

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0010

BETWEEN:

GOLDIN INVESTMENT INTERMEDIARY LIMITED

Appellant

and

CHINA CITIC BANK INTERNATIONAL LIMITED

Respondent

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Trevor Ward
The Hon. Gerard St. C Farara

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

Appearances:

Mr. Paul McGrath KC and with him Ms. Sarah Latham for the Appellant
Mr. John McCarroll SC and with him Mr. Romane Duncan and Ms. Tamika Calme
for the Respondent

2023: May 23;
July 5.

Commercial appeal – Section 157(1)(a) of the Insolvency Act, 2003 – Application to set aside statutory demand – Substantial dispute as to whether debt is owing or due – Whether debt was disputed on genuine grounds and substantial grounds – Interpretation of Deed of Assignment governed by foreign law

By statutory demand, China Critic Bank International Limited (“CCBIL”) demanded full payment by Goldin Investments Intermediary Limited (“GIIL”) of a debt of HK\$990,000,000 (or “the Debt”) within 21 days of the service of the demand. This debt is said to arise by

virtue of a Deed of Assignment of Sale Proceeds, dated 3rd January 2020 (“the Deed of Assignment”) entered into between GILL, as assignor, and CCBIL, as lender. The Deed of Assignment is governed by Hong Kong law. Clause 2 of the Deed of Assignment headed ‘Covenant to Pay’ states that the assignor shall pay and discharge the Secured Liabilities in the manner provided for in the Finance Documents. Under the Deed of Assignment, ‘Secured Liabilities’ is defined to mean the principal amount of all outstanding loans (in the sum of HK\$990,000,000 as of the date of the Deed of Assignment) together with accrued interest and default interest under the Finance Documents from time to time owing.

By clause 3.1 (headed ‘Assignment’), GILL agreed to assign to CCBIL, the Assigned Property as a continuing security for the payment and discharge in full of the Secured Liabilities. The Assigned Property is defined to mean the full benefit and right to receive and recover the Sale Proceeds of 40% of all sale proceeds received and receivable by GILL pursuant to the Sale Contract. The Sale Contract is the Conditional Sale and Purchase Agreement dated 26th September 2019 between the assignor as vendor and Silver Shine Global Limited, as wholly owned subsidiary of Listco (i.e. Goldin Financial Holdings Limited, a Bermuda company). By clause 5.2 of the Deed of Assignment the assignor gave certain undertakings to the lender in relation to the Sale Contract, including at sub-paragraph (e) that ‘if it receives payment of any amount under this Deed (other than in the Borrower Income Account), it will hold such amount on trust for the Lender and will immediately pay it to the Lender for application in accordance with the provisions of the Facilities Agreement’.

The loans referenced in the definition of Secured Liabilities in the Deed of Assignment arose pursuant to the Facilities Agreement dated 4th December 2017 (the “Facilities Agreement”), also governed by Hong Kong Law, entered into between Infinite Blossom Limited (“Infinite Blossom”), as borrower, and CCBIL, as lender with Mr. Ma Zhao (“Mr. Zhao”) as guarantor. The loan facilities provided for under the Facilities Agreement were also secured by other security instruments and documents, including a debenture executed 4th December 2017 (“the Debenture”). These documents are collectively referred to as “the Finance Documents”. GILL is not a party to the Facilities Agreement or the Finance Documents.

Clause 1.2(h) of the Deed of Assignment stipulated that, for the avoidance of doubt, notwithstanding anything in the Facilities Agreement or Finance Documents, GILL shall not be treated as an obligor under the Facilities Agreement and the Finance Documents.

Mr. Pan Su Tong (“Mr. Pan”), who was also not a party to the Facilities Agreement and the Finance Documents, is indirectly the beneficial owner, through Central Source Limited, of 60% of the issued shareholding in GILL. The other 40% shareholder of GILL is Infinite Blossom which is owned or beneficially owned by Mr. Zhao. Mr. Pan executed the Deed of Assignment on behalf of GILL in his stated capacity as a director of GILL.

Under a sale and purchase agreement dated 1st December 2017 (“the SPA”) between Central Source Limited as vendor, Infinite Blossom as purchaser and Mr. Pan as guarantor, Central Source Limited (Mr. Pan) agreed to sell to Infinite Blossom (Mr. Zhao) all its shares (“Sale Shares”) in GILL for the consideration of HK\$9 billion. The effect of this was that upon

completion of the sale and purchase under the SPA, Infinite Blossom (effectively Mr. Zhao) would own 100% of GILL and indirectly, the Land in Hong Kong held by its subsidiary Goldin Finance Global Square Limited. The third installment of the deposit sum of the full balance of the consideration of HK\$9 billion was never paid by Infinite Blossom to Central Source Limited and accordingly, Mr. Pan remains the owner of 60% of the issued shares in GILL.

By a personal guarantee between Mr. Pan and CCBIL (the “Pan Guarantee”) Mr. Pan became personally liable for the repayment to CCBIL of the term loan sums and facilities under the Facilities Agreement, including the outstanding sum of HK\$990,000,000 the subject of the statutory demand.

On 1st August 2019, CCBIL’s solicitors in Hong Kong wrote to Infinite Blossom and GFGLS purporting to terminate the Facilities Agreement on the ground of a repudiatory breach for failure to satisfy certain terms of the said agreement within the time specified. CCBIL also demanded repayment of the Debt along with interest. Both the Pan Guarantee and the Deed of Assignment were executed after this letter. Request for repayment of the Debt by Infinite Blossom and GILL was made in subsequent letters in April 2021.

Minutes of meetings which took place before the execution of the Deed of Assignment confirmed that the debt under the Facilities Agreement had not been repaid in full by Infinite Blossom and the sum of HK\$990,000,000 remained outstanding. An exchange of emails between those representing, respectively, GILL and CCBIL during the negotiations leading to the execution of the Deed of Assignment, showed that GILL was initially not in agreement with the inclusion of clause 2 in the said Deed, but subsequently accepted it being included, leading to Mr. Pan executing the said document on its behalf with clause 2 ‘Covenant to Pay’.

GILL applied on 26th November 2021 to set aside the statutory demand (“the Set-Aside Application”). Both parties, obtained and submitted in the set-aside proceedings expert evidence of Hong Kong law as to the correct interpretation of clause 2 of the Deed of Assignment.

On 1st February 2023, the learned judge rendered an *ex-tempore* decision dismissing GILL’s Set-Aside Application and authorised CCBIL to make an application for the appointment of a liquidator over GILL pursuant to section 157(5) of the Insolvency Act, 2003. The learned judge, having construed the relevant clauses, including clauses 2, 5.2(e) and 2.1(h) of the Deed of Assignment, and having considered the expert evidence, concluded that the provisions of clause 2 were ‘crystal clear’ as creating an assumed obligation on the part of GILL to pay and discharge the outstanding debt of HK\$990,000,000.

In rendering his decision not to set aside the statutory demand, the learned judge relied on the test of a ‘substantial dispute’ in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**. In applying this test, he also concluded that the reason advanced by GILL for not paying the debt was “honestly believed to exist”.

Being dissatisfied with the decision of the learned judge, GILL applied for and was granted leave to appeal. The issues before this Court are (1) the proper construction of clause 2 of the Deed of Assignment and whether the appellant's arguments on the construction issue, coupled with the expert evidence of Hong Kong law raised a 'substantial' dispute within the meaning of that expression in section 157(1)(a) of the Insolvency Act 2003, such that the defence was not "frivolous" nor "thoroughly bad"; and (2) whether the judge was wrong to find that GILL's dispute of the outstanding debt, the subject of the statutory demand, was not genuine or bona fide.

Held: dismissing the appeal, affirming the orders of the judge in the court below and awarding costs of the appeal to CCBIL to be assessed by a judge of the Commercial Court if not agreed within 21 days of the judgment, that:

1. Section 157(1)(a) of the Insolvency Act, 2003 is written in mandatory terms. Under this section, the court shall set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt is owing or due. A substantial dispute means that the debt is disputed on 'genuine (bona fide) and substantial' grounds. The dispute must be genuine in both the subjective and objective sense, which means that the reason for not paying the debt must be honestly believed to exist and based on substantial or reasonable grounds. The court in considering an application under section 157(1)(a) must be satisfied that there is a genuine and substantial dispute which calls for further investigation by a court or some other tribunal with the requisite jurisdiction or authority to do so. In carrying out this assessment, the judge has a duty to carry out a preliminary investigation of the facts to determine whether the dispute which the company has raised about the debt is held on genuine and substantial grounds. An assertion that a substantial dispute exists must be supported by some evidential basis or point of law to demonstrate that the defence or ground relied on is arguably sustainable. Once the judge is satisfied that the dispute raised is not frivolous or thoroughly bad, such that the ground on which the company disputes the debt is or are substantial, he is obligated by section 157(1)(a) to set aside the statutory demand.

Section 157(1)(a) of the **Insolvency Act 2003**, Act No. 5 of 2003 of the Laws of the Virgin Islands applied; **Sparkasse Bregenz Bank AG v Associated Capital Corporation** BVI Civil Appeal No. 10 of 2002 (delivered 18th June 2023, unreported) applied; **Jinpeng Group Ltd. V Peak Hotels and Resorts Ltd.** BVIHCMAP2014/0025 (delivered 8th December 2015, unreported) applied; **Re A Company (No 001946 of 1991)** [1991] BCLC 737 considered; **Donna Union Foundation v Scoboda Corporation** BVIHC (COM) 230 of 2018 (delivered 23rd July 2018, unreported) considered; **Creata (Aust) Pty Limited v Faull** (2017) 125 ACSR considered; **Collier v P & MJ Wright (Holdings) Ltd.** [2008] EWCA 1006 considered; **China Alarm Holdings Limited v China Alarm Holdings Acquisition LLC et al** BVIHCV 2008/0385 (delivered 20th April 2019, unreported) considered; **In the matter of Universal Property Group Pty Limited** [2019] NSWSC 796 considered.

2. While expert evidence of foreign law is a question of fact for the judge, there is no evidence from either expert in this case which suggests that the applicable principles before the courts of Hong Kong when construing a written contract are any different from those under English common law, and indeed, the common law of the BVI. Moreover, the reports from both Hong Kong law experts accepted that the law is the same in Hong Kong and in England. However, this issue as to the correct meaning of clause 2, turns not on expert opinions as to particular principles or provisions of Hong Kong law, but, as the judge opined, on a simple matter of construing the words in clause 2 of the Deed of Assignment in their natural and ordinary meaning within the four corners of the Deed of Assignment. In conducting this exercise, the BVI court is just as equipped to interpret clause 2 of the Deed of Assignment. Accordingly, the learned judge was correct in concluding that the terms of clause 2 were clear, applying the natural and ordinary meaning of the words used therein. Clause 2 of the Deed of Assignment on its plain construction imposes a contractual obligation on GILL to pay the outstanding debt of HK\$990,000,000, the subject of the statutory demand served on it, and GILL's argument to the contrary is so severely lacking in cogency as to be hopeless or thoroughly bad within the meaning of the Sparkasse test.
3. Having found that the meaning of clause 2 of the Deed of Assignment was 'crystal clear' in creating a liability on the part of GILL to pay and discharge the Secured Liabilities, a finding that objectively the reason or ground advanced by GILL was not genuinely believed or held, was not strictly necessary for the learned judge to reach in order to dismiss the Set Aside Application. However, that finding was one open to the learned judge on the evidence before him. It cannot be said persuasively that this finding was blatantly wrong, and ought to be set aside.

JUDGMENT

- [1] **FARARA JA [AG.]:** Goldin Investment Intermediary Limited ("GILL" or "the appellant"), a company incorporated under the laws of the Territory of the Virgin Islands (or "BVI"), appealed against the order of a learned judge of the Commercial Division (Wallbank J [Ag.]) dated 1st February 2022 dismissing GILL's originating application filed 26th November 2021 under section 157(1)(a) of the **Insolvency Act, 2003** (the "Insolvency Act")¹ to set- aside a statutory demand served on it by China

¹ Act No. 5 of 2003, Laws of the Virgin Islands.

Critic Bank International Limited (“CCBIL”), a company incorporated in Hong Kong, on 12th November 2021 (“the Set-Aside Application”).

Background

- [2] By the statutory demand, CCBIL demanded full payment by GIL of a debt of HK\$990,000,000 (approximately US\$127,083,557) (or “the Debt”) within 21 days of service of the demand. The statutory demand has not been complied with and CCBIL has not paid the outstanding sum demanded. As the Deed of Assignment (the scope of which is outlined below in the judgment) is governed by Hong Kong law, both parties obtained and submitted in the set-aside proceedings expert evidence. GIL relied on the expert evidence of Mr. Douglas Lam Tak-Yip (“Mr. Lam”) provided by his affirmation filed 10th January 2022² and the documents at exhibit “DL-1.”³ Mr. Lam was called to the Hong Kong Bar in 1999 and is a Senior Counsel having been so elevated in 2015. CCBIL filed expert evidence of Mr. Khaw Wei Kang Richard (“Mr. Wei”) on 17th December 2021⁴ (and the documents at exhibit “KWKR-1” thereto.)⁵
- [3] Notably, on 26th January 2022, after embarking upon the statutory demand process under section 155 of the **Insolvency Act**, CCBIL commenced substantive civil proceedings before the courts in Hong Kong against GIL and three other defendants (“the HK Proceedings”). The HK Proceedings encompasses claims for breach of the Deed of Assignment, including the loss of the Debt and contractual interest as damages, and originally included a claim for unlawful means conspiracy against all defendants, which claim was subsequently dropped. CCBIL makes clear in its written submissions that, as matters unfolded, it was compelled to bring the HK Proceedings after it discovered that the Land (described in more detail below) had already been transferred away by GIL, and this was after the judge below had handed down his ruling in this matter. Further, it was compelled to file a statement

² Hearing Bundle Vol.1 p. 1430-1454.

³ Hearing Bundle Vol. 1 p. 1456-1752.

⁴ Hearing Bundle Vol.1 p. 858-882.

⁵ Hearing Bundle Vol.1 p. 884-1428.

of claim to prosecute the HK Proceedings for recovery of the outstanding debt “because it needed to do so to maintain the worldwide freezing injunction against GILL’s assets”, and those proceedings are at an early stage with no decision as yet having been made on the merits.

[4] The Set Aside Application having been dismissed, GILL applied for and was granted leave to appeal that decision by a single judge of this Court on 12th April 2022, and a stay of execution of the said order was granted pending the determination of the appeal.⁶

[5] It is important to identify and to address, to some extent, the salient agreements, correspondence and documents relied on before the learned judge, being ever mindful though that it is the Deed of Assignment and, in particular, clause 2 thereof which is at the heart of the issues in this appeal, as was the case before the court below.

Deed of Assignment

[6] The Debt, the subject of the statutory demand, is said to arise by virtue of clause 2 of a Deed of Assignment of Sale Proceeds (“the Deed of Assignment”) entered into between GILL, as Assignor, and CCBIL, as Lender, dated 3rd January 2020. As stated above, the Deed of Assignment is governed by the laws of Hong Kong. Pursuant to the provisions of the Deed of Assignment, the courts of Hong Kong have non-exclusive jurisdiction “to settle any dispute arising out of or in connection with” the said Deed; and the parties thereto expressly agreed that the Hong Kong courts are the appropriate and convenient courts to settle such disputes and, in furtherance thereof, each party agreed not to argue to the contrary.

[7] Clause 2 of the Deed of Assignment, headed ‘Covenant to Pay’, stipulates: “The Assignor shall pay and discharge the Secured Liabilities in the manner provided for in the Finance Documents.” The expression “Secured Liabilities” is defined in clause

⁶ Hearing Bundle Vol.2, p. 228-229.

1.1 (definition section) of the Deed of Assignment to mean “the principal amount of all outstanding Loans (in the sum of HK\$990,000,000 as of the date on this Deed), together with accrued interest and default interest under the Finance Documents from time to time owing, due or payable by the Borrower to the Lender.”

- [8] Clause 3.1 of the Deed of Assignment, headed ‘Assignment’, provides: “As a continuing security for the payment and discharge in full of the Secured Liabilities, the Assignor, as beneficial owner, assigns and agrees to assign to the Lender, by way of security, the Assigned Property.” The term ‘Assigned Property’ is therein defined to mean “the full benefit and right to receive and recover the Sale Proceeds”. The expression ‘Sale Proceeds’ means “40 percent of all sale proceeds received or receivable by the Assignor [GIL] pursuant to the Sale Contract (including the rights and interests of the Assignor in the Sale Contract and any deposits payable thereunder).” The referenced ‘Sale Contract’ is “the Conditional Sale and Purchase Agreement dated 26th September 2019 entered into between the Assignor [GIL] as vendor, and Silver Global Limited, a wholly owned subsidiary of the Listco, as purchaser for the sale and purchase of the entire issued shares in the Company”, meaning Solar Time Developments Limited, a company incorporated under the laws of the BVI. ‘Listco’ is defined to mean Global Financial Holdings Limited (“GFHL”), a Bermuda company listed on the Main Board of the Stock Exchange of Hong Kong.
- [9] By clause 5.2 (headed ‘Sale Contract’) of the Deed of Assignment, GIL (as Assignor) undertakes to CCBIL (as Lender) certain matters pertinent to the Sale Contract, its performance, its receipt handling and payment over of the Sale Proceeds (40%) to the Borrower Income Account. The term “Borrower” is clearly a reference to the ‘Borrower’ under the facilities Agreement, namely, the company Infinite Blossom Limited (“Infinite Blossom”), a company incorporated under the laws of the BVI. These obligations and undertakings by GIL pursuant to clause 5.2 include (materially) at sub-paragraph (e) –

“(e) if it receives payment of any amount assigned under this Deed (other than in the Borrower Income Account), it will hold such amount on trust for

the Lender [CCBIL] and will immediately pay it to the Lender [CCBIL] for application in accordance with the provisions of the Facilities Agreement”.

- [10] By clause 1.2 (headed ‘Construction’) of the Deed of Assignment it is provided at sub-paragraph (h) –

“(h) For the avoidance of doubt, the Lender [CCBIL] and the Assignor [GILL] hereby agrees and confirms that notwithstanding anything in the Facilities Agreement or the Finance Documents, the Assignor [GILL] shall not be treated or regarded as an Obligor under the Facilities Agreement and the Finance Documents whatsoever.”

The appellant places much reliance on the meaning and effect (as proffered by counsel for GILL) on sub-paragraph (h) above. I shall return to this and the other key provisions of the Deed of Assignment in due course.

Facilities Agreement

- [11] The outstanding ‘Loans’ referenced in the definition of ‘Secured Liabilities’ in the Deed of Assignment, which term is used in the ‘Covenant to Pay’ at clause 2 thereof, arose pursuant to a Facilities Agreement dated 4th December 2017 (“the Facilities Agreement”) entered into between Infinite Blossom, as Borrower, and CCBIL, as Lender, and “Mazhao” as guarantor. The term “Obligor” is also defined therein to mean “the Borrower [Infinite Blossom], the Guarantor [Mazhao], the Project Company [Goldin Finance Global Square Limited (“GFGSL”)] and any other parties to the Finance Documents (other than the Lender [CCBIL]) and “Obligor” means each one of them.”
- [12] The loan facilities provided for under the Facilities Agreement were also secured by other security instruments and documents (for example, a debenture also executed 4th December 2017). These documents are collectively referred to as the “Finance Documents” (sic). That term is defined in the Facilities Agreement to mean “[the Facilities Agreement], any Transaction Security Document, any Utilisation Request and any other document designated as such by the Lender [CCBIL] and the Borrower [Infinite Blossom].” At paragraph 2(b) of Schedule 1 to the Facilities Agreement three Security Documents are listed as ‘Finance Documents’. These

are: (i) a charge over 100% issued share capital in the Borrower, Infinite Blossom, to be given by the Guarantor, Mazhao; (ii) a charge over 40% issued share capital in the Target Company, defined to mean GILL, to be issued by the Borrower, Infinite Blossom; and (iii) a debenture to be issued by the Borrower, Infinite Blossom.

[13] Pursuant to clause 2.1 of the Facilities Agreement, CCBIL as Lender agreed to make available to Infinite Blossom as Borrower two term loan facilities

- (a) the Total Facility A Commitment, that is, as defined, an amount not exceeding the Total Commitments of HK\$1,490,000,000; and
- (b) the Total Facility B Commitment, that is, an amount not exceeding the sum of HK\$666,000,000. By clause 3.1 of the Facilities Agreement, Infinite Blossom is obligated to apply the amounts borrowed under Facility A “towards financing partial payment of the Deposit for purchase of the Target Shares under the Acquisition Document”; and under Facility B “towards financing payment of fees, interest and expenses payable under the Finance documents.” The ‘Target Company’ under the Facilities Agreement is GILL and the ‘Target Shares’ are the issued share capital in GILL. Accordingly, the main purpose of the term loan facilities agreed to be provided by CCBIL to Infinite Blossom under the Facilities Agreement was for making a partial payment of the Deposit (defined to mean the term “Deposit” in the Acquisition Agreement, in the amount of HK\$3,600,000,000) under the Acquisition Agreement whereby Infinite Blossom agreed to purchase and Central Source Limited (a BVI incorporated company) agreed to sell its 60 % shareholding in GILL, the other 40 percent being already held by Infinite Blossom.

[14] The Facilities Agreement is governed by the laws of Hong Kong and the courts of Hong Kong have exclusive jurisdiction “to settle any dispute arising out of or in connection with” the said agreement. Additionally, the parties thereto expressly

agreed that the courts of Hong Kong are the most appropriate and convenient forum to settle all such disputes, and each party covenanted not to argue the contrary position. GILL is not a party to the Facilities Agreement or the Finance Documents.

Mr. Pan, Mr. Zhao, and the Hong Kong Land

- [15] Mr. Pan Su Tong (“Mr. Pan”), who was also not a party to the Facilities Agreement and Finance Documents, is indirectly the beneficial owner of 60 percent of the issued shareholding in GILL. This is so by virtue of Mr. Pan’s 100 percent ownership of Superior Mansion Limited, which in turn holds 100 percent of the shares in Central Source Limited. Central Source Limited is a 60 percent shareholder in GILL. The other 40 percent shareholder of GILL is Infinite Blossom, the Borrower under the Facilities Agreement. Infinite Blossom is owned or beneficially owned by Mr. Ma Zhao (“Mr. Zhao”). Mr. Pan executed the Deed of Assignment on behalf of GILL in his stated capacity as a director of GILL. GILL in turn owns 100 percent of Solar Time which owns 100 percent of GFGSL. GFGSL is the registered owner of a plot of land located in New Kowloon Inland Lot 5948 in Hong Kong (“the Land”).

Loan Facilities and the Share Purchase Agreement

- [16] A sale and purchase agreement dated 1st December 2017 (“the SPA”) was entered into between Central Source Limited (100% owner of GILL) as vendor, Infinite Blossom as purchaser, and Mr. Pan as guarantor.⁷ By the SPA, Central Source Limited (Mr. Pan) agreed to sell to Infinite Blossom (Mr. Zhao) all its shares (“Sale Shares”) in GILL for the consideration of HK\$9 billion. Upon completion of the sale and purchase under the SPA, Infinite Blossom (effectively Mr. Zhao) would own 100 percent of GILL and, indirectly, the Land held by the subsidiary GFGSL.
- [17] The deposit in the sum of HK\$3.6 billion (“the Deposit”) to be paid by Infinite Blossom under the terms of the Share Purchase Agreement, was to be paid in three installments. The first in the sum of HK\$900,000,000.00 had already been paid to the vendor Central Source Limited; the second installment of HK\$1,490,000,000

⁷ Hearing Bundle p. 414-443.

was to be paid within 2 working days of execution of the Share Purchase Agreement; and the third installment of HK\$1,210,000,000 within 3 months from the date of the SPA. The punctual performance of the obligations of the vendor, Central Source Limited, under the SPA were personally guaranteed by Mr. Pan to the purchaser, Infinite Blossom. Clause 8 of the SPA provided for, among other rights, a Put Option in favour of the purchaser, Infinite Blossom whereby it could, after completion of the transfer of the Sale Shares, require the vendor, Central Source Limited, to repurchase all of the transferred shares for an amount equal to the Deposit that had been paid but deducting the option price of HK\$900,000,000.

- [18] The loan facilities provided by CCBIL to Infinite Blossom under the Facilities Agreement amounted to HK\$1.49 billion, which sum was used in payment of the second installment on the Deposit under the SPA. Neither the third installment of the Deposit sum or the full balance of the consideration of HK\$9 billion for the sale and purchase of the Sale Shares in GILL was ever paid by Infinite Blossom (Mr. Zhao) to Central Source Limited. Accordingly, Central Source Limited, and indirectly Mr. Pan, remains the owner of 60 percent of the issued shares in GILL.

Share Charge

- [19] By a Charge dated 4th December 2017⁸ between Infinite Blossom (effectively Mr. Zhao) as Chargor and CCBIL as Chargee (“the Share Charge”), Infinite Blossom (as legal and beneficial owner) charged to CCBIL, as lender, by way of security for the payment and discharge of all the Secured Obligations “all Shares in which the chargor may in the future acquire any interest (legal or equitable) including the proceeds of sale derived from them”.⁹ The term ‘Shares’ means all shares in the company, GILL. This provision and charge would clearly extend to and include the ‘Sale Shares’ to be acquired by Infinite Blossom in GILL under and pursuant to the SPA dated 1st December 2017. Clause 3 also charged all ‘Derivative Assets’ of a

⁸ Hearing Bundle Vol.1, p. 443-476.

⁹ Clause 3(a) of the Share Charge.

capital nature now or in the future accruing to the Chargor, and of an income nature now or in the future accruing to the Chargor.

- [20] The term 'Secured Obligations' is defined in clause 1.1 of the Share Charge to include, *inter alia*, any and all obligations and liabilities of Infinite Blossom to CCBIL "of any kind and in any currency...", including obligations and liabilities under or in connection with any Finance Document (which, by definition, includes the Facilities Agreement). The term 'Derivative Assets' is also defined in the Debenture (explained below) to include, *inter alia*, "allotments, rights, money or property arising at any time in relation to any of the Shares by way of conversion, exchange, redemption, bonus, preference, option or otherwise".¹⁰ Thus the charge created under clause 3(b) and (c) of the Share Charge extends to and includes the Put Option rights conferred upon Infinite Blossom by clause 8 of the SPA.

- [21] It is notable that the Share Charge contains a 'Covenant to Pay' at clause 2.1, which stipulates: "The Chargor (as primary obligor and not merely as surety) covenants with the Lender that it will, on the Lender's written demand pay or discharge the Secured Obligations as they fall due." This provision clearly created an additional contractual obligation under the Share Charge on the part of Infinite Blossom to pay and discharge the Secured Obligations, including those provided for under the Facilities Agreement, of which Infinite Blossom is the borrower and a primary Obligor. The governing law of the Share Charge is the laws of Hong Kong, and the court of Hong Kong had exclusive jurisdiction to settle any claim, dispute or matter of difference arising out of or in connection with the said Charge.

Debenture

- [22] Also on 4th December 2017 Infinite Blossom as Chargor entered into a Deed of Debenture ("the Debenture") in favour of CCBIL.¹¹ The Debenture also contains a 'covenant to pay' at clause 2.1 in these terms: "The Chargor (as primary obligor and not merely as surety) covenants with the Lender that it will, on the Lender's written

¹⁰ Clause 1.1 of the Share Charge.

¹¹ Hearing Bundle Vol.1, p. 515-562.

demand pay or discharge the Secured Obligations as they fall due.” By clause 3.1 the Chargor, Infinite Blossom, as beneficial owner, as security for the payment of all Secured Obligations, assigns and agrees to assign absolutely (subject to a proviso for reassignment on redemption) to the Lender CCBIL all rights, title and interest from time to time in (a) any sums payable to it pursuant to the Insurance Policies; (b) and to all Intercompany Loans owed to it; and (c) the benefit of all of its Acquisition Document Claims. These are terms of art defined in the Debenture.

- [23] The Debenture creates both a fixed and floating charge as security for the payment or discharge of all Secured Obligations.¹² The fixed charge is over certain property, interest and rights, including all land the property of the Chargor now or in the future; and a floating charge is over all the Assets of the Chargor, Infinite Blossom, except those Assets already assigned by way of security by virtue of clause 3.1. The term ‘Assets’ is defined to mean in relation to the Chargor, “all its undertaking, property, assets, revenues and rights of every description, or any part of them”.

Mr Pan’s Personal Guarantee

- [24] On 18th September 2019 Mr. Pan by deed entered into a personal guarantee with CCBIL (“the Pan Guarantee”). By clause 2, the Guarantor, Mr. Pan, irrevocably and unconditionally guarantees to the Lender, CCBIL, “punctual performance by the Borrower, Infinite Blossom, of all its payment obligations under the Finance Documents”, which includes the Facilities Agreement. Accordingly, by this instrument Mr. Pan, the ultimate beneficial owner of GIL became personally liable for the repayment to CCBIL of the term loan sums and facilities under the Facilities Agreement, including the outstanding sum of HK\$990,000,000 the subject of the statutory demand - clause 2.1(d). As an added layer of liability, by clause 2.2 of the Pan Guarantee, Mr. Pan agreed to indemnify CCBIL for the payment of the said sum of HK\$990,000,000, in the event that the guarantee under clause 2.1 is for any reason unenforceable, and to do so “upon first written demand by the Lender [CCBIL] under clause 2.1”.

¹² Clauses 3.2 and 3.3 of the Debenture.

Default under the Facilities Agreement and Finance Documents

- [25] It is not seriously disputed that Infinite Blossom, (Mr. Zhao's company), has not repaid to CCBIL in full the loan sums provided to it under the Facilities Agreement and Finance Documents, and the outstanding amount of HK\$990,000,000 remains unpaid.
- [26] By letter dated 1st August 2019¹³ from Wilkinson & Grist, CCBIL's solicitors in Hong Kong, wrote to Infinite Blossom and GFGSL (the guarantor), and pointed out that Infinite Blossom had not satisfied, within the time frame specified, certain Conditions Subsequent at Schedule 2 of the Facilities Agreement, as they were obligated to do under clause 21.27 of the said agreement. It was asserted that these failures constituted an event of default under clause 22 amounting to a repudiation of the Facilities Agreement, which repudiation CCBIL accepted. The said letter continues:
- "By notice of this letter, the Facilities Agreement is terminated." What then followed was a demand for "immediate repayment of the outstanding balance of the Facilities Agreement together with interest, charges and all other sums payable under the Facilities Agreement" which, as of 31st July 2019 showed an indebtedness in the principal sum of HK\$990,000,000 with interest in the sum of HK\$3,562,372.60, together with further interest at the daily rate of HK\$161,926.03 from 1 August 2019 until payment in full..."
- [27] It is notable that the Pan Guarantee and the Deed of Assignment were both entered into by Mr. Pan (in the case of the Guarantee) and by GILL (in the case of the Assignment), with CCBIL subsequent to this letter on 3rd January 2020. Both documents treat the Facilities Agreement as continuing to be valid and in effect. The point was raised briefly by GILL in its skeleton argument¹⁴ but not developed further during Mr. McGrath's oral submissions before the Court, that CCBIL's stance that the Facilities Agreement had been terminated by repudiatory breach accepted by CCBIL in its 1st August 2019 letter, is inconsistent with CCBIL suggestion "that thereafter such obligations remained extant and to be undertaken directly by GILL under the Deed of Assignment." Instead, while not abandoning the point, counsel's

¹³ Hearing Bundle Vol. 1, p. 376.

¹⁴ Para. 18 of the Appellant's Skeleton Argument.

oral submissions focused primarily on the Deed of Assignment being just that, an agreement providing solely for the assignment of the 'Assigned Property' (the full benefit and right to receive and recover the Sale Proceeds, that is, 40% of the sale proceeds derived or to be derived by GILL pursuant to the Conditional SPA dated 26th September 2019 between GILL and Silver Shine Global Limited) under clause 3. GILL also submitted that, on a reasonable alternative construction, which was not fanciful or thoroughly bad, clause 2 of the Deed of Assignment, when read and construed within the context of the entire agreement and the other interlocking agreements relating to the loan facilities, did not, create a separate free-standing obligation on the part of GILL to pay the Secured Liabilities, that is, the outstanding loans amounting to the sum of HK\$990,000,000.

- [28] By letters dated respectively 20th April 2021 and 30th April 2021 from CCBIL's lawyers in Hong Kong to Infinite Blossom and GILL, CCBIL pointed to certain breaches by Infinite Blossom of conditions under the Deed of Assignment with regard to the production of documents to CCBIL. These letters also reminded Infinite Blossom and GILL "to repay [CCBIL] the principal amount of all outstanding Loans of HK\$990,000,000 (as of the date of this letter) under the Facilities Agreement, together with interest and default interest under the Finance Documents (as defined in the Facilities Agreement) owing, due or payable by Infinite Blossom to [CCBIL] forthwith upon completion of the Transaction." The 'Transaction' is therein defined as "the sale and purchase agreement in respect of Solar Time Development Limited (the "Sale Share") between GILL, as seller, and Silver Shine Limited ("Silver Shine, which is a wholly owned subsidiary of Goldin Financial Holdings Limited (the "Listco"), as buyer." Both letters also contained a paragraph to the effect that nothing in each letter shall prejudice or affect the rights of CCBIL under the Finance Documents, the Pan Guarantee, the Consent, or the Assignment of Sale Proceeds ("the Deed of Assignment) or otherwise.

Meetings prior to executing Deed of Assignment

- [29] Before the court below were copies of the minutes of (i) a meeting held on 11th September 2019 between the Goldin Group by its chairman Mr. Pan, Huang Rui (Henry) and Stanley Chun, and CNCBI by its Executive Director and Deputy Chief Executive Officer Bai Lijun, Kan Ying Tim, Wong Man Kin and Paul B Cheung; and (ii) a meeting held on 27th December 2019 between Goldin Group by its chairman Mr. Pan and Mr. Stanley Chum, and CNBI by its Chief Executive Officer Bi Mingqiang, Kan Ying Tim and Wong Man Kin. The minutes of the 11th September 2019 meeting show that the purpose of the meeting was to discuss issues concerning the existing loan of the Kowloon Bay Project “with a loan balance of HK\$990,000,000, to implement a repayment plan. The said loan was to be repaid in full before 20th December 2019. Provision was also made for Mr. Pan to provide his full personal guarantee to CCBIL; and for Infinite Blossom (Mr. Zhao), Central Source (Mr. Pan) and the Bank (CCBIL) to enter into a tripartite agreement to be completed by 26th September 2019 at the latest, which would provide for the ultimate sale of the Kowloon Project to a listed company and the payment by Infinite Blossom of the proceeds of sale of its 40% equity interest to repay the Kowloon Project loan in full to the Bank.
- [30] As the minutes of the meeting of 27th December 2019 show, that meeting was to discuss issues arising from the loans for the Tianjin and Kowloon Bay projects (borrowing companies: Silver Starlight Limited and Infinite Blossom Limited) and “to discuss the implementation of the repayment plan and credit enhancement measures, and to reach an agreement on the following: (i) the overdue interest of the Tianjun Loan shall be repaid on or before 6th January 2020; (ii) all principal and interest of the Kowloon Bay Loan shall be repaid on or before 24th January 2020; (iii) [GIL] shall assign the proceeds from the sale of the Kowloon Bay project to CNCBI and sign the assignment of sale proceeds on Tuesday, 31st December 2019.”

[31] These letters and minutes of meetings are clearly confirmatory that the debt under the Facilities Agreement had not been repaid in full by Infinite Blossom and the sum of HK\$990,000,000 remained outstanding. The obligation to repay this debt was one shared by Infinite Blossom, Mr. Pan as guarantor and arguably by GIL under clause 2 of the Deed of Assignment, to which issue I shall return. Indeed, as is confirmed by Mr. Wong Man Kin ("Mr. Kin"), the Executive Deputy General Manager and Head of Risk Assets Management of CCBIL in his Affirmation filed 17th December 2021 in the proceedings below, a demand letter dated 23rd December 2019 was served by CCBIL through its lawyers on Mr. Pan (as guarantor) demanding payment of the outstanding debt of HK\$990,000,000 plus interest and further interest.¹⁵ Further, Mr. Kin affirms that at the meeting held on 27th December 2019, Mr. Pan had asked for more time until 24th January 2020 to repay the outstanding debt, and the Bank demanded that the Deed of Assignment be signed no later than 31st December 2019, amongst other things.¹⁶

[32] Mr. Kin addresses at paragraphs 24 of his Affirmation that his understanding is that there were negotiations (exchanges) between the parties regarding clause 2 of the Deed of Assignment, with GIL requesting its removal from the draft Assignment, and the Bank refusing to accede to it. In the end, the Deed of Assignment was executed by Mr. Pan on behalf of GIL with clause 2 therein. The fact of these negotiations regarding the inclusion of clause 2 as set out in email exchanges was also addressed and confirmed by Ng Ka Ki in his affirmation filed 17th January 2021.¹⁷ The email exchanges consistent with what Mr. Ng described with regard to the negotiations and exchanges are found at Exhibit "AN-1" to his affirmation.

[33] In my considered view, it is not necessary to address them individually or in any detail. Suffice it to be said that it is clear from these email exchanges that those representing or negotiating on behalf of GIL wanted clause 2 removed, those representing the Bank (CCBIL) wanted it in the documents. Eventually after it was

¹⁵ Para 21 of Affirmation of Mr. Wong Man Kin.

¹⁶ *Ibid* para. 23.

¹⁷ *Ibid* paras. 8-20.

reinserted, the Deed of Assignment in final form was executed by Mr. Pan on behalf of GILL. Importantly, the fact of its reinsertion by CCBIL's lawyers on 2nd January 2020 was acknowledged by Mr. Stanley Chum on behalf of GILL or the Goldin Group who, in his email of the same day, stated: "Clause 2 – Covenant to pay: This clause now provides GILL also have the liabilities to pay the Secured Liabilities under the Finance Document." This statement makes clear that GILL, when it executed the Deed of Assignment with clause 2 in it, construed or interpreted it to mean that GILL was undertaking a liability to repay the Secured Liabilities, that is, the then outstanding principal sum of HK\$990,000,000 plus interest and further interest (as subsequently demanded of it in the statutory demand served on it by CCBIL).

The Decision Appealed

- [34] Having heard arguments from counsel for the parties on 1st February 2023, the learned judge rendered an *ex-tempore* decision dismissing GILL's Set- Aside Application. The judge also authorised CCBIL to make an application for the appointment of a liquidator over GILL pursuant to section 157(5) of the **Insolvency Act** and awarded costs of opposing the Set-Aside Application to CCBIL.¹⁸ The judge's decision is captured in full in the transcript of the proceedings for that day.¹⁹ In brief, the learned judge having considered and construed clause 2, clause 5.2(e) and other provisions of the Deed of Assignment, and having considered the countervailing interpretations and constructions put forward by the parties, concluded that the provisions of clause 2 were 'crystal clear' as creating an assumed obligation on the part of GILL to pay and discharge the outstanding debt of HK\$990,000,000.
- [35] In doing so, the judge rejected the different interpretation of clause 2 and other points of objections, including forum points, put forward by GILL and its counsel, several of which other points GILL does not rely on in this appeal, either in its grounds or in argument. The learned judge found certain of these points and arguments as

¹⁸ Hearing Bundle Vol. 2, p. 10-11.

¹⁹ Hearing Bundle Vol. 1, p. 81-94.

“implausible” or “completely implausible” or “inherently unlikely”, and that they “simply run against the commercial common sense of the entire transaction.” He concluded –

“Now, the Deed of Assignment on its plain construction imposes a contractual liability on [GILL] to pay that outstanding debt. And indeed, the contemporaneous evidence demonstrates that Clause 2 of the Assignment was the subject of clear discussion between the Bank and GILL.”

It’s also clear that Mr. Pan and those involved on behalf of GILL in the negotiation of the Deed of Assignment had ample opportunity to consider the terms and indeed, what that evidence shows [is] that Mr. Chum on behalf of GILL initially invited the Bank to delete Clause 2 from which it can be inferred, as Mr. McCarroll has submitted, that he understood the meaning and legal effect of the clause when the Deed of Assignment was eventually executed with the inclusion of Clause 2.”²⁰

[36] The judge attached some importance to the fact that Mr. Pan had on 18th September 2019 (prior to the execution of the Deed of Assignment) provided his personal guarantee for the payment to CCBIL of the outstanding sums under the Facilities Agreement between Infinite Blossom and CCBIL. He considered that this “makes it more likely than less, that the Bank in fact wanted to double down on its ability to collect this money by requiring precisely such a wide all-encompassing obligation on the part of GILL.”

[37] The judge also considered clause 1.2(h) of the Deed of Assignment relied on or prayed in aid interpretively by GILL, in arguing that there was no intention under the Deed of Assignment to make GILL a primary Obligor under the Facilities Agreement for the outstanding debt. Clause 1.2(h) provides-

“For the avoidance of doubt, the Lender and Assignor hereby agrees and confirms that notwithstanding anything in the Facilities Agreement or the Finance Documents, the Assignor [GILL] shall not be treated or regarded as an Obligor under the Facilities Agreement and the Finance Documents whatsoever.”

[38] The judge roundly rejected the construction and effect on clause 2 of clause 1.2(h) contended for by GILL. In fact, the learned judge considered the proper construction

²⁰ Hearing Bundle Vol. 1, p.89.

and meaning of clause 1.2(h) to be “quite simple”. I must confess an unreserved agreement with the learned judge’s interpretation of clause 1.2(h) when he opined

—

“... this Assignment is not to be construed as somehow novating the obligations or making GIL a party to those documents [an obvious reference to the Facilities Agreement and Finance Documents]. The liabilities that attach to GIL will come out of this document [a reference to the Deed of Assignment]. That would seem the logical answer to that. It’s not at all a point of, a point that is sufficiently strong to send this into court for a dispute to be resolved over it.”

[39] The judge also accepted the submissions of counsel for CCBIL’s that (i) Mr. Pan accepted that the sums were payable to the Bank by Infinite Blossom and that upon signing the Deed of Assignment, GIL assumed liability for a debt that had been admitted; (ii) GIL stepped into Infinite Blossom’s shoes by virtue of the Assignment in clear terms; and (iii) GIL now seeks to shirk its contractual responsibility for the outstanding debt.²¹

[40] As to the test to be applied when considering an application to set aside a statutory demand, the learned judge quoted extensively from the oft cited judgment of Byron CJ (as he then was) of this Court in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**,²² which sets out the important and salient principles to be applied. These principles and the test were not in dispute in the court below or before this Court. However, counsel for GIL seemed to have a difference with counsel for CCBIL as to the requirement, as set out in **Sparkasse**, for the defendant to not only have a genuine defence on substantial grounds disputing the alleged debt, but that he must have an honest belief that such defence exists. That said, the main point of departure between the parties is not the test itself (both accepting the test as stated in **Sparkasse**), but in the way in which the learned judge applied the test to the facts and circumstances of this case.

²¹ Hearing Bundle Vol. 1, p.91.

²² BVI Civil Appeal No. 10 of 2002 (delivered 18th June 2023, unreported).

[41] On the issue of whether GILL (Mr. Pan) held an honest belief in the defence being put forward in contending that the alleged debt was disputed on substantial grounds, the learned judge concluded –

“I don’t believe that the debt is honest, the reason for not paying the debt is honestly believed to exist. Black is black and white is white.

It’s there on paper. And it’s certainly not based on reasonable grounds. It’s a very high hurdle indeed to be able to get out from the crystal clear words, which there are, in a contractual document. And as the judge there says, there must be so much doubt and question about the liability to pay that the Court sees that there is a question to be decided. Well, the way I see it is that that there is not so much doubt or question about the liability that the Court sees that there is a question to be decided. I can’t see that there is.”²³

[42] The learned judge also considered the expert evidence of Hong Kong law filed by both parties in the proceedings to set aside the statutory demand. In particular, he referenced Mr. Lam, a Senior Counsel in Hong Kong and the expert whose evidence of Hong Kong law was relied on by GILL. It was the judge’s view that what GILL’s expert, Mr. Lam, was trying to do “was peering at the screen, peering at the words to see if some ambiguity, some unclarity could be teased out from the underlying context. Well, he was trying too hard, frankly.” The judge also considered that

“ultimately the question is not is there a doubt about what the words mean here or whether our law is the same or different from Hong Kong law. The questions are very clear. The first port of call here is the contract. I don’t see that Mr. Jones’s expert takes the matter any further forward. In fact, in rather begrudging terms he accepts that his fellow expert and his analysis has much going for it in places.”

[43] As to the different opinion of the two experts on the meaning and effect of clause 2 of the Deed of Assignment, the learned judge mused: “It doesn’t mean that just because one expert says that he has some doubt and that this is more difficult and more difficult, he might find it difficult, frankly I don’t and that’s the end of it.” In concluding on this aspect, the learned judge clearly preferred the expert evidence put forward by CCBIL which he considered to be “clearly unambiguous, the view that this Court would take as well. That doesn’t mean that there is a dispute. I don’t think there is.” Finally, in giving his decision dismissing the Set-Aside Application,

²³ Hearing Bundle Vol. 1, p.92-93.

the learned judge also adopted in full the submissions made on behalf of CCBIL, which he stated expressly can be taken as part of his reasons for dismissing the said application.

The Appeal

[44] GILL being dissatisfied with the decision of the first instance court, applied for leave to appeal which was granted by a single judge of the Court on 12th April 2023. In its notice of appeal, GILL relies on three grounds of appeal or three bases upon which they contend that the learned judge had wrongly applied the test from **Sparkasse**. These are:

- (a) there was a substantial and not frivolous dispute clearly established by the different expert opinions on Hong Kong law, and the judge erred in not engaging with, or at least explaining, the principles of Hong Kong law discussed by the experts, which should have been applied to resolve the issue of construction.
- (b) the judge wrongly held that the meaning of the words in the Deed of Assignment are “crystal clear”. At the very least, there is a substantial dispute as to their meaning, again highlighted by the different views of the experts on Hong Kong law. The judge erred in not fully considering clause 2 in its internal context and wider factual matrix, which led him to conclude, wrongly, that there is no conflict between clause 1.2(h) and clause 2.
- (c) Although the judge correctly stated that the dispute must be genuine in both a subjective and objective sense, the judge was wrong to say that “I don’t believe that the debt is honest, the reason for not paying the debt is honestly believed to exist.” The judge erred in not giving his reasons for such a serious finding, especially since the appellant’s belief that the debt does not need to be paid is consistent with the interpretation of the Deed of Assignment supported by an independent Senior Counsel from Hong Kong, Mr. Lam SC.

[45] These grounds of appeal may conveniently be distilled into two broad issues:

- (a) the proper construction of clause 2 of the Deed of Assignment and whether the appellant's arguments on the construction issue coupled with the expert evidence of Hong Kong law raised a 'substantial' dispute within the meaning of that expression in section 157(1)(a) of the Insolvency Act 2003, such that the defence was not "frivolous" nor "thoroughly bad" (the "Construction Issue and application of the Sparkasse test"); and
- (b) whether the judge was wrong to find that GILL's dispute of the outstanding debt, the subject of the statutory demand, was not genuine or bona fide (the "Bona Fide Requirement Issue").

It was accepted before this Court by counsel for GILL that if the judge was correct in his conclusion that clause 2 of the Deed of Assignment was 'crystal clear' in creating a contractual obligation on the part of GILL to pay the Secured Liabilities, the appeal must fail. On the other hand, CCBIL point out that in the court below GILL acknowledged that the requirement for a bona fide dispute is distinct and in addition to one for a "substantial" dispute. I shall return to this when considering this second broad issue.

[46] Before this Court, Mr. McGrath KC, learned counsel for GILL, (quite properly) made clear that the appellant is not -

- (i) challenging or disputing the Sparkasse test in any way. In particular, the appellant does not challenge the requirement of the test of a bona fide belief by the defendant in the defence to an alleged debt;

- (ii) running any abuse of process argument (on the ground that serving the statutory demand was an abuse of process, the appropriate or agreed forum being Hong Kong and not BVI);
- (iii) relying on any ground of appeal as to the shortness of the time which the judge below took to render his *ex-tempore* judgment; and
- (iv) running an argument that permission to appeal having been granted on the basis that GILL 's appeal would have a realistic (as opposed to fanciful) chance of success, would lead to the conclusion that the Set-Aside Application ought to have been granted by the judge as it was not frivolous or hopelessly bad.

Accordingly, it is not necessary to address any of these issues in this judgment, nor is it necessary to address the preliminary objections of CCBIL to them being raised, for the first time, on appeal.²⁴

The test of a genuine and substantial dispute

[47] As mentioned above, the test to be applied when a court is considering an application under section 156(1)(a) of the **Insolvency Act** to set aside a statutory demand served pursuant to section 155 for payment of a debt that is said to be due and payable, is not in dispute. Both parties accept that the test is whether the debt is genuinely disputed on substantial grounds. Section 157, in particular, states:

“157 (1) The Court shall set aside a statutory demand if it is satisfied that
 (a) There is a substantial dispute as to whether
 i. The debt; or
 ii. a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due”.

²⁴ Para. 2.1(f) to (i) of the Respondent's Written Submissions.

[48] The courts have made pronouncements as to the meaning of the phrase “substantial dispute” used in section 157(1) and the relevant principles which undergird the application of that requirement, such that the test and these principles are well-settled. The locus classicus or seminal case in this jurisdiction is the decision of this Court in **Sparkasse**. The oft cited passage from the judgment of the Court given by Sir Dennis Byron CJ sates-

“The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, with other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. [Re Taylor’s Industrial Flooring Ltd (1990) BCC 44] But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. [Tweeds Garages Ltd. (1961) 1 Ch. 406] To fall within the principle, the dispute must be genuine in both the subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding. [Palmer’s Company Law Vol. 3 Para. 15.214] A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company. [In re London and Paris Banking Corporation (1874) LR 19 Eq. 444] If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substance defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of the petition would be an abuse of the process of the Court. [Mann v Goldstein (1968) 2 All ER 769] The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court. [Re Ringinfo Ltd (2002) 1 BCLC 210’

[49] The test and principles in **Sparkasse** on the setting aside of a statutory demand were adopted and followed by this Court in **Jinpeng Group Ltd v Peak Hotels and**

Resorts Ltd.²⁵ There Webster JA [Ag.] mused at para. [27] that the test is usually summed up in the expression ‘the debt must be disputed on genuine and substantial grounds’.

[50] The starting point is section 157(1)(a) of the **Insolvency Act**. This provision is written in mandatory terms. The court ‘shall’ set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt is owed or due. This provision does not permit of any discretion in the court as to whether or not to set aside a statutory demand where it is found that there exists a ‘substantial’ dispute as to whether the debt, the subject of the statutory demand, is owing or due. The rationale for this is quite simple, but profound. They undergird the court’s winding up jurisdiction and practice. Put simply, where a debt is disputed on substantial grounds, the ‘creditor’ is in law not a creditor of the company (at least not until the debt has been established in court proceedings or has been admitted or accepted as a debt of the company). Until then, the so-called creditor has no standing to move the court to wind up the company on the ground of an unpaid indisputable debt. To do so would be an abuse of the statutory demand process by which, if the demand is unsatisfied, the company is deemed to be insolvent.²⁶ To do so would also be contrary to the statutory jurisdiction under section 162(1)(a) and (2)(b) of the **Insolvency Act** by which a creditor can move the court to wind up a company on the ground of an indisputable debt. The second rationale, which is related to the first, is that the winding up court is not the appropriate forum to decide or to determine whether a claim based on an alleged debt is established on a balance of probabilities. That issue or dispute is a matter for the civil courts to hear and determine in the usual manner.

[51] In short, it is a well-established rule of practice that a winding up court will not allow a winding-up petition (originating application to appoint liquidators) to be used “for the purpose of deciding a substantial dispute raised on bona fide grounds.” It is a

²⁵ BVIHCMAP2014/0025 (delivered 8th December 2015, unreported).

²⁶ Section 8(1)(a) of the Insolvency Act, 2003.

rule of practice because presenting a winding up petition and advertising it puts the company under considerable pressure to pay rather than litigate, which is not the same in nature from the effect of an ordinary civil claim form seeking judgment for the alleged debt.²⁷ The trial of issues where a debt is substantially disputed are matters for the civil courts in the full plenitude of their procedures and evidential rules.

[52] In deciding the issue as to whether the Debt the subject of the statutory demand is disputed on genuine and substantial grounds, the court is not required to satisfy itself that the defence to the Debt put forward by GILL will succeed if the matter went to a trial. The court, in considering an application under section 157(1)(a) must apply a lower standard than proof on a balance of probabilities. The judge must be satisfied that there is a genuine and substantial dispute which calls for further investigation by a court or some other tribunal with the requisite jurisdiction or authority to do so. In carrying out this assessment, the judge ‘has a duty to carry out a preliminary investigation of the facts to determine whether the dispute which the company has raised about the debt is held on genuine and substantial grounds’.²⁸ The dispute or the basis for the dispute raised must rise to a standard higher than ‘frivolous’ or ‘hopeless’ or ‘thoroughly bad’.²⁹ Once the judge is satisfied that the dispute raised is not frivolous or thoroughly bad such that the grounds on which the company disputes the debt is or are substantial, he is obligated by section 157(1)(a) to set aside the statutory demand.

[53] I pause here to observe that the test of a “genuine dispute” under the corresponding provision (section 459H(1)(a) of the Corporations Act 2001) of the laws of New South Wales in Australia, is not dissimilar to the test of a “genuine and substantial dispute” in this jurisdiction – whether the defence to the debt is one which is

²⁷ Re A Company No 006685 of 1966 [1997] BCC 830.

²⁸ Jinpeng Group Ltd v Peak Hotels and Resorts Ltd. BVIHCMAP2014/0025 (delivered 8th December 2015, unreported) at para.[29].

²⁹ Donna Union Foundation v Scoboda Corporation BVIHC (COM) 230 of 2018 (delivered 23rd July 2018, unreported).

'hopeless' or 'thoroughly bad'. In the judgment of the Supreme Court of New South Wales **In the matter of Universal Property Group Pty Limited**,³⁰ Rees J, having reviewed the relevant dicta in certain decisions of the courts of Australia, including its Court of Appeal, concluded that the test of a "genuine dispute" was one "involving a plausible contention requiring investigation". Specifically with regard to issues of contractual interpretation, Rees J stated "where the asserted "genuine dispute" is as to the meaning of a contract, determination of the meaning of a contract may be appropriate if a "patently feeble legal argument" is put forward." However, "where the question of construction has any element of rational controversy to it, the Court must exercise particular restraint."³¹ The said judge also posited that "where there are clearly arguable alternatives as to the meaning of a term and related questions of construction, this of itself gives rise to a genuine dispute within the meaning of section 459H(1)(a) and no attempt should be made to determine the question in an application to set aside a statutory demand."³²

- [54] A mere assertion by the company that there is a substantial dispute will not suffice to discharge the statutory demand. There must be some evidential basis or point of law to demonstrate that the ground of defence to the debt is arguably sustainable. However, it is not for the court to conduct a mini trial of the issue or defence on an application to set aside a statutory demand. It suffices for the company to show that there is some evidence to support its version of the facts, whether by way of witness statements, affidavits, expert evidence of foreign law, or by some document, or by advancing a reasonable or plausible construction of a provision in a document. This does not mean that a court must accept any evidence put forward by the company in disputing the debt. It is open to the court or judge to reject that evidence where it is "inherently implausible" or it is contradicted in some material way, or is not supported by contemporaneous documentation as per **Collier v P & MJ Wright (Holdings) Ltd**.³³ Further, the fact that leave to appeal has been granted on the

³⁰ [2019] NSWSC 796.

³¹ *Creata (Aust) Pty Limited v Faull* (2017) 125 ACSR.

³² *Drillsearch Energy Limited v Carling Capital Partners Pty Limited* [2009] NSWSC 1192.

³³ [2008] EWCA 1006.

basis that the appeal has a reasonable prospect of success, does not simpliciter lead to the conclusion that the statutory standard of a substantial dispute has been met or there is 'a genuine dispute on substantial grounds'. This much was held in **Re Welsh Brick Industries Ltd.**³⁴ and approved by Foster J (Ag.) in **China Alarm Holdings Limited v China Alarm Holdings Acquisition LLC et al.**³⁵

[55] In written submissions, GILL having set out in full the above extract from **Sparkasse**, went on to consider whether the **Sparkasse** test sets out one or two distinct limbs or requirements by which a court must be satisfied before setting aside a statutory demand served on a company. These are: (i) there must be a genuine and substantial dispute as to whether the debt is owed or due, and (ii) the dispute must be genuine in the sense that the defence or ground relied on to dispute the debt must be bona fide held by the applicant. Counsel for GILL referred to several cases, some consistent with there being only one test but two ways of expressing that one test, and others which are supportive of there being two requirements or two limbs which must be satisfied by an applicant. GILL also sought, in the face of what they considered to be uncertainty regarding this issue in the case law, to identify 'a common strand of reasoning' in the authorities.³⁶ GILL conclude that if there is a separate and distinct requirement of bona fides, it raises an issue which may well be peculiarly ill-suited and inappropriate for determination in this interlocutory process, as opposed to testing the credibility of GILL's witnesses at trial or in a full hearing.³⁷ This they argue, is especially so where, as in the instant matter, the alleged debtor GILL has by affidavit or affirmation confirmed its belief in the defence or ground advanced in disputing the debt.

³⁴ [1946] 2 All ER 197.

³⁵ BVIHCV 2008/0385 (delivered 20th April 2019, unreported).

³⁶ Para. 39 of the Appellant's Skeleton Argument.

³⁷ Para. 39(f) of the Appellant's Skeleton Argument.

[56] The above statement of principles in **Sparkasse** as to the meaning of the expression 'substantial dispute' in section 157(1)(a) of the **Insolvency Act**, is that the debt must be disputed on 'genuine (bona fide) and substantial' grounds. Furthermore, it is said that the dispute must be 'genuine' in both the subjective and objective sense, 'which means that the reason for not paying the debt must be honestly believed to exist, and must be based on substantial or reasonable grounds.' In my considered view, this is really one test and not two separate and distinct tests or requirements. Approached in this way, it follows that for the dispute over the debt to be 'substantial' the basis or defence advanced must have 'substance'. It must first be likely a 'sustainable answer' to the existence of the debt and/or to it being due and owing. This means the defence or ground on which the debt is being disputed must not be hopeless, frivolous or a thoroughly bad reason. If it were it would clearly not be one which is 'substantial', and the ground or reason may be said to not be 'genuine' or bona fide held as a basis to avoid the consequences of a winding up order. Moreover, for the debt to be disputed on substantial grounds the grounds advanced must relate to the alleged debt or liability to pay. In that sense it must be a likely sustainable defence (whether based on law or fact or both) such as would require full or further investigation, albeit the court does not have to be satisfied that the defence is one which ought to or is likely to succeed.

[57] Likewise, advancing a defence to the debt which appears to be prima facie one of some substance but which, upon further scrutiny, is not one which is bona fide or not genuinely believed, means that the ground advanced for disputing the debt is not substantial. An example which comes to mind is where the signature of the alleged debtor on a key document as to the existence of a liability for the debt (for example, a promissory note), payment of which is demanded by the statutory demand, is disputed as being a forgery or that the person who is alleged to have signed the document (the promissory note) had not done so. On its face, if genuine or bona fide, this ground would be a substantial (or indisputable) defence to the debt on the subject of the statutory demand was served on the company. However, if the assertion of forgery or of the alleged debtor not having signed the pertinent

document is, upon scrutiny of the relevant evidence, clearly fallacious or the assertion simply hopeless, then, in that sense, the defence, which would on its face be one that is likely sustainable and not a hopeless or thoroughly bad defence to the debt, would not be one which is genuinely held or bona fide, and ought to be rejected by the judge and the application to set aside the statutory demand refused.

[58] **In Re A Company (No 001946 of 1991)**³⁸ Harman J put it this way:

‘There is but one proposition of law which can be expressed in either of the form of words....for a man to raise substantial grounds of dispute must be enough to prevent a petition being properly presented to this court, notwithstanding that he does so with the utmost malice toward the other side. “Bona fides”, in the sense of good faith, has nothing to do with the matter ... the true question is, and always is: Is there a substantial dispute as to the debt upon which the petition is allegedly founded.’³⁹

Construction of the Deed of Assignment and application of the Sparkasse test issue

[59] With regard to the ‘construction issue’, GILL takes issue with the judge’s conclusion that clause 2 of the Deed of Assignment was ‘clear and plain’, the obligation created by it was ‘crystal clear’, and that GILL had undertaken a separate and distinct contractual obligation to pay the outstanding debt of HK\$990,000,000. They seek to attack and to undermine the judge’s findings on this issue on several bases. First, they argue that the Deed of Assignment was just that and no more. It was described as an “Assignment of Sale Proceeds” and that is the sole obligation envisaged or created under the said Deed. GILL entered into the Deed of Assignment in the stated capacity as “Assignor” and the only assignment envisaged, and which lay within GILL’s capacity as an ‘assignor’ was the assignment of the Sale Proceeds (as defined therein). Accordingly, the interpretation advanced by GILL in the court below and before this Court, including as advanced by its expert witness of Hong Kong law, is entirely in line and consistent with the terms of the Deed and the capacity in

³⁸ [1991] BCLC 737.

³⁹ Hearing Bundle Vol. 2, p.23.

which GILL entered into it. By contrast, the line of interpretation advanced and relied on by CCBIL is not.

[60] To buttress this point, GILL relies on the 11th September 2019 meeting (see above) which suggests that two relevant matters were agreed, namely, that Mr. Pan would provide his personal guarantee, and that payment of the Sale Proceeds to CCBIL was conditional upon the sale or mortgage of the Land. Consistent with that agreement, personal liability was to be vested in Mr. Pan by virtue of his guarantee and security would be provided by GILL through the instrumentality of the 'assignment' of Sale Proceeds. The immediate difficulty with this point, and the short answer to it, is that the terms of the Deed of Assignment was not concluded by the negotiating parties on 11th September 2019, and the evidence discloses further meetings and exchanges between the negotiating parties with regard to the terms to be incorporated into the Deed of Assignment, including exchanges over the very clause 2, the focal point of this alleged dispute. This much is recognized by GILL at paragraph 49 of its written submissions by use of the words "[n]one of this is decisive but it paints a clear picture..."

[61] GILL seeks to contrast the Deed of Assignment and Mr. Pan's Personal Guarantee whereby, by the latter, Mr. Pan "undertook direct liability for Infinite Blossom's liabilities to [CCBIL]"; whereas, less than 3 months later, CCBIL chose an entirely different type of document, the Deed of Assignment, to purportedly (as CCBIL contends), achieve the same outcome. In my view, this point is equally without merit. The simple answer to it is that a bank may choose a variety of legal instruments to achieve the same result, that is, a liability to the bank for or to pay a debt incurred by a third party. The fact that different types of instruments were delayed (even where the bank is being advised by the same firm of lawyers) lends nothing to the issue of construction and legal effect of a provision or obligation in one such document. Accordingly, this point does not assist in advancing GILL's contention and its ground for disputing the Debt the subject of the statutory demand.

[62] Moreover, GILL's argument, that "[CCBIL] is forced to place the entire weight of its suggested interpretation on [c]ause 2 alone: a one sentence clause otherwise swallowed up in an agreement plainly intended to effect an assignment and create a security arrangement for the protection of [CCBIL's] interest", is equally on very weak footing, and lacking in merit. CCBIL is relying on a clause in the Deed of Assignment which on its face creates an obligation in GILL to 'pay and discharge' the Secured Liabilities (the outstanding debt of HK\$990,000,000), which clause is captioned 'Covenant to Pay'. The fact that the Deed of Assignment also created at clause 3 "Assignment", another obligation binding on GILL, "as a continuing security for the payment and discharge in full of the Secured Liabilities' (emphasis added), the very obligation which GILL undertook at clause 2 to pay and discharge, lends to the interpretation, not that clause 2 is to be read or construed in isolation, but that clauses 2 and 3 are linked, albeit creating two distinct obligations in GILL under one instrument, the Deed of Assignment. Furthermore, it is not unusual, but in fact quite commonplace, in bank documents of the type capable of creating some security interest, for this to be coupled with or accompanied by an obligation or covenant to pay the principal sum and interest owed to the bank, and which is being so secured. We see this in the instant matter where the Deed of Debenture which created a fixed and floating charge as security for the repayment of the outstanding debt owed to CCBIL, also contains a 'Covenant to Pay' at clause 2.1, albeit the debenture is being provided by Infinite Blossom, the Borrower under the Facilities Agreement.

[63] GILL places much reliance on clause 1.2(h) of the Deed of Assignment. They argue that this provision makes it clear that GILL is not an "Obligor" within the definition of that term in clause 1.1 of the Facilities Agreement. They argue that the terms of clause 1.2(h) by using the words "not to be treated or regarded" as an Obligor "whatsoever", goes further than simply excluding GILL from inclusion. They argue that to seek to impose, as CCBIL does, an independent liability on GILL to pay the liabilities owed to the Borrower or Guarantor under the Finance documents, "is to

do precisely what the wide wording exclusion says should not be done ‘whatsoever’: namely to treat or regard GILL as the Borrower or Guarantor.”⁴⁰

[64] In my judgment this point is a hopeless or thoroughly bad one. The terms of clause 1.2(h) are clear and not difficult to construe. It puts it beyond doubt that nothing in the Facilities Agreement or the Finance Documents, shall be used to treat or regard GILL, (as “Assignor” under the Deed of Assignment) as an “Obligor” under the Facilities Agreement or the Finance Documents whatsoever. The effect of this provision is to ensure that, by entering the Deed of Assignment, GILL does not become obligated under the Facilities Agreement or the Finance Agreement, which obligations are both financial and non- financial. In short, any obligation to pay and discharge the Secured Liabilities and to assign the Sale Proceeds under the SPA created by the Deed of Assignment, does not constitute, and cannot be construed as making, GILL a “Obligor” under the Facilities Agreement, which term includes the Borrower (Infinite Blossom), the Guarantor (Mr. Zhao), the Project Company and any other parties to the Finance Documents (other than the Lender (CCBIL). This does not detract from the separate and distinct obligation created by clause 2, whereby GILL covenants to ‘pay and discharge’ the Secured Obligations. In other words, GILL’s repayment obligations in relation to the outstanding debt, rests on its contractual obligation under clause 2 of the Deed of Assignment, and not on it being treated as an Obligor under the Facilities Agreement and Finance Documents, such that the plentitude of obligations thereunder can be visited upon GILL, because of the terms of the Deed of Assignment. To the extent that GILL has obligations, they are under the Deed of Assignment and any enforcement steps against GILL must be taken under that Deed.

[65] Moreover, the obligation to pay and discharge the Secured Liabilities under clause 2 of the Deed of Assignment, is to do so ‘in the manner provided for in the Finance

⁴⁰ Paragraph 60 of the Appellants’ Written Submissions.

Documents', which includes the Facilities Agreement. The clause does not seek to either make GILL, by novation or otherwise, an Obligor under the Facilities Agreement and Finance Document, but an 'obligor' under and by virtue only of the Deed of Assignment, who has now taken on one obligation to pay and discharge the Secured Liabilities, and to do so in the manner provided for under the Finance Documents, but not as an Obligor under the Finance Documents.

[66] GILL also advances the argument that if its interpretation is accepted as credible, neither interpretation can be fully accepted without undermining the other, or at least raising an issue of ambiguity or uncertainty. They see this as a consequence of bad drafting and submit that had clause 2 intended to impose a free-standing obligation to make payment, "it would have spelt out in clear and unambiguous terms the date of such an obligation, whether it arose upon receipt of a written demand, and if so in what format". This is perhaps GILL's best point. However, upon further scrutiny, it is a point which goes more to the drafting than to substance. This point speaks not to whether clause 2 actually created an obligation on the part of GILL to 'pay and discharge the Secured Liabilities', but to the timing and manner in which the obligation clearly created thereunder can be enforced by CCBIL. In this regard, CCBIL pointed to the default provision under the Deed of Assignment. Clause 7 speaks to when "this Security" shall become immediately due and payable and stipulates two 'events of default', both of which refer to certain clauses in the Facilities Agreement. Clause 7 does not speak to a default under clause 2. However, clause 2 itself requires GILL to pay and discharge the Secured Liabilities 'in the manner provided for in the Finance Documents'. Accordingly, if there is a default under the Facilities Agreement or the Finance Documents, that triggers the obligation on the part of GILL under clause 2 to pay and discharge the Secured Liabilities, that is, the outstanding debt of HK\$990,000,000.

[67] In the final analysis, it is GILL's case that its interpretation of clause 2 and the Deed of Assignment is a plausible one. They submit that –

“This is a classic instance of a substantial dispute of construction due to the competing aims and styles of the parties. Clause 1.2(h) was drafted by GILL, and Clause 2 by [CCBIL]. It is not uncommon for difficulties of interpretation to arise on this basis, even in the context of complex formal contracts. The substantial dispute between the parties regarding the proper interpretation of the agreement must be resolved at trial.” (para. 68)

[68] To buttress their case that they have satisfied the requirement under section 157(1)(a) of the **Insolvency Act** and the test in **Sparkasse** that there is a substantial dispute as to the existence of a debt, GILL placed heavy reliance on the expert evidence of Hong Kong law from Mr. Lam SC. Mr. Lam was, as his report discloses, required to address and provide his opinion on four questions, the first of which is: ‘Does clause 2 of the Assignment impose a liability on GILL to pay the Outstanding Debt? If so, does clause 1.2(h) of the Assignment affect the interpretation? In responding to the first part of this first question, Mr. Lam considered certain legal principles applicable to the interpretation of contracts. He agreed with the reliance by Mr. Khan (put forward by CCBIL) on two judgments of the Hong Kong Court of Appeal. These are **Invest Gain Ltd v Novel Good Ltd**⁴¹ and **Sino Channel Holdings Limited v Vast Faith Investment Limited**.⁴² However, Mr. Lam posited that the starting point in his view is the judgment of the Hong Kong Court of Final Appeal in **Eminent Investments (Asia Pacific) Limited v Dio Corporation**.⁴³ Interestingly, however, the first sentence of the passage cited at page 8 of Mr. Lam’s report from the judgment of Ribeiro PJ and Lord Collins NPJ states: ‘It is a truism that the starting point is the ordinary and natural meaning of the words of the contract, and of course in the vast majority of cases that is the ending point also.’”

[69] Mr. Lam relied heavily in his report on the dicta of Lord Hodge in **Wood v Captiva Insurance Services Ltd**,⁴⁴ as the modern approach to the interpretation of agreements and contracts. In the Supreme Court, Lord Hodge emphasised that the interpretive exercise was a ‘unitary exercise’. At paragraph 45, Mr. Lam summarizes

⁴¹ [2021] HKCA 62

⁴² [2020] 2 HKLRD 1286.

⁴³ (2020) 23 HKCFAR 487

⁴⁴ [2017] AC 1173.

five points or principles emerging from the judgment in that case. I would simply note three of them. The first is that the court is required to balance the indications of rival interpretations and it does not matter whether the analysis commences with the relevant language in the contract or the factual background and implications of the rival construction. The second is that some agreements may be successfully interpreted principally by textual analysis. The third is that because of the conflicting aims of the parties, negotiators of complex formal contracts may not often achieve a logical and coherent text. The fourth, is that “commercial common sense and surrounding circumstances should not be used to undervalue the importance of the provision which is to be construed, and the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly for one of the parties, is not a reason for departing from the natural meaning.”

[70] Having considered clause 2 of the Deed of Assignment, Mr. Lam states that he regards “the facts and circumstances known or assumed by the parties at the time of the contract to be the most relevant factors”.⁴⁵ Interestingly, none of the so-called facts and circumstances listed at paragraph 30 of Mr. Lam’s report refers to the exchange of emails between the negotiating representatives of each party; the fact that clause was initially removed by those representing GILL, then reinserted by those representing CCBIL, at which point Mr. Chau recognised in an email the full import of clause 2 as a distinct obligation on the part of GILL to pay the outstanding debt, and the execution by Mr. Lam on behalf of GILL of the Deed of Assignment with clause 2 in it and with full knowledge and understanding of its import, legal effect as a binding legal obligation by GILL to pay the outstanding sum of HK\$990,000,000.

[71] Mr. Lam also considered clauses 3.1 and concluded that in construing the Deed of Assignment as a whole (not just clause 3.1) it “was intended by the parties to function as third- party security whereby [CCBIL] may have recourse to the Sale

⁴⁵ Para. 30 of the Affirmation of Mr. Douglas Lam Tak-Yip.

Proceeds should the CSPA proceed to completion.”⁴⁶ This view, or deduction is based on Mr. Lam’s observation that clause 2 does not expressly state that GIL will pay and discharge the Secured Liabilities “as they fall due as primary obligor and not merely as surety”, as was the expression used in the Facilities Agreement in respect of the ‘Covenant to Pay’ therein. The simple fact is that clause 2 of the Deed of Assignment is clear, as the learned judge termed it ‘crystal clear’, ‘black and white’. It clearly states the obligation (the covenant) on the part of GIL ‘to pay and discharge the Secured Liabilities (the outstanding debt) and to do so in the manner provided under the Finance Documents. It created a primary obligation under the Deed of Assignment and constitutes GIL an obligor thereunder, not under the Facilities Agreement and or the Finance Documents. In this respect, Mr. Lam pointed to no particular principle or unique principle of Hong Kong law supportive of or upon which he grounds what, with the greatest respect, appears to be a deduction on his part, based erroneously upon a flawed application or purported application of the principles of contractual interpretation in both Eminent Investment; and Captiva Insurance.

Analysis and Conclusion

- [72] The simple position with regard to the expert evidence of foreign law, is that while it is a question of fact for the judge, there is no evidence from either expert which suggests that the applicable principles before the court of Hong Kong when construing a written contract are any different from those under English common law and, indeed the common law of the BVI. In fact, the reports from both Hong Kong law experts accept that the law is the same there as it is in England. Secondly, this issue as to the correct meaning of clause 2, turns not on expert opinions as to particular principles or provisions of Hong Kong law, but as the judge opined, on a simple matter of construing the words of clause 2 in their natural and ordinary meaning and within the four corners of the Deed of Assignment. The BVI court was just as equipped to carry out this exercise and to interpret clause 2. This was not a matter of interpretation of a contract which turned on the law of Hong Kong being

⁴⁶ Ibid para. 30(3).

any different from the law and applicable principles of contractual interpretation in the BVI. Accordingly, the learned judge was correct in concluding that the terms of clause 2 were 'crystal clear', applying the natural and ordinary meaning of the words used therein. As he put it "the Deed of Assignment on its plain construction imposes a contractual liability on GILL to pay the outstanding debt. And indeed, the contemporaneous evidence demonstrates that clause 2 of the [Deed] of Assignment was the subject of clear discussion between [CCBIL] and GILL." The most telling evidence is the email of Mr. Stanley Chum of Goldin Group sent to Mr. Jack M K Wong, asking him to send the following comment to your solicitor: "Clause 2 – Covenant to Pay: This clause now provides GILL also have the liabilities to pay the Secured Liabilities under the Finance Documents."

[73] As to the expert evidence, the learned judge preferred CCBIL's expert as it relates to his interpretation of clause 2. The judge also took the position, quite correctly in my opinion, that in a matter such as this where the words of clause 2 are clear in their natural and ordinary meaning, just because an expert produced by one party says the provision being construed is not clear or a different interpretation may also be proffered, does not mean that there is a substantial dispute as to the correct meaning of clause 2 which ought to be further investigated at trial, such that the debt is disputed on substantial grounds.

[74] Accordingly, on this first broad issue of construction of clause 2 and whether clause 1.2(h) or any other provision of the Deed of Assignment makes a difference to that interpretation, I agree with the learned judge's conclusion that clause 2 is 'crystal clear' and the bases upon which he reached this conclusion. In my view GILL's argument to the contrary is so severely lacking in cogency as to be 'hopeless' or 'thoroughly bad' within the meaning of the **Sparkesse** test. In short, it is a 'patently feeble argument' and one which, on the evidence, does not accord with GILL's understanding of the meaning and effect of clause 2 when the insertion of that clause into the Deed of Assignment was insisted upon by CCBIL and the document executed by Mr. Pan on behalf of GILL. This is not the kind of competing contractual

interpretations which it is inappropriate for the court to attempt to decide on an application to set aside the statutory demand. Clause 2 imposes a contractual obligation on GILL to pay and discharge the Secured Liabilities (the outstanding debt of HK\$990,000,000), the subject of the statutory demand served on it. The appellant therefore fails on this basis. This is determinative of the appeal, as learned counsel Mr. Mc Grath accepted at the commencement of his oral submissions. That notwithstanding, I will go on to consider the second broad issue, the appeal against a finding of lack of bona fides or a genuine belief in the ground upon which GILL sought to satisfy the judge that the debt was disputed on substantial grounds.

The Bona Fide Requirement Issue

- [75] This is a short point. I have above expressed my opinion that the Sparkesse test is one test – whether the debt is disputed on genuine and substantial grounds, and not two distinct and separate requirements. The learned judge in his decision was of the view that the reason put forward by GILL in disputing the debt seem to him to be “a thoroughly bad reason.” He concluded that the reason was not genuine, “at least not in the objective sense.” He did not believe that the reason for not paying the debt “is honestly believed to exist.”
- [76] GILL takes issue with these findings. It is submitted that the judge did not provide any reasons for reaching these conclusions, and that he appears to have been influenced by his erroneous decision that there was no objective basis for disputing the debt. I have already concluded that the judge was correct in his finding that the reason advanced by GILL for disputing the debt was a bad one and the provision and liability at clause 2 of the Deed of Assignment was crystal clear.
- [77] CCBIL submits that GILL had taken a contrary position before the judge as to the requirement for a bona fide dispute as distinct from and in addition to the reason relied on giving rise to a substantial dispute as to the existence of the debt. That aside, CCBIL submits that there are good reasons why a debtor should be found to honestly believe that it has a substantial defence to a statutory demand. These they

set out at paragraph 8.7 of their written submissions. It is not necessary for me to repeat them here. CCBIL contends that the learned judge was correct in his finding of lack of honest belief in GILL's purported defence to the Debt, and that in reaching his findings the judge, apart from drawing on what he concluded was the crystal clear provisions of clause 2 of the Deed of Assignment, also drew on the factual evidence given by Mr. Pan in his two affirmations and on the evidence presented by CCBIL, including the email exchanges leading to the execution of the Deed of Assignment with clause 2 therein.

Analysis and Conclusion

- [78] The judge's conclusion as to lack of bona fides was based in part on his finding that clause 2 was 'crystal clear', and "there is not so much doubt or question about the liability that the court sees there is a question to be decided. I can't see that there is." His conclusion that the reason or ground advanced by GILL in disputing the debt was not genuine or bona fide in the objective sense, points not to a finding of a deliberate attempt to mislead the court and a complete lack of bona fides on the part of GILL, but to GILL finding itself faced with a clear liability for this very substantial debt, attempted to find some argument or to devise some interpretation of clause 2, to avoid liability, at least for now. His view is buttressed also by the contemporaneous evidence from the emails concerning the negotiations leading up to the execution of the Deed of Assignment which demonstrate clearly that GILL, and those acting on its behalf, knew and acknowledged that clause 2, if maintained in the Deed of Assignment document, would create a separate and distinct contractual obligation and liability in GILL to pay and discharge the Secured Liabilities. This led the learned judge to conclude, correctly in my view, that the reason advanced by GILL in disputing the debt was not one which, objectively, it genuinely held. In my judgment, this was a finding which was open to the judge to make in applying the **Sparkesse** test, which test requires that the debt must be genuinely disputed (in both the subjective and objective) sense on substantial grounds.

[79] Having found that the meaning of clause 2 of the Deed of Assignment was 'crystal clear' in creating a liability on the part of GILL to pay and discharge the Secured Liabilities, a finding that objectively the reason or ground advanced by GILL was not genuinely believed or held, was strictly speaking not necessary for the learned judge to reach the conclusion which he did in dismissing the Set Aside Application. However, that finding was one open to the learned judge on the evidence before him. It cannot be said persuasively that this finding was blatantly wrong, and ought to be set aside.

Disposition

[80] For the reasons set out above, the appeal fails on all grounds. Accordingly, the appeal ought to be dismissed with costs to CCBIL, there being no circumstances which would displace the general rule that the successful party is entitled to their costs. I would therefore make the following orders:

- (i) The appeal is dismissed and the orders of the judge in the court below affirmed; and
- (ii) Cost of the appeal to CCBIL to be assessed by a judge of the Commercial Court if not agreed within 21 days from delivery of this judgment.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Deputy Chief Registrar