



2. At the same time the judge dismissed the First Defendant's (Olga Pelletier's) application to set aside service of the writ on her out of the jurisdiction and the applications of the Second and Third Defendants to stay the proceedings as *forum non conveniens*.
3. Olga Pelletier, who was Richard Pelletier's wife at all material times, had sought to resist the TIB's application on the grounds of first, the absence of a serious issue to be tried legally and factually and second, on the grounds that there was no jurisdictional connection between the impugned transfers to her and the Cayman Islands. She was also permitted to advance this defence to the TIB's application and the appeal on behalf of the Fifth Defendant (the trustees of the Pelletier Star Trust) in respect of Richard Pelletier's transfers of shares in PDP Corporation and PDP Holdings.
4. Save as to the jurisdictional question of connection with the Islands, the appeal turns on the true construction of Section 107 of the Bankruptcy Act (1997 Revision). The appellants (the Defendants) contend that if their construction of the provision is correct then the TIB's claim is unsustainable and is, accordingly, at an end.
5. In relation to the application by Olga Pelletier to set aside service on her out of the jurisdiction the TIB needs to show that there is a *serious issue to be tried* in respect of the transfers made to her. This is the same test as would apply if resisting summary judgment (*Altimo Holdings and Investment Ltd v Kyrgyz Mobil* [2012] 1 WLR 1804 [84]-[86]).

#### *Background Facts*

6. Richard Pelletier founded Pacer Construction Holdings Corporation (Pacer) and a related group of industrial engineering companies, (the Pacer Group) in 1996, and built it into what he describes as one of Alberta's leading industrial construction companies.
7. On 26 June 2014 the shareholders of the Pacer Group, including Richard Pelletier Holdings Inc (RPHI), of which he was the 100% owner, agreed to sell to MasTec, Inc. (MasTec ) all of the issued share capital in the Pacer Group pursuant to a Share Purchase Agreement.
8. On that date MasTec paid ca. Can\$59m to RPHI, out of the total contract price of ca. Can\$135m.
9. The Agreement contained a provision for adjustment of the purchase price post-closure to reflect the difference between the sellers' estimated balance sheet for the Pacer Group as at 1 June 2014 and the actual balance sheet after 26 June 2014. Any price adjustment liability had to be met by the sellers of the Pacer Group (the Pacer Sellers), including Richard Pelletier himself.
10. There were, in addition, joint and several warranties and representations which included:
  - i. A non-additional funding representation, that none of the entities acquired would require additional capital or other funding; (section 2.1.1.)
  - ii. A solvency warranty under which the Pacer Sellers agreed, *inter alia*, that they, including Richard Pelletier, would be able to pay their debts and liabilities as they became due and

- make adequate provision for the satisfaction in full of any liabilities under the Share Purchase Agreement. (section 2.34)
- iii. An indemnity in relation to losses incurred as a result of any breach of or inaccuracy in any representation or warranty made in section 2 of the Agreement.
  - iv. It was agreed that Can \$9m out of the purchase price would be paid into an escrow fund to cover indemnities or purchase price adjustments, with any balance to be paid after 18 months.
11. On the day after the Share Purchase Agreement, 27 June 2014, Richard Pelletier caused RPHI to transfer to Olga Pelletier Can\$20m, without consideration, (the First Olga Transfer),
  12. On 17 October 2014 a trust deed was executed whereby the Pelletier Star Trust was established to own the Second Defendant, PDP Corporation, incorporated in the Cayman Islands, of which Richard Pelletier was the sole director. It was to own an apartment, No. 18 at the Watercolours, in Grand Cayman where the Pelletiers wished to live. The Pelletiers were beneficiaries under this trust.
  13. On 22 October 2014 Richard Pelletier transferred without consideration US\$4m to PDP Corp (the First Corp Transfer).
  14. On 23 October 2014 Richard Pelletier, who owned all of the 10 ordinary shares in the capital of PDP Corp, transferred them to the Third Defendant Butterfield, (the Second Corp Transfer).
  15. On 9 April 2015, Richard Pelletier transferred property he owned in Calgary, Canada to Olga in exchange for Can \$1.00 (the Second Olga Transfer)
  16. Between 1 and 15 September 2015, he transferred without consideration to the accounts of PDP Holdings, the Third Defendant, various sums (between US\$4.7m to Can\$1.2m) from his bank account to the PDP Holdings accounts at Butterfield (First Holdings Transfer).
  17. On 17 September 2015 RP transferred his 10 ordinary shares in PDP Holdings without consideration to Butterfield (Second Holdings Transfer).
  18. Thus, within two years of the execution of the Share Purchase Agreement and receipt of Can\$59 million, Richard Pelletier had disposed, substantially, of all his assets (see his statement of affairs 16 December 2019).
  19. By a Writ dated 8 January 2020, the TIB sought declarations that all these transfers were void under section 107 of the Bankruptcy Act. On that date a freezing injunction and leave to serve out were ordered. The Trustee then sought summary judgment against the Fifth Defendant, Forbes Hare Trust Company Limited, successor trust to the Pelletier Star Trust. The two transfers in respect of which summary judgment was ordered were those on the 23 October 2014 (10 shares in PDP Corp, the Second Corp Transfer) and of 17 September 2015 (10 shares in PDP Holdings, the Second Holdings Transfer).
  20. It will be necessary subsequently to consider the facts in relation to Olga Pelletier's connection with the Cayman Islands. By way of introduction, I should record that the Pelletiers say that they moved to the Cayman Islands from Canada, where they had been married, with their son

in the summer of 2015. They then moved to Switzerland in June 2017 where their son attended school and later moved to Canada in June 2019. Olga and Richard Pelletier separated in October 2019. They assert that since leaving the Islands they have spent little time there, and only on vacation and not as a permanent home: Richard Pelletier says he has only been here five times, totalling 61 days since June 2017 and Olga four times totalling 57 days since then.

21. The parties to the Share Purchase Agreement were unable to agree on the Purchase Price Adjustment and after MasTec asserted that the sellers were liable under the contractual indemnities, on 14 March 2016 the parties entered into an *ad hoc* arbitration agreement.
22. After a 15 day hearing in Calgary, on 13 March 2019 the Arbitral Tribunal made a principal award of Can\$60m. The sum consisted of a purchase price adjustment, loss of indemnity and costs, with a later award of interest.
23. Other sellers were severally liable and contributed according to a percentage equivalent to their shareholding. The total liability of Richard Pelletier and RPHI was ca. Can\$45m.
24. MasTec pursued bankruptcy proceedings against Richard Pelletier in the Cayman Islands. On 16 May 2019 the Grand Court made an *ex parte* Order recognising the Canadian Arbitration award. MasTec caused Pacer to petition for Richard Pelletier's bankruptcy on 30 September 2019 in the Cayman Islands and an Absolute Bankruptcy Order was made on 16 March 2020. An appeal is pending for hearing in April 2021.

#### **ISSUES**

25. Section 107(1) of the Bankruptcy Act provides:

*“107. (1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage, in right of his wife, shall, if a provisional order in bankruptcy, or an absolute order in bankruptcy in cases where no provisional order is made, takes effect against the settlor within two years after the date of the settlement, be void against the Trustee and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the Trustee unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee of such settlement on the execution thereof.” (My emphasis)*

By section 107(3) “settlement” includes gifts of transfers.

26. It was not disputed that the sums for which Richard Pelletier could be held liable under the Share Purchase Agreement were contingent liabilities. Kawaley J construed the words in the proviso *able to pay all his debts* as meaning that the Defendants had to prove that the bankrupt could, at the time of the impugned transfers, pay not only his actual debts but also meet his contingent or future liabilities. The primary issue in this appeal, therefore, turns on whether the

phrase *all his debts* in section 107(1) refers only to those debts presently due at the time of the impugned transfer or whether it includes contingent liabilities. The Defendants contend that summary judgment should be entered in their favour because, unless contingent liabilities are to be taken into account, the TIB cannot avoid the transfers made by Richard Pelletier.

27. The second issue arises if the TIB is correct in her interpretation of the section. Kawaley J relied upon the Arbitral Award as the basis for estimating the value of the contingent liability for the purposes of summary judgment. The appellants contend that this was impermissible since the award was not admissible evidence of the contingent liability at the time of the transfers, applying the principle in *Hollington v Hewthorn* [1943] KB 587. The judge ought to have made his estimate of the value of the liability without the benefit of hindsight afforded by the award. If the award is inadmissible there is no basis for making any reasonable estimate of contingent liability.
28. The third issue turns on the TIB's assessment of Richard Pelletier's solvency at the time of the transfers. The TIB produced tables of comparative figures purporting to show Richard Pelletier's inability to meet his contingent liabilities on her "best" and "worst" case. The judge, again basing himself on the arbitration award, concluded that the Defendants had no reasonable prospect of establishing that Richard Pelletier was solvent, taking into account his contingent liabilities, at the time he made the impugned transfers. The appellants repeat that the award was no basis for reaching that view. Alternatively, because the TIB was seeking summary judgment it was for her to displace the solvency defence and in light of the large amounts in dispute in the notional balance sheets at the time of the impugned transfers the judge ought not to have given summary judgment against the Fifth Defendant.

#### *Construction of Section 107(1) of the Bankruptcy Act*

29. There was no dispute but that the gifts or transfers made by Richard Pelletier were gifts or transfers within the meaning of section 107(1). Nor was there any dispute but that they were not *settlements* to be excluded under this provision. Richard Pelletier became bankrupt within ten years of each of the impugned gifts or transfers, if, as was agreed, the appeal pending in April 2021 is ignored.
30. The Defendant transferees have a defence if they can prove that at the time of the gift or transfer Richard Pelletier was *able to pay all his debts* without the aid of the property gifted or transferred. The essential question is whether the transferees must show that he could pay all those debts which were due at the time of the settlement or must also show he could meet all his contingent or future liabilities. The distinction deployed in argument was described as the difference between being *cash-flow* insolvent and *balance-sheet* insolvent, a distinction made by Lord Walker in *BNY Corporate Trustee services Ltd v Eurosail-UK plc* [2013] 1 WLR 1408 [1] (see below, hereafter *Eurosail*).
31. Kawaley J concluded that that the solvency test under the proviso to section 107 covers contingent claims [58] In his view it:

*“potentially applies as a matter of law to debts which are presently due and contingent debts and/or liabilities.”* [64]

32. The judge's conclusion rested on three bases. First, he relied on the language of section 108, which he took to provide a broader solvency test when claims to avoid settlements under section 107 were advanced against the estate of a deceased bankrupt [50]. Second, he relied on textbooks and, to a limited extent case-law, as tending to favour the TIB's construction [58] and [62] third, he took the view that the remedy of avoidance in section 107 was intended to benefit contingent creditors; if it did not achieve that purpose it would be ineffective [52],[53],[61], and [62]. I shall start with the language of the statute.

*All his debts*

33. The starting point must be the use of the word *debts*. Section 107(1) makes no reference to liabilities. *Liability* is defined, at least so far as the Act's side-heading would have it, in section 121 (strictly it is not a definition but that is of no matter in relation to its relevance to section 107(1)). The definition applies throughout the Act:

*"121. "Liability" shall, for the purposes of this Law, include any compensation for work or labour done, any obligation or possibility of an obligation to pass money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether such payments be-*

- (a) as respects amount, fixed or unliquidated, and payable in one sum or by instalments, or periodical payments;*
- (b) as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; or*
- (c) as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."*

34. There can be no doubt that the claims successfully made against Richard Pelletier in the arbitration fell within the definition in section 121 of *liability*. The award imposed on Richard Pelletier "*an obligation to pass money...on the breach of an express... covenant... contract or agreement, .... in the future, .... dependent on one or more contingencies* and the sum due was *capable of being ascertained by fixed rules or as a matter of opinion.*"

35. Section 108 was particularly relied on by Kawaley J. The section permits, in the administration of the estate of a deceased bankrupt, those creditors who qualify under this section to avoid settlements to which section 107 applies and to avoid fraudulent preferences to which the provisions of section 111 would have applied had the bankrupt not died. It provides:

*"Extension of power to avoid certain voluntary settlements, etc., as against the representatives of deceased settlers whose estates are insolvent*

*108. In the administration by the Court of the assets of any deceased person, it shall be lawful for the Court, on the petition of any creditor or creditors of such deceased person whose claim or claims together, against the estate would*

*have been sufficient to support a petition in bankruptcy against such person had he not died, and on proof that the assets of such person were, at the time of his death, insufficient to pay his debts and liabilities in full, to order that any settlement of property made by such deceased person within the meaning of section 107 and except as therein excepted, or any conveyance or transfer of property or charge thereon, or any payment, obligation or judicial proceeding, made, incurred, taken or suffered by such person, he being at the time of making, taking, paying or suffering the same, unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor preference over the other creditors, and which settlement, conveyance, transfer, charge, payment, obligation or judicial proceeding would have been void against the Trustee if a provisional order had taken effect against such deceased person at the moment of his death, shall be void as against the executor, administrator, receiver or other person charged with the administration of the assets of such deceased person:*

*Provided that such petition shall be presented within six months after the death of such deceased person...” (Judge’s emphasis)*

36. This provision extends the operation of section 107 to the insolvent estates of a deceased provided that a petition is presented within six months of the deceased’s death. The closing part of the section also extends to such estates the provisions of section 111(1), relating to fraudulent preferences.

37. Section 111(1) refers, like section 108, to *debts as they become due*. It reads:

*“Every conveyance or transfer of property, or charge thereon, and every payment, obligation and judicial proceeding, made, incurred, taken or suffered by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if a provisional order takes effect against the person making, taking, paying or suffering the same within six months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the Trustee.”*

Section 112, which concerns conveyances, assignments and transfers out of stock-in-trade refers to an inability to *pay his debts*.

38. None of the sections to which I have referred, sections 107(1), 111(1), or 112 use the word *liability* when making provision for the test of solvency or insolvency. Yet use of the word *liability* would have triggered the broad definition of *liability* in section 121. If the TIB is correct the Statute provides a broad and comprehensive definition of *liability* which sits alongside and is as co-extensive as the broad definition she ascribes to *debt* in section 107.

39. There are a number of references to *liabilities* throughout the Act, either conjunctively or disjunctively or on their own (see section 13(6) (TIB’s entitlement to commission), section 17(1) (statement of debtor’s debts and liabilities to accompany his petition) section 48(d) (particulars of debts and liabilities to be filed with deed of arrangement).

40. *Debts or liabilities* is used disjunctively in section 71 (order of discharge will not release bankrupt from debt or liability incurred fraudulently); section 119(1) (non-contractual unliquidated claims not provable) section 120 (TIB required to estimate value of contingent debt or liability) section 172 (q) (offence of obtaining credit in incurring debt or liability).

41. Kawaley J, however, took the view that by virtue of the reference to *debts and liabilities* in section 108, the test of insolvency in section 107 was different to that which is provided in sections 111(1) and 112. He explained his analysis [49]:

- (a) the first limb contains prefatory words of general application, by way of creating the procedural remedy:

*“In the administration by the Court of the assets of any deceased person, it shall be lawful for the Court, on the petition of any creditor or creditors of such deceased person whose claim or claims together, against the estate would have been sufficient to support a petition in bankruptcy against such person had he not died, and on proof that the assets of such person were, at the time of his death...”;*

- (b) the second limb extends section 107 to the estates of deceased persons:

*“insufficient to pay his debts and liabilities in full, to order that any settlement of property made by such deceased person within the meaning of section 107 and except as therein excepted...”;* and

(the judge then sets out that part of the section which incorporates section 111 and the final section which he correctly identifies as the operative part) and continues:

*“[50] In my judgment the second limb of section 108 is not a standing provision; rather it provides a broader solvency test than is applicable under the third limb of section 108 and sections 111-112, in the specific context of enabling claims under section 107 to be advanced against the estates of deceased persons, within a six months of death time-frame. The words “and liabilities” are added for clarity to distinguish the broader section 107 solvency test from the narrower test created for the purposes of the other limb of the same section. Generally, each section has a single solvency test. This ultimately straightforward reading of section 108 supports rather than undermines the notion that the solvency test under section 107 is not the same as the cash-flow test applicable to the other avoidance claims (section 108, third limb, section 111 and 112).”*

42. Kawaley J has, in my view, misconstrued the opening part of section 108. Contrary to the view he expresses in [50], the part he describes as the second limb of that section *is* a standing provision. It specifies what a creditor must prove if he is intervening in the administration of the bankrupt estate of a deceased person. Such a creditor must prove, in addition to the debt owed to him (see definition in section 2), that at the time of his death, the deceased’s assets were insufficient to meet the deceased’s debts or liabilities in full.

43. As the Defendants' counsel, Mr Lowe QC, explained, this requirement is imposed on the creditor to establish his standing to petition. It is explicable once it is appreciated, as the opening words of the section provide, that the creditor is intervening by petition in an existing administration of the estate of the deceased and in competition with other creditors.
44. The part of the section on which the judge relied is not the operative part of the section and has no relevance to section 107(1). Section 108 does refer to section 107 but only for the purpose of identifying which settlements are included in section 108, viz. *any settlement....within the meaning of section 107* and which are excluded. *Except as therein excepted* incorporates the defence for which section 107(1) itself provides. Thus, under section 108 a transferee may have a defence, just as he would under section 107, if he can prove that the deceased at the time of settlement was able to pay all his debts.
45. Accordingly, in my view section 108 does not support the judge's interpretation of section 107. The reference to debts and liabilities is of relevance only to the standing of a creditor who wishes to intervene in the existing administration of a deceased's bankrupt's estate.
46. It should go without saying, but was, in any event accepted by both sides, that the meaning of *debts* where it is used within the Act should be ascertained from its context. It is, as Mr McKie QC on behalf of the TIB submitted, used for different purposes and the fact that it bears one meaning in a particular section or part of the Act does not dictate its meaning in other provisions.
47. For example, the Act draws a distinction between the test to be satisfied by those seeking to present a petition, that is the test of standing, and the test which provides for those who seek to substantiate a claim against the bankrupt's estate, that is the test for *provable debts*.
48. Thus, section 2 identifies *creditors* as including those to whom *a debt is owing*. Section 14 identifies those who may present a petition by reference to the amount of *the debt or debts owing* to a single creditor or creditors. Other provisions limit the class of those who may petition so as to avoid abuse of the process of petitioning by imposing pressure to resolve disputed debts.
49. Such provisions may be contrasted with those provisions which refer to *provable debts*. They are designed to create a broad class of creditors who may benefit from the estate of the bankrupt by means of a wide definition of *provable debts*. Thus by section 119(2):

*“Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the provisional order or to which he may become subject by reason of any obligation incurred previously to the date of the order, shall be deemed to be debts provable under a bankruptcy petition under this Law.”*

### ***Historical context***

50. This contrast may be underlined by an examination of the history of the changes which took place in relation to insolvency on the introduction of the Bankruptcy Act 1869 (UK). The point of what Michelin used to call *un peu d'histoire*, is that when it was sought to enlarge the category of debts provable by creditors both for their benefit and for the benefit of the bankrupt,

this was achieved by specifically incorporating the word *liabilities* and a broad interpretation provision.

51. The statutory source of section 107(1) was section 91 of the Bankruptcy Act 1869 (UK), although it only applied to traders. This limitation was a throw-back to a time when, up to the nineteenth century, bankruptcy was limited to certain classes such as fraudulent traders. The scope of the bankruptcy laws gradually increased, occupation by occupation. Before 1830 bankruptcy was in the hands of creditors. The Bankruptcy Court (England) Act in 1831 created a system of administration through “official assignees” attached to the newly created Bankruptcy Court. Bankruptcy trustees took over when the assignees were abolished by the Act of 1869.
52. Cayman legislation is derived from the Jamaican Bankruptcy Law 1880, the source of which was Law 25 of 1871 which itself was derived from the 1869 Act (UK); the 80<sup>th</sup> Section of the 1880 Act was in the same terms as section 107(1) and was not limited to traders. Section 91 remained unchanged when reproduced in section 47 of the Bankruptcy Act 1883 (UK), save for the removal of the limitation to settlements made by traders and again reproduced in section 42(1) of the Bankruptcy Act 1914 (UK). The phrase *able to pay his debts*, was only changed when section 339 of the Insolvency Act replaced section 42 of the 1914 Act. Moreover, the interpretation provision in section 121 of the Cayman Act was of a similar longevity (section 31 of the 1869 Act, section 37 of the 1883 Act, section 30 of the 1914 Act).
53. The same provisions remained unchanged in the Revised Edition of the Bankruptcy Laws of Jamaica (1927) and Section 107(1) came via section 112 to the Islands (Bankruptcy Law (1953 Revision)). It was adopted when these Islands became independent from Jamaica (see Cayman Islands Statute Law Revision (Amendments) Act 1963 and *Grupo Torras v Al Sabah* [2003] CILR 413 [4]).
54. The changes which took place in the 19<sup>th</sup> Century to the definition of a *provable debt* shows that in order to create a wider definition the phrase *and liabilities* was added to the word debts. Section 31 of the 1869 Act expressly extended the meaning of the word liability to include contingent liabilities (*all debts and liabilities, present or future, certain or contingent*) as well as, in the same section, providing the definition of *liability* for application throughout the Act.
55. It was necessary to create a broad class of creditors or, as Mr Lowe QC put it, a wider congregation of creditors, by means of a wide definition of *provable debts* so as to afford a former bankrupt a better chance, for the future, of starting afresh without facing a fresh bankruptcy. This also helped to achieve equal justice to all creditors and potential creditors because a potential creditor would no longer need to bring a further petition.
56. The purpose of these *gradual steps taken by the legislature to extend the application of the bankruptcy law to future and contingent debts*, (per Lord Halsbury LC), culminating in the 1869 Act, was explained in *Hardy v Fothergill* (1888) 13 AC 351, 355 and in *Re Nortel* [2014] AC 209 at [93], (cited by Kawaley J at [31], in relation to the introduction of the equivalent of section 119 in rule 13.12 (2) by the Insolvency Act and its Rules, 1986).
57. In *Hardy*, Lord Halsbury said:

*“Prior to that Act (6. Geo.4. c. 16) contingent demands could not be proved under a commission taken out before the contingencies upon which they were made payable had taken effect.... My Lords, from that time until year 1869 I think the legislature has been engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof.” (at p.355)*

As Lord Fitzgerald put it:

*“The bankruptcy law, as it now exists, seems to depend on the great principle of equity – the doctrine of equality – that is to say equality amongst the creditors in the common shipwreck, injustice and humanity to the debtor if he gives up all his property– everything that he has – for equal distribution amongst his creditors, and has conform to and has not violated the provisions of the bankruptcy law.” (at p.363).*

58. It is of significance that where the legislature seeks to refer to contingent or future liabilities, it does so by expressly referring to liabilities and thus incorporates the broad definition in section 121.

59. Mr McKie QC, on behalf of the TIB, gave an example where no express reference to future or contingent liability is to be found. In *Flint v Barnard* (1888) 22 QBD 90 a broad construction of *debts due* was necessary to fulfil the purpose of provisions designed to identify those creditors who were to be bound by schemes of arrangements. Section 18(8) of the Bankruptcy Act 1883 (UK) provided:

*“A composition or scheme accepted and approved in pursuance of the section shall be binding on all the creditors, so far as relates to any debts due to them from the debtor and provable in bankruptcy.” (my emphasis).*

60. Fry LJ explained that a wide interpretation was necessary to fulfil that purpose:

*“Section 18 must be read and interpreted with reference to the other sections and the scheme of the Act. ... Therefore we have given to the expression “debt” a far larger meaning than its strict and primary one, so that it includes not merely present debts, but liabilities that may mature into debts.” (p.94) (see also Lord Esher MR, referring back to *Hardy* at p.92).*

61. The case is of assistance to the TIB in demonstrating a willingness to enlarge the strict meaning of debts to suit the purpose of the provision, but the court was concerned with debts which were *provable* and Fry LJ accepted that the strict meaning of *debt* did not include contingent liabilities.

62. Kawaley J placed reliance on the reference to *all* his debts. He said that it was significant that section 107(1) was the only section which used that expression and that *it must mean something* [48] and found its meaning by reference to section 108:

*“... Firstly, section 107 is the only section in the entire Law which uses the phrase “all of his debts” (emphasis added). On balance, it seems to me, despite the somewhat idiosyncratic drafting style found in Part XVII of the Law, that*

*this signifies a broader solvency test than that connoted by "his debts" simpliciter. It permits one to construe the solvency test in section 107 harmoniously with the solvency test in the second limb of section 108, which applies the section 107 avoidance remedy to claims against the estates of deceased persons utilizing the phrase "debts and liabilities".*" [57]

63. For the reasons I have given, section 108 does not assist in interpreting section 107 or in providing meaning to the expression *all his debts*. I think that *all* merely requires the court to consider the totality and does not assist in construing what is meant by *debts*.
64. Before any conclusion can be reached, however, on either the language of the section or its purpose it is necessary to consider case-law even though the light it casts on the issue may not be particularly bright.

#### *Case-Law*

65. Before embarking on an analysis of the cases to which the court was referred it is necessary to draw a distinction between the statutory provisions to which they relate. There are provisions for avoidance of settlements which do not require proof of an intent to defraud. Section 107(1) and its statutory antecedents in the United Kingdom and in Jamaica did not depend on proof of any bad faith or fraud.
66. On the other hand, avoidance of fraudulent transfers did require proof of an intention to defraud creditors even though that intention might be inferred from a transfer made at a time when the transferor was insolvent. Avoidance of a transfer in such circumstances was provided for in a far more venerable statute, the Fraudulent Conveyances Act 1571 (the Statute of Elizabeth). This became part of the law of the Cayman Islands no later than 1962 and remained the law of the Islands until it ceased to have effect pursuant to section 3 of the Fraudulent Dispositions Act, 1989.
67. Mr McKie QC submitted, on behalf of the TIB, that the case law as to the meaning and effect of section 91 of the 1869 Act (predecessor to section 107) developed in a manner consistent with the provisions of the Statute of Elizabeth. Mr Lowe QC, disagreed. He contended that, save that both were concerned with avoidance of transactions, since the Statute of Elizabeth required proof of an intent to defraud, it developed separately and the test for solvency developed differently.
68. A further distinction must be drawn in the cases between those relating to corporate and those relating to personal insolvency. Mr Lowe QC contended that cases dealing with corporate insolvency were instructive, while Mr McKie argued that the law had developed in a different direction and no assistance could be gained from such cases.
69. There can be no doubt but that the liabilities Richard Pelletier incurred under the share purchase agreement were contingent liabilities which Lord Reid in *Re Sutherland* [1963] AC 235 at 249 described as "*a liability which by reason of something done by the person bound, will necessarily arise or come into being if one or more of certain events occur or do not occur.*" His approach was more recently adopted by Lord Neuberger in *In re Nortel* [2014] AC 209. A company will have committed itself to a contingent liability if it has "*incurred an obligation from which a contingent liability may arise*" [81].

70. There is no shortage of authority for the proposition that a claim for damages is a contingent or prospective liability (see e.g. *Re T & N* [2006] 1 WLR 1728 in which David Richards J held that a company was subject to a contingent liability to pay damages to those who had been carelessly exposed to asbestos and might later suffer compensatable loss; they were creditors and, as such, subject to proposed schemes of arrangement or company voluntary arrangements [60D]).

71. *Ridler v Ridler* (1882) 22 LR Ch 74 demonstrates that liability under a guarantee is a contingent liability to be taken into account for the purpose of avoidance of a transfer under the Statute of Elizabeth. A father who had guaranteed his son's overdraft to the extent of £1000 had made a voluntary settlement, the very day his son became overdrawn by £1515. The Court of Appeal, in considering the application of the Statute of Elizabeth, accepted counsel's submission that an intention to defraud could be inferred:

*"if that was the necessary effect of the settlement. There need not be a debt actually due, the intention will be inferred if a man settles nearly all his property when he is embarking in a risky course of dealing (p.78).*

Cotton LJ agreed:

*"...under 13 Eliz. C. 5, where the question is whether a settlement was made with intent to defeat or delay creditor the man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them, ... (p.82).*

72. *Crossley v Elworthy* (1871) L.R. 12 Eq 158 underlines the focus in the application of the Statute of Elizabeth on an intention to defraud. In that case the plaintiff sought to avoid a settlement under that statute. At the time of the settlement, on the advice of his solicitors, the debtor prepared a statement showing a balance in his favour. Nine months after the making of the settlement, he was bankrupt and made a statement to his creditors showing his insolvency. The Vice-Chancellor said:

*"The general policy of the Act of 13 Eliz. C.5, is that those who are engaged in the transactions of life, buying or selling or otherwise indebted, are not, by means of voluntary settlement, to take the property out of the reach of their creditors." (p.164)*

73. The case is also worthy of note because at the time of the settlement the settlor was facing an action for damages for fraudulent misrepresentations as to the value of a company whose shares he was selling. Counsel for some of the infant beneficiaries of the settlement argued that that the unliquidated damages could not become a debt until judgment had been obtained. As it turned out, it was not necessary to rely on this claim to prove insolvency. But the Vice-Chancellor did not think that liability could be "*wholly disregarded*" (p.168). The transferor had executed the settlement before the action was brought but the verdict of the jury showed that he knew he had made false statements to the purchaser of the shares before he executed the settlement and that those statements made him liable:

*"for a debt which he did not calculate upon when he executed the settlement,*

*for he did not know till 1867 that the action would be brought. But the result of the action was to prove him to become indebted in 1865 when he made the false representations by which the liability was created. I do not say that the debt would have been sufficient of itself to invalidate the settlement, but it was a circumstance which, considering the way he was involved in transactions with this company, ought to have led him to pause.” (p.169).*

74. The focus of this case was on proving the intention to defraud the creditors at the time of making the settlement. The contingent liability was evidence of that intention even though it did not go to establishing that the settlor was, at the time of the settlement, insolvent.

75. *In re a Debtor Ex p. the Debtor v Allen* [1967] 1 Ch 590 affords an example of a future liability to pay damages not being relevant to whether a debtor had standing to present a petition under section 6 of the Bankruptcy Act 1914 (UK). The test was whether the debtor was *unable to pay his debts*. Goff J held that only debts presently payable were relevant. The debtor had admitted liability in a shooting accident and been ordered to pay damages of £2400 by instalments. He could pay those instalments, though he was unable to pay the lump sum straightway. In such circumstances he did not satisfy the statutory test of insolvency. Goff J, on appeal said:

*“We agree that the judgment created a present debt of £2,400 but payable in futuro saving only as to the weekly sum of 25s. from time to time actually accrued due and unpaid, and in our judgment, upon the true construction of section 6 of the Act of 1914, it is only debts presently payable which have to be considered for the purpose of determining inability to pay debts. Any other view would lead to absurdities. The man is not unable to pay his debts because at some future time he will have to pay a debt which he would be unable to meet if it was presently payable. And if authority were needed for that proposition it is to be found in the judgment of James L.J. in *in re European Life Assurance Society*, where a section similar to section 6 was considered.” (594 C-D).*

76. This case is of significance in Goff J’s use of a corporate insolvency case in one relating to personal insolvency, a “cross-over”, as Mr Lowe QC called it. I shall turn to *Re European Life Assurance Society* (1869) LR Eq 122 below.

77. In *Re Densham* [1975] 3 All ER 726 the same judge, Goff J, considered the question whether an employee’s indebtedness to his employers following his admitted theft was to be treated as debt or merely a liability to be sued for the purposes of determining personal solvency under the avoidance provision of section 42 of the Bankruptcy Act 1914 (UK). The bankrupt had been stealing from his employers to support his way of life. He bought a house for himself and his wife, whose half share was avoided because she could not establish that her husband was able to pay all his debts, on the basis that the money he had stolen was part of those debts; the proviso did not apply (736c-d). As for the money he had stolen Goff J said that “*he was already indebted, because of his stealing*” (736c) and added:

*“Prima facie, therefore, the proviso does not apply, but it was argued that the indebtedness to the employers was not a debt at all at that time but merely a liability to be sued for damages for fraudulent conversion. I cannot accept that argument. An action for money had and received would lie, and in my judgment the bankrupt was clearly indebted to his employers for the sum which he had stolen from them.” (736d).*

78. I do not read that case as supporting the proposition that contingency liabilities are relevant to the assessment of solvency, as Mr McKie QC submitted. Kawaley J took the view that this case supported "*the thesis that the solvency test under section 107 does potentially cover contingent claims*" at [58(a)]. But *In Re A Debtor, the Debtor v Allen (supra)* was cited to Goff J and he did not suggest that the principle expressed in the words he had himself used *only debts presently payable were to be considered* was inapplicable.
79. The case seems to me an example not so much of a contingent liability being taken into consideration, but of a somewhat broader view being taken of present indebtedness so as to include liabilities which were bound to fall due in the reasonably near future (the cash-flow test which was considered in *Eurosail* and *Weaving* (infra [85] and [92]) . There was no dispute as to the theft, the debtor had pleaded guilty and the liability was inevitable.
80. It is possible to use cases of corporate insolvency to illustrate how a broader view of indebtedness developed. After all, Goff J had himself deployed a case of corporate insolvency, *European Life Assurance*, in dealing with non-corporate bankruptcy.
81. The statutory test of corporate insolvency provided by the phrase *an inability to pay its debts* historically indicated a cash-flow test and did not include contingent or future liabilities. In *Re European Life Assurance Society* two petitioners sought to wind up the Society pursuant to section 80 of the Companies Act 1862 on the grounds that it was unable to pay its debts (p.126). Sir William James VC said:

*"I apprehend that Mr Glasse is right in his construction, that inability to pay debts must refer to debts absolutely due – that is to say, debts for which a creditor may go at once to the company's office and demand payment."*  
(p.127)

82. The striking feature is that section 91 of the Bankruptcy Act 1869 (UK), (the source of section 107) adopted a test which the courts at that time plainly understood to be a cash-flow test in the context of corporate insolvency. It is difficult to see why it should have been thought that the same words should bear a different meaning in relation to personal insolvency.
83. In *Eurosail*, Wigram VC's test was re-considered in relation to the test of an inability *to pay its debts as they fall due*. But it was not suggested that those last three words made any significant difference or that the court was concerned with anything other than a cash-flow test.
84. The TIB relied on this case to show that even on a cash-flow test of corporate solvency the expression *ability to pay its debts* contains within it some element that looks to the future. In that case loan notes contained specified events of default which included conditions contemplated by section 123 of the Insolvency Act 1986. Lord Walker (at [1]) drew a distinction between the test provided in section 123(1)(e) of the 1986 Act (the cash-flow test):

*"If it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due;"*

and section 123(2) describing what may loosely described as balance-sheet insolvency:

*“The company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.”*

85. Lord Walker described the words “as they fall due” as *“words which look to the future as well as to the present”* at [25]. Like the words of section 123(2), they appeared for the first time in the 1986 Act. But assurance had been given during the passage of the Bill that the words were not intended to amend previous legislation as interpreted by the courts at [26].
86. Lord Walker considered the previous legislation and authority. He said that the judgment of James V-C showed *very little reasoning* and that it is *“unfortunate that the judgment has come to be regarded as a leading case”* at [28]. The changes in company legislation in 1907 and 1908 introduced contingent liabilities and, thus focussed attention on balance-sheet considerations at [29]. Lord Walker’s review led him to the conclusion that from 1908 *“neither the notion of paying debts “as they fall due”, nor the notion of balance-sheet insolvency was unfamiliar before the Insolvency Act 1985”* at [32].
87. For the purposes of the instant appeal, Lord Walker’s explanation of the cash-flow test is of importance in two respects: first that the addition of the words *as they fall due* made little difference to the meaning and effect of the cash-flow test and second, that that test looks only to the reasonably near future and does not look to contingent or future liabilities:

*“Despite the difference of form, the provisions of section 123 (1) and (2) should in my view be seen, as the government spokesman in the House of Lords indicated, as making little significant change in the law. The changes in form served, in my view, to underline that the “cash flow test” is concerned, not simply with the petitioner’s presently-due debt nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company’s business.... The express reference to assets and liabilities (in section 123(2)) is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which, depends, again, on all the circumstances) any attempt to apply a cash flow- test will become completely speculative, and the comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, and the burden of proof must be on the party which asserts balance-sheet insolvency.”* [37]

88. The contrast between cash-flow and balance-sheet solvency is also underlined in Lord Walker’s citation with approval of Toulson LJ in the Court of Appeal:

*“Essentially, section 123 (2) requires the court to make a judgement whether it has been established that, looking at the company’s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due, the more distant the liabilities, the harder this will be to establish.”* [42]

89. In these Islands, the Court of Appeal followed *European Life* in 2008 but more recently, in 2016, has adopted the approach of Lord Walker. In *In the Matter of Strategic Turnaround Master Partnership Limited* [2008] CILR 447, the Court of Appeal decided that a future creditor did not have standing to present a petition on the grounds that a company was *unable to pay its debts* for the purposes of section 94 of the Companies Act (2007 Revision). Vos JA pointed out that that provision differed significantly from the balance sheet test in section 123(2) of the Insolvency Act 1986 see [39]. He applied James V-C's dicta in *European Life*. I should pause to observe that, as Mr Lowe QC pointed out, Vos JA quoted the wrong part of the Head-Note to that case at [40]. The part quoted related to a different point in *European Life* concerning petitions on the just and equitable ground. The correct part of the Head-Note to that case reads:

*"Inability of a company to pay its debts under section 80 of the Companies Act 1862, is an inability to pay debts actually due, for which a creditor could claim immediate payment."*

90. *In the Matter of Weaving Macro Fixed Income Ltd* [2016] (2) CILR 514 concerned preferential payments made contrary to section 145(1) of the Companies Act (2013 Revision). This provides:

*"Every conveyance or transfer property..... made, incurred, taken, or suffered by any company in favour of any credit at the time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor preference over the other creditors shall be invalid if made, incurred taken or suffered within six months immediately preceding the commencement of the liquidation."*

91. In that case liquidators sought to avoid a number of redemption payments, which were made within six months of the commencement of the company's liquidation. The company argued that the judge, in assessing its cash-flow insolvency, had failed to take into account that there was a period of grace of 30 days available to the company for payment of redemptions [18]. This court held that the judge had been right to ignore that period and that the amounts were due without regard to that period of grace.

92. But Martin JA did consider the extent to which future debts could be taken into account in applying the cash-flow test to the question of the company's solvency:

*"In my view, the cash flow test in the Cayman Islands is not confined to consideration of debts that are immediately due and payable. It permits consideration also of debts that will become due in the reasonably near future. The approval of In re European Life Assurance Society by this court in Strategic Turnaround (15) does not prevent that conclusion: that case was primarily concerned with winding up on the just and equitable basis, not on the basis of inability to pay debts and the headnote quoted by this court refers to debts resulting from future business, not to future debts resulting from existing business. Nor does para. 42 of this court's judgment in Strategic Turnaround (quoted in para. 34 above) suggest otherwise. If, as this court erroneously thought, the suspension of redemptions was valid, the petitioner's debt would not be payable for an indeterminate period and if the period could not be determined it was impossible to say that the debt would fall due in the*

*reasonably near future. I do not regard the words “as they fall due” as adding anything of substance. In Eurosail (1), Lord Walker, after noting that the words “as they fall due” were introduced for the first time in the Insolvency Act 1985, said ([2013] 1 W.L.R. 1408, at para. 37) that despite the difference in form they made little significant change in the law and served to underline that the cash flow test was concerned both with presently due debts and with debts falling due in the reasonably near future. Any other conclusion leads to artificiality: if a company is able to pay a small debt due on a particular day, but will inevitably be unable to pay a much larger debt due on the following day, it is artificial to say that on the first day it is not unable to pay its debts.”* [40]

93. Contrary to the view I have expressed, the TIB argued, and the judge appears to have agreed, that little assistance can be derived from this case since it related to corporate insolvency [30] [47].
94. But if it is necessary, as the TIB submits, to confine attention to those authorities relating to personal bankruptcy then one of the few cases said by the Defendants to bear directly on section 107 is *Ex parte Mercer. In re Wise* (1886) LR 17 QB 290. The case concerned the Statute of Elizabeth, although section 47 of the Bankruptcy Act 1883 (UK), a predecessor of section 107, was also briefly considered. The issue was whether the settlement was made with intent to defeat or delay creditors. By the time, in 1881, a master mariner had made a voluntary settlement on trust for himself and his newly married wife, his former fiancée had brought an action for breach of promise. Nearly a year later, in 1882, she won damages of £500 (now about £50,000). Over three years after the voluntary settlement the mariner was made bankrupt.
95. Cave J held that a liability which might or might not result in a debt was not a debt (p.294 and see Grantham J, who referred specifically to section 47 (predecessor to section 107) at p.296, in a passage cited at length by Kawaley J at [39]). In the Court of Appeal counsel argued that the mariner’s solvency should be determined taking into account his contingent liability for breach of promise.
96. As Mr McKie QC stressed, the Court of Appeal’s judgments appear to have turned on the speculative nature of the action the bankrupt had faced both as to liability and quantum. So speculative was it that no intention to defraud could be inferred. After commenting that no-one could foretell the result of the verdict (p.299) Lord Esher MR said:

*“It was entirely a matter of speculation what the amount of the verdict would be. Therefore he was not insolvent; it was not the necessary consequence of what he did to defeat or delay the plaintiff in the action, for, if the verdict of had been for a small amount, she would not necessarily have been delayed for a week....*

*In order to make this deed void under the Statute of Elizabeth (however far that statute may be stretched), we are bound in the present case to find that there was an actual intent in the bankrupt’s mind to defeat or delaying his creditors, and there is no evidence of such an intent.”* (p.300)

97. Lindley LJ said that it was clear that section 47 did not apply (p.362). Lopes LJ pointed out that the action might have failed for various reasons (p.362).

98. Since the case was primarily about establishing an intent to defraud creditors for the purposes of the Statute of Elizabeth it is not as powerful a case for the Defendants as they might wish. But it does provide some support and it is not authority contrary to their case.

99. The judge, however, took the view that if any assistance could be drawn from the case it was in favour of the TIB, demonstrating that contingent liabilities could potentially be taken into account:

*“So Mercer does provide explicit support for the proposition that the mere existence of a contingent liability without more (in particular an intention to defeat creditors’ claims), even where a writ has been issued at the time of the settlement, does not mean the liability must be taken into account for deciding the debtor’s solvency. However, as Mr McKie QC pointed out in reply, Mercer confirms that a contingent liability does potentially qualify to be taken into account. However, it appears to be more a fact-based decision than a case which decides a point of statutory construction.” [40].*

100. Later in his judgment he returned to this case to demonstrate the impracticability of anything other than a balance-sheet test, where solvency has to be assessed over a lengthy period:

*“It is particularly instructive that in Ex Parte Mercer; Re Wise (1886) 17 QBD, the evidence relied upon (primarily to defeat the Statute of Elizabeth claim) was described in the Divisional Court by Cave J as follows:*

*“There is another point which was not dealt with by the county court judge, though it was taken before him, viz., that, if the settlement is not void under the statute of Elizabeth, it is void under s.47 of the Bankruptcy Act. I think, however, that the parties claiming under the settlement have proved that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in it. The bankrupt himself in terms swears that he had no debts then, and this is confirmed by the statement of his debts and liabilities which he has made in the bankruptcy.” [Emphasis added] [62]*

*“Although the finding clearly was that the specific contingent liability in person should not be taken into account, a matter which will be revisited further below, the evidence relied upon included not just the debtor’s own word but a statement of “debts and liabilities” as well. This illustrates, in a very general way, that giving section 107 a purposive construction, it is impossible to sensibly conclude that the solvency test provided for is anything other than a balance sheet test.” [63]*

101. The statement which the mariner made in bankruptcy more than three years after the voluntary settlement did set out his debts and liabilities and that, as Cave J said, confirmed that he had had no debts some three years earlier. But that does not seem to me to assist as to whether the statement of solvency at the time of the settlement took into account contingent liabilities or not. It plainly did not take into account the claim for breach of promise.

102. Grantham J (cited at [39] of Kawaley J’s judgment) referred to *Crossley v Elworthy* in order to draw a contrast between the dubious speculations and false representations of Elworthy with the breach of promise in *Wise* but that too was a case concerning the Statute of Elizabeth.

103. Similar to the statement made by the master mariner, Wise, was the baker's statement of affairs in *Re Butterworth ex parte Russell* (1882) 19 Ch. D. 588. McKie QC relied on this case, as showing that a balance-sheet test had been applied in considering whether the baker was able to pay all his debts for the purposes of section 91 of the Bankruptcy Act 1869 (UK). It was also contended that the settlement he had made could be avoided under the Statute of Elizabeth.
104. The baker had, on the advice of his solicitor, drawn up a statement of his assets which showed that they exceeded his debts. The County Court Judge and the Chief Justice accepted that statement and accordingly held that section 91 did not apply (p.594).
105. Jessel M.R examined the statement of assets and rejected the view that his assets were sufficient:

*"A man is not able to pay his debts because he has some odds and ends which can possibly be sold, and on which he puts a fancy value"* (p.597).

Moreover his debts had been undervalued. In reaching his conclusion as to section 91, the Master of the Rolls said:

*"It is suggested, however, that the goodwill of the bakers business was worth something. I daresay it was; but can that be called an available asset when a man is carrying on his trade? Is he able to pay all his debts because he might possibly, after the lapse of a considerable time, sell the goodwill of his business? The debts were presently payable. How can a man be said to be able to pay his debts because he has a business the goodwill of which he may be able to sell? It is quite plain that that is not an asset which ought to be reckoned within the purview of his the section. Therefore it appears to me clear that the settlement is void under the 91<sup>st</sup> section."* (p.598).

Baggallay LJ had more to say about the making of a contemporary record to show that at the time of the settlement the settlor was able to pay all his debts:

*"By that section [section 91] a heavy burden is cast upon persons making settlements of this kind. Under any circumstances it would be a difficult thing, even after the lapse of only three or four years, for the persons beneficially interested in a settlement to shew that the settlor was at the date of its execution able to pay his debts without having recourse to the settled property, and the difficulty, of course, becomes greater as the time grows longer. The section extends to a period of 10 years, and consequently every prudent solicitor who is applied to by a client to prepare a voluntary settlement under such circumstances, would endeavour, as far as he could, to retain some record or other materials which would show at any future time, if the settlement was impeached, that the settlor was able at the time when he made it to meet all his debts without the aid of the settled property. In the case with which we are dealing the solicitor appears to have taken the course. It was of course a prudent step to take, and it was one which might have been of very great use if the settlement had remained longer unimpeached."* (p.599-600)

Baggallay LJ went on to explain how the memorandum, as he called it, was inaccurate both as to the estimated amount of the assets and the extent of the debts. (p.600).

Lindley LJ referred to debts and liabilities:

*“I also think the settlement falls within the 91<sup>st</sup> section of the Bankruptcy Act. When we look at the words of that section, and have to consider whether a man is able to pay his debts, we must not merely look at the amount of his assets and liabilities, but we must consider the position which he is assuming. If, for example, this baker had been retiring from trade, of course we must have taken into account all his pots and shovels, the goodwill of his business and everything else; all those things would be the means of paying his debts. But if he is going on with his baker’s business, it appears to me idle that we should take such things into account as assets. He must be able to pay his debts in the way in which he proposes to pay them, that is by continuing his business. That is the fair way of looking at it, and I am satisfied that he could not pay his debts and also carry on his business with the property left unsettled.”*(pp 601-602).

106. Mr McKie QC strongly relies on this case as demonstrating that a balance-sheet test was used to determine whether the baker was able to pay all his debts at the time he made the voluntary settlement. Otherwise there was no need even to consider his unrealised assets. It seems to me that the Court of Appeal was bound to consider the memorandum or statement of affairs proffered in order to show the settlor’s ability to pay all his debts. But there does not seem to me anything in the case to support the inclusion of contingent liabilities in the calculation of the debts.

107. Baggallay LJ emphasised the importance of keeping a record of solvency at the time the settlement is made; this would be equally prudent whether it was sought to demonstrate a cash-flow or a balance-sheet solvency. I shall return later to the way in which Kawaley J deployed this case, at [61] and [62], to support the view that the proviso to section 107 can only, as a matter of good sense and practicality be read as imposing a balance-sheet test.

108. The strongest support for the TIB’s construction comes from the textbooks. Halsbury’s Laws (3<sup>rd</sup> ed. Para.1087) asserts in relation to section 42 of the Bankruptcy Act 1914 (UK):

*“In inquiring into the settlor’s ability to pay all his debts at the date of the settlement without resorting to the settled property, it is necessary to take into account all his liabilities, whether present or contingent, and place a reasonable estimate upon them...*

*In considering the question of a settlor’s solvency a contingent liability under a guarantee may have to be taken into account, and also a contingent debt such as a covenant by a husband to pay a sum of money to his wife if she survives him.”*

109. The authority cited for the guarantee example is *Re Ridler* (*supra*) which, as I have noted was concerned with the Statute of Elizabeth and an inference of an intention to defraud. The footnote to the second example accepts that the authority relied upon related to that statute. Accordingly, I do not accept that that passage is of assistance in construing section 107(1).

110. *In Williams and Muir Hunter’s Law and Practice in Bankruptcy, 19<sup>th</sup> edition* page 340 under the heading “*Solvency of settlor: how calculated*”, the editors write:

*“Some guidance on the manner in which doubtful assets and contingent liabilities are to be valued for this purpose, will be found in re-Ridler and in re-Densham.”*

111. *Re Densham*, as I have observed, is by no means a clear example of a contingent liability. The footnote also refers to *Official Receiver v Saebbar* [1972] ALR 612 (Qld). But as the judge recognised that decision in the Supreme Court of Queensland concerned a statute which contained a definition of *debt*, which included *liability* (Kawaley J at [58(d)]). But the review by Hoare J of the UK authorities including *Crossley v Elworthy*, *Re Ridler*, *Re a Debtor* (1967) *European Life Assurance* and *ex parte Mercer* are all supportive of the case advanced by the TIB (see also below).
112. New Zealand, however, provides a case which directly supports the TIB’s submissions. In *In Re John McLeod* (1884) 3 NZLR (SC) 223 Williams J held that although the transferor’s balance sheet showed that his firm’s assets exceeded liabilities, a liability to the bank, payable on demand, had to be taken into account. (p.228). Williams J appears to have been applying a balance-sheet test to determine solvency under section 76 of the Bankruptcy Act 1883 (NZ), (in the same terms as section 107(1)).

### ***The Purpose of Section 107***

113. Kawaley J’s conclusion at [58] that the solvency test under the proviso to Section 107(1) includes contingent claims owed much to what he considered to be the purpose of the provision. As he puts it:

*“Where a statutory provision creates a legal remedy, a fundamental part of construing the provision involves seeking to identify what meaning is most likely to allow the remedy created by the Legislature to be available to its intended beneficiaries. [52]*

114. He took the view at [53] that if cash-flow solvency at the time of transfer was the test under section 107 then it would not provide *effective relief*. He explained:

*“In my judgment the most broad principled ground on which I would accept the construction contended for by the Agents is that the contrary construction would mean that section 107 would not confer effective relief in a wide array of circumstances and would almost be rendered nugatory. Standing to petition must be grounded on the petitioning creditor having a debt which is “a liquidated sum due or growing due” (section 14, proviso of the Law). A bankruptcy proceeding, like a corporate insolvency, will only commence when the debtor is cash-flow insolvent. The Law implicitly applies a policy assumption that such insolvency did not begin when the bankruptcy proceeding commenced, because it enables certain transactions entered into for value within the preceding six months to be set aside if shown to be, inter alia, preferential to creditors on terms prescribed in sections 111-112. Section 107, by way of contrast, enables the Trustee to look back beyond what amounts to a six month presumed cash-flow insolvency period to a time when the debtor might well have been able to pay his day to day debts as they fall due and targets voluntary transfers of property which may have been made to avoid non-current debts. The look-back periods are:*

- (a) a 2 year period, during which any voluntary transfers made are automatically void as against the Trustee; and
- (b) a 10 year period during which any voluntary transfers made by the debtor are void as against the Trustee, unless the transferees can prove that the debtor was at the material time “able to pay all his debts”.

[54] Once a bankruptcy commences, the legislative scheme retrospectively creates the following notional avoidance zones:

- (a) **a high level hazard zone:** 6 months preceding the bankruptcy, even transactions for value are liable to be set aside if they are preferential or outside of the ordinary course of business;
- (b) **a medium-high level hazard zone:** 2 years preceding the bankruptcy, voluntary settlements are liable to be automatically set aside;
- (c) **a moderate level hazard zone:** 10 years preceding the bankruptcy, voluntary settlements are liable to be set aside, unless the transferees can prove the debtor was “able to pay all his debts” when the impugned transfer was made.

[55] As noted above, section 107 is quite an aggressive pro-creditor provision. Yet if the First to Third Defendants’ construction is correct, the extended 10 year period is only intended to be available in circumstances where the debtor was, many years before the bankruptcy commenced, unable to pay his debts as they fall due. Yet the utility of the provision is only likely to inure to the benefit of a creditor who did not have a presently due claim (or a commercially significant presently due claim) at the time when the impugned transfer was made. A creditor with a commercially significant presently due claim would ordinarily obtain a judgment promptly and, if it was unsatisfied and the debtor had no available assets, promptly petition for bankruptcy. It would be absurd if section 107 in its extended 10 year scope could not apply at all to a debtor who was able to meet minor bills could dispose of all his assets and ignore substantial contingent claims. On this basis, the 10 year look-back period in section 107 would be unavailable when it was most needed (i.e. by large creditors whose claims were contingent when the voluntary settlements were made) and available when it was not needed at all (i.e. by small creditors whose debts would likely have been paid or would lack the resources to pursue an avoidance claim in any event).

[56] Accordingly I firmly reject the following submissions in the First to Third Defendants’ Skeleton Argument on the grounds that the construction contended for would in real world terms nullify the efficacy of section 107a almost altogether.

"59...the TIB’s construction requires the court to embark on an

*entirely artificial exercise, potentially upsetting receipts that have taken place many years previously without any bankruptcy occurring...""*

115. Mr Lowe QC argued that that proposition assumes the very thing which must be established. It assumes that section 107 is designed to provide a remedy for the benefit of contingent creditors.
116. I am not persuaded that this is an adequate answer to Kawaley J's identification of the purpose of section 107. In light of the long ten year period during which transfers remain liable to avoidance, it would be curious if one who was contingently liable could make a transfer, secure in the knowledge that if he was able to pay debts due at the time of the transfer, he could transfer large sums which would have been available to meet his contingent liability in the future.
117. That is, so Mr McKie QC argued before the judge, the significance of *Saebur* which, although dealing with an Australian statute which included liabilities within the definition of debts, provides the rationale for including contingent liabilities. In that case a murderer shot and killed his neighbour's wife and the next day transferred his interest in land to his own wife (there was a dispute as to whether it was for value which is irrelevant to this appeal); he was sued by the surviving husband. Inevitably, argued Mr McKie QC, it would take a long time for damages to be quantified and it would be absurd if a transfer during that period were to be immune from avoidance.
118. After analysing *Ex parte Mercer* (supra) Hoare J said:
- "I do not think there is anything in that case (Mercer) to indicate that the subjective belief of the settlor has any real relevance in determining whether a prospective liability should be taken into account when determining the solvency of the settlor. It would seem that the correct approach is to consider the whole of the circumstances and if the liability can be regarded as purely speculative and without any real likelihood of liability being established then the liability can be ignored (re Mercer, supra). However, if there is a real likelihood of the prospective liability becoming in due course an actual one, then that liability must be taken into account."* [45]
119. This chimes with Kawaley J's views that it would be absurd if section 107 permitted, given the length of the period it covers, a transferor to ignore substantial contingent claims ([55], cited above).
120. It seems to me that the problem is, at least in part alleviated by the fact that if the transferor had deliberately ignored a contingent liability, the transaction would have been liable to be avoided as a fraudulent transaction under the Statute of Elizabeth or under section 111(1) (fraudulent preferences).
121. After all, the Statement of Claim in the instant case alleges that all of the transfers were made in bad faith. There was a dispute as to whether the TIB could bring proceedings under the Fraudulent Dispositions Act 1996, which refers to proceedings being brought at the instance of a creditor. There is no need to resolve that issue; section 107 must be construed in the context of section 111 and the co-existence of the Statute of Elizabeth.

122. Moreover, at least part of the problem to which Kawaley J refers is alleviated by adopting the approach to cash-flow insolvency in *Eurosail*, and followed by this court in *Weaving*. Although the words *as they fall due* do not appear in the proviso to section 107, in my view Lord Walker’s construction should be applied and accordingly, a transferor cannot ignore liabilities falling due in the reasonably near future.
123. I appreciate that this does not satisfactorily answer the judge’s concern that a cash-flow test of solvency will not be of any avail to a contingent creditor to whom no debt is owed in the reasonably near future following the transfer. I agree with the judge that it is that category of creditor who is most likely to benefit from the lengthy period during which the transfer is vulnerable to avoidance.
124. But it must be born in mind that from the point of view of the settlor and the transferee a period of between two to ten years is a very long period during which there is no security that the settlement will be safe. As Mr Lowe QC pointed out, there is no requirement of bad faith; the settlor may have done his honest best, the transferee may be a wholly innocent infant beneficiary as in *Crossley v Elworthy*. The defence available for the period of ten to two years prior to bankruptcy affords some protection. If the transferee cannot show that the transferor was able to meet debts due in the reasonably near future looking forward from the date of the settlement, then the transaction will be avoided despite absence of bad faith.
125. Kawaley J also relied upon what he described as the *very peculiar idea* of a transferee proving cash flow-solvency, many years before, at the time of the transfer. In his view, the transferee would, inevitably, have to re-construct a balance-sheet, like the statement of debts and liabilities in *Ex parte Mercer*.
126. After referring to the assumption that contingent liabilities must be taken into account for the purposes of section 42 of the Bankruptcy Act 1914 (UK) (our section 107) in *Williams and Muir Hunter’s Law and Practice in Bankruptcy, 19<sup>th</sup> edition* he said:

*“This would be consistent with the common sense assumption that a trustee in bankruptcy, seeking to invalidate voluntary settlements made between 2 and 10 years before the commencement of a bankruptcy, would almost invariably be seeking to establish insolvency based on what were at the date of the settlement merely contingent or prospective claims.[61]*

*The idea of the transferees being required to prove that the transferor was able to pay his debts as they fell due many years ago is, to my mind, a very peculiar idea indeed. For forensic reasons, if nothing else, section 107 only becomes effective from the standpoint of those seeking to validate voluntary settlements made years ago if there is a practical way of demonstrating that the settlor was able to pay “all his debts”. Proof of inability to pay debts is a well-recognised process which requires little more than establishing that the debtor has failed to pay one or more undisputed presently due debts. There is, to my knowledge, no statutory precedent for proving the converse: that a person was able pay his debts as they fall due. Establishing balance sheet solvency through statements of assets and liabilities is an entirely straightforward and commercially and legally familiar exercise.” [62]*

127. Kawaley J continued by referring to Cave J's reference to the mariner's statement of debts and liabilities, and concluded at [63], that it was impossible sensibly to conclude that the solvency test in section 107 is other than a balance-sheet test (see para.101 above).
128. The judge's concern as to the impracticability of the cash-flow test when seeking to assess solvency over a lengthy period echoes Lord Walker's speech in *Eurosail*, which I have already recalled:
- “The express reference to assets and liabilities (in section 123(2)) is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which, depends, again, on all the circumstances) any attempt to apply a cash flow-test will become completely speculative, and the comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, and the burden of proof must be on the party which asserts balance-sheet insolvency.”* [37]
129. Lord Walker's views, however, as to the speculative nature of a cash-flow test when looking to the future is predicated on the terms of section 123(2) of the Insolvency Act 1986 which necessitates, with its direct reference to assets and liabilities, a look into the future. But that raises a crucial question as to the construction of the proviso to section 107. Kawaley J takes the view that, to make section 107 effective, a transferor is required to look to the future when making a transfer over the period of ten years during which his transfer remains vulnerable to avoidance. On that assumption it becomes clear that only a balance-sheet test is possible. If, on the other hand, the transferor is only required to ensure that, at the date of transfer, he is able to meet debts presently-due or liabilities falling due in the reasonably near future, then the judge's objections on grounds of practicality seem to me to fall away. In short the impracticality of a cash-flow test depends on the view taken as to the test for solvency in section 107, it does not assist as to how that test is to be construed.

### ***Conclusion on Construction***

130. I do not find any clear or obvious answer as to whether the fact that settlements and transfers are vulnerable over a period of ten years dictates the conclusion that that, at the time of the transfer, the transferor's assets must exceed his liabilities including those which are contingent. On the TIB's construction, as Hoare J points out in *Saebar*, the test is objective and the settlement is vulnerable whether or not the settlor himself was aware of the contingent liability or could foresee that he might become bankrupt at the end of a period of ten years following the settlement. There will obviously be cases where the rickety nature of his business or lifestyle would so indicate and worse cases where the transfer is made with that foresight, because like the dubious defendant in *Crossley v Elworthy* (*supra*), he ought to have known he would be called to account for his misrepresentations (the TIB seeks to put Mr Pelletier in that category). But that type of case would be powerful evidence of fraud, as it was in *Crossley v Elworthy*.
131. Of course, it almost goes without saying that a construction of section 107 must be adopted, if it can, which avoids the conclusion that the section has misfired. This, in the end, appears to have driven the judge to his conclusion: it misfires, on the Defendants' construction, because

although contingent creditors are those who are most likely to benefit from the lengthy period during which transfers remain vulnerable to avoidance, a transfer may be made which ignores their interests. I acknowledge the force of the judge's reasoning although I must qualify this support by reference to the considerations I have identified above, the lengthy period of uncertainty after a settlement made in good faith and the context of other statutory provisions providing for avoidance in cases of fraud.

132. In the end I am left with the language the section itself uses to provide for the test of solvency. It makes no reference to liabilities.
133. The statute itself uses the words debts and liabilities. The test in the proviso to section 107 refers only to debts and not to liabilities. This test is laid down in the context of a statutory definition in section 121 of liabilities which, beyond argument, covers the liabilities in the instant appeal. The proviso has deliberately eschewed the use of a phrase, *debts and liabilities* which would have removed all doubt as to what the transferee would have to establish to prove solvency.
134. The definition in section 121 of the Act was not novel. It is to be found in section 31 of the Bankruptcy Act 1869 (UK) and its successors (section 37(8) Bankruptcy Act 1883 (UK), section 30(8) Bankruptcy Act 1914 (UK).) If it was sought to enlarge the scope of *debt* for the purposes of the proviso to section 107, then there was a lexicon readily to hand in section 121, just as the scope of provable debts was enlarged in 1869 for the purposes explained in *Hardy v Fothergill*.
135. If the test of solvency was intended to refer to a capacity to pay debts presently due and contingent liabilities there was no difficulty in saying so.
136. For that reason, apart from liabilities which were bound to fall due in the reasonably near future as explained at [121] and [128] above, I conclude that the contingent liabilities to which Richard Pelletier was undoubtedly subject were not to be taken into account in determining his solvency at the time of the impugned transfers.
137. This conclusion means that I do not need to consider whether the liabilities under the Share Purchase Agreement were capable of reasonable estimation or whether the TIB was bound to succeed on her argument that Richard Pelletier was insolvent at the time of the transfers. I should mention that the Defendants contend that the judge was wrong to deploy the award in the arbitration as a basis for his findings on both those issues. They contend that the rule in *Hollington v Hewthorn* prohibits reliance on the award. I mention this because Mr McKie QC wishes to reserve the TIB's position on this issue so that he leaves open the possibility of arguing that that rule does not apply.
138. After the end of the (remote) hearing a dispute arose prompted by my query as to what the result should be, if the court accepts the Defendants' construction of section 107. At the hearing, it appeared that Mr McKie QC might have been accepting that if the TIB lost on this point, then the Defendants were themselves entitled to summary judgment. Now Mr McKie QC wishes to contend that even applying a cash-flow test, as explained in *European Life* and *Weaving*, since the burden is on the transferees to establish Mr Pelletier's cash flow solvency, they must do so and it cannot be assumed they will succeed.

139. Mr Lowe QC's response was that there is no basis in law for regarding Mr Pelletier's liability as falling within the approach to cash flow insolvency in *Eurosail* and *Weaving*. He submitted on behalf of Olga Pelletier that the liabilities set out in the TIB's table were not actual or indisputable debts payable immediately or in the reasonably near future. They were, he argued, "contingent in the sense of being dependent on events which had not occurred, unliquidated and prospective". They thus differed from the redemptions in *Weaving* which took effect on 1 December 2008 but, as a result of a 30 day period of grace for payment of redemptions were in practice payable on 31 December 2008. It was submitted that, because the amounts were (see *Weaving* at [35]) due without regard to the period of grace, as at 19 December 2008 when the payment to the appellant in that case was made, the debts "were known, certain, liquidated and not contingent". In this case Mr Pelletier's liability was not known or certain but contingent, prospective and unliquidated. Those submissions do not, however, reflect the approach to cash flow insolvency in *Eurosail* and followed by this court in *Weaving* ((2016) 2 CILR 544 at [40] set out at [93] above) which are accepted at [121] and [128] of this judgment.
140. In my view, bearing in mind that the burden does lie on the transferees it would be wrong to shut the TIB out at this stage. Accordingly, although I would allow the Defendants' appeal I would not make any Order which bars the TIB from resisting any attempts by the Defendants to establish Mr Pelletier's solvency applying the cash-flow test.

*Setting Aside Service: "serious issue" and "sufficient connection"*

141. I turn to the appeal against the judge's refusal to set aside service out on Olga Pelletier. There are two questions. The first is whether there is an issue to be tried against Olga in respect of the transfers made to her. The second is whether the TIB's claim against Olga has a sufficient connection with these islands.
142. In view of the judge's conclusion that all Richard Pelletier's contingent liabilities at the date of the transfers to Olga were to be taken into account, he did not deal with whether there was a serious issue to be tried against Olga applying the cash flow test set out *Eurosail* and followed by this court in *Weaving*. It, however, follows from the conclusion that, for the reasons given in [139] and [140], it will remain open to the TIB to resist attempts by the defendants to establish Mr Pelletier's solvency applying the cash flow test including amounts due "in the reasonably near future" that there remains a serious and live issue to be tried against Olga.
143. As to the second question, whether the TIB's claim against Olga has sufficient connection with these islands, it was common ground that the principles were set out and explained by Sir Donald Nicholls V-C in *Re Paramount Airways Ltd* [1993] Ch. 233, a decision of the Chancery Division of England and Wales concerning section 238 of the Insolvency Act 1986. It was also common ground that, just as section 238 gives the English courts jurisdiction to make an order against a foreigner resident abroad, so section 107 of the Bankruptcy Act gives the courts of these Islands such jurisdiction.
144. The judge set out the following section of the Vice-Chancellor's judgment:

*"The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the*

*court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would **by itself** be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.*

*Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.”: [1993] Ch 233 at 239G – 240E*

145. At [103] the judge stated that the legal test for sufficiency of connection “*is clearly a flexible one*” and reiterated the point made by the Vice-Chancellor in the last sentence of the passage set out, that the court must seek to “*ensure that it does not seek to exercise oppressively or unreasonably the wide jurisdiction conferred*” by an extra-territorial statutory provision. He then stated at [104] that, adopting that approach, four “*factors point decisively to there being sufficient connection between the [TIB’s] avoidance claim under section 107 and the Cayman Islands*” to enable the Grand Court to exercise the jurisdiction it conferred. They were:

*“(a) although there was no apparent connection with this jurisdiction when the relevant transfer was made it was the first of series of voluntary transfers made all directed by [Olga Pelletier’s] husband, and the other transfers were to transferees within the jurisdiction;*

*(b) in addition to the related transfers being connected with the Cayman Islands, [Olga Pelletier] took up residence here between August 2015 and June 2017, just over a year after the relevant transfer occurred in June 2014, and apparently benefited from assets which the Debtor transferred*

*to this jurisdiction (1) arguably in breach of his contractual obligations under the S.p.a. and (2) (as I have now found in granting summary judgment against [Forbes Hare Trust Co. Ltd]) in breach of section 107 of the law;*

*(c) when the present proceedings commenced on January 8, 2020, the Debtor and [Olga Pelletier] continued to have access to residential property in the jurisdiction and were in legal terms still seemingly permanent residence of the Cayman Islands;*

*(d) the Debtor’s bankruptcy proceedings are before this court, and have been recognised by a Canadian court as a foreign main proceeding. This jurisdiction is the most natural forum to adjudicate a section 107 avoidance claim.”*

146. He accepted at [103] that if one focussed on the date of the transfer to Olga Pelletier the jurisdictional connection to the Cayman Islands “*is very weak and almost non-existent*” and at [105] that in reality she had later all but severed her factual residential ties with the Cayman Islands, but stated at [103] that if one focussed “*on the date of the commencement of the proceedings the connection was clearly sufficiently strong*”. He rejected the suggestion that but for the intervention of the TIB to discourage the Cayman Islands authorities revoking Richard Pelletier’s residential certificate, neither he nor Olga would have had a residential connection with the Islands. It was, he stated, one thing to move residence, but another “*to seek to sever a legal connection with a jurisdiction shortly after bankruptcy proceedings have been filed*”. It was for these reasons that he rejected Mr Lowe’s submission that the residence factor was artificial and of little weight.
147. The judge also considered at [105] – [106] that there was another “*more substantive consideration*” supporting his conclusion. The evidence as to Canadian law placed before him made it doubtful that a Canadian avoidance remedy was still available and unclear whether a Canadian court would be competent to grant relief for a Cayman Islands law claim in respect of a Cayman Islands bankruptcy. Relying on the decision of the Privy Council in *Al Sabah v Grupo Torras* [2005] 2 AC 333 at 341 dismissing an appeal from this Court that concerned co-operation in insolvency by assisting a foreign court, he also stated at [106] that where a Debtor is in bankruptcy in the Cayman Islands, that is the most natural forum to adjudicate a section 107 claim.
148. Mr Lowe QC accepted that the judge “correctly recited” the factors which the Vice-Chancellor stated would be relevant. He, however, submitted that the judge erred in applying these factors. At the heart of his submissions was the suggestion that the judge did not sufficiently distinguish the “close connection” factors contemplated in *Re Paramount Airways Ltd* which had to be assessed at as at the time of the transaction which the TIB sought to avoid, and the *forum conveniens* issues which also had to be addressed. What had to be linked to the Cayman Islands, he argued, was the impugned transaction. At the time of the first transfer to Olga there was no link between her and the Cayman Islands. It was, he submitted, not fair to apply section 107 to a transaction in Canada between two Canadian citizens. The circumstances surrounding that all took place in Canada and the later transfers to PDP Corp., and PDP Holdings were legally

separate and had nothing to do with the impugned transfers to Olga. He argued that Olga's residence in the Islands between August 2015 and June 2017 was, in the words of the Vice-Chancellor, "*coincidental and unrelated to the transaction*". It was he maintained "*at best a forum conveniens factor*". Similarly, Olga's access to residential property in the islands via a discretionary trust was unrelated to the impugned transaction.

149. Mr Lowe did accept that the fact that Richard Pelletier's bankruptcy is before the Cayman courts is a relevant connecting factor. However, he submitted that three matters weakened its relevance. The first is that Richard's connection with the Cayman Islands is itself weak. The reason for his bankruptcy was a Canadian transaction with Canadian counterparties and a Canadian arbitration award. Mr. Lowe maintained that the decision to institute bankruptcy proceedings in the Cayman Islands was "blatant forum shopping" when, at that time, bankruptcy proceedings could have been instituted in Canada. Secondly, Richard's bankruptcy is not an issue in the TIB's proceedings against Olga. Thirdly, if this factor is more than a weak connection, a TIB could proceed against anyone in the bankruptcy jurisdiction. Mr Lowe also argued that the unavailability of Canadian proceedings to impugn the transaction with Olga is only relevant to *forum non conveniens* and is not relevant to the *Paramount* "sufficient connection" test.
150. I have concluded that the judge was entitled to decide that the claim against Olga has a sufficient connection with these islands, and while accepting that the matter is not entirely straightforward, I reject Mr Lowe's submissions. The judge clearly recognised that the "*sufficient connection*" principle is a distinct principle from the *forum conveniens* principle: see his acceptance of Mr Lowe's argument at [103]. My summary at [145] above shows that he was also acutely aware of the almost non-existent connection of Olga to these islands at the date of the transfer. But it does not follow that a connection at a later date is necessarily irrelevant or insufficient to amount to a "*sufficient connection*".
151. In *Re Paramount Airways Ltd.* the Vice-Chancellor (at 239G and 240E) referred to the width of the discretion in these cases. He was referring to the fact that, even where there is jurisdiction, the court is able to make no order if justice requires that. But he had earlier also said (237G) that there is "*no single simple formula which is compelling, save for one in wide and loose terms*", such as "*sufficient connection*". While the court is left to exercise restraint in the exercise of its jurisdiction, the width of the discretion enables an order to be made if the court is satisfied that "*in respect of the relief sought against him*", the defendant is sufficiently connected with, in that case, the English forum, for "*it to be just and proper to make the order against him despite the foreign element*": see 239F-240A.
152. Since Olga was not present in the Cayman Islands at the time of the transaction or when proceedings were commenced, the searchlight Mr Lowe deployed on what the Vice-Chancellor said about presence left other parts of his analysis in the judgment somewhat in the shadows. I refer in particular to the passage at 240D-E relied on by the judge and set out at [143] above. That enables the court to look at "**all the circumstances**" including the defendant's "**connection with the insolvent**" and "**the nature and purpose of the transaction being impugned**". Mr Lowe's approach may also have had insufficient regard to the Vice-Chancellor's statement at 236C – D that to treat presence as the factor which determines

whether a transaction is within the ambit of the statute “*would be to adopt a criterion which would be capricious in the extreme*”.

153. In this case the judge was entitled to take into account that the transactions with Olga were part of a series of transactions and that the other transferees were all entities within the jurisdiction controlled by Richard (until the Bankruptcy Order was made) and Olga Pelletier. The transfers to Olga had to be considered in the context of the wider picture and scheme. The judge had evidence before him entitling him to conclude that there was a link between the transfer to Olga and the other transactions. That evidence included an email dated 1 September 2014 from Richard to Olga setting out the things to be done to prepare for their offshore residence in the Cayman Islands. Those included setting up an offshore company and an offshore trust, and buying property in the name of the offshore company.
154. The judge was also entitled to take into account the fact that Richard Pelletier’s bankruptcy proceedings are in this jurisdiction and have been recognised by the Canadian courts as a foreign main proceeding. This was a discretionary decision, and the factors referred to mean that the conclusion reached by the judge is well within the ambit of discretion conferred on him and one with which, for the reasons give, it would be wrong to interfere. Given the overall picture and the transfers to Cayman banks and then to Cayman entities as trustees, it is also difficult to regard the decision to institute bankruptcy proceedings in the Cayman Islands as forum shopping. For these reasons, I would dismiss the appeal on this issue.

**The Rt Hon Sir Jack Beatson, JA**

155. I agree.

**The Hon Dennis Morrison, JA**

156. I also agree.