Monitor is deemed to be actual communication to the other party. When that evidence is read against the intermediary clause it is evidently disingenuous.

14 Although Lemma seeks to dispute the debt on the basis of the late/non-provision of the bordereau, it makes no attempt to identify what loss if any it has suffered by reason of this alleged breach or to relate it to the demand by Enterprise. Mr. Cruz for Enterprise relies upon the inadvertent errors and omissions clause which provides:

> "Any inadvertent error or omission in the administrative processing of this business covered by this agreement, not however in the taking of judgmental or discretionary decisions which are constitutive of or relevant to the rights or duties of either party under this agreement, shall not prejudice the rights or duties of either party under this agreement if such error or omission is rectified or made good immediately upon discovery, adequate proof thereof being submitted."

15 Whether, given the terms of that clause, the delay was such as amounted to a breach entitling Lemma to give 30 days' notice of cancellation of the reinsurance agreement, as opposed to the three months required by the agreement, or whether the 30 days' notice was an act of generosity on the part of Lemma, who could have treated the breach as amounting to a repudiation of the agreement, does not fall for determination; that, of course, would be a matter for arbitration. However, the clause serves to highlight another significant weakness in the case advanced by Lemma in respect of which no substantive countervailing argument is advanced.

16 In the circumstances, I reach the conclusion that Lemma has failed to advance sufficiently cogent evidence, in relation to both the Majeed claim and the non-provision of the bordereau, to lay the foundation properly for a case which is real as opposed to frivolous, and I am not persuaded that the debt is disputed on substantial grounds. The application for an injunction is dismissed and the injunction granted by me on February 23rd, 2012 discharged.

17 In the circumstances, it is unnecessary for me to consider whether Lemma breached its duty of full and frank disclosure or to consider the evidence relating to its solvency, given that a petitioner is entitled to rely upon s.221 of the Companies Act 1930 and ask that the court deem a company unable to pay its debt if it fails to satisfy a statutory demand.

18 Orders accordingly. I shall hear the parties as to costs.

Application dismissed.

[2010–12 Gib LR 330]

T v. T (Divorce Jurisdiction: Nationality and Domicile)

SUPREME COURT (Butler, J.): May 30th, 2012

Family Law—divorce—jurisdiction—jurisdictional test in Council Regulation (EC) No. 2201/2003, art. 3.1(b) is domicile not nationality, as Gibraltar a "territorial unit" of United Kingdom for purposes of Regulation, by virtue of art. 66, although not in domestic or political sense—jurisdiction to hear divorce if parties domiciled in Gibraltar, or Gibraltar courts would never have jurisdiction under art. 3.1(b)

The petitioner wife sought a divorce in the Supreme Court.

The parties had married in Gibraltar and were habitually resident in Spain, but were assumed by the court to be domiciled in Gibraltar and, being from Gibraltar, were British nationals. The respondent made no objection to the petition being heard in Gibraltar, save that, as a matter of law, he submitted that the court lacked jurisdiction to hear it by virtue of Council Regulation (EC) No. 2201/2003 ("the Regulation").

The respondent submitted that (a) the parties were not habitually resident in Gibraltar, but in Spain; (b) nationality could not be an avenue for Gibraltarian jurisdiction as there was no Gibraltarian nationality and the parties were British nationals; and (c) domicile could not be an avenue for Gibraltarian jurisdiction, as the parties were not domiciled in the United Kingdom but in Gibraltar, which was not a "territorial unit" within the "United Kingdom" for the purposes of arts. 3.1(a) and 66 of the Regulation.

The petitioner made no submissions about jurisdiction.

Held, dismissing the challenge to jurisdiction:

The court had jurisdiction to hear the divorce proceedings. Article 3.1(a) and (b) of the Regulation provided two approaches to jurisdiction: (a) habitual residence; and (b) nationality or, in the case of the United Kingdom, domicile. As the parties were habitually resident in Spain, the only avenue that could yield Gibraltarian jurisdiction was art. 3.1(b). The parties were assumed to be domiciled in Gibraltar and it was therefore unnecessary to deal with nationality (which for Gibraltarians meant British nationality), as domicile alone determined jurisdiction for those "within the United Kingdom." Such persons, for the purposes of art. 3.1(b), included those domiciled in Gibraltar, because art. 66 defined domicile in the "United Kingdom" to mean domicile in one of its "territorial units." Although Gibraltar was not, as in the case of Scotland or