OPINION OF LADY SMITH : OUTER HOUSE, COURT OF SESSION : 26th November 2002

[1] This application raises the question of whether, where a company in liquidation is in arbitration with another party, an application to sist the liquidation should be granted in the face of opposition to it by the latter where that party is not currently a creditor of the company but claims an interest in respect that it may, at a future date in the arbitration, be successful in obtaining an award of expenses.

The statutory provisions:

[2] The application was presented under two provisions of the Insolvency Act 1986[" the 1986 Act"], as alternatives, namely sections 5[3][a] and 147 [1]. Section 5[3] features in the part of the 1986 Act which was introduced to make it simpler for companies and individuals in financial difficulties to enter into arrangements with their creditors if a sufficient majority approved the proposed arrangement. Section 147[1] is in very similar terms to those of section 89 of the Companies Act 1862, to which it can trace its origins. Similar terms also featured in s.256[1] of the Companies Act 1948. The two sections are as follows:

> *"5 [3] Subject as follows, if the company is being wound up or an administration order is in force, the court may do one or both of the following, namely -*
>
> *[a] by order stay or sist all proceedings in the winding up or discharge the administration order,*
>
> *[b] give such directions with respect to the conduct of the winding up or the administration as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement.*
>
> *147[1] The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed or sisted, make an order staying or sisting the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit."*

It is evident that whether an application to sist is granted under s.5[3][a] or under s.147, the court has a discretion. Parties were in agreement that that was a discretion which ought to be exercised in accordance with common-sense albeit that there was an issue between them as to whether, under s.5[3] [a], it was competent to grant a sist for a limited period only. Given that dispute, counsel for the Noter moved, without opposition, in the course of the hearing, to amend the Note in the liquidation so as to bring the Noter's application not only under s.5[3] [a] but, as an alternative, under s.147. I allowed the amendment.

The facts:

[3] In 1990, Appollo Engineering Limited ["the company"] entered into a contract with the Second Respondents ["Scott"]. They were to perform part of the work subcontracted to Scott by main contractors in a contract to construct an explosives handling jetty at Hunterston in Ayrshire. Scott were mechanical and electrical subcontractors. The company contracted to carry out work which involved the fabrication and installation of pipework for a mechanical arm which Scott had undertaken to provide. A winding up order was made against the company on 25 September 1991, the date of the liquidation being 3 September 1991. The First Respondent ["Mr Blin"] was appointed provisional liquidator, interim liquidator and, ultimately, liquidator of the company and entered on the duties of his office. Scott raised an action against Mr Blin as liquidator of the company, seeking possession of certain fabrications that he was holding by way of lien for payments due to the company by Scott. Mr Blin counterclaimed for a sum of about £2.5m and the action and counterclaim were sisted for arbitration.

[4] A deed of submission to arbitration was entered into in 1996 between Scott, the company in liquidation and Mr Blin, the parties thereby referring their disputes under the subcontract to Christopher R. Ford Esq of Messrs JMP Consultants Limited, 20 Royal Terrace , Glasgow. I was provided with a Record in the arbitration in which the company states claims totalling in excess of £2.66m and Scott counterclaims for sums totalling just over £1m.

[5] By resolution of a meeting of creditors of the company, Mr Blin was removed from office as liquidator on 8 May 1998, the reason being that agreement could not be reached between him and the creditors regarding an offer to settle the arbitration in the sum of £330,000 which had been made by Scotts. Mr Blin had sought to persuade the creditors to accept it but they were not minded to do so. I was shown correspondence between Mr Blin and Mr Politakis, director and creditor of the company which sets out

Mr Blin's reasons for recommending that the offer be accepted, including his refusal to expose himself any further to the risk of personal liability for the expenses of the arbitration.

[6] During his period of office, Mr Blin had progressed matters in the liquidation. He ingathered the company's realisable assets and is said to have administered them for the company's creditors to the extent that the sums now left in his hands amount to only some £39,000 [together with accrued interest] which he is holding to meet any liability in respect of the expenses of the arbitration that he is ultimately found to have. The extent of his liability for those expenses is said not to be entirely clear. In a letter dated 10 October 1996, addressed to Scott's agents, Messrs McGrigor Donald, who were acting as Mr Blin's, agents wrote: "We confirm that the liquidator accepts personal liability in respect of any awards of Expenses in favour of the Respondents in this Arbitration." I was advised by Mr Sellar that Scott's position is that the terms of that letter amount to an undertaking on the part of Mr Blin that he will remain liable for any award of expenses in the arbitration throughout, irrespective of the termination of his office as liquidator. Mr Connal, for Mr Blin, was present at the initial part of the hearing on 22nd February 2002. He made no submissions at that stage. He appeared briefly at the continued hearing on 7 November 2002 but only to present a note of written submission and withdraw. No oral submissions were, accordingly, made to me by or on behalf of Mr Blin but it seems implicit in the written submission presented that he is concerned at the risk that he might be found liable in the arbitration expenses to an extent that is greater than the sums retained by him for that purpose. That is not to say that he concedes Scott's argument regarding the extent of his liability, namely that it subsists beyond the date that he ceased to be liquidator. It would be surprising if he did. He does, however, appear to be aware of it and its potential implications for his position.

[7] It is also clear that the company presently has no assets. On the positive side it has only its claim in the arbitration albeit that that is, evidently, a substantial one.

[8] After the removal of Mr Blin there was no liquidator in office for a period. Then David K Hunter of Messrs Campbell Dallas was appointed as liquidator of the company of 28 July 1999. He sought an indemnity to protect him against liability for the costs of and expenses in the arbitration. It proved impossible, however, to reach agreement regarding an indemnity for him and he, accordingly, resigned as liquidator on 8 January 2001. The arbitration appears not to have progressed in the meantime. Duncan Donald McGruther, ['the Noter'], was appointed as liquidator on 8 January 2001.

[9] On 31 January 2001, at meetings of creditors and members of the company, a creditor's voluntary arrangement ["CVA" - 61/1 of Process] was approved. Under the CVA the Noter became its Supervisor and it is provided, by clause 2.1, that he is to pay the preferential creditors in full, he having reached agreement with Adquest Ltd, [a creditor of the company of which Mr Politakis is also a director] that it would provide funds to enable him to do so. The CVA provides thereafter that the Noter is required to apply to the court to sist the liquidation [clause 2.4] and in the event of the court doing so, that the arbitration will be conducted by the directors of the company [clause 2.8].

[10] In the event of the application for a sist being refused, the Noter is entitled to call on Adquest Ltd to provide him with "sufficient indemnity against the costs of the arbitration as he shall reasonably require to pursue the arbitration to a conclusion". But no specification is given as to what constitutes "sufficient" indemnity or "reasonable" requirement. Clearly, there is much scope for disagreement on those matters and a real risk that, if the sist is not granted, matters will rest as they did in the case of Mr Hunter, with no agreement on satisfactory indemnification ever being reached and the arbitration thus not being able to progress at all.

[11] The results of the meetings at which the CVA was approved were reported to the court on 5 February 2001 and no challenges to the CVA have been made. The requirements of section 5[4] of the Act have, accordingly, been met, in the event that consideration is given to the granting of a sist under s.5[3] of the Act.

[12] The arbitration is governed by The Chartered Institute of Arbitrators [Arbiters] Scottish Branch's Scottish Arbitration Rules, rules 7.2 and 7.3 of which provide:

"7.2 The arbiter shall have the power to order any party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner the arbiter thinks fit.

7.3 The arbiter shall also have the power to order any party to provide security for all or part of any amount in dispute in the arbitration."

To date, no applications have been made to the arbiter under either rule. From the submissions made to me, I can surmise that Scott has not done so thus far as it has considered itself adequately protected by the fact that it has been arbitrating not only with Mr Blin in his capacity as liquidator but with the added reassurance provided by his agents' letter of 10 October 1996, to which I have already referred.

The proceedings :

[13] The Noter lodged the present application with the Court shortly after the expiry of the time limits provided for in s.5[4] of the Act. Answers for both Mr Blin and Scott were lodged in opposition to the application. The pleadings were adjusted, a Record was made up and a hearing fixed for the earliest available date which was not until 22 February 2002. The hearing did not finish and was continued until the next available date, 7 November 2002. Whilst there had been delays in the court process, these did not appear to be indicative of any lack of appropriate urgency on the part of the Noter. Rather, they appeared to be due to the time taken up by the process of exchange of written pleadings and the unavailability of the requisite court time. That was, in any event, what was stated to be the cause by counsel for the Noter, without contradiction. It did seem to me to be singularly unfortunate that in a liquidation which began some eleven years ago, it has taken almost two years to get to the end of a hearing to determine an application in respect of an issue surrounding an arbitration which began over six years ago. The resolution of the affairs of the company clearly now requires to move forward.

[14] ***Whether or not the liquidation should be sisted:***

Submissions for the Noter:

Counsel for the Noter invited me to sist the liquidation either under s.5[3] or s.147[1] of the 1986 Act although he had a preference for s.5[3]. He submitted that the matter was a question of the exercise of a discretion and there was no authority that compelled me in either direction. Whether I approached matters by reference to s.5[3] or s.147 [1], there were good reasons for the grant of a sist namely: whilst the company was in liquidation, there were problems with the arbitration; there was now a CVA in place and that CVA expressly envisaged the sisting of the liquidation; there was a particular significance of the CVA in that it showed that the majority of those entitled to vote at the meetings where the proposal was approved had identified the route whereby the liquidation would be sisted as the most appropriate one to secure the company's only potential asset in circumstances where the company had no other assets; there would be a benefit to the directors of the company in that they would be in charge of the arbitration without there being any scope for conflict between them and the liquidator; there would be a benefit to the creditors in that there would be savings in the expenses of the liquidation including the substantial indemnity premium that would require to be paid to protect the liquidator in respect of the expenses of the arbitration if the liquidation were not sisted; Scott did not have title to object since they were not creditors or members of the company nor were they the liquidator; and even if Scott did have title and/or interest to object their interests were adequately protected by their right to apply to the arbiter for an order for security for costs under the rules of the arbitration.

[15] Counsel for the Noter stressed that it could be in Scott's interests that the arbitration never be resolved and that was a potential outcome if the sist were not granted. Scott's interests seemed to lie in preserving the status quo which had quite patently prevented the resolution of the arbitration so far. What Scott was, in effect, seeking to do was to assert a right that they did not have, namely the right to have a determinative voice in the question of whether or not their opponent in an arbitration should remain in liquidation or not. Counsel for the Noter recognised that, so long as the company was in liquidation, any liquidator conducting the arbitration would expose himself to the risk of personal liability for expenses albeit that the precise terms of any award of expenses would not be a foregone conclusion. It was clear from authorities such as ***Kilmarnock Theatre Company Ltd* v *Buchanan*** 1911 SC 607 and ***Dyer* v *Craiglaw Developments Ltd*** 1999 SLT 1228 that whilst there is a general rule that a liquidator who litigates exposes himself to the risk of personal liability on the basis that by litigating in a representative

capacity he warrants the sufficiency of the funds available to meet the cost of litigating, disposal of the question of liability for expenses to that effect is not inevitable. It is, it was submitted, always in the discretion of the court as regards the finding in expenses it makes. A liquidator could, for instance, be found liable in expenses only to the extent that there are company funds to which he look for relief. Equally, he may be found liable for expenses irrespective of the availability of company funds.

[16] Interesting though the excursus into the authorities as to the potential nature of a liquidator's liability for expenses in a litigation to which he is party was, it was clear that, for the purposes of this application, the Noter had to and did accept that Scott was entitled to assert that if the arbitration was conducted by the company rather than by the liquidator, they would be deprived of the chance or prospect of being able to recover expenses from the liquidator in the event of their obtaining such an award in the arbitration. Further, counsel for the Noter did not demur from the submission advanced by senior counsel for Scott that any such award would constitute liquidation expenses and so be given priority over other debts. Nor, indeed, did he demur from the underlying assumption that was implicit in the approach taken by senior counsel for Scott namely that no liquidator would, as a matter of practicality, be prepared to litigate or arbitrate without first ensuring that there was adequate funding available to him to meet any liability for expenses. In the event of the company having no assets, that would mean the liquidator ensuring that there was some other protective mechanism in place such as an indemnity. Professional liquidators would not act otherwise.

[17] In respect that the Noter and Scott were at issue as to whether or not s.5[3] conferred power on the court to grant a sist for a limited period only, counsel for the Noter submitted that its terms were clearly wide enough to cover such a power. His primary submission was that ordinary language should, in accordance with the standard principles of statutory interpretation, be given their ordinary meaning. Parliament had clearly deliberately included the use of the Scottish term 'sist'. That term was well known in ordinary language at least as used by Scots lawyers, to refer to the temporary cessation of proceedings. There was no policy or principle that dictated that it should be understood only to refer to a permanent cessation.

Submissions for Scott :

[18] Senior counsel for Scott submitted that the application for a sist should not be granted. Various extended arguments were advanced orally under reference to a written submission, a first further written submission and a second further written submission as to why the application for a sist should be refused but ultimately Scott's essential position remained that [a] they were seeking protection for their "rights as contingent creditors" in respect of any future award of expenses in the arbitration; and [b] their opposition would be withdrawn if the company made any offer of security for expenses which they considered reasonable: security for the sum of £250,000 was advanced by senior counsel for Scott as a figure that they would consider reasonable. That sum of £250,000 was the estimate of the total of their expenses and potential liability for the fees of the arbiter and the arbiter's clerk. That was against a background of an averment on Scott's behalf that their expenses to date amounted to £130,000. Vouching produced at the November hearing showed those expenses, insofar as recoverable, infact to be no more than about £52,000 and there may yet be disputes about that figure which reduce it.

[19] Senior counsel for Scott submitted that any sist granted under s.5[3] would require to be a permanent one as the section did not allow for temporary sists, which could be distinguished from s.147, the wording of which expressly did so. Initially, he submitted that s.5[3][b] achieved broadly the same function as the "limited time" part of s.147 but later he submitted that parts [a] and [b] of s.5[3] were the wrong way round and that the reference to the power to discharge an administration order made it clear that the section was concerned with permanent not temporary cessation.

[20] The argument for Scott focused heavily on the fact that if they were successful in obtaining an award of expenses against a liquidator, any such award would constitute expenses in the liquidation and would, accordingly, put them in an advantageous position. Various references were made to the ways in which the law provides protection for a liquidator as regards recovery of liquidation expenses and the priority given to them over other debts but these were not, in the main, in dispute.

[21] Some reliance was placed by Mr Sellar on the terms of Rule 1.19 of the Rules applicable to CVA's in respect that provision is made for what is to happen in respect of outstanding balances due to the liquidator where the liquidator does not become Supervisor of the CVA . In short, the rules oblige the non-liquidator Supervisor to discharge any balance due to the liquidator or give an undertaking in respect of it. Mr Sellar submitted that that indicated that Parliament intended that a CVA should not prejudice a liquidator's rights and, by implication, it was intended that the rights of third parties i.e. those to whom the liquidator, in turn, had liabilities, should also be protected.

[22] Further, Mr Sellar referred to the recent decision of the Court of Appeal in ***Re N T Gallacher & Son Ltd*** [2002] BCLC 133. It confirmed that in the absence of express provision to the contrary, company assets put into a voluntary arrangement predating its liquidation remain subject to the trust created by that arrangement so as to be available firstly for the benefit of the creditors in the voluntary arrangement. Mr Sellar relied on this decision for a submission that the court should not remove a third party's "rights against a liquidator" [those "rights" being, in this case, not rights which presently subsist but which will subsist at a future date if and only if Scott obtains an award of expenses] where they may be that party's only protection.

[23] It was common ground between the parties that there was no authority on the application of s.5[3] of the 1986 Act but both referred me to two English cases where the applicability of s.147 [1] had been considered.

[24] The first of these was ***In re Calgary And Edmonton Land Co. Ltd [In Liquidation]*** 1975 1WLR 355, a case in which a minority shareholder sought a permanent stay of a liquidation under s.256[1] of the Companies Act 1948, in circumstances where no firm or acceptable proposals had been made in respect of the interests of the creditors and the liquidator nor was there any scheme in place to bind the other shareholders. The application for a stay was, accordingly, refused. Counsel for the Noter sought to distinguish the case under reference to the existence of the CVA in the present case and the fact that he was seeking a sist only until the outcome of the arbitration, not a permanent one. Senior counsel for Scott, on the other hand, referred to and adopted the passage in the opinion of Megarry J at p.358-9 where he states that the wording of the legislation indicates to him that the applicant for a stay must " make out a case that carries conviction." He also submitted that the reference to the requirement to consider the interest of the liquidator supported his contention that it was important, when considering whether to sist, to take account of the need to protect the liquidation expenses.

[25] The other case relied on by both parties was ***Re Lowston Ltd*** 1991 BCLC 570 where a stay was granted in the unusual circumstances of a company having been put into liquidation on the basis of a judgment in default which was subsequently set aside ***In Re Calgary And Edmonton Land Co Ltd*** was there referred to as support for Harman J's approach that he had to: *" be satisfied that it is proper to allow this company with this history to re-emerge back as an unencumbered company able to trade and carry on business"*, where the company proposed to recommence trading. The stay was granted subject to certain undertakings regarding the keeping of company records and the postponement of certain debts. The court was, on the basis of these undertakings, satisfied that there was proper protection for *"the putative future creditors of the company."* [see: Harman J @ 574]. Counsel for the Noter sought to distinguish the case on the basis that it concerned a company which sought to return to its former trading which the present company did not. Indeed, he indicated that the company would give an undertaking not to trade if the sist were granted. Senior counsel for Scott relied on the case as one which supported his position. There was, he submitted, no difference in principle between allowing an insolvent company to trade and allowing an insolvent company to arbitrate. The court should be as concerned regarding the latter as the former, particularly where to allow the insolvent company to arbitrate would deprive the other party in the arbitration of the prospect of any award of expenses being recoverable as an expense in the liquidation and so in priority to other debts.

Decision:

[26] It seems to me that the circumstances of this case are really very simple. I proceed on the basis that the company has a claim in an arbitration that is a stateable one as is evident from the record and as can, perhaps, be regarded as being confirmed by the fact that Scott has, in the past, been prepared to offer a

significant sum [a sum in excess of even their highest estimate of the risk in expenses that they run] to settle the company's claim. The arbitration has not progressed to any significant degree whilst the company is in liquidation. The arbitration will not progress without a sist of the liquidation unless the Noter secures a satisfactory indemnity for the risk that he will incur in expenses if he takes it on. It cannot be assumed that a satisfactory indemnity will be available. Scott, through their senior counsel, frankly acknowledged that the arbitration is getting nowhere at present and showed no desire to revive it. Although Scott have a counterclaim, given that the company has no assets, the value to them of that counterclaim lies only in its ability to diminish any liability that the arbiter finds they have to the company. It would not be at all surprising if a party in Scott's position viewed inaction as being the ideal strategy.

[27] There seems to be no doubt that I can also approach matters on the basis that if the company remains in liquidation and if Scott are ultimately successful in securing an award of expenses that is not wholly offset by their liability to the company, those expenses are liable to be paid to Scott by the Noter. The Noter may have a right of relief in terms of any indemnity arrangements and he may, depending on the terms of any decree , not be found liable beyond the extent of any company assets available to him, as I have already discussed, but his counsel was correct, in my view, to accept that for the purposes of the present application, it was appropriate to proceed on the basis that he could be found liable. Separately, it seemed to be accepted by him that, in any event, any such award would have priority against the company's assets as against other debtors, since they fell to be treated as liquidation expenses. I could not, though, help but feel that in the present case, if all that Scott's could rely on was that the award of expenses would have the priority of liquidation expenses then that would have the character of a pyrrhic victory. That is because the only assets that the company can ever now have is the damages, if any, that it recovers from Scott in the arbitration. That being so, if no damages are awarded against Scott, then notwithstanding the proper characterisation of an award of expenses in their favour as a liquidation expense, there will be no assets amongst which they can take priority. In short, to be certain of recovery, Scott would require to obtain an award of expenses that is effective against the Noter. To stress that any award of expenses would form expenses in the liquidation did not really seem, in the circumstances, to add weight to Scott's argument.

The nature of Scott's interest:

[28] Mr Sellar submitted that Scott were to be regarded as contingent creditors and therefore persons who had an interest to object to the sist. Mr Sandison submitted, conversely, that Scott were not even a contingent creditor so that at best, they could be regarded as a party with an interest but not with a right. He made that submission under reference to the case of ***Re Wisepark Ltd*** 1994 Ch D 221 in which it was held that a claim for costs was not a contingent liability within s.382 of the 1986 Act but was only a claim which came into existence if and when an order for costs was made. It is, though, clear that the decision in that case was motivated, at least to some extent, by a desire to overcome the difficulty presented by the fact that under s.51 of the Supreme Court Act it was only the court that had power to order costs incurred in court proceedings. The Supervisor of a CVA did not have that power. Thus the only means available to ensure that the claimants obtained an order for costs which might otherwise have been treated as debts in the CVA was to find that they were not, during the period of the CVA determined and therefore left over for the court to award at a later date.

[29] I note, however, that the matter is also dealt with by **Graham Stewart on Diligence** @ p.81, where claims are described as being "truly contingent" where there is no vested right in the creditor. At that stage, they are said to exist only "*in spe*". It is also observed: *"Claims again which depend on the issue of a suit are not truly contingent debts; for decree in the action merely constitutes the debt which existed at the commencement of the case."*

That would all seem to suggest that a debt which did not exist at the commencement of the action but to which a party had some hope of obtaining right, could properly be characterised as a contingent claim.

[30] Whatever be the correct label to give Scott's interest, whether contingent creditor or not, it is clear that Scott has an interest in the present proceedings. That was not seriously disputed by the Noter. Scott has an interest in respect that, in the arbitration, they might, in the fullness of time, obtain an award of

expenses against the company. I have no difficulty in accepting that that is an interest which should be taken into account in considering whether or not to exercise the discretionary power to sist, whether under s.5[3][a] or 147[1] of the 1986 Act notwithstanding that in such case law as presently exists on the exercise of the power to stay, only the interests of creditors, members and liquidators have been considered. That is though, it seems, because as a matter of fact, there were no parties involved in the cases under consideration who asserted any interest comparable to that of Scott. The question that then arises is what weight should be given to Scott's interest, bearing in mind the whole surrounding facts and circumstances.

The test to be applied:

[31] Whilst parties were agreed that it was **relevant to consider the terms of the opinion of Megarry J in the case of *In** re Calgary & Edmonton Land Co Ltd*, there was a difference in emphasis as between their approaches. Senior counsel for Scott seemed to urge me to accept the case as definitive of the test to be applied when considering a sist whilst counsel for the Noter, though not disputing the merits of the approach set out, sought to distinguish the present case on its facts. The case is clearly of some assistance. There would seem to be no doubt that the court would normally wish to ensure that the interests of creditors, shareholders and the liquidator were not going to be prejudiced by the grant of a sist [see: Megarry J @ p.360]. Stress was laid by senior counsel for Scott on the passage at p. 358H-359A, where, having observed that the power to determine an application under s.256[1] of the Companies Act 1948 was circumscribed by the condition imposed by s.307 of that Act to the effect the court must be satisfied that it would be "just and beneficial" to exercise the power, Megarry J states: *"... the words 'satisfied', 'just and beneficial', 'satisfaction of the court', and 'ought to be stayed' seem to me to indicate that the appellant for a stay must make out a case that carries conviction... ."*

Mr Sellar seemed to suggest that the words "case that carries conviction" implied that a particularly high and stringent standard required to be met by the applicant. If, however, that were so, that would conflict with the fact that Parliament have, in terms of both provisions which empower the court to grant a sist, conferred upon it a wide and unfettered discretion albeit that it is seems clear that in both cases, the onus is on the applicant to satisfy the court that the order sought can properly be made.

[32] It is, in my opinion, appropriate to approach the application for a sist on the basis that [a] the onus is on the applicant; [b] it is for the applicant to satisfy the court that it is appropriate, in all the circumstances, to grant the sist, taking account of all the relevant interests. In many cases under s.5[3][a] it may well be that little will require to be presented to the court other than the fact of the CVA and it is, no doubt, because of that that Parliament did not consider it necessary to spell out that the court would require to be satisfied that the sist "ought" to be granted. It is, though, inconceivable that the court would exercise its discretion to grant the sist other than in circumstances where it was satisfied that it ought to do so.

[33] The difference between the tests laid down in the two subsections would seem to be one of emphasis. It can, perhaps, be characterised by the fact that whereas under s.5[3][a], the simple wording is such that the court may well be persuaded to grant a sist where there is a CVA in circumstances where to sist would not cause any harm, under s.147[1], given the wording *"proof to the satisfaction of the court"* that the liquidation "ought" to be sisted, the court is liable to look for evidence of tangible benefit that is likely to arise if there is a sist.

[34] In this case, I am satisfied that it is necessary to take account of the interests of the creditors, shareholders, liquidators [past and present], and those of Scott. I was not made aware of any other party who might have an interest. Clearly the question arises of whether any of the identified parties have an interest which might be adversely affected by the sist and if so, what protections might be available for that party in respect their interests, in the event of a sist.

Applying the test:

[35] The application for a sist being one which emanates from the terms of a CVA, it can be approached on the basis that the majority of those who had title and interest to participate in the CVA have positively identified a sist of the liquidation as being the most appropriate route to secure the only remaining potential asset for the company. In short, they have identified that it will be beneficial to the company. Clearly, unlike the position in the case of ***In re Calgary and Edmonton Land Company***, the rights and

interests of creditors, shareholders and the present liquidator have been covered by the CVA. I am satisfied that I can safely conclude that their rights and interests will not be adversely affected by the granting of the sist. As regards Scott, I am satisfied that their interest in respect of their potential claim for expenses is adequately protected by the fact that they can make application to the arbiter for an order for costs, at any time.

[36] There is no reason to suppose that the arbiter will not reach a fair and just decision regarding any application that Scott makes to him for an order for security for costs. Indeed, I consider that I am obliged to assume that he will do so. He is an experienced arbiter to whom the parties have agreed to submit their dispute for resolution. He, as arbiter, will be in a far better position than this court to assess what ought to occur in the arbitration over which he presides and he has been put in that position by agreement of the parties. That agreement includes specific provisions empowering him to make orders regarding security for costs and Scott are, accordingly, to be taken to have accepted that he is capable of determining any application for such security in a manner which is fair and just as between parties. In particular, it is for him, not this court, to determine what is the appropriate sum to be received in respect of costs, if any. He may consider £250,000, the sum proposed by Scott, to be excessive. He may, on the other hand, order that security for that sum be found in which case failure by the company to find it, will entitle Scott to absolvitor in the arbitration. He may make no order at all. The point is that he is in the best position to judge what is fair as regards security for expenses. I cannot, in these circumstances, regard Scott's interests as being other then adequately protected by reason of the rights that they have under the arbitration process itself.

[37] Further, there is a clear advantage in sisting the liquidation in that it will enable progress to be made towards a final resolution of the company's affairs. That is clearly desirable.

[38] Mr Sellar sought to argue that it was important for Scott that the company remain in liquidation for the purpose of strengthening their case for expenses against Mr Blin. They apprehended that if the sist was granted then he would found on the fact of the company being no longer in liquidation as supporting his argument that his liability for the expenses of the arbitration has been curtailed. No doubt that may be so. However, at this stage, the claims as between Mr Blin and Scott for expenses extending beyond his period of office are no more than hinted at and they are not, by definition, claims against the Noter or for which he is responsible. Mr Blin's position as set out in his written argument was distinctly coy and tentative on the matter. Further, I had the impression that Scott's attitude was to look to Mr Blin as something of a backstop lest they failed to recover against the Noter or against the company. In all the circumstances, such interest as Scott may have to maximise their available arguments against Mr Blin should not, in my opinion, be given any significant weight.

[39] I would add that it was somewhat unsatisfactory that Mr Blin, who has an outstanding Note in the liquidation, and who appeared, from the terms of the written argument lodged on his behalf, to have something to say as to whether or not the sist should be granted, decided, on the second day of the hearing, to have Mr Connal withdraw from the hearing. That meant that the court was left with a somewhat half hearted written suggestion that he might be adversely affected by the sist - if, for instance there was a shortfall between the funds retained by him and his ultimate liability for expenses - but no oral argument to support it. In particular, the question that obviously arises as to why his agents' letter of 10 October 1996 was not withdrawn when he ceased to hold office, was left unanswered. In the event, I consider that counsel for the Noter was right to characterise his written argument as amounting to no more than his saying: "what about me?" but without adding flesh to the bones of that question. I could not, I concluded, in the circumstances, regard any interest that Mr Blin had as being such as to weigh against the grant of a sist.

Section 5[3][a] of the 1986 Act

[40] In the event, the question of whether or not s.5[3][a] of the 1986 Act empowers the court to grant a sist for a limited period or not, does not require to be resolved, given the Noter's amendment which had the effect of presenting the application under both sections 5[3][a] and 147[1]. Senior counsel for Scott did not suggest that the application could not competently be presented under s.147[1] and it certainly seems clear that it is an alternative course that is available to the Noter in terms of the statute.

[41] Had I had to determine the question, I would, however, have been satisfied that this subsection does not require to be interpreted in the restricted sense contended for by senior counsel for Scott, namely so as to empower the court to grant only a permanent sist. Whilst s.147, which appears in Part IV of the 1986 Act, may be in different terms, it is clear that its genesis is different from that of s.5[3] [a], it having emerged from the earlier legislation to which I have already referred. S. 5 [3] [a], on the other hand, is the result of drafting required by the introduction of the new statutory scheme for creditors' voluntary arrangements that is contained in Part 1 of the 1986 Act. Thus, the two sections do not require to be looked at as being part of a seamless exercise for the provision of an interlocked scheme, whereby Part I was to cover permanent sists and Part IV, temporary ones.

[42] Further, I am readily satisfied that the terms of s.5[3][a] fall to be interpreted in accordance with the principles of applying to them ordinary linguistic sense. The subsection uses two recognised legal terms, "stay" and "sist". One is well understood to have a particular meaning south of the border and the other is well understood in this jurisdiction. "Sist" is regularly used in Scotland to refer to the situation where a stop is put on the further conduct of proceedings so the parties are precluded from taking any further steps until the arrival of a certain date or the occurrence of an event or until further order of the court. The process is not terminated whilst an action is sisted. Indeed, arrestments on the dependence of an action can be laid on during a period of sist [***Robert Taylor & Partners Ltd* v *William Gerard Ltd*** 1996 SLT [Sh Ct] 105]. It is not used to refer to circumstances where proceedings are brought wholly to an end. There being no indication within the body of the statute as to any reason for applying a different meaning to the word "sist" and no reason in policy or principle for doing so, I am not persuaded that I should give it a restricted interpretation.

[43] I do not see that the fact that discharge of an administration order is also provided for in the subsection calls for the word "sist" to be given a different interpretation than the ordinary one. Nor do I see that parts [a] and [b] of the subsection should be read so as confine the court's powers under [b] to the period prior to sist, which was the thrust of the submission by senior counsel for Scott. On the contrary, it is clear, in my submission, from the fact that the court has power both to sist and to give directions with respect to the conduct of the winding up that it was envisaged that any sist may not be a permanent one. Directions in the winding up may be called for after a period of sist, for instance.

[44] I have reached the view that the Noter's application to sist the liquidation until the final decree in the arbitration should be granted provided that an undertaking to the effect that the company will not trade during the period of sist is given. I am prepared to grant the application under and in terms of s.5[3] of the 1986 Act but if I am wrong in regarding that as a provision which empowers the grant of a sist for a limited time, then I am also satisfied that, considering the whole and unusual circumstances of this case, the liquidation ought to be sisted under and in terms of s.147[1] of the 1986 Act. That is so even if, as was originally submitted on behalf of the Noter, there is a heavier onus on an applicant under s.147 [1] than under s.5[3][a]. I am readily satisfied, for the reasons stated above, that given the facts of this case, an order to sist ought to be granted. The pronouncing of such an order is clearly the only way in which further procedure in the arbitration can be assured and the procedural rules of the arbitration procedure itself provide precisely the protection that Scott sought to assert in response to this application. The sist will be for the period from the date of the interlocutor in respect of the Noter's Note until the final decree in the arbitration. I will put the case out By Order to afford the opportunity of an undertaking being given in the terms I have discussed.

First Respondent: Connal, Solicitor Advocate, Q.C.; McGrigor Donald
Second Respondents: Sellar, Q.C.; MacRoberts