

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0022

BETWEEN:

GOLDEN MEDITECH STEM CELLS (BVI) COMPANY LIMITED

Appellant/Respondent

and

[1] BLUE OCEAN CREATION INVESTMENT HONG KONG LTD.

[2] BLUE OCEAN STRUCTURE INVESTMENT COMPANY LTD.

Respondents/Applicants

Before:

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mde. Petra Nicola Byer

Justice of Appeal [Ag.]

The Hon. Mr. Darshan Ramdhani

Justice of Appeal [Ag.]

Appearances:

Mr. Ben Valentin, KC, with him Mr. John Carrington, KC and Ms. Reisa Singh
for the appellant

Mr. David Chivers, KC and Ms. Hilary Stonefrost for the respondents

2024: October 29, 30;

2025: July 09.

Application to adduce fresh evidence – Principles in Ladd v Marshall [1954] 1 WLR 1489 – Whether evidence that did not exist at the time of the trial or a change in circumstance post-trial could be evidence adduced before the Court of Appeal – Whether the inherent jurisdiction of the Court could be invoked

This application arises out of an appeal filed on 20th December 2023, wherein the appellant appealed against an order dated 12th September 2023 ordering the following: i) the respondents' application for summary judgment be granted; ii) the appellant's re-amendment

application be dismissed; and iii) the costs of both applications be paid by the appellant to the respondents.

The respondents filed a counter notice of appeal on 5th March 2024 as well as an application to adduce fresh evidence (“the application”), which is the application before the Court. The application sought to adduce as fresh evidence, the judgment of Justice Linda Chan (“Chan J”) in the decision *China Stem Cells Holdings Limited v Zheng Ting & Ors* (the “HK Judgment”) in the appeal.

The respondents posit that the HK judgment should be admitted as fresh evidence in accordance with the principles set out in *Ladd v Marshall* and/or in the exercise of the Court’s inherent jurisdiction. The appellant, however, argues that the factual findings by a judge in a foreign court are inadmissible to the case at hand.

Held: dismissing the application to adduce fresh evidence, ordering that costs on the application be costs in the appeal, that;

1. There is a clear duty on parties to present their full case at the first instance, and it is very undesirable if interlocutory disputes are argued out afresh on appeal on different materials never put before the judge whose primary discretion it is to make those determinations. An opportunity to bring an appeal from interlocutory decisions is not another opportunity for the losing party to invite the Court to rehear the application on the basis of either evidence available but not adduced before the court below and which the party seeking to adduce and to rely on it could not have discovered with reasonable diligence or additional or new evidence not in existence at the time of the first instance hearing.

Thune and another v London Properties Ltd and Ors [1990] 1 WLR 562 applied; **Chia Hsing Wang v XY and Ors** BVIHCMAP2022/0055 (delivered 6th June 2023, reported) applied.

2. This Court must be cautious in its approach when determining an application for fresh evidence pursuant to the inherent jurisdiction of the Court. The inherent jurisdiction of the Court aids the juridical operation of the overriding objective to enable the court to deal with cases justly and should only be invoked if the evidence is relevant and of utility to the Court. Thus, on fresh evidence applications the Court is guided by the principles in *Ladd v Marshall*. However, it has been recognised that those principles should be relaxed in interlocutory appeals, as the court seeks to give effect to the overriding objective in circumstances where the issues between the parties are yet to be fully determined on their merits.

Guy Joseph v The Constituency Boundaries Commission et al SLUHCVP2015/0013 (delivered 1st October 2015, unreported) applied.

3. The principles set out in *Ladd v Marshall* are 1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; 2) the

evidence must be such that if given would probably have an important influence on the result of the case, though need not be decisive and 3) the evidence must be such as is presumably to be believed or in other words it must be apparently credible but not necessarily incontrovertible. Further, it is fatal to the application to rely on fresh evidence if even one limb cannot be satisfied.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Premier Exports London Ltd v Piyush Rajwani** [2022] EWHC 1188 considered.

4. In considering whether an applicant can find themselves within the parameters of the first limb, a more relaxed approach is utilised in matters of an interlocutory nature. Although courts may apply a relaxed standard of diligence in interlocutory appeals, this does not extend to evidence that came into existence after the lower court's decision. The findings of the judgment which the respondent wishes to admit as fresh evidence clearly post-dates the hearing and the order of the court below. Therefore, the application has failed to meet the threshold of the first limb.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Lam Wo Ping and Anor v Chen Jian Yun and Ors** BVIHCMAP2023/0006 (delivered 20th August 2024, unreported) applied; **WWRT Limited v Carosan Trading Limited et al** BVIHCMAP2022/0002 (delivered 20th July 2022, unreported) applied; **Staray Capital v Cha, Yang** BVIHCMAP2013/0009 (delivered 14th July 2024, unreported) distinguished.

5. The finding in the HK judgment had nothing to do with the debt issue before this Court and fell squarely outside of the Hong Kong court's scope of inquiry. There is nothing before the Court to suggest that the HK judgment would have had an important influence on the matter before this Court. Similarly, an issue estoppel argument may not succeed where: (i) the parties in the two proceedings lack privity, particularly where corporate separateness is not displaced by mere allegations of common control; and (ii) the foreign judgment relied upon is interlocutory or subject to appeal and thus lacks finality. Furthermore, as neither party argued the third limb, it cannot be argued that the HK judgment was credible. Therefore, the second and third limbs also fail.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Caylon v Irene Michailaidis and Ors** [2009] UKPC 34 followed; **Arnold v National Westminster Bank plc** [1991] 2 AC 93 applied; **Hollington v F. Hewthorn & Co Ltd** [1943] KB 587 applied.

JUDGMENT

Background

- [1] **BYER JA [AG.]:** By notice of appeal filed on 20th December 2023, the appellant (being the defendant in the lower court) appealed against the decision of Wallbank

J [Ag.] made on 12th September 2023 by which the learned judge ordered that (i) the respondents' application for summary judgment be granted; (ii) the appellant's re-amendment application be dismissed; and that (iii) the costs of both applications be paid by the appellant to the respondents. The respondents filed a counter notice of appeal on 5th March 2024. By application filed on the same date (the "Application"), the respondents sought to adduce, as fresh evidence in the appeal, the judgment of Justice Linda Chan ("Chan J") in the decision **China Stem Cells Holdings Limited v Zheng Ting & Ors** (the "HK Judgment").¹ The fourth affidavit of Richard John Baird was filed in support of the Application.

- [2] As a matter of context, in the court below, the respondents claimed relief from the appellant on the basis that certain purported share charges relied upon by the appellant were invalid and of no effect. The appellant alleged that they were owed a debt by the Ying Peng Fund. This debt was secured, in 2018, by share charges over the respondents (the "2018 share charges"). The 2018 share charges are the subject of the proceedings in the British Virgin Islands ("BVI"). In 2019, another set of charges were said to have been entered into over the business holding companies of the Ying Peng Fund and those arrangements are said, by the appellant, to be in support of the same debt (the "2019 security arrangement"). The 2019 security arrangement is the subject of proceedings in Hong Kong. The respondents contend that in essence, there was one debt secured by two separate charges and the debt was the connecting factor between the BVI and Hong Kong proceedings.

Respondents' submissions in support of the Application

- [3] The respondents posit that the HK Judgment should be admitted as fresh evidence in accordance with the principles set out in **Ladd v Marshall**² and/or in exercise of this Court's discretion in its inherent jurisdiction. They reiterated the guiding principles as espoused by Denning LJ in **Ladd v Marshall** that:

¹ [2024] HKCFI 481.

² [1954] 1 WLR 1489.

- (i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (ii) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive and;
- (iii) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[4] The respondents highlighted that in the case of an interlocutory appeal, the **Ladd v Marshall** principles are applied in a more relaxed manner and that the power to adduce fresh evidence, being discretionary, ought to be exercised in furtherance of the overriding objective of the **Civil Procedure Rules (Revised Edition) 2023** (the “CPR”).

The evidence could not have been obtained with reasonable diligence for use at the trial

[5] The respondents assert that the HK Judgment could not have been obtained for use in the proceedings in the court below as it post-dated the judgment of Wallbank J [Ag.]. They also asserted that whilst the HK Judgment post-dated Wallbank J [Ag.]’s decision, the information and evidence on which Chan J’s findings were made, existed prior to the hearing before Wallbank J [Ag.]. This information included the fact that the appellant’s witnesses participated in the 2019 security arrangement, and this was only first mentioned in the defence filed in the HK proceedings. This fact of the 2019 security arrangement, the respondent says, was not disclosed in the BVI proceedings.

- [6] Citing the decision of this Court in the consolidated appeal **Bilzerian v Weiner et al**,³ the respondents highlighted that in that case, this Court admitted into evidence, documents (including a judgment and order) which post-dated the hearing and decision in the court below. They argued that this Court, at paragraph 33 of the decision, accepted that documents which came into existence, subsequent, to the delivery of the judgment, which was subject to appeal, could be admitted as fresh evidence in the appeal notwithstanding that they did not exist at the time of the judgment below. The respondents further cited this Court's decision in **Maluf v Durant International Corp**⁴ where this Court admitted into evidence an opinion on foreign law which had been prepared during the course of the appeal, several months after the decision from which the appeal was brought. In that case, this Court also accepted that the first limb of **Ladd v Marshall** had been satisfied. They thus argued that the HK Judgment, like the judgment and order in **Bilzerian**, and the opinion in **Maluf**, satisfied the first limb of the **Ladd v Marshall** principles, despite post-dating Wallbank J [Ag.]'s decision, and therefore ought to be admitted.
- [7] Counsel for the respondents also noted the decision of this Court in **WWRT Limited v Carosan Trading Limited et al**⁵ where this Court stated that to satisfy the first limb of **Ladd v Marshall**, the evidence to be adduced must be evidence that existed at the time of the trial but could not have been obtained with reasonable diligence for use at the trial. Expressing doubt as to the correctness of **WWRT Limited**, the respondents argued that even if the decision was correct, this did not prevent the HK Judgment from satisfying the first limb of **Ladd v Marshall** since the facts were, in material respects, on par with the facts of **Staray Capital Limited et al v Cha, Yang**.⁶ They posited that like the evidence used to populate the opinions in **Staray v Cha**, the information and evidence on which Chan J's findings were based, existed

³ SKBHCVP2019/0028; SKBHCVP2019/0030; SKBHCVP2019/0031; SKBHCVP2019/0032; SKBHCVA2019/0033 (delivered 21st July 2020, unreported).

⁴ BVIHCP2021/0025 (delivered 13th January 2022, unreported).

⁵ BVIHCP2022/0002 (delivered 20th July 2022, unreported).

⁶ BVIHCP2013/0009 (delivered 14th July 2014, unreported).

prior to the hearing before Wallbank J [Ag.]. On this basis, they posit that the decision in **WWRT Limited** ought to be distinguished from the present facts.

- [8] Further, the respondents noted that in the subsequent decision granting conditional leave to appeal to His Majesty in Council (see **WWRT Limited v Carosan Trading Ltd. et al**⁷) the Court opined that insofar as the decisions in **Staray v Cha** and **Bilzerian**, where documents which post-dated the hearing were admitted into evidence, may be construed as being inconsistent with the decision in the appeal below, and that the Court could benefit from the guidance of the Privy Council. This, the respondents argued, was sufficient to doubt the correctness of the appeal court's decision in **WWRT Limited** and the Court should instead follow its decisions in **Staray v Cha**, **Bilzerian** and **Maluf** and determine that despite post-dating the trial judge's decision, the HK Judgment should be admitted since the evidence on which Chan J made her decision, existed prior to the hearing before Justice Wallbank.

Important influence

- [9] The respondents further assert that the HK Judgment is likely to have an important influence on the result of the appeal since the HK Judgment provides the factual basis for the ground of the respondents' counter notice of appeal which seeks to raise an issue estoppel. In their application for summary judgment in the court below, the respondents asserted that the purported indebtedness alleged by the appellant to be secured by the share charges, did not exist (the "Debt Issue") and this was evidenced by the factual findings made by Chan J in the HK Judgment, particularly those at paragraph 124 of the HK Judgment. The issue decided by Chan J which was relevant to the BVI proceedings, was her finding that the appellants' witnesses were in breach of their duties as directors by entering into the 2019 security arrangement since no debt was owing to the appellant by the Ying Peng Fund. Following cross examination of Ms. Tina Zheng and Mr. Albert Chen, she found that their evidence and that there had been a default in payment of the full consideration of the debt, did not withstand scrutiny since it was inconsistent with

⁷ BVIHCP2022/0002 (delivered 11th May 2023, unreported).

what was stated in the annual report of the appellant's parent company (Golden Meditech Holding Limited ("GMHL")).

- [10] In the BVI proceedings, the judge below found that the Debt Issue was a triable one and this is the subject of the respondents' cross appeal. The respondents' evidence in the court below was that the contemporaneous evidence of payments in 2018 of the purported debt was not only unassailable but had also never been challenged by the appellant since in the annual report of GMHL, the chairman's statement evidenced, that cash consideration had been received for the debt. The respondents contended that this was the very factual finding made by Chan J in the HK Judgment.
- [11] They further contended that this gave rise to an issue estoppel as to the non-existence of the debt. The 2018 share charges and the 2019 security arrangement, they argued, concerned the same debt. Thus, only one debt was in existence and the HK Judgment, had decided on the issue of the existence of this debt. If there was no debt for the purpose of the 2019 security arrangement, then no debt existed as it related to the 2018 share charges. The respondents therefore posited that the appellant is estopped from asserting in this appeal that the debt has not been paid in full since the grounds for issue estoppel are satisfied, in that, (i) the HK Judgment is a decision by a court of competent jurisdiction which is final and conclusive and a decision on the merits; (ii) there is a clear determination of the issue by the HK Judgment; (iii) the issue in the HK Judgment is the same as the issue decided by the lower court judge in the proceedings and (iv) the privity aspect is satisfied through either of two routes; the first being Mr. Kam who is the sole owner of GMHL, which in turn, owns the appellant; and secondly, the parties or their privies are the same in both proceedings.
- [12] The respondents argued that if they were to succeed on the issue estoppel argument in their counter-notice, then the appeal must necessarily fail. This was, in the contention of the respondents, a strong ground, for the admission of the HK

Judgment since it was crucial to their cross appeal and without it, there would be no factual basis for raising the issue estoppel argument.

The evidence must be credible

- [13] Counsel for the respondents asserted during oral submissions that this Court was not being asked to accept the opinion evidence of Chan J, but rather her determination of the issue regarding the non-existence of the debt. This, the respondents submitted, was credible evidence of the findings made by the learned judge that the debt no longer existed. As to the question, whether or not Chan J was only being asked to rule on the credibility of the witnesses, and not the issue of the non-existence of the debt, learned counsel responded that on the agreed list of issues for determination in the summons in Hong Kong, the court had to determine whether the witnesses were in breach of their fiduciary duty. He stated that one of the reasons they were found to be in breach of their fiduciary duty by Chan J was because the debt did not exist for the purpose of the 2019 security arrangement. As to the fact that the HK Judgment was now under appeal, counsel posited that as there was no stay in effect, the judgment was fully effective notwithstanding the pending appeal. Furthermore, there was no evidence before this Court that the findings of Chan J in relation to the non-existence of the debt, was in any event a finding that was under appeal.

Appellant's submissions in opposition

- [14] The crux of the appellant's argument is that the factual findings made by a judge in a foreign court are inadmissible in the present case and no issue estoppel arose on the facts. On the authority of **Hollington v F Hewthorn & Co Ltd**,⁸ the appellant asserted that it was trite law that a finding of fact in a judgment of another court or tribunal in earlier proceedings, even if against the same party as in the subsequent proceedings, is generally inadmissible in subsequent proceedings for the purpose of proving that finding of fact. Highlighting the rationale behind the **Hollington** rule,

⁸ [1943] KB 587.

the appellant quoted the words of Clarke LJ in **Rogers v Hoyle**⁹ where the learned judge stated that the opinion of someone who was not the trial judge was, as a matter of law, irrelevant. The appellant submitted that **Hollington** had been applied in several subsequent decisions and in the absence of any distinguishment proffered by the respondents, there was no good reason for this Court to depart from the **Hollington** rule. The findings by Chan J in the HK Judgment as regards to the Debt Issue, the appellant submitted, would have been wholly inadmissible in evidence before the trial judge on that issue and would therefore be equally inadmissible before the Court of Appeal. Despite the attempt by the respondents to argue that they were not asking the Court to accept the opinion evidence of Chan J, but rather her determination of the issue regarding the non-existence of the debt, counsel for the appellant asserted that this distinction was meaningless since what in fact the respondents were asking the Court to rely on, were her factual findings and opinions at paragraph 124 of the HK Judgment.

[15] The appellant further argued that, in any event, the HK Judgment failed to satisfy any of the three limbs of the **Ladd v Marshall** principles. Relying on **WWRT Limited**, the appellant submitted that the respondents failed to even overcome the first limb of the **Ladd v Marshall** principles since the HK Judgment post-dated Wallbank J [Ag.]’s decision. They further emphasized that the decisions relied on by the respondents to overcome the obstacle presented by **WWRT Limited**, were distinguishable.

[16] In relation to the case of **Bilzerian**, the appellant asserted, that that case did not in fact determine the question of fresh evidence as that case was ultimately determined based on a concession from counsel. The Court also did not decide the issue in **Staray v Cha** where it was not disputed that principles (i) and (iii) of **Ladd v Marshall** were satisfied. The appellant consequently posited that it was well-established that conceded points of law remained open to argument in other cases

⁹ [2015] QB 265 at paras. 39-40.

as per the authority of **Joscelyne v Nissen**.¹⁰ This principle they contended also applied where propositions of law were assumed as common ground as adumbrated in the case of **THG Plc & Others v Zedra Trust Company (Jersey) Limited**.¹¹ The appellant also distinguished the decision in **Maluf**, noting that on that occasion, the Court did not have the benefit of submissions on the **Hollington** rule.

[17] The appellant asserts that the respondents do not attack the reasoning in **WWRT Limited** but only seek to distinguish it based on the misconception that like the evidence used to populate the opinions in **Staray v Cha**, the information and evidence on which Chan J's findings were based existed prior to the hearing before Wallbank J [Ag.]. The appellant asserted that the existence of the alleged issue estoppel was "created", if it truly exists, by the HK Judgment and the evidence upon which it was based is beside the point. The respondents, they argue, are not seeking to refer to the recitation of evidence in the HK Judgment. They only rely on the findings made therein to ground an alleged issue estoppel. They resultantly submit that the distinction sought to be drawn by the respondents is therefore plainly wrong. Moreover, the evidence upon which the alleged finding in the HK Judgment appears to be based on, was before the court below and was considered by the judge who nevertheless concluded that in his opinion, the Debt Issue raised a triable issue. The contrary opinion of the HK judge is therefore inadmissible and irrelevant. The Court, they say, is bound by **WWRT Limited** and there is no argument advanced that **WWRT Limited** was *per incuriam* as per **Young v Bristol Aeroplane Co Ltd**.¹²

[18] The appellant made the further point that the Court did not have original jurisdiction to hear what amounted to a fresh strike out application that had not been considered below, which was the legal effect of this fresh evidence application. The issue estoppel argument, they say, should have been the subject of an application in the court below to allow the appellant an opportunity to be heard on same. The Court, the appellant submitted, does not have the jurisdiction to determine the Debt Issue,

¹⁰ [1970] 2 QB 86 at 99B per Russell LJ.

¹¹ [2024] EWCA Civ 158 at paragraphs 47-60 per Lewison LJ.

¹² [1944] 1 KB 718.

particularly where the lower court found this to be a triable issue as per the authority of **European Asian Bank AG v Punjab and Sind Bank (No 2)**.¹³

[19] Lastly, the appellant argued that the HK Judgment was not capable of being “apparently credible” since it was incapable of founding the issue estoppel argument. They submit that it was incumbent on the respondents to show some special reason why it would be an abuse of process and manifestly unfair to them that any purported re-litigation of what they have identified as the same issues would bring the administration of justice into disrepute. The Application, they posit, fails to point to any identifiable abuse. Moreover, they emphasize that the HK Judgment insofar as it made what is said to be a finding on the Debt Issue, went beyond the preliminary issues which had been set down to be determined by the judge. This purported ‘finding’ in paragraph 124 alleged by the respondents was really concerning the credibility of the witnesses in relation to the breach of their fiduciary duty. The judge therefore did not reach a final decision on the Debt Issue and in any event, she could not, since the parties to the debt were not before her.

[20] Also, there was no privity as alleged by the respondents since neither the appellant nor the respondents were parties to the proceedings in which the HK Judgment was made. The parties simply were not the same. Further, Wallbank J [Ag.]’s decision never determined whether Mr. Kam was the “moving spirit” in control of the appellant and in any event, this did not make the appellant his privy for the purpose of issue estoppel. In addition, the HK Judgment was presently under appeal and the “final and conclusive” requirement was not met. For these reasons, the appellant asserted that the Application ought to be dismissed forthwith.

The respondents’ reply

[21] During oral submissions, the Court took cognisance of the respondents’ contention that perhaps **WWRT Limited** was not rightly decided considering the Court’s decision in **Staray v Cha**. However, the Court specifically highlighted the recent

¹³ [1983] 1 WLR 642.

decision of **Lam Wo Ping and Anor v Chen Jian Yun and Ors**¹⁴ which appeared to have followed **WWRT Limited** and sought counsel for the respondents' views and submissions on this decision. Counsel addressed the decision in his oral arguments in reply and stated that he accepted that **Lam Wo Ping** did not support their argument that perhaps **WWRT Limited** had been incorrectly decided. Counsel, however, pointed out that in **Lam Wo Ping**, the underlying information was known to the parties whereas in this case, the information was withheld deliberately. He countered counsel for the appellant's argument that the information concerning the 2019 security arrangement was irrelevant by arguing that it was relevant since at no point did the two witnesses reveal the information and it would have clearly pointed to serious misconduct on their part. Counsel therefore asserted that **Lam Wo Ping** was distinguishable from the present facts.

- [22] Counsel for the respondent also reiterated that the application was being made both under the **Ladd v Marshall** principles and the inherent jurisdiction of the Court. He re-emphasized that the case fell within the overriding objective of the CPR, even if it was found to not fall within the precise **Ladd v Marshall** principles. Should the Court find that an issue estoppel does arise on the facts, it would not be in furtherance of the overriding objective for the Court to ignore this, since the point would likely be raised forthwith in the court below by an application being made and this would only lead to unnecessary costs and delay.

Court's considerations

- [23] In considering an application for fresh evidence, it is for this court to bear in mind the words of Lord Bingham in **Thune and another v London Properties Ltd and Ors**¹⁵ that there is a clear duty on the parties to present their full case at first instance. The learned judge also posited that it is very undesirable if interlocutory disputes are argued out afresh on appeal on different materials never put before the judge whose primary discretion it is to make those determinations. As this Court in

¹⁴ BVIHCMAP2023/0006 (delivered 20th August 2024, unreported).

¹⁵ [1990] 1 WLR 562 at 571.

Chia Hsing Wang v XY and Ors¹⁶ stated, an opportunity to bring an appeal from interlocutory decisions is not:

“... another opportunity for the losing party to invite the court to rehear the application on the basis of either evidence available but not adduced before the court below and which the party seeking to adduce and to rely on it could not have discovered with reasonable diligence; or additional or new evidence not in existence at the time of the first instance hearing. If this was generally allowed the justice system would become clogged with many dissatisfied parties seeking to produce and rely on new or other evidence as a means of rehearing the application at the appellate level. This would be contrary to the important principles of fairness and bringing finality to proceedings which principles undergird our system of justice.”

[24] That being said, I must be cautious in my approach when determining an application for fresh evidence under the inherent jurisdiction of this Court, but I must consider exercising my discretion judicially and according to principles of law that guide me as set out in the case of **Ladd v Marshall**.¹⁷

[25] Although the **Ladd v Marshall** principles were set out above, for completeness and to remind ourselves of same, they are restated here:

- (i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at trial;
- (ii) The evidence must be such that if given would probably have an important influence on the result of the case, though it need not be decisive
- (iii) The evidence must be such as is presumably to be believed or in other words it must be apparently credible but not necessarily incontrovertible

¹⁶ BVIHCMAP2022/0055 (delivered 6th June 2023, unreported).

¹⁷ Supra.

- [26] It is however now recognized by this Court that in considering the applicability of these principles a more relaxed approach has developed “in the interest of justice when dealing with applications to adduce fresh evidence in an appeal from an interlocutory application or an application which is not decisive of the merits of the matter.”¹⁸ This was confirmed in this Court’s decision in **Guy Joseph v The Constituency Boundaries Commission et al**¹⁹ where Pereira CJ (as she then was) concluded, that the **Ladd v Marshall** principles should be relaxed in interlocutory appeals, considering “...the courts seek to give effect to the overriding objective in circumstances where the issues between the parties are yet to be fully determined on their merits.”
- [27] The pertinent question in this instance must therefore be, whether in all the circumstances of the instant matter and on the application filed it would be in the furtherance of justice and pursuant to the overriding objective to allow a party at the hearing of the appeal to rely on evidence that was not before the lower court.
- [28] In this application the respondents in this matter seek to have admitted the HK judgment delivered on 8th February 2024 a date agreed by both sides as being subsequent to the judgment of the learned Judge in the court below.
- [29] In considering the arguments and submissions of the respondents in support of this application, it is clear that although they seek to bring their argument within all three limbs of **Ladd v Marshall**, it is also pellucid that the main limb upon which they rely is the second one on the basis that if the evidence is given, it would have an important influence on the hearing of the appeal, though it need not be decisive. In particular, the argument supports the counter notice of the respondents²⁰ in which they have appealed against the finding of the court below on that the issue surrounding the existence of the Debt should be determined at trial. In that counter

¹⁸ SKBHCVAP2019/0033 (delivered 21st July 2020, unreported) at paragraph 27.

¹⁹ SLUHCVAP2015/0013 (delivered 1st October 2015, unreported).

²⁰ Filed 5/3/2024 – seeking an order that there was no triable issue as between the parties on the question of an outstanding debt.

notice the respondents have therefore also sought to have the judgment of the learned judge below confirmed and additionally to have the finding made by him as to the triable issue regarding the Debt Issue set aside.

- [30] The fresh evidence which the respondent sought to adduce was however not the entirety of the HK judgment, but rather the finding of the trial judge specifically at paragraph 124(2) of that judgment which states in part as follows:

“124. Third, none of the reasons proffered by Tina and Albert for believing that the execution of the 2019 guarantee was in the best interests of the companies concerned withstands scrutiny...

(2) The assertion that Ying Peng Partnership/Yuan/Sanpower had been in default of paying the purchase price for the shares by September/October 2019 is contradicted by the statements in GMHL’s annual report of 2017/2018, which stated that (a) KPMG had inspected evidence of receipt of consideration under the 2016 SPA, and (b) the full consideration (and extension fee) had been received and partly spent. The annual report was approved by the Board of Directors of GMHL (which included Kam and Tina) and Albert was its corporate finance Vice President. Although Tina claims that in the notes to GMHL’s 2020 annual report it was stated that Ying Peng Partnership had not fully paid the relevant amount, *it seems that if the statements in the 2017/2018 annual report were correct, the amount referred to in GMHL’s 2020 annual report could not have been a reference to other debts owed by the Ying Peng Partnerships.*” (emphasis added)

- [31] The respondent submitted that because of this ruling handed down by the Hong Kong Court, the Debt Issue before this Court is now *res judicata*, considering it has been settled once and for all by a court of competent jurisdiction. It is upon this basis that the respondents have argued for its admission before this Court.

- [32] For me therefore, despite the focus of the arguments made by the respondents at the hearing of this application, the respondents cannot circumvent the clear requirement that there is a need to address all three limbs of the **Ladd v Marshall** guidelines in determining whether they have met the required threshold to have this evidence admitted on appeal.

Limb #1- It must be shown that the evidence could not have been obtained with reasonable diligence for use at trial

[33] The question on the first limb must be therefore, whether this evidence, with reasonable diligence, could have been obtained at the time of the hearing of the application for summary judgment in the court below.

[34] It cannot be disputed that the only evidence which the respondent now wishes to adduce in this Court, is the ruling made by a judicial officer in Hong Kong. However, in considering whether an applicant can find themselves within the parameters of the first limb, the Court accepts that it is entitled to take a more relaxed approach to the consideration where the matter, as this case is an appeal that is interlocutory in nature. As this Court in **Geminis Investors Ltd v Goods Technology Starting International Ltd**²¹ at paragraph 28 stated:

“The standard of diligence (in discovering the evidence) relates directly to the first limb of *Ladd v Marshall* ...as to what constitutes reasonable diligence under this limb, the court will have regard to the interlocutory context.”

[35] It is however the case of the appellants before this Court, that the respondents have not been able to satisfy the first limb of **Ladd v Marshall** even upon applying this relaxed approach to diligence. Neither side disputes that the judgment came into existence after the decision of the court below. This without more, in fact runs afoul of the settled consideration to satisfy the test at the first limb. It is now accepted that any evidence which is being introduced as fresh evidence at the appellate level “... does include evidence that the applicant was unaware existed at the time of trial or evidence that existed at the time but proved difficult to obtain. ;[it] does not however contemplate that evidence that did not exist at the time of the trial or a change in circumstance post-trial could be evidence adduced before the Court of Appeal.”²² (emphasis added)

²¹ [BVIHMAP2022/0020] consolidated with [BVIHMAP2022/0043] (delivered 30th January 2025, unreported).

²² BVIHMAP2022/0002 (delivered 20th July 2022, unreported) at paragraph 81.

- [36] In my mind, this is indeed the settled law. The use of **Staray Capital v Cha** by the respondents to circumvent the clear evidence of the non- existence of the HK judgment at the time of hearing in the court below, is in my opinion misguided.
- [37] Furthermore, despite the respondent's attempt to suggest that **Staray Capital** decided the point that even if evidence postdated the judgment of the court below, that could be admitted into this Court as fresh evidence and thereby satisfy the first limb, it is clear, that that case made no such pronouncement. In **WWRT Ltd** the learned Chief Justice in debunking the myth perpetuated that **Staray** somehow seemed to create a "new" niche for the usage of fresh evidence that came into existence after the trial of the matter, categorically stated that **Staray** did no such thing. Instead stated that "...upon a closer reading of the judgment of the court it becomes apparent that while the production of the opinions by the Shanghai Municipal Bureau of Justice took place sometime after the trial, the information or evidence used to generate/populate those opinions existed well before the trial took place in January 2013"²³ and as such fell well within the parameters of the first limb of **Ladd v Marshall**.
- [38] This position was further solidified in the case of **Lam Wo Ping** where this Court, in deciding an application for fresh evidence in circumstances almost on all fours as the present matter, made it clear that the applicant therein could not rely on a judgment of the People's Republic of China's appellate court, as the same had been delivered subsequent to the hearing of the court below. The court therein found that the applicant who was seeking to rely on the findings and conclusions contained in the judgment, rather than on the underlying facts which were in existence and known by the parties, could not do so, and determined that the applicant had not met the requirements under the first limb.
- [39] In my mind, this is exactly what the respondents are seeking to do here with the findings contained in the HK judgment. It is clear from their arguments that the

²³ BVIHCMAP2022/0002 (delivered 20th July 2022, unreported) at paragraph 83.

reliance on the HK judgment falls squarely within findings of fact or conclusions to which the Hong Kong Court arrived. It is these findings that they contend must now give rise to an issue estoppel and prevent the court from investigating the alleged Debt Issue as it has determined it has the right to do. The use of the HK judgment by the respondents in this matter, therefore, has nothing to do with establishing a reliance on any underlying facts which may have been before the Hong Kong court, and which admittedly may have been in existence at the time of the lower court's consideration of the application for summary judgment.

[40] Rather, the fresh evidence which the respondents wish to admit is in fact the findings of the HK Court on the **credibility** of the parties as to the existence of a debt owed, not **whether** such debt was in fact owed. These findings further clearly post-date the hearing and the order of the court below. On that basis, I find that the application has failed to meet the threshold of the first limb of the **Ladd v Marshall** test.

[41] Having failed on the first limb, there is no need for this court to assess whether the respondent has been successful on the other limbs, since the **Ladd v Marshall** criteria are cumulative. As was said in **Premier Exports London Ltd v Piyush Rajwani**²⁴ per Nichol J "... it is fatal to the application to rely on fresh evidence if even one[limb] cannot be passed." However, for the sake of completeness and to consider whether the Court should entertain the said evidence under the inherent jurisdiction of the court exercising the overriding objective, this Court will also consider limbs two and three.

Limb #2 - The evidence must be such that if given would probably have an important influence on the result of the case, though it need not be decisive

[42] The second limb of **Ladd v Marshall** concerns the determination that the evidence sought to be introduced would have an important influence on the outcome of the matter, though it need not be decisive. In this regard, this limb and the arguments that were advanced by the respondents seemed to have been the focus of the

²⁴ [2022] EWHC 1188 at paragraph 21.

application. It is therefore clear that an analysis of the issue or issues that were under consideration in the Hong Kong proceedings must be undertaken, and ultimately what was decided in those proceedings.

[43] The approach of the respondents was therefore two pronged in this regard. Firstly, they argued that the HK judgment had made certain findings that the debt as claimed by the appellant was not owing (the issue estoppel argument) and secondly, that the parties were the same as those before the court below and resultantly, both proceedings were concerned with the same asset between the same parties just in two different jurisdictions (the privity argument).

[44] I will deal with the latter argument first. At the hearing of the matter, the court was provided with an ownership structure by the respondents which sought to advance their argument that the parties in the matter before this Court were fundamentally the same parties that were before the Hong Kong court. The basis of this argument was that once the court accepted that there was critical beneficial ownership arrangements existed, the court could accept that there also existed such close “relationships” as between individuals and companies in both proceedings to the effect that they could be regarded as the same parties in the respective suits. However, relying on such a tenuous relationship, in my mind seemed to completely deny the existence of the concept of corporate personality. By merely making the averment as was done in the submissions of the respondent, that one individual “apparently” straddled the companies before this jurisdiction and those in the HK proceedings without more, is a proposition that cannot be accepted by this Court. The respondents having failed to ground this argument in any evidentiary basis, I therefore dismiss the contention fully. As was stated conclusively by the Judicial Committee of the Privy Council in **Caylon (A company incorporated under the laws of the Republic of France) v Irene Michailaidis and Ors**²⁵ which adopted the judgment of Goddard CJ in **Hollington v F Hewthorn & Co Ltd**²⁶: “...a

²⁵ 2009 UKPC 34.

²⁶ [1943] KB 587 at 644 – 645.

transaction between two parties in a judicial proceeding, ought not to bind any person who could not be admitted to make a defence or to examine witnesses or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of fact, the verdict of a jury finding the fact and the judgment of the court upon facts found although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.”

- [45] That being said, it cannot be clearer to this Court that the parties in this case are indeed strangers to the Hong Kong proceedings and as such, I cannot accept that there is any connection that has been established to bind the parties by way of this argument as suggested by the respondents.
- [46] Can the same be said in relation to the arguments, that the findings in the HK judgment bind the parties, raising the issue estoppel argument? In my mind it can.
- [47] It must be recalled that the Hong Kong proceedings were brought by way of application to determine issues in relation to the validity of transfer documents between Hong Kong entities and whether there had been a breach of the fiduciary duties of two directors who are also tangentially connected to the parties before this Court.
- [48] In making that determination the court in the HK judgment made findings about the credibility of the witnesses Ms. Tina Zheng and Mr. Albert Chen, who are also persons of interest in the matter before the court. That determination which was set out at paragraph 30 above shows clearly that the judge made no finding as to the **existence** of the Debt to which the appellant herein, has claimed is due and owing. Rather, the learned judge in the HK judgement made findings in relation to the “story” of the key witnesses and their credibility on whether any debt was in fact still due and owing.

[49] Indeed this analysis of the judge's findings is even more strengthened when I consider what the learned judge went on to say at paragraph 124(3) of the HK judgment, where she opined that "even if the purchase price for the shares remained outstanding...", the company (GMHL/GMSC/Kam) was entitled to take enforcement action. Such reasoning clearly shows that the judge made no determination as to the question of any share price, debt owed or anything to which the present appellant has claimed in this Court.

[50] Indeed the Chan J having been tasked with the sole issue of a determination of certain impugned documents, understood her function when she stated at paragraph 85 of the HK judgment that:

"While I agree that the veracity or validity of the 2019 Guarantee and the 2019 Security arrangement do not fall within the preliminary issues I do not see why the Court cannot make findings on the credibility of Albert and Tina's evidence in so far as it relates to their case and the issue as to when they actually signed the 1st Transfer Documents and the 1st Appointment Resolutions..."²⁷

[51] Clearly the finding of the Hong Kong court had nothing to do with the debt issue before this Court and fell squarely outside of that court's scope of inquiry as raised between the parties. The argument therefore that the HK judgment establishes the issue estoppel argument upon which the respondents rely, in my mind, is not made out. There is nothing before the court to suggest that this that judgment would have any important influence on the matter before this Court and therefore, I find that the respondents have failed on the second limb of the **Ladd v Marshall** principles.

[52] However before I leave the issue of the second limb completely, I would also to wish to state, that this court is also satisfied that the fact that the HK judgment was itself an interlocutory trial on preliminary issues raised in those proceedings, and the further fact that the judgment is now on also now under appeal also further belies in this Court's mind, any reliance on the same to ground an issue estoppel. Following

²⁷ China Stem Cells Holdings Limited v Zheng Ting & Ors [2024] HKCFI 481 at paragraph 85.

the reasoning of the decided cases,²⁸ issue estoppel, cause of action estoppel and res judicata all have fundamentally the same basis, namely that is that a party should be bound by a determination in one matter preventing them from re-litigating the same issue in another matter. As the court in **Arnold v National Westminster Bank plc**²⁹ put it so succinctly, “estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process.”

- [53] Beyond establishing an abuse of process based on a connection as between the parties, which this Court has found the respondent has failed to do in this matter, this Court must also consider that the abuse of process does not and cannot arise where there is no finality as between the parties in any event. The HK judgment was clearly a judgment on preliminary matters raised before the Hong Kong Court and further that judgment is on appeal. Although this question was raised with the respondents’ counsel in oral arguments before this Court, it was never, in my mind adequately addressed and for this Court, the fact of the appeal, must sound a further resounding death knell to the argument by the respondents to rely on the HK judgment as an issue estoppel.

Limb #3: The evidence must be such as is presumably to be believed or in other words it must be apparently credible but not necessarily incontrovertible

- [54] The third and final limb of the principles relates to the authenticity of the evidence to be introduced. In that regard neither side argued this limb, and quite rightly so, as it could not have been argued that the HK judgment was anything but credible. However, success on this limb has no effect on the findings of the court on the other two limbs as set out herein.

²⁸ Carl Zeiss Stiftung v Rayner & Keeler Ltd No.2 [1967] 1 AC 853.

²⁹ [1991]2 A.C 93 at 110G.

[55] Therefore my final consideration on the application, is whether regardless of the findings above, the admittance of the evidence would advance the overriding objective to deal with cases justly and thereby invoke the inherent jurisdiction of the court.

Inherent jurisdiction of the court

[56] Having found that the HK judgment would add nothing to the issues that have to be determined in this matter before this Court, and are indeed quite irrelevant, it is clear that I am not persuaded to allow this fresh evidence into these proceedings pursuant to the inherent jurisdiction of the court. This jurisdiction which aids the juridical operation of the overriding objective to have all matters before the court to enable the court to deal with cases justly could only be invoked if the evidence had been relevant and of utility to the court. This is not the situation in the instant case under consideration. There would therefore be no useful basis to allow the application and admit this fresh evidence as it would have no influence on the result of the matter and add nothing to the issues to be decided on the appeal and counterappeal.

[57] In light of all the foregoing, the application to adduce fresh evidence is therefore dismissed. I would order that costs on the application be costs in the appeal.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Darshan Ramdhani
Justice of Appeal [Ag.]

By the Court

Chief Registrar