

**Judgment 12/2007 Galaxy International Limited v Ladbrokes PLC –
Royal Court (Civil Action File 1078) – 15th May 2007**

Companies (Guernsey) Laws 1994 to 1996 (Section 96(1) – application by Ladbrokes for winding up of Galaxy – application by Galaxy for stay pending determination of proceedings in England – not appropriate for Galaxy to seek to re-argue contractual issues already determined by the Royal Court on 7th February 2007 – application for stay refused – hearing of the winding-up application to proceed solely on the basis of the affidavits filed by the parties – winding-up application will involve issues to be decided by the Jurats

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1078

The 15th day of May, 2007 before Richard Charles Southwell QC, Lieutenant Bailiff, sitting alone.

GALAXY INTERNATIONAL LIMITED

(Applicant)

V

LADBROKES PLC

(Respondent)

Whereas on 10th and 11th May 2007 the Lieutenant Bailiff considered applications:

- 1) For a stay of the winding up position pending determination of the English proceedings and
- 2) Whether oral evidence is to be heard on the winding up application:-

and heard thereon Advocates J M Wessels and P Richardson counsel for the Applicant and Respondent respectively the Lieutenant Bailiff this day gave judgment in the terms attached hereto and

- 1) ORDERED that there should be no stay of the winding up application
- 2) DIRECTED that the hearing of the said winding up application will proceed on the basis solely of the affidavits filed by the parties.

And the Lieutenant Bailiff ORDERED that

- (i) Each party file with the Greffe and serves on the other party by 4.00pm on 17th May 2007 written statements of those parts of the affidavits which they contend to be irrelevant or inadmissible or both.
- (ii) If argument is necessary in this respect there will be a hearing on either 21st or 22nd May at a time to be determined by the Court.
- (iii) Any application to amend Galaxy's Defence must be filed and served by 4.00pm on 16th May 2007 with any issue in that regard to be heard on 21st or 22nd May 2007.
- (iv) The hearing of the winding up application be fixed for 10th, 11th, 12th July and that should Counsels' prior commitments change they should forthwith inform the Greffe so that the hearing of this matter may be brought forward:-
- (vi) The costs of and occasioned by this hearing are reserved to the Court on the completion of the substantive hearing.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

LADBROKES PLC

Applicant

and

GALAXY INTERNATIONAL LIMITED

Respondent

Judgment of Lieutenant Bailiff Richard Southwell QC

1. This matter concerns an application by Ladbrokes PLC (an English company formerly known as Hilton Group PLC, and in this judgment referred to as “Ladbrokes”) dated 9 February 2007 to wind up Galaxy International Limited (a Guernsey company, referred to as “Galaxy”) pursuant to section 96(1) of the Companies (Guernsey) Laws 1994 to 1996, as amended (referred to as “the Law”) on the ground that Galaxy owes to Ladbrokes the sum of US\$2.5 million plus interest (amounting at 7 February 2007 to US\$893,219.36, and continuing to accrue at a daily rate of US\$616.44) under the terms of a written contract between Ladbrokes and Galaxy dated 21 February 2001 (referred to as “the Contract”). The history which forms the background to this winding up application is of some importance, and I will try to summarise the history as briefly as I can.

2. Under the Contract Ladbrokes agreed to sell and Galaxy agreed to buy the entire issued share capital of Ladbroke Casino Holdings SA (Pty) Limited, a South African company with a number of South African subsidiaries, referred to in the Contract and here as “the Company”

(and also what were referred to as the “Sale Claims”, which are, however, not relevant for present purposes). The consideration for what Ladbrokes were selling was defined as the aggregate consideration payable by Galaxy (and I emphasise, payable by Galaxy) provided for in Clause 4 of the Contract. It was there specified to be the sum of US\$2.5 million which was to be paid by Galaxy to Ladbrokes on or before 3 February 2003 (subject to the possibility of an earlier call for payment in certain events which did not happen). Thus the consideration was payable by Galaxy nearly two years after the Contract was entered into. Pursuant to clause 5.1 completion was to be on the date on which the condition in clause 3.1 was satisfied (or a later date if agreed in writing). Under clause 5.4 the payment of the consideration of US\$2.5 million was to be guaranteed (and I emphasise the word “guaranteed”) by means of a conformed irrevocable letter of credit obtained at Galaxy’s expense from the Branch Banking & Trust Co of South Carolina (referred to as “BBT”) in a form approved by Ladbrokes. The obligation of BBT under such letter of credit was to be an unconditional primary obligation and was not to be subject to any deduction.

3. Under Clause 3.1 the Contract was made conditional on Galaxy obtaining the letter of credit provided for in clause 5.4 (as already described) as a guarantee for the payment of the consideration of US\$2.5 million. Under clause 3.2 Galaxy was to use all reasonable endeavours to procure fulfilment of the clause 3.1 condition precedent as soon as practicable and in any event on or before 28 February 2001. This date was by a written agreement dated 1 March 2001 changed to 5 March 2001. If the condition precedent had not been fulfilled or waived by that date, then the Contract was to lapse and be discharged (with the exception of three of the Clauses which are not relevant for present purposes).

4. Under clause 12 the Contractor was to be governed by English law and the English courts were to “have exclusive jurisdiction in relation to any dispute with respect to the subject matter or construction” of the Contract. Clause 14.1 was a “whole agreement” clause in relatively standard form. Under clause 14.9 in the event of default by Galaxy in payment of any part of the consideration, interest was to be paid at 4% above Barclays Bank base rate, accruing from day to day. I emphasise that the default referred to in clause 14.9 was default by Galaxy.

5. It appears to be common ground between the parties that they knew in February and March 2001 that (1) Galaxy could not then pay the consideration of US\$2.5 million, and (2) the Company and its subsidiaries had yet to embark on any successful operations in South Africa.

So the date for payment was put off for nearly two years on the footing that payment would be guaranteed by the letter of credit provided by BBT.

6. Following receipt of a letter of credit from an officer of BBT by Ladbrokes, completion of the Contract took place, and Galaxy became the owner of all the shares of the Company, and thereby gained control of all the subsidiaries of the Company.

7. When 2003 arrived, Galaxy told Ladbrokes that Galaxy would not be able to pay the sum of US\$2.5 million, and that Ladbrokes should present the letter of credit to BBT for payment. The letter of credit was so presented, and was rejected by BBT as a forgery. Ladbrokes sued BBT in the US District Court in South Carolina. On 16 November 2006 a jury in that court determined that the letter of credit was a document not authorised by BBT and under which BBT was not liable.

8. On 18 December 2006 Ladbrokes served on Galaxy pursuant to section 95 of the Law a statutory demand dated 13 December 2006 for payment of US\$2.5 million and interest as at 30 November 2006 amounting to US\$850,685, giving notice to Galaxy that, in the absence of payment (or the giving of acceptable security) within 21 days, Ladbrokes would apply to the Royal Court for an order that Galaxy be wound up compulsorily pursuant to section 94 of the Law.

9. On 10 January 2007 Galaxy applied to the Royal Court for an order that Ladbrokes' demand be set aside.

10. I note at this point in the history that it was open to Galaxy at any time from 18 December 2006 to rely on the exclusive jurisdiction clause (clause 12) and to apply for a stay of the statutory demand and any ensuing winding up proceedings in Guernsey until the English Courts had decided the issues relating to the interpretation of the Contact. But Galaxy elected at that stage **not** to rely on clause 12 and to seek a stay in Guernsey, and instead elected to argue the grounds for not being liable to pay Ladbrokes in the Royal Court of Guernsey.

11. Galaxy's application to set aside Ladbrokes' demand came before Deputy Bailiff Richard Collas on 12 January 2007 for directions. Galaxy was represented then and subsequently by Advocate Paul Richardson, and Ladbrokes by Advocate Jeremy Wessels. The transcript shows

that Mr Wessels specifically drew to the attention of the learned Deputy Bailiff and of Mr Richardson that if, on the hearing of Galaxy's application, the Royal Court were to decide (as Mr Wessels contended the Court should decide) that the basis for asserting non-liability was not substantial or genuine, then subsequently Mr Wessels would contend that Galaxy could not re-argue the same grounds on any subsequent occasion, for example on an application to wind up Galaxy.

12. Galaxy's application was heard before the Deputy Bailiff on 7 February 2007. Mr Richardson supported the application with two lines of argument, which I summarise as

- (1) that on the true interpretation of the Contract the production of a valid and effective letter of credit was a condition precedent to the Contract coming into force and being binding on the parties, and since the purposed letter of contract was not valid, the Contract lapsed and was discharged, leaving Galaxy with no contractual obligation itself to pay Ladbrokes the purchase consideration (despite, I observe, having received under the Contract all that Ladbrokes had agreed to sell and Galaxy to purchase); and
- (2) that Ladbrokes had assumed responsibility for verifying the authenticity of the letter of credit, and had thereby assumed a duty of care to Galaxy, which duty Ladbrokes had broken, giving rise to a liability of Ladbrokes in damages in the same amount as claimed by Ladbrokes.

This alleged duty of care was rejected by the Deputy Bailiff as not being reasonably arguable.

13. As to Mr Richardson's first argument, that on the true interpretation of the Contract the invalidity of the letter of credit discharged Galaxy from liability to pay the consideration, this was fully argued by Mr Richardson, and responded to by Mr Wessels. In his judgment delivered on 7 February 2007 the Deputy Bailiff reached the conclusion that the provision by Galaxy of a supposed valid letter of credit which subsequently turned out to be invalid could not discharge Galaxy from its primary liability under the Contract to pay the consideration due for the shares of the Company (and the other matters purchased). The Deputy Bailiff held that in his judgment: "it would be a perverse interpretation of the [Contract] to hold that as a result of the forgery,

Galaxy is absolved to pay for the shares it has received.” Accordingly he dismissed Galaxy’s application with costs.

14. On 9 February 2007 Ladbrokes applied to the Royal Court for the compulsory winding up of Galaxy on the ground of non-payment of the debt due under the Contract (as I have already described) under section 94(e) of the Law, and for the appointment of a named person as liquidator of Galaxy under section 99 of the Law.

15. I should here refer to a few relevant provisions of the Law. Part XVI deals with compulsory winding up. Section 94 provides that a company may be wound up by the Court if (inter alia)

“(e) the company is unable to pay its debts.”

Section 95 provides as follows:

“A company shall be deemed to be unable to pay its debts if:

- (a) a creditor to whom the company owes a sum exceeding £750 then due has served on the company through the office of the Sergeant at the company’s registered office a written demand for payment; and
- (b) the company has, for a period of 21 days immediately following the date of service, neglected to pay the sum or to secure payment to the reasonable satisfaction of the creditor;

or if it is proved to the satisfaction of the Court that the company is unable to pay its debts.”

The Deputy Bailiff having held that on the true interpretation of the Contract Galaxy owes to Ladbrokes US\$2.5 million plus substantial interest, then those sums have not been paid within the 21 day period in section 95, and Galaxy is deemed to be unable to pay its debts. Under section 96(2) an order for winding up operates for the benefit of **all** the company’s creditors as a class. Section 98 provides that the Court “may grant” an application for compulsory winding up “on such terms and conditions as it thinks fit, dismiss the application, or make such other order as it thinks fit.” It is common ground that this gives the Court a discretion, to be exercised naturally in a judicial manner, taking due account of all the matters argued before it on behalf of creditors and the company.

16. The application to wind up Galaxy came before the Deputy Bailiff for directions on 23 February 2007. Mr Richardson then indicated that Galaxy was to bring an action in England by virtue of the exclusive jurisdiction clause, and that it would be seeking leave to appeal from the Deputy Bailiff's decision of 7 February 2007. Mr Richardson stated that at that stage he was not applying for a stay of the winding up application on the basis of either the projected English proceedings or the projected application for leave to appeal. He indicated that Galaxy would be asking the Court to stay any winding up order on the basis of evidence to be obtained from South Africa, including valuations of Galaxy and its businesses there. He stated that he would be seeking to re-argue the matters decided by the Deputy Bailiff on 7 February 2007. The Court ordered Galaxy to file a pleading within two weeks from 23 February 2007.

17. On 6 March 2007 Galaxy filed an application to the Deputy Bailiff for leave to appeal against his judgment of 7 February 2007. The grounds set out in the attached draft notice of appeal were

- (1) as to the Contract, that it had lapsed because there was no valid letter of credit, and/or it was void for common mistake;
- (2) on the basis of Ladbrokes' alleged duty of care to verify that the letter of credit was valid.

I observe that, though no specific contention was made on 7 February 2007 in reliance on a "common mistake", it is plain that in the draft notice of appeal Mr Richardson was treating this contention as being part and parcel of his case in relation to the Contract terms. The application for leave to appeal was heard by the Deputy Bailiff on 9 March 2007, and he refused leave on the ground that any appeal would not have any realistic prospect of success, and no question of general public interest or policy was involved. Galaxy has since, out of time, applied to the Court of Appeal for leave, and in its application it has abandoned reliance on the alleged duty of care.

18. On the same day (9 March 2007) Mr Richardson filed a Defence of Galaxy. First, it was alleged that at that date Galaxy was "solvent, irrespective of the alleged claim of [Ladbrokes] upon which the Petition [to wind up] is based", and affidavit evidence would be served in

support of this. The draft accounts of Galaxy as at 31 December 2005 (which are the latest draft accounts of Galaxy now before this Court) show that the draft financial statements have been prepared by the directors on a going concern basis only because Galaxy's

“loan creditors have continued to make funds available to [Galaxy] to enable it to meet its obligations to other creditors as and when they fall due.”

The auditors' report is neither signed nor dated. On the footing of these accounts and certain further documents including a valuation by the auditor of Galaxy, a Mr Paul Venn carrying on practice as a chartered accountant apparently from his home in Winscombe, Somerset, it is contended that it is not appropriate now to wind up Galaxy.

19. Secondly, in the Defence the contractual issues were raised again, including allegations that (1) in the absence of a valid letter of credit the condition precedent was not satisfied (so that Galaxy was discharged from liability), alternatively (2) it was an implied term that the letter of credit was required to be valid, (3) the parties acted under the Contract on a common mistaken belief that the letter of credit was valid, and (4) proceedings for declarations would be issued in the English Courts “as soon as practicable”.

20. On a date or dates between 9 and 16 March 2007 affidavits or draft affidavits were served on behalf of Galaxy, as follows:

- (1) An unsworn draft affidavit of Mr Steven McCain, a director of Galaxy. The position of Galaxy and its subsidiaries is described by him at some length, together with optimistic statements as to their business and financial futures. There is a section containing the history of relations between Galaxy and a Mr Dave Diggins, an American whose present whereabouts have not been discovered. This history leads into a history of circumstances connected with the making of the Contract with Ladbrokes. There follows a history of circumstances after the Contract was completed and Galaxy took over the Company and its subsidiaries. Circumstances relating to the discovery of the forgery are then described. Finally, the draft deals with “Galaxy's Solvency Position”. I observe that the 2005 draft accounts are wrongly stated in paragraph 134.1 to be for the year 2006, and that in paragraph 148

reference is made to opposing creditors who would be filing affidavits and these are stated to be “creditors to the sum of approximately £2 million”.

- (2) Sworn or unsworn affidavits of four shareholder creditors (Mr T A Devlin, Mr C I C Woods, Ms L R Parrack representing a trust and Mr M Le Tissier) who oppose a winding up. These documents refer to the financial connections with Galaxy which can be summarised as follows:

	<u>A</u> Ord Shares investment £	<u>B</u> Prof Shares investment £	<u>C</u> Loans £	<u>D</u> Total for which is a creditor £
Devlin	184,240.00	262,861.00	449,949.00	897,050.00
Woods	184,240.00	262,861.00	373,706.00	820,807.00
Parrack	31,620.00	51,576.00	75,480.00	158,676.00
Lel Tissier	57,838.00	25,814.00	880.00	84,532.00
Totals	£457,938.00	£603,112.00	£900,015.00	£1,961,065.00

It is plain that the only sums in respect of which these persons are, or represent, creditors are those in column C, i.e. a total of just over £900,000, rather than the figure of “approximately £2 million” in Mr McCain’s paragraph 148. Mr Richardson accepted this. Subsequently sworn Affidavits of Mr McCain and Mr Woods have been served.

21. On 16 March 2007 the matter came before the Deputy Bailiff again for directions and was adjourned. Mr Richardson stated that proceedings would be commenced in England the next week.

22. But it was not until 10 April 2007 that a claim form was served in an English action brought by Galaxy against Ladbrokes seeking in the Particulars of Claim a sole declaration that because the letter of credit was a forgery

“the condition set out in clause 3.1.1 of the [Contract] was not satisfied and the [Contract] lapsed and was discharged as between the parties thereto on about 5 March 2001.”

In support of the claim for such declaration, some of the history is pleaded, and (inter alia) the common mistaken belief of the parties that the letter of credit was valid, and the implied term already mentioned, are relied on. No reliance is placed on the previously alleged duty of care. Though in brief details of the claim on the Claim Form an alternative declaration based on a common mistake was included, this has not been included in the Particulars of Claim. Ladbrokes have filed a defence and counterclaim, as required by English Court Rules. In a letter dated 8 May 2007 from their solicitors to Galaxy's solicitors they contend that the issue of these English proceedings is an abuse of process, and indicate that they will be applying for summary judgment.

23. On 13 April 2007 the Deputy Bailiff recused himself from this matter, and thereafter I was nominated to deal with it. I fixed a preliminary hearing for 10 and 11 May 2007.

24. On 2 May 2007 Mr Richardson for Galaxy served on Ladbrokes an application for a stay pending determination of the English proceedings.

Stay pending determination of action in England

25. Yesterday the first matter argued before me was Galaxy's substantive application for a stay of the winding up petition pending determination of the English proceedings. This is a separate ground for a stay from Galaxy's reliance on the present financial and business circumstances of Galaxy and its South African subsidiaries, and on the opposition of the four creditors, which will be decided at the next hearing.

26. Mr Richardson submitted, in reliance on observations of Jessel MR in *In re St Thomas' Dock Company* [1876] 2 Ch D 116 that the Court has a general power to stay winding up proceedings. While the question of liability is before the English Courts which have exclusive jurisdiction on contractual issues under clause 12 of the Contract, it would, he submitted, be inappropriate for this Court in Guernsey to proceed with the hearing of the winding up application founded on a disputed contract debt. I asked why the English action had not been started as soon as the statutory demand was served on Galaxy on 18 December 2006, or at all events at the same time (10 January 2007) as Galaxy applied to this Court for an order setting the statutory demand aside. In my judgment no satisfactory answer was given to that question by Mr Richardson.

27. Mr Wessels submitted that

- (1) There had been full argument of the contractual issues on 7 February 2007 before the Deputy Bailiff. Though the alleged implied term and common mistaken belief had not then been raised specifically, it was plain from Mr Richardson's arguments that these were no more than different facets of the same contention, that because of the forgery Galaxy had been contractually discharged from liability. The Deputy Bailiff had fully considered the matter and had reached a clear and firm conclusion that for Galaxy to escape liability by themselves obtaining an invalid letter of credit when it was Galaxy's contractual responsibility to obtain a valid document, which in any event was to be no more than a guarantee to secure Galaxy's own liability, would be a thoroughly perverse interpretation of the Contract. So the contractual issues had already been decided.
- (2) It would be wrong in principle to allow a debtor faced with a statutory demand to delay or escape the consequences of failing to comply with the demand, by the debtor itself bringing proceedings for a negative declaration whether in the Courts of Guernsey or in another jurisdiction; and particularly where as here the Royal Court had already decided the issues before the debtor had thought of the tactic of starting proceedings in England.
- (3) Galaxy had deliberately chosen to fight the Contract issues in Guernsey on 7 February 2007 and not to apply for those issues to be decided in England. Having chosen to adopt that course, and having thereafter long delayed before starting proceedings in England, Galaxy could not now argue with any force that the matter should wait for the new and belated English proceedings to be carried to completion.
- (4) Mr Wessels relied on an unreported decision of a two member English Court of Appeal in *BST Properties Ltd v Reorg-Apport Penzugyirt* [2001] EWCA Civ 1997, for one point only briefly touched on in the judgment. There was an exclusive jurisdiction clause in the agreement there in issue giving jurisdiction to the Courts of Hungary. Jonathan Parker LJ in paragraph 31 of his judgment said that whether

or not proceedings in England as to the effect of that agreement could be stayed on the basis of the jurisdiction clause, that did not in his judgment

“affect the question which was facing the Companies Court, namely whether the petition debt is bona fide disputed on substantial grounds.”

Mr Wessels submitted that this Court should adopt the same approach in the present case, and a fortiori, because this Court had already decided the contractual issues with the full and willing participation of Galaxy.

- (5) Mr Wessels reminded me that an application to wind up a company is not a private dispute between the applicant and the company, but rather a class remedy for the benefit of the whole class of creditors. He referred to the observations of Harman J in *In re Southbourne Street Metal Co Ltd* (1992) BCLC 361. I have already mentioned in this connection section 96(2) of the Law.
- (6) He referred also to *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 Court of Appeal. There the petitioner brought ordinary proceedings claiming the debt and the High Court granted to the company unconditional leave to defend. The petitioner then brought winding up proceedings based on the alleged debt, and the Court of Appeal held that the judge in the Companies Court was entitled nevertheless to go into the evidence before him to consider whether or not there was a bona fide dispute, and whether or not a winding up order should be made (as in fact it had been).

Re-argument of Contractual Issues

28. Before reaching a conclusion on this application for a stay, it is convenient to consider also the arguments and submissions before me on the question whether the decision of the Deputy Bailiff of 7 February 2007 is res judicata or gives rise to an issue estoppel or a *Henderson v Henderson* abuse of process, or on any other ground should be held to preclude Galaxy from seeking to re-argue the Contract issues he has already decided.

29. These submissions turned mainly on what was said by the English Court of Appeal in two cases: *RWH Enterprises Ltd v Portedge Ltd* [1998] BCC 556, and *Coulter v Chief Constable of Dorset Police (No.2)* [2005] EWCA Civ 1113. The facts of these cases are complex. Rather than engaging in a detailed analysis of those facts, it seems to me that I should rather set out the principles which the Court of Appeal laid down:

- (1) the mere fact that issues have been raised and dealt with summarily on an application to set aside a statutory demand would not of itself prevent the same arguments being raised at the hearing of the substantive application to wind up;
- (2) where issues have been fully argued when an application to set aside a statutory demand is heard, and the Court has reached a decision based on such full arguments, it would be a waste of the Court's time and the parties' money for the same arguments to be rehearsed and for the Court to reconsider the effect of those arguments on the hearing of the winding up application;
- (3) principle (2) is derived, not from legal rules as to res judicata or issue estoppel, but simply from the inappropriateness of allowing a repetition of what has been fully argued and decided already by the Courts;
- (4) the same principle applies to arguments which could have been raised on the earlier occasion, but were not so raised, unless, for example, they arise from facts which were not available on the earlier occasion.

30. Those principles have to be applied by this Court in relation to the matters which Mr Richardson now wishes to raise on Galaxy's behalf in opposing the application to wind up Galaxy. In my judgment the issues arising from the interpretation of the Contract have already been fully ventilated in this Court, and decided by the Deputy Bailiff. The reliance on an alleged implied term and on a common mistaken belief that the letter of credit was valid, though not specifically raised on 7 February 2007, are no more than alternative ways of presenting the same contractual arguments. Accordingly in applying the principles derived from *RWH Enterprises* and *Coulter* it seems to me that it would be inappropriate for Mr Richardson to be allowed to re-argue the contractual issues in this Court, or for that matter, for Galaxy to re-argue the same issues in the English Courts. Any such attempt might be argued to be an abuse of process in both

jurisdictions. Any such re-argument should be before the Guernsey Court of Appeal if that Court were minded to grant leave to appeal.

31. I should add that when the substantive hearing of the winding up application takes place, this Court will have to have regard to all the relevant circumstances, and it may be that there will be aspects of Galaxy's case in opposition which it will be appropriate to allow to be argued though they have been adverted to on the hearing of the application to set aside the demand. It would not be right at this stage for the Court to bar Mr Richardson from raising again points which were not then fully argued. In so far as Mr Richardson is able to satisfy this Court that there is something genuinely new in his arguments based on implied terms or common mistake, this Court would not bar Galaxy from raising such a genuinely new point.

Decision as to Stay

32. In the light of these principles derived from *RWH Enterprises* and *Coulter*, I return to the question whether the winding up application should be stayed by this Court pending determination of the issues raised in the English proceedings. In my judgment there can be only one answer to this question – that no stay should be ordered, for these primary reasons:

- (1) If Galaxy wished to rely on the exclusive jurisdiction clause, and to have the issues arising from the Contract decided by the English Courts, the time for that to be raised was before the full argument of those issues took place in this Court on 7 February 2007. But Galaxy elected to have those issues decided in the Courts of Guernsey. Having so chosen, and having allowed those issues to be fully argued and decided in Guernsey, it is not appropriate for Galaxy, having failed in Guernsey, then (and after no small further delay) to turn to the English Courts to seek to persuade those Courts to arrive at a conclusion different from the conclusion already reached by the Guernsey Court, while at the same time seeking to re-argue those issues on appeal in the Guernsey Court of Appeal.
- (2) Applying the principles derived from *RWH Enterprises* and *Coulter*, it is not appropriate to give Galaxy a second bite of the cherry in the English Courts. The contractual arguments should be ventilated again, if at all, in the Guernsey Court of Appeal on appeal from the Deputy Bailiff.

(3) As Mr Wessels submitted, it would be wrong in principle to allow a debtor who has failed to set aside a statutory demand to seek to trump the winding up application by bringing separate proceedings, whether in the same Court, or as here in the Courts of another jurisdiction. In this regard the cases cited by Mr Wessels and referred to in paragraph 27(4), (5) and (6) above support this approach. The winding up application must now be heard substantively by this Court.

33. Accordingly no stay of the winding up application will be ordered.

34. So that no doubt is created, I wish to emphasise that the other matters to be relied on by Galaxy in support of a stay of the winding up application, including the present business and financial position of Galaxy and the opposition of other creditors, will be able to be raised at the hearing.

Oral or Affidavit Evidence

35. I turn to the next matter argued before me which is whether oral evidence is to be heard on the winding up application. After some prevarication Mr Richardson accepted, as Mr Wessels had argued, that there should be no repetition of the written affidavit evidence in oral evidence in chief. Mr Wessels argued that cross-examination of the witnesses who have given affidavit evidence would be unnecessary and inappropriate, because the hearing of a winding up application is primarily a summary hearing; if the Court is satisfied that there are arguable bona fide disputes as to liability, the Court will allow those issues to be decided by another Court and will dismiss the application; or if the Court is satisfied that there is a bona fide and sufficiently strong case that the company sought to be wound up will soon be in the position to pay its debts, then the Court may grant an appropriate length of stay. Cross-examination of the witnesses would be unlikely to assist on these matters, and should not be permitted in the present case, though Mr Wessels accepted that the Court can allow cross-examination where that would have the likelihood of clarifying matters which the Court will need to decide.

36. Mr Richardson, on the other hand, argued strongly that Galaxy should be permitted to cross-examine Ladbrokes' witnesses. When pressed by the Court to give examples of matters to which any such cross-examination would be directed, all Mr Richardson's examples would be

directed to an attack on the conduct of Ladbrokes designed to persuade this Court that Ladbrokes had behaved badly. In my judgment that would not be a proper use of cross-examination in winding-up proceedings, would raise irrelevant matters, and would be a waste of the Court's time and the parties' money.

37. In the absence of any indication of relevant and admissible avenues for cross-examination, I direct that the hearing of the winding up application will proceed on the basis solely of the affidavits filed by the parties. I should, however, make it clear that I would be prepared to revisit this decision if in the light of further developments the position were to change materially.

The Jurats

38. I asked the Advocates to consider whether the presence and involvement of the Jurats would be necessary and appropriate, because most of the issues appear to be ones of law for a judge. Mr Wessels most helpfully referred to two previous disputed winding up proceedings in which the Jurats had been involved, *Re The International Underwriters Association Ltd ex p Blake and Benjamin* (13 December 1973, unreported) and *Re Circuit Skips Ltd ex p Hubert* (24 January 2001, unreported). Both cases involved winding up applications based on the just and equitable principle, and therefore it was entirely appropriate for extensive oral evidence to be called. The Jurats had to decide certain issues of fact and then whether in all the circumstances it was just and equitable to wind the companies up. In the light of those cases I am satisfied that it will be necessary for the Jurats to sit in this case. Accordingly the Advocates will be asked each to provide to the Court a statement of the issues to be decided by the Jurats, and a brief summary of the directions to be given by the judge to them.

39. The Court of Appeal has in a number of recent decisions expressed some concern about the appropriateness in civil cases of the Jurats being asked to give simple verdicts without any reasons being stated. I note that in *Circuit Skips* the reasoning of the Judge, Lieutenant Bailiff Russell Finch, and of the Jurats (Mr Le Page, Mr Bisson and Rev Lane), was stated fully in a reasoned judgment. I hope that it will be accepted that in the present case it will be appropriate to follow this precedent.

Affidavit Evidence

40. In my judgment, and as Mr Wessels argued, parts of the affidavits contain evidence which is irrelevant or inadmissible or both. Accordingly I order that each party files with the Greffe, and serves on the other party, by 4pm on Thursday 17 May 2007, written statements of those parts of the affidavits which they contend to be irrelevant or inadmissible or both. If argument is then necessary, there will be a hearing on 21 or 22 May at a time to be fixed for the issues in relation to the affidavits to be argued and determined by the Court.

Galaxy's Defence

41. Mr Richardson indicated that he might wish to apply for leave to amend Galaxy's Defence. If so, the application must be filed with the Greffe and served on Mr Wessels by 4pm on 16 May 2007, and any issue in that regard heard in the same hearing on 21 or 22 May 2007.

Amount of Debt

42. Though this had been raised as an issue to be decided by the Court, Mr Richardson accepted that it is not necessary for the Court to decide on the hearing of the winding up application the precise total amount of the debt (if any, which Galaxy disputes) owed to Ladbrokes.

Grounds for Stay

43. In my judgment the primary matter to be decided by the Court will be whether the winding up application should be stayed or held over for a period in view of the material before the Court as to the future business and financial prospects of Galaxy and the opposition of the four other creditors who are said to be owed by Galaxy just over £900,000.

The Hearing

44. I had anticipated that the hearing would take place at an early date, and to this end offered dates in May 2007 and early June 2007. It appeared that because of the advocates' commitments none of the dates which I offered was acceptable. Accordingly I offered the afternoon of 10 July

and 11 and 12 July 2007 for the hearing which were fixed for the hearing. But I wish to emphasise strongly that in my judgment the hearing should, if practicable, take place earlier. If the advocates' other commitments change, they should inform the Greffe immediately so that the hearing can be brought forward, even if that is at short notice. At present noon on 29 June 2007 has been fixed for the service of skeleton submissions, and the advocates will need to be ready to serve these earlier if the hearing date can be advanced.

Costs

45. Costs of and occasioned by this hearing for directions are reserved to the Court on the completion of the substantive hearing. But I indicated, following argument, that I would be likely to order that the costs involved in the hearing of the application to stay by reference to the English action be paid by Galaxy in any event.