CACV 215/2019
[2019] HKCA 1220

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 215 OF 2019

(ON APPEAL FROM HCB NO 6051 OF 2018)

BETWEEN

SIT KWONG LAM (薛光林) Debtor

and

PETROLIMEX SINGAPORE PTE. LTD Petitioner

Before: Hon Kwan VP, Cheung JA and Chu JA in Court
Date of Hearing: 24 October 2019
Date of Judgment: 24 October 2019
Date of Reasons for Judgment: 1 November 2019

REASONS FOR JUDGMENT

Hon Kwan VP (giving the Reasons for Judgment of the Court):

1. This is the appeal of Sit Kwong Lam ("the Debtor") against a bankruptcy order made against him by Ng J on 11 April 2019 ([2019] 2 HKLRD 924). The bankruptcy petition was presented by Petrolimex Singapore Pte Ltd ("the Petitioner") in respect of a debt of over US$30 million ("the Debt"). Two broad issues are raised on appeal. Firstly, whether the Debt is covered by an arbitration clause. Secondly,

if there is at least a good *prima facie* or reasonably arguable case on the first issue, whether the judge should have exercised his discretion to stay or dismiss the petition on the basis that the Debt is not admitted.

2. At the conclusion of the hearing, we dismissed the Debtor's appeal. These are the reasons for our judgment.

Background

3. We adopt the summary of the background matters set out in the judgment below at §§3 to 11, using the same expressions as the judge:

> "3. Brightoil Petroleum (Holdings) Limited ("**Holdings**") is a company listed on the Hong Kong Stock Exchange. The Debtor is the indirect controlling shareholder and chairman of Holdings.
>
> 4. Brightoil Petroleum (Singapore) Pte Ltd ("**Brightoil Singapore**") is a wholly-owned subsidiary of Holdings. Brightoil Singapore bought goods from the Petitioner in the total sum of US$30,253,600 payable under 2 invoices dated 23 April 2018, but had difficulty paying.
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> 5. By a Deed of Personal Guarantee dated 23 April 2018 ("**Personal Guarantee**") executed by the Debtor in favour of the Petitioner, the Debtor guaranteed the punctual performance by Brightoil Singapore of its obligation to pay the sum due under the 2 invoices on or before 10 July 2018.
>
> 6. Brightoil Singapore failed to pay the sum due by 10 July 2018 and requested additional time to make the payment.
>
> 7. The Petitioner and Brightoil Singapore then entered into a settlement agreement on 12 July 2018 [1] ("**Settlement Agreement**") to settle the Petitioner's claims against Brightoil Singapore and to provide for payment by Brightoil Singapore of the sum due by 4 instalments between 10 August 2018 and 9 November 2018 ("**Settlement Sum**"). Clause 1 of the Settlement Agreement provided that within

[1] According to a "witness record" of Guantao Law Firm made on 19 July 2018, the Settlement Agreement dated 12 July 2018, the PCG dated 16 July 2018 and the PG Addendum dated 16 July 2018 were signed by the Debtor on the same occasion in Shenzhen on 19 July 2018 as witnessed by two lawyers of a Mainland law firm.

5 business days of the execution of the Settlement Agreement, Brightoil Singapore should procure:

(1) Holdings to execute and deliver to the Petitioner a Parent Company Guarantee ("**PCG**"); and

(2) the Debtor to execute and deliver to the Petitioner an addendum to the Personal Guarantee ("**PG Addendum**").

8. In accordance with Clause 1 of the Settlement Agreement, Holdings executed a PCG in favour of the Petitioner expressed to have been made on 16 July 2018. The PCG was executed by *inter alia* the Debtor on behalf of Holdings.

9. Further, the Debtor executed a PG Addendum in favour of the Petitioner also expressed to have been made on 16 July 2018. The PG Addendum expressly provided as follows:

> "This Addendum is executed on this 16th day of July 2018 as a Deed by the undersigned, Dr Sit Kwong Lam … (the "Guarantor") in respect of the Personal Guarantee duly executed as a deed by the Guarantor on or about 23 April 2018...
>
> Pursuant to this Addendum, I warrant and confirm that:
>
> 1. I am fully aware of the terms and effect of the Settlement Agreement dated 12 July 2018 (the "**Settlement Agreement**") entered between PLX and Brightoil in connection with the Guaranteed Obligations.
>
> 2. The PG is hereby extended to cover the performance of Brightoil's obligations under the Settlement Agreement.
>
> 3. I agree to amend the meaning of Guaranteed Obligations in Clause 1.1 of the PG such that it will now read as follows:
>
> "**Guaranteed Obligations**" means the Debtor[2] 's payment obligation under invoice PS18050A&PS1805B

[2] "Debtor" was defined in the Personal Guarantee to mean Brightoil Singapore.

> dated 23 April 2018 and/or any and all of the Debtor's obligations under any settlement agreement entered by the Seller[3] and the Debtor in respect of the foregoing payment obligations of the Debtor, including but not limited to the Settlement Agreement dated 12 July 2018 between the Seller and the Debtor.
>
> 4. All other terms and conditions of the PG, including the arbitration clause, shall remain unchanged and this Addendum shall constitute an integral part of the PG."[4]
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> 10. Other than the payment of US$100,000 to the Petitioner, Brightoil Singapore has failed to discharge its payment obligations under the Settlement Agreement. Thus the Settlement Sum was deemed to have fallen due on 10 July 2018 by virtue of Clause 4 of the Settlement Agreement.
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> 11. By the statutory demand, the Petitioner demanded from the Debtor payment of the outstanding Settlement Sum pursuant to the Personal Guarantee and the PG Addendum. The statutory demand was served on the Debtor on or about 12 September 2018 and was not complied with."

4. The bankruptcy petition was presented on 23 October 2018 and the Debtor filed a notice of intention to oppose the petition on 14 December 2018, stating the grounds upon which he intended to oppose the petition, including the contention that pursuant to clause 4 of the PG Addendum the parties had intended any dispute arising out of the PG Addendum to be resolved by arbitration and in such circumstances the court should exercise its discretion to dismiss and stay the petition,

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[3] "Seller" was defined in the Personal Guarantee to mean the Petitioner.

[4] The PG Addendum also contained a declaration by the Debtor that he had been advised to seek independent legal advice before signing it, that he will be legally bound by the terms of the PG Addendum and the amended Personal Guarantee upon signing it, that the PG Addendum and the amended Personal Guarantee had been explained to him, and that he understood the provisions stated and agreed to be bound by the same.

invoking the approach in insolvency liquidation in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("the *Lasmos* case").

5. The petition first came before the judge on 7 January 2019. He gave directions for the filing of evidence and adjourned the matter to a substantive hearing on 4 April 2019. Judgment was handed down on 11 April 2019.

The judgment below and this appeal

6. Before the judge, the Debtor opposed the petition on these three grounds: (1) the court should exercise its discretion to stay or dismiss the petition due to the existence of an arbitration clause; (2) there is *bona fide* dispute of the Debt on substantial grounds; and (3) there is reasonable prospect of the underlying debt being paid by Brightoil Singapore within a reasonable time.

7. The judge held against the Debtor on all three grounds. The two broad issues raised on appeal mentioned at the outset of this judgment concern only the first ground of opposition. The Debtor did not challenge the holdings on the other grounds of opposition.

8. The first issue on appeal is an issue of construction and relates to the contention that the arbitration clause in clause 7 of the Settlement Agreement was incorporated by reference to the PG Addendum by virtue of clause 4 of the PG Addendum. The second issue is the exercise of discretion in light of the existence of an arbitration clause.

9. If the Debtor fails on the construction issue, the discretion issue does not arise. We will deal with the construction issue first.

The construction issue

10. The difficulty about the Debtor's case on the construction issue is that notwithstanding clause 4 of the PG Addendum, which referred to "all other terms and conditions of the PG, including the arbitration clause", there is actually no arbitration clause in the Personal Guarantee. An arbitration clause is only found in clause 7 of the Settlement Agreement, the relevant part of which reads as follows:

> "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the International Arbitration Centre ("SIAC Rules") in force as on the date of this Settlement Agreement, which rules are deemed to be incorporated by reference in this clause. The Tribunal shall consist of a sole arbitrator. …"

11. It is not in dispute that an arbitration clause may be incorporated by reference like any other contractual term. The judge has referred to these pertinent statements of Kaplan J in *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328 at 339F and at 338C to D[5]:

> "The task before the court in determining whether or not there has been incorporation by reference is one of construction, namely, to ascertain the parties' intentions when they entered into the contract by reference to the words that they used."
>
> "… the fundamental question was whether the language of the clauses relied on pointed plainly to the intention of the parties to incorporate the main contract arbitration clause …".

12. The judge rejected the construction advanced on behalf of the Debtor as "entirely without merits". His reasoning was as follows:

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[5] Judgment, §§16 and 17.

> "If one looks at the actual language used in Clause 4 of the PG Addendum, one will not be able to find (i) any reference to the arbitration clause in the Settlement Agreement at all, or (ii) any purported attempt to incorporate the arbitration clause in the Settlement Agreement into the PG Addendum. As this court pointed out earlier, all one can find in Clause 4 is a reference to a *non-existent* arbitration clause in the Personal Guarantee, *period*. In these circumstances, it is difficult to see how Mr Chan can demonstrate the language of Clause 4 "pointed plainly to the intention of the parties to incorporate the arbitration clause in the Settlement Agreement" into the PG Addendum."[6]

13. The judge acknowledged that while in construing a contract, all parts of it must be given effect where possible and no part of it should be treated as inoperative or surplus, he took the view that the reference to "arbitration clause" in clause 4 of the PG Addendum was a clerical mistake, which should be ignored as a matter of construction[7].

14. The court may correct obvious and easily correctable mistakes in contractual documents as a matter of construction, see *In re BCA Pension Plan* [2016] 4 WLR 5 at §20, which quoted from the judgment of Lord Hoffmann on the correction of mistakes by construction in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at §§22 to 25:

> "22. In *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 Brightman LJ stated the conditions for what he called "correction of mistakes by construction":
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> > "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

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6 Judgment, §18.
7 Judgment, §19.

> 23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said, at p 1351, para 50:
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> > "Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."
>
> 24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ, paras 44-50, that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
>
> 25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. …"

15. The arguments advanced on behalf of the Debtor by Mr Victor Dawes, SC, who appeared with Mr Derek Chan on appeal, are substantially the same as Mr Chan's arguments to the judge, although the judge did not appear to have dealt with those arguments in the judgment.

16. Mr Dawes contended that on a proper construction of the objective intention of the parties, there are various pointers showing that the parties intended the PG Addendum to be governed by an arbitration clause in the same terms as the Settlement Agreement: the PG Addendum

was signed by the Debtor on the same occasion as the Settlement Agreement, which contained an arbitration clause; the present case concerned a "single commercial relationship" between the Petitioner on the one hand and Brightoil Singapore, Holdings and the Debtor on the other hand; the guaranteed obligation in the PG Addendum was in respect of the same debt in the Settlement Agreement. Hence, it makes "eminent commercial sense" for the parties to agree that disputes arising out of the PG Addendum, which concerned the same debt as in the Settlement Agreement, should be adjudicated in the same forum, citing *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at §13.

17. As to the anomaly that the Personal Guarantee did not contain an arbitration clause, he contended that it is more probable than not the parties had mistakenly believed the Personal Guarantee had incorporated an arbitration clause in the same or similar terms as clause 7 of the Settlement Agreement. That was why clause 4 of the PG Addendum provided that "all other terms and conditions of the PG, including the arbitration clause, shall *remain unchanged*" (emphasis supplied).

18. Mr Dawes also prayed in aid the *contra proferentem* rule. The Settlement Agreement and the PG Addendum were drafted by the Petitioner. Any ambiguity in the drafting should be resolved against the Petitioner.

19. Alternatively, Mr Dawes submitted there was a unilateral mistake of the Debtor which was known to the Petitioner. The Debtor deposed he was aware that clause 4 of the PG Addendum had stated that an arbitration clause in the PG would remain unchanged, that the Settlement Agreement had provided for disputes thereunder to be referred

to arbitration in Singapore, and that he believed that the parties had agreed that disputes under the PG Addendum would similarly be referred to arbitration in Singapore [8]. It was contended that the Petitioner's knowledge of this mistaken belief of the Debtor could be inferred from the wording of clause 4 of the PG Addendum, which was drafted by the Petitioner. If the above matters are established, two consequences in law would follow. Firstly, as a dispute resolution clause is an essential term, there would be no contract if the parties are not *ad idem*, citing *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] 2 Lloyds Rep 685 at §87 and *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at §§101 and 104. Secondly, the Debtor can seek rectification of the PG Addendum on the basis of unilateral mistake.

20. Mr Dawes emphasised it is not necessary that the court should come to a firm view in favour of one or both of the arguments he has advanced. For present purpose, it would suffice if there is a good *prima facie* or reasonably arguable case that the PG Addendum is governed by an arbitration clause, he could then raise the discretion issue in that situation.

21. There is clearly a mistake on the face of the PG Addendum, in that clause 4 referred to a non-existent arbitration clause in the Personal Guarantee. Mr Dawes criticised the judge's holding this was a "clerical error" in that there was an absence of clear evidence as to how such error had come to be made. We do not think it relevant to have regard to any evidence how the error had come about. To paraphrase what Carnwath LJ said in *KPMG LLP v Network Rail Infrastructure Ltd* as quoted earlier, the court's task is simply to interpret the agreement in its context, in order to

[8] Affirmation of the Debtor, §§14, 15.

get as close as possible to the meaning which the parties intended. The court is not concerned with the subjective or uncommunicated states of mind of any party. It is an objective assessment, with regard to the background and context, of what a reasonable person would have understood the parties to have meant by the words they have chosen to express their agreement.

22. One starts with the language of the agreement in the PG Addendum. The object of the addendum is to provide for a change to the "Guaranteed Obligations" assumed by the Debtor in the Personal Guarantee as a result of the Settlement Agreement made between the Petitioner and Brightoil Singapore. Clauses 3 and 4 of the PG Addendum made clear that the only change to the Personal Guarantee is to clause 1.1 thereof, and expressly stipulated that "All other terms and conditions of the PG … shall remain unchanged". According to the natural meaning of the words used in clause 4 of the PG Addendum ("All other terms and conditions *of the PG*, *including* the arbitration clause, shall remain unchanged"), "the arbitration clause" mentioned in this provision is clearly an arbitration clause to be found in the Personal Guarantee. It cannot be construed to mean the arbitration clause that is found in the Settlement Agreement. The wording of the PG Addendum is unambiguous.

23. The court should be slow to reject the ordinary and natural meaning of a contractual provision as correct. As Lord Neuberger of Abbotsbury PSC stated in *Arnold v Britton* [2015] AC 1619 at §19:

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been

> perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

24. Lord Clarke of Stone-cum-Ebony JSC also said in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at §23, "where the parties have used unambiguous language, the court must apply it."

25. When one turns to relevant provisions in the Personal Guarantee as part of the documentary, factual and commercial context against which the PG Addendum is to be construed, it can readily be seen that the interpretation advocated by the Debtor (that the PG Addendum should be governed by an arbitration clause in the same terms as the Settlement Agreement) is untenable.

26. Not only did the Personal Guarantee contain no arbitration clause, specific provision was made in the form of an exclusive jurisdiction clause for the resolution of disputes. Clause 13.2(a) provided as follows:

> "The Guarantor irrevocably agrees that the Hong Kong courts have exclusive jurisdiction and accordingly submits to the jurisdiction of the Hong Kong courts in relation to any matter arising in connection with this Deed (including regarding their existence)."

27. It is pertinent to note also clause 13.1 of the Personal Guarantee, which provided that the document "is governed by and shall be construed in accordance with the laws of Hong Kong".

28. If the PG Addendum is to be construed to mean that it should be governed by an arbitration clause in the same terms as the Settlement Agreement, this would be directly contrary to the basic premise of the PG Addendum, which is that the only change to be made in the Personal Guarantee is clause 1.1 thereof, and "all other terms and conditions of the

PG … shall remain unchanged". The governing law provision in the Personal Guarantee, which remains unchanged, reinforces the position that the Hong Kong courts remain the exclusive forum for the resolution of disputes arising from the Personal Guarantee as amended by the PG Addendum.

29. The conditions for correction of mistakes by construction are plainly satisfied in this instance. There is clearly a mistake on the face of the PG Addendum in referring to a non-existent arbitration clause in the Personal Guarantee. And it is clear that the correction that ought to be made to cure this mistake is by deleting the words "including the arbitration clause" in clause 4. The judge is plainly right in his construction of the objective intention of the parties reflected in the PG Addendum and in holding that the arbitration clause in the Settlement Agreement had not been incorporated into it.

30. As for unilateral mistake, it is insufficient for the Debtor to assert that he mistakenly believed that disputes arising under the PG Addendum should similarly be referred to arbitration in Singapore as in the Settlement Agreement and that the Petitioner must have known of this mistaken belief and shared this belief in that clause 4 was drafted by the Petitioner. Obviously, both parties had mistakenly thought there was an arbitration clause in the Personal Guarantee. The pertinent mistake was not merely the non-existence of an arbitration clause, but also the non-existence of any provision in the Personal Guarantee (such as an exclusive jurisdiction clause) that would be wholly inconsistent with an arbitration clause so that an arbitration provision from another contractual document may be incorporated. Such mistaken belief on the Debtor's part

is not made out on the facts. There is no question of any knowledge on the Petitioner's part of such mistaken belief.

31. There is no case of unilateral mistake on the available evidence.

32. On this basis, the discretion issue does not arise for consideration. This is sufficient for the appeal of the Debtor to be dismissed.

The discretion issue

33. This is the second occasion within two months that the appeal court was asked to consider the correctness of the approach in the *Lasmos* case, in which Harris J departed from previous authorities at first instance and held that save for exceptional cases, a creditor's petition to wind up a company should "generally be dismissed" where three requirements are met (at §31):

(1) if a company disputes the debt relied on by the petitioner;

(2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) and files an affirmation in accordance with rule 32 of the Companies (Winding-Up) Rules, Cap 32H, demonstrating this.

34. In *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873, the Court of Appeal did not find it necessary to decide whether the *Lasmos* approach should be adopted in an application to set aside a statutory demand, because even if the *Lasmos* approach was adopted, the third requirement (the necessity of which was not challenged by the debtor in that case) was not satisfied as the appeal court upheld the finding below that the debtor had not taken any steps to commence arbitration and had no genuine intention to commence arbitration[9]. However, in view of the importance of what should be the proper approach where the petitioning debt is covered by an arbitration clause, the Court of Appeal made a number of observations regarding the *Lasmos* case on an *obiter* basis.

35. Likewise, in the present appeal, we do not find it necessary to address the correctness of the *Lasmos* approach as the second requirement in that case (the existence of an arbitration provision) is not satisfied. We do not see the occasion to add to the *obiter* observations in *But Ka Chon* as the present situation is not an appropriate case to consider the proper exercise of discretion where the requirements in the *Lasmos* case are met.

36. Nevertheless, in view of the challenge mounted by Mr Dawes to the necessity of the third requirement, we should say something about this, to discourage debtors from making opportunistic attempts to invoke the *Lasmos* approach in future.

37. First, it should be apparent from *Lasmos* that for the court to exercise the discretion of dismissing or staying a creditor's petition, it is not necessary that arbitration has been commenced by the time the

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9 *But Ka Chon v Interactive Brokers LLC*, §§49, 55.

insolvency proceedings are heard. All that is required of the debtor is that he has taken the steps required under the arbitration clause to commence the process of arbitration, which may include preliminary stages such as mediation, and file an affirmation in accordance with rule 32 of the Companies (Winding-Up) Rules, Cap 32H[10], demonstrating this. This sensible requirement is to demonstrate to the court that the debtor has a genuine intention to arbitrate and could hardly be considered onerous. As stated in *But Ka Chon* at §53, "it would make no sense to dismiss or stay an insolvency petition on the mere existence of an arbitration agreement when the debtor has no genuine intention to arbitrate". See also *Re Golden Oasis Health Limited* [2019] HKCFI 2173 at §§40 to 43.

38. Second, that no mention was made of this requirement in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589, upon which the *Lasmos* approach was modelled, is beside the point. It could not have been suggested in *Salford* that the company had no genuine intention to arbitrate, as arbitration had been commenced and concluded and the debt upon which the winding-up petition was founded comprised the sum due under the arbitration award plus further sums which had not yet been referred to arbitration. Nor does *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] BCC 877 support Mr Dawes' contention that this requirement is unwarranted or otiose. The arbitration clause in *Eco Measure* provided that "after attempts by alternative dispute resolution procedure had been exhausted", any dispute arising out of the agreement might be referred to arbitration by either party. Evidence was filed by the company confirming that it wished to refer the dispute to

[10] In a personal insolvency situation, the debtor should depose to this in his supporting affirmation filed pursuant to rule 47(4) of the Bankruptcy Rules, Cap 6A if he applies to set aside the statutory demand, or mention this in his notice of intention to oppose the petition filed pursuant to rule 68 of the Bankruptcy Rules.

arbitration pursuant to that clause[11]. Apparently, the preliminary stages of the contractually mandated dispute resolution process had been set in train (as envisaged in *Lasmos*). Again, there was no question of any lack of genuine intention to go to arbitration.

39. Third, the fact that the debtor has no substantive claim against the creditor is immaterial. It is entirely possible for the debtor to refer the dispute to arbitration and seek a declaration of non-liability in respect of the debt alleged by the creditor. This is accepted by Mr Dawes.

40. Turning to the facts of the present case, we do not think the third requirement in *Lasmos* is satisfied. The Debtor asserted in the notice of intention to oppose the petition filed on 14 December 2018 that the court should exercise its discretion to dismiss and stay the petition. He was aware of the requirements in *Lasmos*, as this case was mentioned in the skeleton submissions he filed for the first hearing before the judge on 7 January 2019. No mention was made in the subsequent affirmation he filed of any steps taken to commence the process of arbitration. In the skeleton submissions filed for the substantive hearing of the petition on 4 April 2019, the Debtor challenged the need for the third requirement and contended that "all that should be required is that the arbitration clause remains operable and capable of being performed", and "if necessary, [the Debtor] can undertake to commence arbitration within a prescribed period since the arbitration clause is still operable"[12]. The Debtor had ample opportunity to take steps to commence the arbitration process. He did not suggest there was any obstacle in taking the necessary steps. The belated

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[11] *Eco Measure* §§5 and 6.

[12] Skeleton submissions of the Debtor dated 28 March 2019, §§14.3 and 14.5.

and conditional assertion in the skeleton submissions of his counsel can hardly be regarded as indicative of a genuine intention to arbitrate.

41. This is an additional reason why it is unnecessary to consider if the discretion to dismiss or stay the petition should be exercised in the same way as the *Lasmos* case.

Conclusion

42. The debt in the petition is not subject to any arbitration provision. There is no challenge to the holding that there is no *bona fide* dispute of the debt on substantial grounds. We have therefore dismissed the Debtor's appeal with costs.

(Susan Kwan) Vice President | (Peter Cheung) Justice of Appeal | (Carlye Chu) Justice of Appeal

Mr Look Chan Ho, instructed by Jingtian & Gongcheng LLP, for the Petitioner (Respondent)

Mr Victor Dawes SC and Mr Derek J Y Chan, instructed by Tanner De Witt, for the Debtor (Appellant)