

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0044

BETWEEN:

WIN BUSINESS (CAOFEIDAN) LIMITED
FORMERLY WIN BUSINESS (AFRICA) LTD

Appellant

and

[1] ANADARKO CHINA HOLDINGS 2 COMPANY
[2] ANADARKO PETROLEUM CORPORATION

Respondents

Before:

The Hon. Dame Janice Pereira
The Hon. Mde. Esco Henry
The Hon. Mr. Robert Levy

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Stewart Buckingham KC for the Appellant
Mr. Timothy de Swardt and Mr Merrick Watson for the Respondents

2023: May 22
July 5.

Interlocutory appeal – Statutory Demand – Judge’s refusal to set aside Statutory Demand served on Appellant by Respondents – Appellant arguing new grounds on appeal during hearing of appeal – New grounds of appeal not mentioned in notice of appeal or Appellant’s written submissions – New grounds of appeal not advanced in court below – No formal application made to advance new grounds of appeal – Rule 62.4(8) of the Civil Procedure Rules 2000 – Whether the Appellant ought to be permitted to rely on the new grounds of appeal – Whether the new grounds of appeal were pure points of law or further evidence would be needed on appeal - Whether the Respondents would be substantially prejudiced

by the new grounds of appeal being advanced at such a late stage in the proceedings – Whether appeal had any merit if the new grounds of appeal were not allowed

On 2nd March 2022, the Respondents served a Statutory Demand (the “Demand”) on Win Business (Caofeidan) Limited formerly Win Business (Africa) Ltd (the “Appellant” or the “Company”). The Demand related to various sums, in the nature of costs, disbursements, and interest (the “Demand Debt”) payable by the Company to the Respondents following an arbitration between the parties at the London Court of International Arbitration (the “LCIA”).

By application dated 17th March 2022 (the “Originating Application”), the Company applied to set aside the Demand on the grounds, *inter alia*, that the Demand was defective, there were issues in English law as to whether one of the parties had submitted to the LCIA’s jurisdiction and that the Demand caused the Company substantial injustice. By further application dated 30th May 2022, the Company sought an adjournment and amendment of the Originating Application. The amendment sought to raise the point that the Demand sought to enforce a claim in respect of tax due in a foreign jurisdiction and the courts of the Territory of the Virgin Islands (the “BVI”) would not enforce the foreign revenue laws of another state. At the hearing on 31st May 2022, Jack J [Ag.] granted the amendment application and without counsel for the Appellant mentioning the adjournment application, counsel went on to move the application to set aside the Demand.

By judgment dated 2nd June 2022 (the “Judgment”) Jack J [Ag.] dismissed the application to set aside the Demand. The judge noted that the BVI court would not permit the enforcement of foreign revenue laws. He further noted that the Chinese tax authorities (“TOOTB”) had already been paid in full many years previously and that all that had been in dispute at the LCIA was which of the three private companies was liable to reimburse the other private company. This, he ruled, was a private law issue and had nothing to do with a sovereign nation (in this case the People’s Republic of China (the “PRC”)) enforcing its own tax laws and that TOOTB had no interest in the BVI proceedings or the LCIA arbitration. The judge thus concluded that enforcement of the LCIA award did not offend the foreign revenue rule and the Company did not meet the test for setting aside the Demand. The judge dealt with the other grounds of the application in a summary manner as he did not consider them as being of assistance to the Company.

Being dissatisfied with the judge’s ruling, the Company appealed. In the notice of appeal dated 23rd June 2022, the Company asserted that the learned judge erred by (i) applying the wrong test to the question of whether the Demand Debt amounted to vindication of foreign revenue law; (ii) failing to make any determination on the Respondents’ argument opposing the set aside application that recognition of foreign revenue law is permitted so long as there is no enforcement; (iii) failing to properly consider whether the Appellant’s awards such as costs and disbursements associated therewith should likewise be unenforceable; and (iv) failing to properly consider the jurisdiction issue arising out of the suggestion that BECB Limited (“KMCPL”) was not a party to the arbitration agreement.

At the hearing of the appeal, the fourth ground/jurisdiction issue was abandoned and counsel for the Appellant raised, for the first time, the argument that the Respondents were coerced into the role of nominees of TOOTB and on that basis, made the tax payment. As this new

point had been raised, the parties were given an opportunity, post the hearing of the appeal, to file written submissions on the right to rely on new points on an appeal. In written submissions, the Appellant asserted that the nominee/coercion point was not strictly new and rather, it was a point of pure law which they could rely on. In any event, the Appellant argued, any prejudice to the Respondents could be compensated in costs. The Respondents countered that since the Appellant chose not to raise this issue in the lower court, the Court of Appeal did not have the benefit of the judge's judgment on the issue. Further, there were no exceptional circumstances on the facts to allow the new points to be raised and the Appellant failed to explain why the issue was not advanced in their grounds of appeal or addressed in any of their written submissions before the Court.

Held: refusing permission to argue the new points on appeal, dismissing the appeal and subject to any written submissions being filed within seven days, ordering the Appellant to pay the Respondents' assessed costs of the appeal, such costs to be assessed by a judge of the Commercial Court unless agreed within 21 days, that:

1. Parties should argue all their points at first instance and a trial is not the dress rehearsal for the appeal. When a party seeks to raise a new point on appeal, the party should seek the Appellate Court's permission to do so, and a cogent explanation should be given as to why the point was not raised below. A case need not be exceptional before a new point may be argued on appeal, however, whether or not an Appellate Court will permit a new point depends on where such new point lies on the spectrum between pure points of law that can be argued on the findings of the judge below, and those which, had they been raised below, might have changed the course of the evidence given at trial. Where a new point would require further evidence or, had the new point been argued below it would have resulted in different evidence being filed, an Appellate Court should err on the side of caution in allowing such new points to be raised. This caution is even greater where the other party has not had adequate time to deal with the new point.

Rule 62.4(8) of the **Civil Procedure Rules 2000**; **Notting Hill Finance Limited v Sheikh** [2019] EWCA Civ 1337 applied; **Singh v Dass** [2019] EWCA Civ 360 applied; **Ex parte Firth, In re Cowburn** (1882) 19 Ch. D. 419 considered; **Prudential Assurance Co Ltd v Revenue and Customs Comrs** [2017] 1 WLR 4032 applied.

2. On the facts, in addition to there being no formal application to run the nominee/coercion argument on appeal, the Appellant gave no explanation for the delay in seeking permission to do so. There was also no explanation for the omission to make the points below. In considering the nominee/coercion argument, the Court found that they were not pure points of law. Rather, the argument was a mixture of fact and law since the Court would have to determine whether such a relationship existed and how it came into being. The Court therefore accepted the Respondents' contention that had they known they would face this argument on appeal, they would have wanted to adduce evidence. Thus, contrary to the Appellant's assertion, there was insufficient evidence before the Court to deal with this argument and the Respondents did not have adequate time to deal with it. The

Court also noted that the argument was strictly new on appeal, having never been raised in either the Appellant's submissions or before the trial judge. Instead, the Appellant ran the opposite argument in the lower court, denying that the Respondents were representatives of TOOTB. The Appellant, having lost on this particular basis, could not now disavow its earlier position and run a diametrically opposite argument in the Appellate Court. The Court having considered these matters and the fact that the Respondents would be substantially prejudiced if the new points were allowed, decided to refuse permission to the Appellant to run the new arguments on appeal.

3. Parties to litigation can reasonably be expected to have advanced all proper arguments at both first instance and on any appeal. On the facts, the matter had already taken up a considerable amount of time and resources. If yet further points were to be taken on the appeal, then further court time would have to be afforded to any such hearing. This inefficient use of court time would be to the detriment of court users and a waste of the court's resources. This was a further reason for the Court of Appeal to deny permission to the Appellant to raise any new grounds in the appeal.
4. As had been conceded by the Appellant, unless the nominee/coercion argument had been established, the Appellant had no case on the appeal. There was no bona fide dispute on substantial grounds whether the Demand Debt was, and remains, due. The Demand did not seek to enforce a tax liability due to TOOTB and there was no evidence whatsoever that TOOTB had an interest in the LCIA proceedings or the proceedings in the BVI. The learned judge therefore did not err in finding that enforcement of the arbitration award did not offend the revenue rule. The judge also did not err in not finding that the amounts claimed in the Demand were parasitic on an award, the enforcement of which would have offended the foreign revenue law rule. The Court also found that the argument concerning the jurisdiction of the LCIA over KMCPL was without merit. On this basis, the grounds of appeal, as they were originally cast, were dismissed since the judge did not err in finding that the Appellant failed to pass the test for setting aside the Demand.

JUDGMENT

- [1] **LEVY JA [AG]** : By notice of appeal dated 23rd June 2022, Win Business (Caofeidan) Limited formerly Win Business (Africa) Ltd (the "Appellant" or the "Company") appealed against the order of Jack J [Ag.] dated 2nd June 2022 (the "Order") by which (amongst other things) the learned judge dismissed its application to set aside a

Statutory Demand (the “Demand”) issued by the Respondents.¹ The Demand, served on the Company on 2nd March 2022, related to various sums, in the nature of costs, disbursements, and interest (the “Demand Debt”) payable by the Company to the Respondents pursuant to arbitration awards following an arbitration between the parties in the London Court of International Arbitration (the “LCIA”). Jack J’s [Ag.] judgment (the “Judgment”) was handed down on 2nd June 2022.

Background – The Facts

- [2] As stated in the Judgment, there was, at least at the hearing before Jack J [Ag.], no substantial dispute between the parties as to the facts, and the notice of appeal did not raise any. Accordingly, I can take the facts (as did the judge below)² from the Demand itself:

“1. The Debt arises from arbitration awards handed down by the LCIA in Case No. 153051 viz (i) the Partial Award on Liability dated 12th March 2019 (the “Partial Award”), and (ii) the Final Award on Quantum (Save as to Undertakings) dated 13th October 2021 (the “Final Award”) (together the “Awards”).

2. The arbitration proceedings were commenced after a dispute on payment of tax liabilities pursuant to a Stock Purchase Agreement dated 11th February 2014 (the “SPA”) executed by [A2] as the Seller, [A1] as the Seller’s Guarantor, the Company as the Buyer, and its parent company registered in Bermuda... as the Buyer’s Guarantor, for the purchase of all the issued and outstanding share capital in a Bahamian company, BECB Limited (“BECB”) (hereinafter in the appeal “KMCPL”) in the amount of US\$970,801,858.

3. During a course of meetings between the parties held between 27th January 2014 and 10th February 2014, the Creditors agreed to be responsible for the tax liability of the ordinary business operations of BECB unrelated to the SPA up to closing whereas the Company and BECB agreed to be responsible for transfer taxes and VAT.

4. The Creditors also agreed to be responsible for corporate income tax and business taxes arising from the sale of BECB and that, since APC [Anadarko Petroleum Corporation] would be responsible for such taxes, it would negotiate

¹ This judgment does not distinguish between the two Respondents, although the roles they played, and their rights and liabilities, in the underlying transaction are distinct. That distinction is not relevant for present purposes.

² See Judgment at paragraph 2.

such tax liabilities directly with the Tianjin Offshore Oil Tax Bureau (the "TOOTB") (the "Alleged Promise").

5. Between 5th December 2014 and 11th August 2015, the TOOTB issued a series of notices to BECB and [A1] informing them of the corporate income tax payable with respect to the transaction.

6. TOOTB ultimately set a deadline of 30th September 2015 for the tax payments to be made. This resulted in the Company writing to Creditors on 18th December 2021 to enforce the indemnity clauses in the SPA.

7. The Company and BECB commenced arbitration before the LCIA in Case No. 153051 on 8th June 2015 in which they asked for an award that the Creditors pay the taxes due and owing on behalf of BECB.

8. The parties successfully secured a reduction in tax liabilities from the TOOTB and on 7th December 2015, [A2] made a payment of US\$193.8 million to TOOTB on behalf of BECB on a without prejudice base as agreed between the parties (the "Tax Payment").

9. TOOTB later confirmed that BECB was entitled to reduced tax liabilities under Chinese Law, i.e., the Tax Payment would entitle BECB to reduce its taxable income for a period of eight years from 2014 thus ensuring that it would have tax savings accrued from the step-up in its income tax basis (the "Tax Benefit").

10. The Arbitration Tribunal was constituted on 26th August 2015 in accordance with the LCIA rules and in accordance with clause 13.04 of the SPA.

11. Under the terms of the Awards, the Tribunal held that:

(a) BECB do forthwith pay to [A2]:

(i) the tax benefit in the sum of US\$142,943,168 (the "Tax Benefit Sum").

(ii) pre-award simple interest on the Tax Benefit Sum at the LIBOR US Dollar 3-month rate on 9th December 2015 plus an uplift of 2% calculated from 9th December 2015 to 13th October 2021, in the sum of US \$20,845,860.39; and

(iii) post-award interest at the LIBOR US Dollar 3-month rate on 13th November 2021 plus an uplift of 2% on all amounts due and unpaid under sub-paragraphs (i) and (ii) above from 13th November 2021 until the date of full payment.

(b) the Company and BECB do jointly and severally pay to the Creditors, the Debt which comprises of Creditors' total fees and disbursements in the sum of US\$6,185,886.85 (the "Fees and Disbursements") plus arbitration costs in the sum of GBP 618,249.91 (the "Costs") plus post-award interest at the LIBOR US Dollar 3-month rate on 13th

November 2021 plus an uplift of 2% on all amounts due and unpaid on the Fees and Disbursements and Costs from 13th November 2021 until the date of full payment.”

The application to set aside the Demand

- [3] By an originating application dated 17th March 2022 (the “Originating Application”), the Company applied to set aside the Demand. By paragraph 6, it summarised the grounds of the application as being:

- “(a) that the Demand was defective;
- (b) that there were issues in English law as to whether one of the parties to the arbitration (KMCP, on the Company’s side) had submitted to, or was estopped from challenging, the arbitral tribunal’s jurisdiction, and that the Demand failed to identify the complexity of the factual matrix to the debt claimed. It went on to assert that the Demand caused the Company a substantial injustice as insolvency proceedings may be based in a forum (presumably the Territory of the Virgin Islands (the “BVI”) where they are not appropriate, thereby engaging the court’s discretion to set the Demand aside under section 157(2)(a) of the **Insolvency Act 2003** (“IA 2003”); and, in the alternative;
- (c) There was, for the purposes of section 155(2)(b), “other reason” for the Demand to be set-aside, because it caused the Company a substantial injustice”.

- [4] For good reason, not all of these grounds were pursued with the same vigour at the hearing below.

- [5] By a notice of application filed 30th May 2022, merely one day before the hearing listed to determine the set aside application, the Company applied for permission to amend the Originating Application and for the hearing to be adjourned (the “Amendment and Adjournment Application”). The adjournment was sought “for directions to be given [for the adjourned hearing] (including directions for the Respondents to serve evidence in response to this application to amend and for the applicant to serve reply evidence).”

- [6] As to the substance of the proposed amendment, this sought to add the following language to the Originating Application seeking to set aside the Demand:

“The Awards directly or indirectly purport to enforce [People’s Republic of China] PRC tax law and are not entitled to recognition or enforcement in the BVI. In circumstances where the Debt is said to arise out of the Awards, there is therefore a bona fide substantial dispute as to whether the Debt is owing or due.”

Thus, by a proposed amendment, the day before the hearing, the Company sought to raise the point, dealt with in greater detail below, that in broad terms, the courts of the BVI will not enforce the foreign revenue laws of another state.

- [7] By its written submissions in support of the Amendment and Adjournment Application, the Appellant referred to a recent change of counsel (on 27th May 2022), and asserted that there was a bona fide substantial dispute because the award of the LCIA sought to enforce, at least indirectly, a tax liability of the Respondents to the PRC tax authorities and was thus not entitled to recognition in the BVI. In paragraph 7, the submissions explained that the adjournment was necessary in order for the Respondents to submit evidence to address “the new tax issues.” It went on to explain that the sum awarded by the LCIA, and the Demand Debt (being the costs etc. payable by the unsuccessful party) were in respect of a tax liability of KMCPL to the tax authorities of the PRC, and accordingly it was “at the very least arguable” that the Demand sought to enforce a claim in respect of tax due in a foreign jurisdiction.

- [8] In support of that argument, the Appellant referred to the decision of the Privy Council in **Webb v Webb**,³ where, at paragraph 22, Lord Kitchen explained:

“[32] It is a long-standing principle of the common law that the courts will not collect taxes of a foreign state for the benefit of the sovereign of that foreign state. The history of the principle, which I will call the foreign tax principle, as did the Court of Appeal, was explored by the House of Lords in *Government of India v Taylor* [1955] AC 491. As Viscount Simonds observed at p 504, it was already well established when Lord Mansfield CJ repeated the formula: “for no country ever takes notice of the revenue laws of another” in a series of cases in the 18th century: *Planché v Fletcher* (1779) 1 Doug 251, 253; *Holman v*

³ [2020] UKPC 22.

Johnson (1775) 1 Cowp 341, 343; and *Lever v Fletcher* (1780) unreported. A persuasive explanation for the principle, provided by Lord Keith of Avonholm in *Government of India* at p 511, is that the enforcement of a claim for taxes is an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.

[33] The foreign tax principle of course applies to direct enforcement. But it also extends to indirect enforcement and, in particular, to a claim or defence raised by a party to vindicate or assert the claims of a foreign state. A few examples will suffice to illustrate its scope.”

- [9] The submissions went on to refer to some earlier decisions in the BVI where Jack J [Ag.] had adjourned cases to decide whether enforcement of the debts under consideration therein would breach the foreign revenue rule. It continued to assert that the Demand Debt, being the fees and disbursements etc. of the LCIA award, involved the recognition of KMCPL’s liability to the PRC tax authorities, and therefore its enforcement.
- [10] The submissions in support of the Amendment and Adjournment Application also relied on the grounds in the Originating Application to set aside the Demand.
- [11] At the hearing before Jack J [Ag.], on 31st May 2022, the Respondents opposed the amendment application on the basis that the proposed amendment had no real prospect of success as a matter of law. Their counsel explained to the judge that if the amendment were allowed, then the Respondents would not wish to put in any further evidence.
- [12] Having heard argument, the learned judge allowed the amendment, and counsel for the Appellant then went on, without mentioning, let alone pressing, his adjournment application, to move the application to set aside the Demand.

Jack J's [Ag.] Judgment

- [13] On 2nd June 2022, the learned judge handed down a written judgment by which he dismissed the application to set the Demand aside. At paragraph [8] onwards, he faithfully set out the substance of the Appellant's submissions, including the reference to **Webb v Webb**, but noted that in paragraph 38 of Lord Kitchen's opinion, it was explained that the foreign revenue rule was not without limits and that "whilst a court will not entertain an action by a foreign state directly or indirectly to enforce that foreign state's exchange control legislation, a court may properly recognise a foreign revenue law where necessary to do so."
- [14] At paragraph 12 of his Judgment, the learned judge explained, in clear terms, that "this Court will not permit the enforcement, whether directly or indirectly, of foreign revenue laws." He went on to set out the Respondents' submissions in the instant case. These included:
- (a) The assertion that the tax authorities of the PRC had no interest in the proceedings before the LCIA (or the proceedings before Jack J [Ag.]).
 - (b) That the Chinese tax authority (hereinafter "TOOTB") had already been paid and there were no outstanding liabilities to them (anywhere in the world). It followed, said the Respondents, that TOOTB "does not need or seek to vindicate its rights through the Arbitral Award or proceedings such as these. Its rights have already been vindicated." The Respondents explained that the Demand sought merely to vindicate the rights of private parties.
 - (c) That the Appellant conflated recognition of a foreign revenue law with enforcement, and explained, by reference to **Dicey, Morris and Collins on the Conflict of Laws**⁴ at paragraph 5-031 (which was not the current edition at the date of the hearing before the judge), that:

"Although it was once said that revenue laws are never recognised abroad, this proposition had no justification and it is clear that a foreign revenue law which is part of the applicable law may be

⁴ 15th Edn. (2012).

recognised. Accordingly, where no question of enforcement arises, foreign revenue laws are applied by the courts if they are relevant to an issue, although in individual cases such laws may (like any other foreign rule) have to be disregarded on grounds of public policy.”

[15] At paragraph 13 of his Judgment, the learned judge considered the points outlined in the previous paragraph to be “well-made.” He noted that the Chinese tax authorities had been paid in full many years previously and that all that had been in dispute in the LCIA arbitration was which of three private companies, as between themselves, was liable to reimburse the other private company. He noted that the matter was, quintessentially, a private law dispute and had nothing to do with a sovereign nation, in this case the PRC, enforcing its own tax laws, and that TOOTB had no interest in the proceedings in the BVI (and had no interest in the LCIA arbitration.)

[16] Accordingly, the judge concluded that the enforcement of the award did not offend the foreign revenue rule and that the Appellant did not meet, let alone pass, the test for setting aside the Demand as contained in the judgment of this Court in **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp.**⁵

[17] The learned judge dealt with the other grounds of the set aside application in a summary manner, explaining that he did not consider them to assist the Appellant.

[18] Jack J’s [Ag.] Order, made on 2nd June 2022, *inter alia*, granted the Amendment Application, but dismissed the application to set aside the Demand.

Subsequent events

[19] It is not necessary to recite in any detail the further hearings and applications in this matter. In short, an application seeking the appointment of liquidators was issued and determined by Small Davis J [Ag.] (see her judgment of 21st March 2023, and

⁵ BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

see also the judgment of the Court of Appeal dated 9th September 2022 on issues relating to this appeal).

This Appeal – The Notice of Appeal

[20] By a notice of appeal dated 23rd June 2022, the Appellant appealed Jack J's [Ag.] Order. It asserted that he erred in law, or mixed law and fact, in determining that there was no *bona fide* dispute as to whether the Demand Debt was due. This was said to be for four reasons:

(a) Jack J [Ag.] applied the wrong test to the question of whether the Demand Debt amounted to vindication of foreign revenue law. It asserted that the LCIA Award sought to enforce, indirectly, a tax liability of KMCPL to TOOTB. The judge therefore erred in concluding that merely because the Demand Debt arose out of a dispute between private companies as between themselves regarding the liability to reimburse each other for a tax liability (that had been settled) it did not offend the foreign revenue rule. It was asserted that the learned judge adopted a flawed approach to the Respondents' grounds for seeking to oppose the set aside application, namely the facts that TOOTB had no interest in the proceedings and that it had already been paid. It followed that the judge wrongly concluded that "indirect vindication of the type present in the proceedings, does not amount to vindication of foreign revenue laws";

(b) Jack J [Ag.] erred by failing to make any determination on the Respondents' fourth ground for seeking to oppose the set aside application, namely that recognition of foreign revenue law is permitted so long as there is no enforcement;⁶

⁶ It strikes me as odd that an Appellant, whose application had been dismissed on its own grounds, should appeal a judge's supposed failure to determine one of the Respondents' grounds for opposing an application.

- (c) Jack J [Ag.] erred by failing properly to consider, or give sufficient weight, as to whether the Appellant's awards such as costs and disbursements associated therewith should likewise be unenforceable;
- (d) Jack J [Ag.] erred in failing properly to consider the jurisdiction issue arising out of the suggestion that KMCPL was not a party to the arbitration agreement.

[21] The notice of appeal also asserted that the learned judge erred in failing to give reasons for his refusal of the adjournment application and failed to consider the grounds of that application properly or at all.

The Appellant's Skeleton Argument in support of this Appeal

[22] By its skeleton argument in support of its appeal, the Appellant developed the grounds of appeal as set out in the preceding paragraph. On the first ground of appeal, it explained that the LCIA had concluded that whereas the First Respondent had paid the tax liability to TOOTB, the liability to TOOTB had all along been that of KMCPL, and that (for reasons that are not immediately important) the First Respondent had overpaid. As a result, KMCPL was obliged to reimburse the First Respondent the difference. It followed, said the Appellant, that because the principal liability in the LCIA Award was in respect of a tax liability of KMCPL which the First Respondent had paid, so too were the fees and disbursements awarded in relation to that dispute.

[23] The Appellant again relied on the extracts from **Webb v Webb** set out above, and also dicta of Simon Brown LJ (as he then was) in **QRS 1 ApS & Others v Fransden**.⁷ In that case, the judge at first instance had struck out claims by companies in liquidation (the liquidators having been appointed by the Danish tax authorities) seeking to recover (for the benefit of the said authorities), tax due in

⁷ [1999] 1 WLR 2169.

Denmark. In the Court of Appeal, Simon Brown LJ opened his judgment by explaining that “it is a fundamental principle of English law that our courts will not directly or indirectly enforce the revenue laws of another country.”

[24] The Appellant continued by explaining that the courts of the BVI will not enforce direct claims by foreign revenue authorities, nor would they enforce indirect claims or demands “including claim by private parties seeking to “vindicate the rights of a foreign state.” It argued that in the instant case the liability concerned, in part, a payment made to the PRC tax authorities, and that the judge erred because the Demand Debt was parasitic on the debt found due in the LCIA Award, and, whilst the former was an indirect liability, it was nonetheless a tax liability.

[25] The skeleton argument maintained that the judge erred in not making any determination on one of the Respondents’ grounds of opposition to the set aside application, and continued by asserting that the judge erred by failing to give sufficient weight to the Appellant’s argument that if the principal liability under the LCIA Award was unenforceable then so too were parasitic awards (such as the Demand Debt). Likewise, the Appellant maintained that the learned judge had erred by failing to consider that KMCPL (that had fully participated in the arbitration proceedings), was not a party to the arbitration agreement, but had agreed to be joined for a limited purpose.

[26] Finally, the Appellant maintained that the judge erred in not adjourning the hearing “so that this appeal could be heard.” As noted above, the adjournment was initially sought to enable the Respondents to file evidence to respond to the amended application to set the Demand aside. At the hearing, the Respondents explained that they did not wish to put in any further evidence. It is unclear how that application transmogrified on appeal into a suggestion that the judge should have adjourned the proceedings to enable the instant appeal to be heard; the application was to adjourn the hearing for the Respondents to submit evidence, not for an appeal. In any event, when, at the hearing, the judge granted the amendment application, the

Appellant's counsel did not mention an adjournment again and proceeded to move the amended set aside application. As noted below, at the hearing of the appeal, the Appellant withdrew this ground of appeal.

The Respondents' Skeleton Argument in opposition to this Appeal

[27] The Respondents' skeleton argument was filed on 10th February 2023. It noted the local cases that the Appellant had relied upon (viz **Michael James Gregson (as Liquidator of Meribelle Investments Limited (In Liquidation) v Meribelle Investments Limited (In Liquidation) et al**⁸ and **West Bromwich Commercial Ltd. v Hatfield Property Ltd**),⁹ (which in any event were cases where the court merely noted the existence of the foreign revenue rule), were cases concerning liquidators or office holders acting as nominees or agents of a foreign revenue authority, and, as such, were distinguishable from the facts of the instant case. In point of fact, the Respondents could have gone further; in both those cases the learned judge adjourned hearings for further argument about the application of the foreign revenue rule in the BVI. He did not express any concluded views in relation to that issue, and whilst I have no doubt about the correctness of his treatment of those cases, they do not strike me as authority for any positive proposition concerning the said rule.

[28] The Respondents explained, in clear terms, that there was no arrangement between the Respondents and TOOTB, by which the former acted, directly, or indirectly, for the latter, and that (doubtless because TOOTB had been paid in full (in fact overpaid)), recovery of the tax element of the LCIA Award would not benefit TOOTB at all. It continued by explaining that the Tax Benefit was calculated by the LCIA and that the funds that had been paid to TOOTB had been paid voluntarily and without prejudice (as to the liability therefor as between the parties to the arbitration).

⁸ BVIHC2020/0013 (delivered 23rd April 2020, unreported).

⁹ BVIHC2020/0138 (delivered 21st January 2021, unreported).

- [29] The Respondents asserted that the Appellant's argument suggesting that the Demand Debt was parasitic on the principal of the LCIA Award was a red herring because it ignored the fact that TOOTB had been paid the tax (some years ago), and there was therefore no tax owed to it, and that the Respondents were not the agents or nominees of TOOTB.
- [30] Having referred to some of the (numerous) decision on the scope of the foreign revenue law, the Respondents referred to **QRS** where Simon Brown LJ cited the decision of Lord Mackay of Clashfern in **Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd**¹⁰ to the effect that no judicial approval had been given to the suggestion that an action could properly be described as indirect enforcement of a foreign revenue law when no claim under that (foreign) law remained unsatisfied. Lord Mackay explained that "[t]he existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle".
- [31] The Respondents referred to the decision in **Buchanan (Peter) Ltd and Macharg v McVey**¹¹ (an appeal to the Supreme Court of Eire), containing dicta to the effect that the court needs to examine the substance of the claim to see if the defendant is acting as a nominee or agent of the foreign state, and asserted that the facts of the instant case do not support such a finding.
- [32] As to the second ground of appeal, the Respondents asserted that the learned judge was correct in finding that the recognition of foreign revenue law is permitted, provided there is no enforcement. They referred to the passage in **Dicey** set out in paragraph [14](c) above and explained that the only potential relevance of foreign revenue law was in relation to the quantification of the actual award of the arbitral tribunal and that this was not claimed in the Demand.

¹⁰ [1986] AC 368 at 441.

¹¹ [1955] AC 516.

- [33] The Respondents accepted that, in principle, where an award would not be enforceable due to the foreign revenue rule, then any costs award parasitic thereon would likewise not be enforceable. However, they suggested that the costs element that formed the basis for the Demand Debt was not unenforceable under that rule, and it followed there was no bar to the claim for costs (and the associated elements of the Demand Debt).
- [34] The Respondents took issue with the Appellant's appeal relating to whether the arbitral tribunal had jurisdiction over KMCPL. They also asserted that the appeal based on the judge's refusal to adjourn the hearing was a bad point.

The Appellant's Reply Submissions

- [35] On 27th February 2023, the Appellant filed reply submissions. They spent much time dealing with the law concerning whether a debt is disputed on substantial grounds, and consideration of section 157 of the **IA 2003**. Those submissions rehashed previous arguments attacking the judge's finding that the Demand Debt arose out of a private law dispute, suggesting that the issue was "far more complicated and nuanced than that" and that the enforcement of the Award amounted to an indirect vindication of a foreign tax liability.

The Appellant's Supplementary Written Submissions

- [36] On 15th May 2023, just 7 days before the hearing of its appeal, the Appellant filed supplementary written submissions. It is not necessary to deal with the background to this filing; suffice for present purposes to say that those submissions were filed without any application to this Court, and therefore without the Court's permission. The supplementary submissions noted that the Respondents objected to the filing of the same and that at a case management conference, on 2nd May 2023, the Deputy Chief Registrar directed that the Court of Appeal would decide what submissions would be considered. The author of those submissions explained that they were only directed to the first ground of appeal and that "[t]hey provide further

explanation, both in relation to the underlying facts and the law, why it would be contrary to public policy for the Demand to be allowed to stand

- [37] In point of fact, the supplementary submissions went a good deal further than the Appellant's earlier written submissions, and introduced an entirely new argument, not canvassed before Jack J [Ag.] or in either of the Appellant's previous written submissions before this Court. They contained a detailed analysis of the foreign revenue rule, which started with consideration of Lord Keith's statement of principle at pages 510 to 511 of **Government of India, Ministry of Finance (Revenue Division) v Taylor and another**,¹² before referring to the decision of the Court of Appeal in **Skatteforvaltningen v Solo Capital Partners LLP**¹³ in which Flaux C explained, with reference to the foreign revenue rule, that:

"What it renders inadmissible (whether under the narrower revenue rule or the wider sovereign powers rule) is an action, that is a claim, to enforce directly or indirectly a foreign revenue, penal or other public law. In its narrower form, the revenue rule, what it prohibits is enforcement of a direct or indirect claim for tax which is due but unpaid, as is clear from the speeches of the House of Lords in **Government of India** and from the passages from the speech of Lord Mackay in **Williams [and] Humbert [Ltd]**..... which I cited at paras 41–42 above. In its wider form, the sovereign powers rule, it focuses on whether the claim is one which involves the exercise or assertion of a sovereign right, as stated in the passage in para 50 of the decision of this court in *Mbasogo* [2007] QB 846:

"The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim."

- [38] The supplementary submissions submitted (correctly) that there were two limbs to the foreign revenue rule, namely the narrow rule, which concerns direct or indirect enforcement of foreign tax liabilities, and the wider principle, which prevents more generally the exercise or assertion of a foreign sovereign right.

¹² [1955] AC 491.

¹³ [2022] EWCA Civ 234.

[39] Having emphasised that the court should look to the substance of what was being enforced (or possibly who was enforcing), rather than the form, the Appellant conceded, at paragraph 13, that the English courts have taken the view that the narrower rule against enforcement of tax is contingent on the underlying obligation to the foreign revenue remaining unpaid, such a rule was not universally accepted and there were policy reasons why the rule should not always apply. As support, the Appellant referred to a decision of the Hong Kong Court of Appeal in **Organising Committee of the XXII Olympic Winter Games and XI Paralympic Winter Games of 2014 in Sochi v Pico Projects**,¹⁴ and cited two passages, the first being from Kwan VP, who said, at paragraph 56:

“As for the suggestion that Rule 3 may be circumvented by the intermediary making payment to the tax authority and then bringing a claim against the taxpayer for recoupment, I am inclined to agree with Mr. Stock that the outcome may depend on the status of the intermediary and the basis and nature of the intermediary's claim against the taxpayer.”

Secondly, the Appellant referred to paragraph 59 of the judgment of G Lam JA, who explained:

“I agree that the appeal should be dismissed for the reasons given by Kwan VP but would add a few words of my own. The existence of an unsatisfied tax claim is likely generally to be highly relevant to the question whether an action seeks the indirect enforcement of foreign revenue law, but I would hesitate to hold that it is an absolute requirement in every case. As Mr. Stock SC recognises, where, for example, an intermediary has paid the foreign tax and brings a claim against the taxpayer, the application of Rule 3, instead of being dismissed off hand on the ground that the foreign revenue has been paid, may well depend upon consideration of various factors including the status of the intermediary and the basis and nature of his claim against the taxpayer.”

[40] As an aside, to the extent that the point is relevant (given the dicta of Lord Mackay in **Williams and Humbert Ltd**), it is notable that in the **Pico Projects** case the Hong Kong Court of Appeal does not appear to have conclusively decided, as a matter of Hong Kong law, that the existence of an unsatisfied claim to the satisfaction of which the proceeds of the action will be applied is an essential feature

¹⁴ [2021] HKCA 1798.

of the application of the foreign revenue law. In paragraph 48 of the judgment Kwan VP appears to have decided that it was (and see too paragraph 55 thereof). Whilst G Lam JA hesitated as to whether it was an absolute rule, Chow JA expressed no opinion on the matter.

- [41] At all events, decisions of the House of Lords in England are obviously highly persuasive for this Court and, whilst intending no disrespect to the Court of Appeal of Hong Kong, a decision of that court doubting, or not following, a clear decision of the House of Lords is certainly not a decision this Court should follow or find persuasive.
- [42] Returning to the Appellant's supplementary submissions, having referred to **Pico Projects**, they reverted to the foreign revenue rule as expressed in **Dicey** (*ante* at paragraphs 8-004 to 8-007) to explain that direct enforcement (of a foreign revenue obligation) arises where a foreign state or its nominee seeks to obtain money or property, or other relief, in reliance on the foreign rule in question. Secondly, indirect enforcement is also prohibited, for a foreign state cannot be allowed to do indirectly what it cannot do directly. Thirdly, indirect enforcement occurs where the foreign state (or its nominee) in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extraterritorial effect; or where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state.
- [43] Reference was then made to the decision, in **The Attorney General for Canada v Williams Schulze & Co.**¹⁵ in which it was held that the costs of a "revenue suit" could be dissociated from the suit itself. Lord Stormonth Darling, sitting in the Outer House, held that they could not. However, that was a case in which three packages landed by Scottish merchants in Montreal were seized by the Canadian authorities for alleged breaches of Canadian revenue laws. After the merchants were notified of the reason for the seizure, and consideration of evidence supplied by them, the

¹⁵ (1901) 9 SLT 4.

Canadian Controller of Customs declared the goods to be forfeited to the Crown. The proceedings in Scotland related to the attempts by the Attorney General of Canada to recover the costs of the proceedings in Canada. The facts of that case are accordingly very far removed from the instant case; it involved a direct claim by the Attorney General to recover the costs of the Canadian Controller of Customs.

- [44] The supplementary submissions raised what appeared to be a new point; not mentioned in either set of the Appellant's prior written submissions (and certainly not mentioned, or apparently alluded to in its grounds of appeal). Whilst they included the assertion that the effect of the claim was the enforcement of PRC tax law against KMCPL, and that its effect is the application or validation of PRC tax laws, they continued by asserting that the First Respondent "has been cast in substance in the role of nominee of the PRC tax authorities, effecting the collection of tax." It is notable that at no stage previously had the Appellant argued that either Respondent was the agent or nominee of the Chinese revenue authorities, much less that either had been coerced into collecting tax on behalf of those authorities.

The hearing of the appeal

- [45] The appeal came on for hearing on 22nd May 2023. Counsel for the Appellant (correctly) explained that the appeal against the refusal of the adjournment was abandoned. He was quite right to do so. The adjournment was only ever sought by the Appellant to afford the Respondents the opportunity to submit evidence. As soon as the Respondents' attorney explained that they did not wish/need to file evidence, there was no basis upon which the Appellant could have asked for an adjournment. Indeed, as stated above, when the learned judge granted the amendment, counsel for the Appellant moved the set aside application. It follows that that ground of appeal was without merit.
- [46] Counsel for the Appellant also explained that the ground of appeal concerning the arbitral tribunal's jurisdiction over KMCPL would also not be pursued. Again, he was right to do so; that ground of appeal appeared likewise to be without merit

because to the extent that the tribunal acted without jurisdiction or there was some other alleged procedural irregularity the Appellant should have applied to the courts in London. In fact, the evidence is that an extension of time for the making of an application was obtained from the English courts and they then allowed time to lapse so that such claim was time-barred.

- [47] The Appellant's counsel then turned to the surviving grounds of appeal. He submitted that the case was not a mere private law dispute between the parties, but that the Court should look beyond the contractual dispute, and that the substance was that the Respondents were acting as nominee or proxy for TOOTB, and that, again in substance, the Court would be giving effect to/validating PRC tax law in a manner that offended the foreign revenue law.
- [48] The Court was taken to the Partial Award in the arbitration, and in particular to paragraph 135 which explained that in June 2015, TOOTB issued a notice to the Respondents (alone – previous notices had been sent to KMCPL), which explained that KMCPL was liable for certain taxes which it had not settled, and that it should declare and settle the tax. The notice apparently stated that as the Respondents controlled KMCPL it should urge KMCPL to meet those liabilities or pay them themselves. We were also taken to paragraph 140 of the Partial Award which dealt with a fourth notice from TOOTB, this time to KMCPL, urging payment.
- [49] The Partial Award refers to the fact that, *inter se*, the parties to the arbitration agreed, without prejudice, that the Respondents would fund the payment to TOOTB (and that they would deal with liability for the tax within the arbitration itself).
- [50] Counsel for the Appellant submitted that the Respondents paid the tax to TOOTB “with a gun to their head.” This submission was based on the notices referred to above, and also to the Tribunal's finding, in paragraph 336.7 of the Partial Award, that the parties agreed that the Respondents would pay the tax on behalf of KMCPL

“as there was a real threat from TOOTB of criminal sanctions and the levying of substantial interest and penalties against (at least) KMCPL (and potentially others).”

[51] The Appellant also took the Court to an expert report that had been obtained by the Appellant for use in the arbitration. That report had been in the bundle before Jack J [Ag.] but had not been referred to in submissions. It is to be noted that the contents of this report were not agreed, and in the circumstances it is not possible to draw any conclusions in relation to it.

[52] Having taken the Court through some of the very weighty papers, counsel for the Appellant invited the Court to draw the following ten conclusions:

- (a) That TOOTB was demanding tax from KMCPL. There can be little doubt that this is correct.
- (b) That TOOTB coerced the Respondents, under threat of criminal and civil sanctions, to pay the tax. In essence, the Respondents were being forced to act as a tax collector. Whilst it is correct that there was evidence that demand was made from the Respondents to urge KMCPL to pay the tax, and veiled threats were made, counsel was unable to explain whether such threats could have materialized into anything more substantial (particularly given that neither Respondent is a Chinese company). Nonetheless, counsel suggested that there were threats and that the Respondents complied because there was operative coercion. He explained that actual coercion was not an essential aspect of his case as he also relied on the Respondents being the nominees of TOOTB.
- (c) In paying the tax, the Respondents were being forced to act in the interests of TOOTB as a collector of tax, or TOOTB’s nominee (albeit without enthusiasm).
- (d) So coerced, the Respondents paid the tax (on a gross basis).

- (e) In fact, taking into account certain capital allowances, KMCPL's liability was a net liability.
- (f) In order to earn the capital allowances, KMCPL had to pay the tax.
- (g) Overall, the net result following the payment by the Respondents was that KMCPL had underpaid the tax and the Respondents had overpaid.
- (h) The net effect of the arbitration Award was to deprive KMCPL of a capital allowance which under Chinese law it had not earned (ultimately counsel accepted that this submission was not correct); and
- (i) In effect and substance there was an enforcement or validation of PRC tax law.

[53] The Court was then taken to the authorities mentioned above, following which we were invited to accept the following six principles:

- (a) That there are two limbs to the foreign revenue rule, the wide rule, and the narrow rule;
- (b) The narrow limb is a rule against direct or indirect collection of tax by a foreign authority or its nominee;
- (c) The wide limb prohibits the exercise, assertion, or vindication of a foreign sovereign right, and the essential question is whether the claim involves the assertion or vindication of such right;
- (d) Under English law, it is a condition of the application of the narrow rule that the tax remains unpaid;
- (e) Whether looking at the narrow or wider limb, the court will always have regard to the substance over the form, and that includes determining whether there truly has been a payment of the tax; and

- (f) Where costs have been incurred in a claim that infringes the foreign revenue rule, those costs cannot be enforced.

[54] Counsel went on to assert that the Respondents had been coerced into the position of tax collector, and that this was not simply a case where private entities were working out their private law obligations; the Respondents had been cast into the role of the nominees of TOOTB and, as such, made the payment. Counsel explained that casting the Respondents as the nominees of TOOTB was essential to the Appellant's case, and that if the Court concluded that there was no element of coercion, and that the Respondents paid the tax for private reasons (to stop interest running pending the determination between the parties to the arbitration as to who was ultimately liable), then that could possibly make a difference to the outcome of the case. Counsel also accepted that his case on coercion or nomineehip went further than any decided case.

[55] The Court put it to Mr. Buckingham KC that the nomineehip/coercion arguments had not been raised or alluded to either before the judge or in any of the Appellant's written submissions in this Court. He appeared to accept that he had argued the appeal on the basis of arguments not previously raised and that the Appellant had certainly not suggested coercion before the hearing on 22nd May 2023, or made a substantial argument that the Respondents were TOOTB's nominees. He was correct to have done so; in fact he should have pointed out that, contrary to the manner in which the appeal was argued, at the hearing before Jack J [Ag.], counsel for the Appellant had accepted that the Respondents were "absolutely not" representatives of the PRC tax authorities, and that "Your Lordship is quite right to say that [the Respondents are] not some form of representative of the Tax Authorities."

[56] At the appeal hearing, Mr. Buckingham KC accepted that his appeal had been moved on a basis not raised previously and that his client had not previously suggested that the Respondents were nominees of/coerced by TOOTB. When

questioned by the Court he accepted that unless he could establish an arguable case of nominee ship or coercion, his clients had no case.

- [57] Thus, the Appellant sought to run an entirely new argument on appeal; one that had not been canvassed in its notice of appeal, or its first two rounds of appeal submissions, and only surfaced in its supplementary written submissions (which, even then, did not run a coercion argument).
- [58] At the hearing, the Respondents' counsel opposed the nominee ship/coercion argument, pointing out that they had not been argued before the judge, and asserting that these were new arguments that were run very late in the day. He suggested, correctly in my view, that if, *ab initio*, the Appellant had run the nominee ship/coercion arguments, the Respondents would have sought to adduce evidence to counter them.
- [59] In their written submissions, the Respondents pointed out that the Appellant had cited no authority in support of its argument, and took the Court through all the cases relied upon by the Appellant. Thus, as regards **Webb v Webb** (*ante*), it was pointed out that Lord Kitchen had noted that the foreign revenue rule was not without limits and that the court could properly recognize a foreign revenue law where appropriate. They also noted that **Webb v Webb** could be distinguished on its facts.
- [60] As regards the judge's earlier decisions in **Gregson** and **West Bromwich Commercial Ltd.**, the Respondents pointed out that Jack J [Ag.] had regard to them, and nevertheless held that the foreign revenue rule was not engaged.
- [61] Counsel for the Respondents also pointed out that the argument that the Demand Debt was parasitic on the principal liability found in the LCIA Awards was a red herring because the Court should have regard to the particular facts of the case, namely that TOOTB had already been paid and there were, at the time of the Demand, no outstanding liabilities. The sums claimed in the Demand did not fall

foul of the foreign revenue rule because the debt claimed did not fall foul of the rule. This was simply a case about liability *inter se* between private parties in relation to contractual liabilities.

[62] Focusing on the fact that the tax liability had been paid, the Respondents relied upon the dicta in **Williams and Humbert Ltd** (*ante*) and its treatment in **QRS** (*ante* – noted above).

[63] On the second ground of appeal, the Respondents argued that the learned judge did not err in finding that recognition of a foreign law is permitted if there is no question of enforcement. They pointed to paragraph 5-031 of **Dicey** set out at paragraph [14](c) above, and submitted that the only potential relevance of foreign tax law is on the question of quantification of the award debt, which was not claimed in the Demand, and that accordingly the proceedings before the learned judge were not dealing with the enforcement of Chinese revenue laws. It was emphasized that the tax had already been paid and that TOOTB had no interest, direct or indirect, in the proceedings.

[64] For the respondents, Mr. de Swardt pointed out that absent an outstanding liability (i.e. unpaid tax) the foreign revenue rule was not engaged in its narrow form. As to the rule in its wider form, he denied the notion that the LCIA awards were an assertion of sovereign authority by the Chinese State or TOOTB, and asserted that the Award merely vindicated his clients' right to be reimbursed for the Tax Benefit (in an arbitration between private parties). Accordingly, he submitted that the wider rule was not engaged.

[65] In his reply submissions, Mr. Buckingham KC argued that he should be entitled to run the new nominee/coercion argument because there was no suggestion of any prejudice to the Respondents. He further suggested that because the foreign revenue rule was a rule of public policy then, if he was correct, this Court would be enforcing an award contrary to that policy.

[66] In response, Mr. de Swardt pointed out that if his clients had known they had to meet the new case, they would have wanted to put in evidence.

Post hearing submissions

[67] At the close of the hearing the parties were invited to submit short written submissions dealing with the right to rely on new points on appeal.

[68] The Appellant's written submissions did not accept that the nominee ship argument was "strictly new". Conceding that the Appellant had not expressly referred to the Respondents as "nominees" of TOOTB until the supplementary submissions, it asserted "that the language used by the Appellant in the appeal all along in substance indicated that the Respondents had acted as nominees, albeit not expressly using that term. Mr. Buckingham KC gave only one example, from its original submissions which contained the following extract at paragraph 42:

"In fact the award debt on which the present debt is parasitic, is simply one element in the overall tax liability. It is admittedly indirect, but no less a tax liability for that. Put simply, the award debt is a determination by the tribunal that KMCPL is not in fact entitled to the full benefit of the tax reduction. Instead it must pay, via the Respondents, to the PRC tax authorities, a liability in order to acquire that tax reduction." (Emphasis added)

[69] I do not accept that the paragraph set out above discloses that the Appellant had indicated that the Respondents had acted as nominees of TOOTB. Much less do I accept that such an argument had been run "all along." On no fair reading of the Appellant's first two sets of submissions on the appeal could it possibly be discerned that it was asserting that the Respondents were the nominees of the PRC tax authorities; (much less that they had been coerced into so acting). The nominee argument had simply not been made in any remotely obvious or discernible manner.

[70] In terms of the law, Mr. Buckingham KC's submissions did not address the **Civil Procedure Rules 2000** (the "CPR"). He cited from paragraph 26 of Snowden LJ's judgment in **Notting Hill Finance Limited v Sheikh**,¹⁶ which reads:

"..... there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

[71] However Mr. Buckingham KC did not refer to the fact that in the earlier paragraphs of his judgment, Snowden LJ had referred to a number of earlier authorities, including Haddon-Cave LJ's judgment in **Singh v Dass**¹⁷ at paragraphs [15]-[18], where he said:

"15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (R (on the application of Humphreys) v Parking and Traffic Appeals Service [2017] EWCA Civ 24....)."

Mr. Buckingham KC also referred to Nourse LJ (as he then was) in **Pittalis and another v Grant and another**¹⁸ at 611, who said:

¹⁶ [2019] EWCA Civ 1337.

¹⁷ [2019] EWCA Civ 360.

¹⁸ [1989] QB 605.

“Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it.”

However, the Appellant did not cite the passage from **Ex parte Firth, In re Cowburn**,¹⁹ which appears immediately above the extract from **Pittalis** cited above, in which Jessell MR. said:

“...the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.”

[72] With reference to Snowden LJ’s judgment, the Appellant pointed out that there are two ends of the spectrum in which new points may be raised on appeal. At one end is the situation where there has been a full trial involving live evidence, following which there is an attempt to raise a new point on appeal, which, had it been raised below, might have changed the course of the evidence given at trial. In such a case the potential prejudice to the opposing party is likely to be significant and it is difficult to see how it would be just to permit the new point to be taken on appeal.

[73] At the other end of the spectrum are cases where the point to be taken is a pure point of law which, per Snowden LJ at paragraph 28 of **Notting Hill Finance**, “can be run on the basis of facts as found by the judge in the lower court.” In such cases, Snowden LJ accepted that an appellate court would more readily permit the new point to be argued on appeal.

¹⁹ (1882) 19 Ch. D. 419 at 429.

- [74] As noted above, Mr. Buckingham KC does not accept that the nominee argument is in fact a new argument. Accordingly, he suggests that the present case falls within the “pure points of law” end of the spectrum, which can be run on the basis of the facts as presented to Jack J [Ag.]. He argues that the Court should be cautious in accepting the Respondents’ assertion that they would have wanted to adduce evidence had they known they were actually facing a nomineeeeship/coercion argument. Mr. Buckingham KC says that there is sufficient material before the Court to indicate that the Respondents acted as nominees and were coerced into doing so. As to the latter point, he referred to paragraph 329(c) of the Partial Award where ACH (Anadarko China Holdings 2 Company) positively relied on the fact that “there was a real threat from TOOTB of criminal sanctions and the levying of substantial interest and penalties, as well as the risk of consequential losses to Brightoil, Win Business and KMCPL.”
- [75] The Appellant concludes by asserting that even if further evidence on nomineeeeship or coercion was appropriate “this can be done in relatively short order and the prejudice to be suffered by the Appellant were the points not allowed would be significantly outweighed by the prejudice, if any, to be suffered by the Respondents if the points were allowed.” It concludes that any prejudice could be adequately addressed in costs.
- [76] It is notable that Mr. Buckingham KC’s submissions do not refer to CPR 62.4, headed “Contents of notice of appeal,” which provides, at (8), that “the appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court.”
- [77] For the Respondents, Mr. de Swardt referred to numerous authorities in support of his argument that the Appellant should not be granted leave to argue new points on appeal. In addition to citing **Notting Hill Finance**, he relied upon the decision of this Court in **Bennette Roach v National Development Foundation Montserrat**

Limited.²⁰ In particular he noted Carrington JA's [Ag.] judgment at paragraph 15 where he said:

"This Court is a court of appellate jurisdiction and so is entitled to the benefit of the opinion of the court below in relation to matters coming before it. The court below is a court of pleadings and so is entitled to decide a dispute on the pleadings before it."

Pausing here, whilst the instant case was not argued on pleadings, there was copious evidence before Jack J [Ag.] and he had the benefit of full written submissions. Plainly the purpose of the application to set aside the Demand, and the submissions in support, was to inform the Respondents of the case they had to meet. It seems to me not to be a matter of any great moment that there were no "pleadings" in the sense of statements of claim or defences etc.

[78] The Respondents further referred to Carrington JA's [Ag.] reference to the judgment of Barrow JA in **George Knowles (as executor and beneficiary of the Estate of Oliver Knowles) v Elaine Knowles**²¹ in which the learned Justice of Appeal said:

"...it cannot be a satisfactory situation that one case is 'pleaded' and the judgment is pronounced on a different case. The judgment shows the embarrassment that this situation caused."

Carrington JA [Ag.] continued:

"This Court, through the learned Pereira CJ in *Marie Makhoul v Cicely Foster et al*, has also stated in relation to matters before the appellate court that it is 'trite that it is not permissible to argue on appeal a case which was not placed before the court below save in limited circumstances. One such circumstance is where the issue goes to the court's jurisdiction.' A fortiori, in the instant claim, this Court is also not obliged to consider that issue or submissions thereon as any ruling on that issue would be blatantly obiter dictum on the part of this Court. I would therefore dismiss ground (3) of the appeal."

[79] In light of the authorities, the Respondents submitted that because the Appellant chose not to run the nominee/coercion arguments before the judge (and indeed, positively avowed that the Respondents were not representatives of TOOTB), the

²⁰ MNIHCVAP2018/0002 (delivered 28th January 2021, unreported).

²¹ ANUHCVP2005/0017 (delivered 18th September 2006, unreported).

Court of Appeal did not have the benefit of the judge's judgment on such matters. They submitted that there were no exceptional circumstances in the instant case and that there was nothing to prevent the Appellant running those arguments before Jack J [Ag.]. It seems to me that there is some force in Mr. de Swardt's submission. Whilst it is not decisive of whether or not permission to rely on the new arguments should be refused, had the points been run below, this Court would have had the benefit of the learned judge's views on them.

- [80] Mr. de Swardt also argued that if the Appellant was permitted to run the new arguments, then the Respondents would wish to adduce evidence going to the nature of their relationship with TOOTB and their reasons for making the voluntary payment. Accordingly, say the Respondents, the factual record would need to be supplemented.
- [81] The Respondents accept that the Partial Award did record threats being made by TOOTB against KMCPL and the Respondents, but pointed out that those threats did not form part of the Appellant's case before the learned judge, and that the Respondents should not be expected to guess, many months later, and in direct contradiction to the case advanced before Jack J [Ag.], that the Appellant would run an appeal on the basis that this was a case of indirect enforcement because the Respondents were, in effect, TOOTB's nominees or coerced into payment.
- [82] The Respondents further argue that the Appellant has not given any explanation for its failure to raise the new arguments at first instance or in its grounds of appeal (one could go further and add in the Appellant's first two sets of appeal submissions). They refer to **Prudential Assurance Co Ltd v Revenue and Customs Comrs**²² in which Lewison LJ, giving the judgment of the Court of Appeal, explained, at paragraph 25, that "..... before an appeal court permits a new point to be taken, it will require a cogent explanation of the omission to take the new point."

²² [2017] 1 WLR 4032.

Discussion on new points on appeal

[83] Having carefully considered the parties' oral and written submissions, and in particular their post hearing submissions, I have reached the conclusions set out below. As a matter of law, I accept that the case does not have to be exceptional before a new point may be argued on appeal, and that whether or not to permit such new point may depend upon where such new point lies on the spectrum, between pure points of law that can be argued on the findings of the judge below, and those which, had they been raised below, might have changed the course of the evidence given at trial (adopting the approach of Snowden LJ in **Notting Hill Finance**). However, I also note that this Court should be cautious about allowing any substantial new points to be argued, and that if it considers that such new point would require further evidence (or that had it been run below it would have resulted in different evidence being filed) then, that caution urges me to err against allowing such new point to be argued (see (**Singh**)). The caution is even greater where the other party has not had adequate time to deal with the new point. I also note Jessel MR's comments in **Ex parte Firth**, which refer to the long-standing principle that the parties should argue all their points at first instance. As numerous courts have explained, a trial is not a dress rehearsal for an appeal, and in this case, neither is a serious application before a judge. Further, noting the dicta from this Court referred to above, I obviously agree that this Court would have benefitted from Jack J's [Ag.] findings on the new points. I also hold, in line with **Prudential Assurance Co Ltd**, that a party seeking to rely on a new point on appeal should provide a cogent explanation why the point was not taken below. Accordingly:

- (a) I reject the Appellant's submission that the nominee/ship/coercion arguments are pure points of law. They are plainly points of mixed fact and law. For a court to determine whether any such relationship existed, and why, the court would need to determine how, and when, that relationship came into being. That being the case, I accept Mr. de Swardt's suggestion that had his clients known they were facing an argument based in nominee/ship or coercion they would have wanted to have adduced evidence; so much is perfectly clear.

- (b) I find that it is not open to the Appellant to assert that the nominee argument is not strictly new. I disagree that the passage from its original appeal submissions, cited in paragraph [68] above, discloses that it was running an argument that the Respondents were TOOTB's nominees (and certainly not that they were coerced by TOOTB into paying). On no plain reading of that passage could such a finding be made. The point being made in that passage was that KMCPL's liability to TOOTB had been discharged by the Respondents; the language of the text does not plainly or obviously admit of an additional reading whereby the Respondents paid as nominees of TOOTB; the notion of nomineehip was simply not mentioned.
- (c) I find that, as noted in paragraph 55 above, the Appellant was absolutely clear before Jack J [Ag.] that it was no part of its case that the Respondents were representatives of the PRC tax authorities. Thus, it is surprising for them to suggest in this appeal that the nomineehip argument is not a new argument in circumstances where, before the trial judge, it had denied that the Respondents were representatives of TOOTB. It is thus not only a new point; but also the opposite of what the Appellant argued below.
- (d) I hold that the coercion argument was not raised before Jack J [Ag.] - the Appellant admits as much (and perforce the argument is a new argument on appeal).
- (e) In view of the dicta cited above, this Court should be cautious in allowing new points to be raised on appeal. The fact that the nomineehip argument is not merely a new point, but in fact an argument which is completely contrary to the way in which the case was argued before the learned judge, suggests that at least as regards that point the Appellant is not seeking (merely) to argue a new point, but is in fact seeking to approbate and reprobate – having lost at first instance (when it expressly disavowed an argument that the Respondents were the representatives of TOOTB) it now seeks to argue that they were TOOTB's representatives. A party, having

lost on a particular basis, cannot subsequently disavow its earlier submissions and run a diametrically opposite argument in this Court.

- (f) I also reject Mr. Buckingham KC's suggestion that there was sufficient material before the court to deal with his new arguments. Plainly the Respondents were entitled to know the express case they had to meet and I entertain little doubt that the evidence would have taken on an entirely different dimension had it been clear that, all along, this was a case about nomineeehip/coercion. It is simply wishful thinking for the Appellant to suggest that there is sufficient material before the Court to permit it to deal with the new arguments, and the documentary record would have to be exceptionally strong before the Court would give any credence to such an Appellant's suggestion that the Respondents do not need to submit further evidence to meet the point.
- (g) I do not accept that paragraph 329(c) of the Partial Award (see paragraph 74 above), assists the Appellant. The fact that the Respondents apparently "positively relied" on there being a real threat from TOOTB does not, to my mind, demonstrate that they considered themselves to be, much less had become, agents of TOOTB, or for that matter were coerced into making the payment. In any event, had the Respondents known they were facing those arguments, I have no doubt, as Mr. de Swardt submitted, that his clients would have wanted, or want now, to adduce further evidence.
- (h) Furthermore, I do not accept that it would be appropriate, if this is what Mr. Buckingham KC was actually suggesting in his post hearing submissions, for the fresh evidence to be admitted in this Court. Whilst of course the Court has a well-established jurisdiction to admit fresh evidence on an appeal, that is generally in support of existing arguments on the appeal. I fail to see, in circumstances where there has been no formal application by the Appellant to run new grounds of appeal, why the Respondents should be forced to make an application to adduce fresh evidence to meet points that they had no indication were being made against them.

- (i) In addition to the above, not only was there no formal application for permission to run the new arguments, but there has been no explanation for the delay in seeking permission. Of course Mr. Buckingham KC is in a difficult position on this (certainly as regards the nominee ship argument); he argues that it is not strictly a new point and therefore any such application would have to be without prejudice to that position. However he does not suggest that the coercion argument was argued below, or signaled in the written submissions. There is absolutely no, let alone no cogent, explanation of the omission to take the points below. As matters stand the Appellant has offered no explanation for that failure, and it is not for this Court to try and read between the lines and reach any conclusions for it.
- (j) I do not consider that the Respondents had adequate time to deal with the new points. As to the nominee ship/agency argument, that was raised for the first time in the Appellant's supplementary submissions, On 15th May 2023, just 7 days before the appeal hearing. The papers in this matter are very voluminous and there was no certainty that this Court would allow the new points to be run. The evidence "closed" before the hearing before Jack J [Ag.]. In those circumstances I do not accept that the Respondents were obliged to file copious affidavit evidence dealing with the new arguments disclosed by that document. I do not know whether they would have had sufficient time to do so. But had they done so, I imagine there would then have been a request by the Appellant to file yet further evidence (or possibly complain that it had not had sufficient time to file such evidence). Whilst it is not for me to speculate, the consequential effects on the hearing of the appeal could have been considerable.
- (k) In any event, the coercion argument was not foreshadowed, at all, in the Appellant's supplementary submissions. Whether I am right or not in paragraph (j) above, the Respondents had no time whatsoever to deal with that argument and could not have filed any evidence to meet it.

- (l) I do not accept the Appellant's submission that there would be no prejudice to the Respondents if the new points were allowed. It occurs to me that there would be very substantial prejudice to them. There can be no doubt that they are creditors of the Appellant (the only point being whether the debt is enforceable). Yet the Respondents have been kept out of their money for a very considerable period of time, and have been forced to meet ever-changing arguments from the Appellant; in this regard I refer to the exceptionally late amendment of the application to set aside the Demand, the application for an adjournment, and the new points the Appellant sought to run in this very appeal (I also note Mr. Buckingham KC's reservation of the right to take his points in another place – by which I assume he intends to argue his points on an appeal to the Privy Council). In addition, if Mr. Buckingham KC is inviting this Court to determine the appeal having afforded the Respondents an opportunity to adduce further evidence, then the Respondents will have lost one right of appeal – had the points been raised before Jack J [Ag.] then an appeal would have been to this Court; however if this Court decides the point there would only be the possibility of one further appeal. If, on the other hand, the matter was to be remitted to the Commercial Court for argument on the new basis, then there would likely be further, substantial delay. Whilst Mr. Buckingham would say that such matters could be compensated in costs, in those circumstances I do not accept that costs would be sufficient compensation in a case where the Respondents have been kept out of their money by proceedings which have involved a substantial volte face by the Appellant (note the admission before Jack J [Ag.] being, apparently, the opposite of the new nominee ship argument), change with barely any notice (note the exceptionally late application to amend the set aside application, and the similarly late submission of the Appellant's supplementary submissions), and, on one occasion at least (note the absence of a formal application for permission to run a new case on appeal) without reference to the procedural rules of this Court.

(m) In addition to prejudice, it seems to me that there is a further matter that needs to be considered, namely finality of litigation. The parties to litigation can reasonably be expected, and taken, to have advanced all proper arguments at both first instance and on any appeal. This matter has already taken up a considerable amount of court time and resources; not only before Jack J [Ag.], but also before Small Davis J [Ag.] and Webster JA [Ag.], not to mention the full day of argument on this appeal (and the very substantial pre-reading), and the time of the Registrar/Deputy Registrar, which is very valuable to the court and all court users. If yet further points are to be taken then inevitably further court time will have to be afforded to any such hearing (or hearings, and any possible appeals). This inefficient use of court time is/would obviously be to the detriment of other court users and a waste of the court's resources.

[84] It follows that I have no hesitation in finding that the nominee/coercion arguments were not raised before Jack J [Ag.] and were new points which, extremely belatedly, the Appellant sought to argue on appeal. The former was canvassed exceptionally late in the day – in submissions filed shortly before the appeal hearing. The latter, coercion, was raised for the first time at the appeal hearing itself. Permission was not formally sought under CPR 62.4(8); indeed the Appellant's post hearing submissions did not even refer to that rule. To the extent that an informal application for permission was made at the appeal hearing, I would refuse that application. To the extent that the Court is invited to treat the matter as if a formal application had been made, I would reject that application. It fails for the reasons set out above.

The Appeal as originally cast

[85] As noted at paragraph 56 above, Mr. Buckingham KC accepted that unless he established an arguable case of nominee-ship or coercion then his clients had no case on the appeal. He accepted that if the Respondents were not nominees of TOOTB then the case falls outwith the foreign revenue rule.

[86] For the reasons set out above, I would refuse permission to argue the nominee ship and coercion arguments. It follows that the appeal as originally cast should be dismissed. What is more, I have no doubt that the decision of Jack J [Ag.] was correct for the reasons he gave. There is no bona fide dispute on substantial grounds whether the Demand Debt was (and remains) due and owing. The Demand did not seek to enforce a tax liability due to TOOTB; there was no evidence whatsoever that TOOTB had any interest in the LCIA proceedings or the proceedings in these Islands. Jack J [Ag.] did not err in finding that enforcement of the arbitration award did not offend the revenue rule. For good reason, he accepted the Respondents' arguments on this point. Nor did he err in not finding that the amounts claimed in the Demand were parasitic on an award the enforcement of which would have offended the foreign revenue law rule. The argument concerning the jurisdiction of the LCIA tribunal over KMCPL was also without merit. Accordingly, I would have dismissed an appeal on the grounds of appeal as they were originally cast and argued below.

The merits of the new arguments

[87] In view of my conclusions above it is not strictly necessary to reach any conclusion on the merits of the nominee ship/coercion arguments. However, because the points were considered I address them, albeit briefly.

[88] Mr. Buckingham KC accepted in his submissions that under English law it is a condition of the application of the narrow foreign revenue rule that the debt remains unpaid. For the reasons set out above he was correct to do so. That rule is established by authority of the House of Lords in **Government of India**, which is highly persuasive in this jurisdiction. There is no basis whatsoever for this Court to follow (inconclusive) dicta from the Hong Kong Court of Appeal in preference to a decision of the House of Lords. It would be contrary to principle to do so.

- [89] It follows that had the Appellant been granted permission to argue the new points, I would have dismissed the appeal to the extent that it was based on the narrow limb of the foreign revenue rule.
- [90] That therefore would have left open the Appellant's argument under the wide limb of the foreign revenue rule, namely that the Demand amounts to the exercise, assertion, or vindication of a foreign sovereign right. As to this, the Demand was not issued by TOOTB, and there is no evidence of a formal appointment of the Respondents by the PRC tax authorities. Nor is there any evidence that the Respondents were seeking to assist TOOTB in any way at all, or asserting any rights on behalf of TOOTB. So the Demand was certainly not an exercise etc. of a foreign sovereign right through an agent or nominee.
- [91] As noted, before Jack J [Ag.], the Appellant eschewed any notion that the Respondents were representatives of TOOTB. TOOTB had been paid long before the Demand, and indeed before the LCIA awards. Even if I had been persuaded to allow the Appellant to run the new arguments it seems to me that there is no proper evidential basis for asserting that the Respondents had become the agents of TOOTB or had been coerced into paying the money. Despite the thousands of pages of documents in the court bundles, the Appellant took the Court to but a few paragraphs here and there, none of which was inconsistent with the Respondents acting in their own interests, or consistent with their having become the nominees of TOOTB, or actually being coerced by TOOTB, or inconsistent with the Respondents paying the tax simply to stop interest etc. running, and dealing with the right to recover it in the arbitration proceedings with the Appellant.
- [92] The underlying substance of the Demand was, as the learned judge found, quintessentially, a private law dispute. The arbitration concerned a dispute between private parties as to whether any of them, and, if so, which, was liable to reimburse the Respondents for having paid the tax. As Jack J [Ag.] found, the arbitration had nothing to do with the PRC enforcing its own tax laws. There was nothing to suggest that TOOTB was remotely interested in the arbitration (and every reason to suggest

that a foreign tax authority whose demand had been satisfied would be supremely uninterested (both intellectually (which is doubtlessly irrelevant) and economically), in the outcome of the arbitration or these proceedings). TOOTB had no rights to assert or vindicate. Its rights had been vindicated when it received payment. There is no reason whatsoever to imagine that it cared in the slightest who (if anyone), as between the parties to the arbitration was liable to reimburse the Respondents. The arbitration ultimately dealt with the Respondents' exercise, assertion, or vindication of its rights as between other private parties.

[93] In so far as the Appellant asserts that where costs have been incurred in relation to a claim which infringes the revenue rule then a claim for those costs should not be enforced, for the reasons stated, I do not accept that the Demand infringes the foreign revenue rule. It follows that the Appellant's reliance upon **The Attorney General for Canada** does not assist it. That was a case where the Attorney General sued to recover the costs of the Canadian Customs authority. It is very far removed from the facts of the instant case.

[94] Accordingly, had permission to run those new points been granted, I would have dismissed the appeal. On Mr. Buckingham KC's own submission, as a matter of English law (which is highly persuasive) the appeal on the narrow limb of the foreign revenue rule fails because the tax has been paid. Thus, to the extent that the appeal relied on that rule, it fails on the Appellant's own case. On the wider limb of the rule, the Demand did not amount to the exercise, assertion, or vindication of a foreign sovereign right.

Disposition

[95] In the premises I would:

- (a) Refuse permission to argue the new points on appeal.
- (b) Dismiss the appeal.

- (c) Subject to any written submissions being filed within seven days, (as to which I can see no reason, the result of the appeal being clear and the usual costs liability therefore following) order that the Appellant do pay the Respondents' assessed costs of the appeal, such costs to be assessed by a judge of the Commercial Court unless the parties agree otherwise within 21 days from the date of this decision.

I concur.

Dame Janice Pereira

Chief Justice

I concur.

Esco Henry

Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar