

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

**IN THE MATTER OF THE INSOLVENCY ACT 2003
AND IN THE MATTER OF TAI FENG INVESTMENTS LIMITED**

CLAIM NO. BVIHCM2023/0271

BETWEEN:

CHINA MINSHENG BANKING CORP., LTD., HONG KONG BRANCH

Applicant

V

TAI FENG INVESTMENTS LIMITED

Respondent

Appearances:

Mr. Nicholas Burkill and Mr. Romauld Johnson for the Applicant.
Ms. Lauren Peaty for the Respondent.

2024: 29 January;
19 February.

JUDGMENT

Application to appoint liquidator – service of statutory demand - effect of unsatisfied statutory demand – rebutting statutory presumption of insolvency - disputed debt – delay in enforcing security for debt – rule 26 Insolvency Rules 2005 - sections 8, 155, 159, 162 and 167 Insolvency Act 2003

- [1] **WEBSTER J. (Ag):** On 11th December 2023 the applicant, China Minsheng Banking Corporation Limited., Hong Kong Branch (“the Bank”), applied by originating application under sections 159(1)(a) and 162(1)(a) of the Insolvency Act, 2003 for the appointment of Mr. John Skelton of Grant Thornton (British Virgin Islands) Ltd as a liquidator of Tai Feng Investments Ltd. (“**the Company**”).
- [2] The Company was incorporated in the British Virgin Islands with registration number 1571878. Mr. Sun Kwok Ping (“**Mr. Sun**”) is the sole director of the Company and together with Mr. Cheng King (“**Mr. Cheng**”) is a guarantor of repayment of the money loaned by the Bank to the Company.
- [3] The Bank was incorporated under the laws of the People’s Republic of China and is registered in Hong Kong as a registered non-Hong Kong company.

The Debt

- [4] The loan monies were duly advanced to the Company and were repayable with interest and other charges. Between June 2015 and October 2019 the Company made various payments of the principal and interest to the Bank but the repayment of the loan was not kept up to date. The Loan Agreement was amended on three occasions by amendment agreements No 1 on 31st March, 2017, No 2 on 11th December, 2017 and No 3 on 26th June, 2018. Amendment agreement No 2 required the Company to pay US\$11,634,597.32 (“**the First Repayment**”) to the Bank on 16th November, 2018 and the remaining balance of the Loan by the final maturity date of 15th November, 2019. The Company failed to make this payment. Under clause 21 of the Loan Agreement this constituted an event of default under the Loan Agreement. The Bank also accelerated repayment of the Loan pursuant to the terms of the Loan Agreement thereby making the outstanding amount of the loan with interest and other charges immediately due and payable. The Company failed to comply with the demands for payment and as at 1st September, 2023 it was indebted to the Bank for the aggregate sum of US\$34,490,855.65 comprising unpaid principal, accrued interest, handling fees and default interest.

- [5] On 10th October, 2023 the Bank served a statutory demand on the Company at its registered office in the British Virgin Islands demanding payment of the sum of US\$34,490,855.65 ("**the Debt**"), less estimated value of securities provided by the Company of US\$ 756,085.00 ("**the Statutory Demand**"). The Company did not respond to the Statutory Demand, nor did it apply to set it aside.
- [6] The effect of an unchallenged statutory demand is that the debtor company is deemed to be insolvent pursuant to sections 8(1)(a) of the Insolvency Act 2003 ("**the Act**"). Section 8(1)(a) of the Act provides that "*A company ... is insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside under section 157.*"
- [7] Section 162(1)(a) of the Act provides that "*The Court, on an application by a person specified in subsection (2), may appoint a liquidator of a company under section 159(1)(f) if the company is insolvent.*"
- [8] On 11 December 2023 the Bank applied under section 162(1)(a) of the Act for the appointment of Mr. John Skelton as liquidator of the Company on the ground of its insolvency. The Company filed a notice of opposition opposing the application on the following grounds:
- (1) the statutory demand on which the application is based was not served on the Company in compliance with the insolvency rules;
 - (2) the Debt is disputed on substantial grounds in that the sums claimed under the Loan Agreement were discharged pursuant to an oral agreement entered into in or around June 2018 ("**the Oral Agreement**");
 - (3) alternatively, if the Oral Agreement was not effective, the Company enjoys security over property which is worth substantially in excess of the Debt, and therefore:
 - (a) the Company would be entitled to an order setting aside the statutory demand pursuant to section 157(1)(c) of the Act; and
 - (b) the Company has already complied with the requirement in section 155(2)(d) of the Act by securing the Debt;

- (4) alternatively, the Bank did not act in good faith in enforcing its share charge; and
- (5) the Company is solvent - it owns property that is of a significantly higher value than the Debt.

[9] Section 157(1)(c) of the Act (referred to in paragraph (ii)(a) of the notice of opposition) provides that the Court shall set aside a statutory demand if it is satisfied that the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.

[10] Section 155(1)(c) of the Act (referred to in paragraph (ii)(b) of the notice of opposition) provides that a statutory demand shall require the debtor to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service on the demand.

Service of the Statutory Demand

[11] The rules relating to service of a statutory demand on a company are contained in Rule 26 of the Insolvency Rules made under the Act. The relevant rule is rule 26 which provides that:

(1) Subject to paragraphs (2) and (3), service on a company may be effected by one of the methods of service specified in CPR 5.7 (Service on limited company).

(2) Service of a document of a type specified in Rule 24(2)(a), (b), (d) and (e)¹ shall be served on a company

(a) at its registered office

(i) by serving the application personally on a director, officer or employee of the company,

(ii) by serving the application personally on a person who acknowledges himself to be authorised to accept service of documents on behalf of the company, or

(iii) if service under sub-paragraphs (i) or (ii) is not possible, by leaving the application at the registered office in such a way that it is likely to come to the attention of a person coming to the office;

¹ Document "e" is a statutory demand.

[12] The registered office of the Company in the BVI is Vistra (BVI) Limited, Wickhams Cay 11, Road Town, Tortola, British Virgin Islands. The Statutory Demand was served by Shammah Tittle, office messenger of Ogier, the legal practitioners for the Bank, by hand delivering the Demand and supporting documents to Ms. Helen Walters-Frank, a representative of Vistra. Mr. Tittle Exhibited a copy of the Statutory Demand as served with the following endorsement:

*“OGIER SERVICE REPORT
Served upon: Tai Feng Investments Limited
Date: 10/10/23
Time: 2:15 pm
Served by: Shammah Tittle
Received by: (sgd) Helen Walters-Frank”*

This is unchallenged evidence of service of the Statutory Demand at the registered office of the Company. The document was received by a representative of the registered agent who signed acknowledging that the document was served on the Company. This is sufficient compliance with rule 26(2)(a)(ii) of the Insolvency Rules for service on a person authorised to accept service of documents on behalf of the Company. Mr. Nicholas Burkill who appeared for the Bank referred the Court to the decision of this court in **Richard Fogerty v Island Properties SA**² where Bannister J accepted, without demur, that service of a statutory demand on the registered office of a company is proper service.

[13] The Company, through the evidence of Mr. Sun, disputed the validity of service on the ground that although the Statutory Demand was delivered to the registered office of the Company on 10th October, 2023, it did not come to his attention until early December 2023 and he immediately engaged lawyers to advise him on the necessary legal actions to take.³ The result of the delay in the Statutory Demand coming to his attention was that the Company was not afforded the opportunity to respond to the Demand. He took a different position in his second affidavit filed on 27th January, 2024 when he said in paragraph 13 that “[H]e received and had knowledge of the statutory demand on 23 December

² BVIHCV2008/0259.

³ Paragraphs 6 and 7 of his first affidavit held up 24th January, 2024.

2023.” This is different from what he said in his first affidavit and the change goes to the Court’s overall assessment of his evidence.

- [14] Mr. Sun’s substantive challenge to the service of the Statutory Demand is the delay in the registered agent forwarding the document to him. But this does not in any way affect the validity of the service that was affected on 10th October, 2023. The delay in notifying Mr. Sun is a matter between the Company and the registered agent. It is only relevant in this case when the Court comes to consider how to exercise its discretion under section 167 of the Act⁴. The challenge to the service is dismissed.

Failure to challenge the Statutory Demand

- [15] Turning to the substantive challenges to the application I should point out that the finding of insolvency of the Company based on its failure to challenge the Statutory Demand does not mean that the Company cannot deal with the issue of its insolvency in these proceedings. The decision of the Court of Appeal in **Trade and Commerce Bank v Island Properties SA and Jacob Ungar**⁵ which was followed by this Court in **Everbright Sun Hung Kai Company Limited v Walton Enterprises Limited**⁶, is to the effect that a company that does not challenge a statutory demand will not be precluded from challenging the issue of its insolvency at the hearing of the application to appoint liquidators - but it will have the burden of rebutting the statutory presumption of insolvency. In **Trade and Commerce Bank** George-Creque JA (as she then was) summed up the position in paragraph 28 -

*“28. It is useful to note that section 156 of the Act does not go on to say, as does the **Australian Corporations Law**, that where a company fails to challenge a statutory demand, then the company cannot later bring evidence in support of its application that could have been adduced to set aside the demand. Further, it does not say that the company is thereby precluded from being heard and from opposing the originating application. In my view, the failure to set aside is left to be weighed by the court at the originating application stage when the court is exercising its discretionary powers. Obviously, a company which has failed to challenge a statutory demand, in seeking to oppose the appointment of*

⁴ See paragraphs 45 and 46 below.

⁵ BVIHCAP 2009/12.

⁶ BVIHC(COM) 2020/0022.

a liquidator will be saddled with the burden at that stage of establishing its solvency by way of countering its state of 'statutory insolvency' under s. 8(1)(a) brought about by such failure."

- [16] The Bank did not object to the Company's evidence disputing the Debt and its insolvency, but maintained throughout that the burden was on the Company to establish its solvency and/or that the debt is disputed on substantial grounds and/or that the Bank has security for the Debt in an amount greater than the amount of the Debt.

The Oral Agreement

- [17] The Company disputed that it was indebted to the Bank for the Debt because there was an oral agreement made between the Bank, Mr. Sun and Mr. Cheng by which the Bank agreed to release the Company from further liability to repay the Debt ("**the Oral Agreement**"). The evidence of the Oral Agreement is that in or about June 2018, Mr. Cheng and Mr. Sun met with the president of the Bank at the Bank's offices. During the meeting it was purportedly agreed that Mr. Cheng would take over the responsibility for the repayment of the amounts outstanding on the Debt in place of the Company, and that the Company's liability for the Debt would be discharged. Ms. Lauren Peaty who appeared for the Company did not dispute that the Oral Agreement was not supported by any contemporaneous written evidence, but submitted that the Agreement could be inferred from the Bank's failure to take any enforcement steps from 2019 until 2023 when it issued the statutory demand. She submitted that the inaction of the Bank during this period is consistent with the Oral Agreement that the Company was no longer responsible for the Debt. It was only when the Bank found out that Mr. Cheng had disappeared that it decided to renege on the Oral Agreement and pursue the Company for the Debt.
- [18] The Bank denied that there was an oral agreement. Further, that there is evidence that the Bank took steps after the meeting in June 2018 when the Oral Agreement was allegedly made to recover the Debt from the Company. I will

deal with these steps when I come to deal with the Bank's denial of the Oral Agreement.⁷

- [19] It is common ground between the parties that when a company is resisting an application to appoint liquidators on the ground that the debt on which the application is based is disputed, the dispute must be on substantial grounds. The leading case for this well-known principle is **Sparkasse Bregenz Bank AG v Associated Capital Corporation**⁸ where Chief Justice Sir Dennis Byron set out the test as follows:

"The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without 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. 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. To fall within the principle, the dispute must be genuine in both a 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 that 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"

- [20] The test in **Sparkasse** for determining whether a debt is disputed on substantial grounds has been applied on many occasions by this Court and the Court of Appeal. This case is no different. I also bear in mind that this is a trial on documentary evidence without cross examination. Mr. Sun gave evidence on behalf of the Company about the Oral Agreement but he did not support the existence of the Oral Agreement by any contemporaneous documents. Such documents would have been helpful to establish the existence of the Agreement, even on a prima facie basis. In **Simetra Global Assets Ltd and another v Ikon Finance Ltd and others**⁹ Males LJ referred to the importance of contemporaneous documentary evidence in the following terms -

⁷ See paragraph 22 below.

⁸ BVI Civil Appeal No 10 of 2021.

⁹ [2019] EWCA 1413

‘...I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned... Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.’¹⁰

[21] To the same effect was Lord Goff in **Armagas Ltd v Mundogas SA, The Ocean Frost**¹¹:

“Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case.”¹²

The Ocean Frost is a fraud case but the general principle of relying on documentary evidence to prove a disputed fact applies in other civil cases. The cited passage from Lord Goff has been relied on with approval on numerous occasions by the Court of Appeal in cases not involving fraud.¹³

[22] Applying the principles from the cases I find that the Company has failed to establish a prima facie case that there is a genuine or substantial dispute regarding the existence of the Oral Agreement. In coming to this conclusion, I have had regard to the fact that the Oral Agreement is not supported by any contemporaneous documents. In fact, it is inconsistent with the documentary evidence. Examples of this are:

- (1) The Oral Agreement was allegedly made in June 2018. The actual date in June was not given. The third amendment to the Loan Agreement

¹⁰ Ibid at paragraph 48

¹¹ [1985] 3 WLR 640

¹² Ibid at 676

¹³ Tyrone Burke v Otto Sam SVGHC VAP 2014/0002 para 21; Mark Byers and others v Chen Ningning BVIHC VAP 2015/0011 para 56; Attorney General v Simon Riley MNIHC VAP 2019/0008, para 29.

was executed on 26th June, 2018 which would have been either contemporaneously with or after the Oral Agreement. The third amendment acknowledges the Company's continuing obligation to repay amounts due on the Loan which is inconsistent with the Company's position that the Loan was discharged by the Oral Agreement;

- (2) On 5th September, 2018 the Bank issued a demand letter asking for payment of the amounts outstanding on the Debt¹⁴;
- (3) On 29th April, 2019 the Bank filed a petition in Hong Kong for the bankruptcy of Mr. Sun. The petition makes reference to the Company's obligation to repay the Loan and Mr. Sun's personal liability as guarantor of the Loan.¹⁵ The bankruptcy petition was withdrawn on 25th October, 2019. One term of the withdrawal was that the Company would pay HK\$20,000,000 on account of the amounts outstanding on the Loan. Further, that the part payment was not in final settlement of the Company's obligation to repay the Debt.¹⁶; and
- (4) On 23rd June, 2022 the Bank's solicitors in Hong Kong wrote to the Company, Mr. Sun and Mr. Cheng demanding repayment of the outstanding balances on the Debt.¹⁷

[23] The Company did not assert in any of these documents or letters that there was an oral agreement. The evidence shows that after the Oral Agreement was supposedly made discharging the Company's obligations for the repayment on the Loan, the parties continued to treat the Company as the primary debtor with full responsibility for the repayment of the outstanding amounts of the Loan.

[24] It is very easy for a debtor, when faced with an application to appoint liquidators, to say that the debt on which the application is based is disputed on substantial grounds because there is an oral agreement disputing the debt. Each case must be decided on its own facts, but where such an allegation is made, especially

¹⁴ Hearing Bundle e-page 201.

¹⁵ Hearing Bundle e-page 209 et seq.

¹⁶ Hearing Bundle e-page 217.

¹⁷ Hearing Bundle e-page 598.

when there is written evidence to the contrary, the debtor faces an uphill task to satisfy the Court that there is a genuine or substantial dispute regarding the repayment of the debt. I find that the Company has failed to discharge the burden on it to satisfy the Court that there is a genuine or substantial dispute regarding its obligation to repay the amounts outstanding on the Loan.

- [25] The evidence also shows, contrary to the Company's submission, that the Bank took steps during the period June 2018 when the Agreement was allegedly made to October 2023 when the Statutory Demand was issued to recover the outstanding amounts of the Loan from the Company.¹⁸

The Company's Solvency

- [26] The Company asserted that the value of its assets exceeds the amount of the Debt and it is solvent. Therefore, the Court should not appoint liquidators on the ground of the Company's statutory insolvency brought about by the failure to set aside the Statutory Demand. The burden of proving that the Company is solvent is squarely on the Company.

- [27] The Company asserted that it has two valuable assets. These are:
- (1) 43,869,027 shares in Nobao Renewable Energy Holdings Limited, a Cayman Islands unlisted company, now corrected to 25,963,867 shares; and
 - (2) 150,232,591 shares Sunshine Oilsands Limited, a listed company in Hong Kong.

- [28] The Company placed the value of the Nobao shares at US\$42,061,464.54 based on a 2016 subscription for the shares at US\$1.62 per share. The Company did not produce a recent valuation of the shares. They relied entirely on the 2016 subscription and on what is said to be an extract from a financial report from "**The Group**" which shows that as at December 2021, The Group has substantial value. Nobao is not named in the extract as a member of The Group and it is difficult to use the information in the extract to estimate the value of the Nobao shares.

¹⁸ See paragraph 22 above.

- [29] There is evidence from the Bank that Deloitte Hong Kong, as receiver under a share charge for the Nobao shares, attempted to sell the shares in 2019. Following Deloitte's marketing efforts they did not receive a reasonable offer for the shares. The Bank therefore listed the shares as having a \$0 (market) value in the Statutory Demand.
- [30] It may very well be that the Nobao shares have some value but the Company has not assisted the Court by providing evidence from which the current value can be estimated. For example, recent accounts of the Company would show the Company's estimate of the current value. But no such accounts were provided. The Court also notes that there is no written evidence that the Company owned and still owns the Nobao shares. In the circumstances the Court cannot estimate the current value of the Nobao shares and will not speculate as to the current value.
- [31] The Company conceded in its written submissions that the amount of Sunshine Oilsands shares that it holds is 8,556,750, and not 150,232,591 as stated in its evidence, resulting in a value of US\$625,300.96.¹⁹ This is significantly less than the amount of the Debt.
- [32] The Court also notes that there is no evidence of the Company's liabilities which makes the evidence of the value of the assets even less reliable in the context of proving the Company's solvency.
- [33] Finally on this issue, and assuming that the Company is solvent on a balance sheet test, if it refuses to pay a debt that is not disputed substantial grounds it is still insolvent within the meaning of Section 8(1)(c)(ii) of the Act. Section 8(1)(c)(ii) provides that a company is insolvent if it is proved to the satisfaction of the Court that it is unable to pay its debts as they fall due. An application to appoint liquidators of a solvent company can succeed if the company is unable or refuses to pay its debts as they fall due.

¹⁹ Paragraph 51 of the Company's Skeleton Argument.

[34] In all the circumstances I find that the Company has not rebutted the presumption of statutory insolvency.

Was the Debt adequately secured?

[35] It is not disputed that if the value of the security held by the Bank exceeds the amount of the Debt the Court may not appoint liquidators. In this situation the Bank could realise its security and use the proceeds of the realisation to settle the Debt.

[36] The Bank held share charges over two Hong Kong listed companies:

- (1) 150,000,000 shares in Shun Feng International Clean Energy Limited (“**Shun Feng**”); and
- (2) 532,669,500 shares in Sunshine Oilsands.

The Bank also held a share mortgage over Mr. Sun’s shareholding in the Company by virtue of which the Bank has an interest in the Company’s shareholding in Nobao.

[37] The 150,000,000 shares in Shun Feng were sold by the Bank over 2017 to 2018 and the proceeds applied to the Loan. In October 2018, the Company deposited another 252,000 Shun Feng shares with the Bank. The Bank still holds these shares because the value of the shares has dropped since 2018 and the proceeds of a sale at this time would be less than the costs of the sale. This security was therefore given a \$0 value in the Statutory Demand.

[38] The 532,669,500 shares in Sunshine Oilsands were consolidated in January 2020 resulting in the number of shares being reduced to 10,653,390 shares. The traded value of these shares in October 2023 when the statutory Demand was issued was HK\$0.18 per share resulting in the value of US\$756,065. The Company was given credit for this amount in paragraph 13 of the Statutory Demand. The Company does not accept this valuation of the Sunshine Oilsands shares, but even if the Court were to accept the Company’s valuation of these shares this would yield a value of US\$10,950,457.40 which is significantly less than the Debt.

[39] I have already dealt with the value of the Nobao shares which have a proven market value of \$0 and an unknown potential value that cannot be determined by the Court based on the lack of evidence.

[40] In summary, the security held by the Bank does not come close to the value of the Debt and therefore the Company cannot rely on the provisions of sections 157(1)(c) and 155(2)(d) of the Act to avoid a winding up order.²⁰

Delay in enforcing the Security

[41] The Company submitted that following its default in repaying the Loan in November 2018 the Bank was under a duty to act in good faith and take reasonable steps to obtain the best price for the secured property. Mr. Sun pointed out that the selling price for the Shun Feng and Sunshine Oilsands shares in November 2016 was HK\$0.41 and HK\$9.00 respectively. If the Bank had sold the shares at that time, it would have recovered more than enough to cover the total amount due on the Loan. However, the Bank delayed in selling the shares and in the meantime the price of the shares plummeted and their values are now insufficient to cover the amount outstanding on the Loan.

[42] The Bank's response to this allegation is contained in paragraphs 5.13 and 5.14 of its skeleton argument. Mr. Burkill submitted that upon default the security documents gave the Bank the power to sell or otherwise dispose of the shares on such terms and in such manner as the Bank may think in its absolute discretion. Further, the security documents absolve the Bank of any liability for any loss attributable to (among other things) a sale of the charged shares and "whether or not a better price could or might have been obtained by deferring or advancing the date of sale or disposition of the charged shares."²¹ Simply put, absent bad faith, the Bank can sell the security as and when it deems most appropriate.

²⁰ Sections 157(1)(c) and 155(2)(d) are set out in paragraphs 8-10 above.

²¹ Clause 9.6 of the share charge (e-page 421 of the Hearing Bundle).

[43] Mr. Burkill also made the point that if the shares were sold in November 2018 the recovery would still not have been sufficient to cover the amount outstanding on the Loan.

[44] The alleged delay in selling or otherwise disposing of the shares does not assist the Company's case.

The request for an adjournment

[45] Ms. Peaty referred the Court to the fact that Mr. Sun did not become aware of the Statutory Demand until approximately two months after it was served, and the Company's wish to supplement its evidence. She urged the Court to exercise its undoubted discretion under section 167 of the Act and adjourn the decision on the application. Section 167 provides that

"On the hearing of an application for the appointment of a liquidator, the Court may

- (a) appoint a liquidator under section 159(1);*
- (b) dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved;*
- (c) adjourn the hearing conditionally or unconditionally; or*
- (d) make any interim order or other order that it considers fit."*

[46] In considering this request the Court noted that Mr. Sun was not completely candid about the time that the Statutory Demand came to his attention²²; the Company has had ample time to prepare its evidence – it was served more than three months after the service of the Statutory Demand and one month after Mr. Sun became aware of the Demand; and the general lack of cogency of the Company's evidence regarding the Oral Agreement and the value of its assets. The Court also considered the scheme of the Insolvency Act which requires applications to appoint liquidators to be dealt with expeditiously.

[47] In the circumstances I will not accede to the request to adjourn the delivery of the decision on the application to allow the Company to file additional evidence.

²² See paragraph 13 above.

Disposition

[48] The application to appoint a liquidator of the Company is granted and I make the following orders:

- (1) The Company be liquidated by the Court in accordance with the provisions of the Insolvency Act 2003;
- (2) Mr John Skelton of Grant Thornton (British Virgin Islands) Limited, 171 Main Street, 2nd Floor, The Barracks, PO Box 4259, Road Town, Tortola, British Virgin Islands, be appointed as liquidator of the Company (the "**Liquidator**");
- (3) The Liquidator is at liberty to employ such counsel, solicitors or other agents in the British Virgin Islands or elsewhere to assist with the Liquidator's duties as will be required to be carried out by them at such hourly rates as agreed from time to time by the Liquidator and these other solicitors or agents;
- (4) The Liquidator may exercise all those powers set out in section 186 and Schedule 2 of the Act as set out in the schedule to this judgment;
- (5) The Liquidator shall advertise notice of his appointment in the BVI Gazette;
- (6) The costs of the liquidation, including the proper fees and disbursements of the Liquidator, be paid out of the assets of the Company in priority to all other claims; and
- (7) The Applicant's costs of the Application be costs in the liquidation.

Paul Webster (Ag.)
High Court Judge

By the Court

Registrar

SCHEDULE

Schedule 2 of Insolvency Act 2003

POWERS OF LIQUIDATOR

(Section 186)

WITH SANCTION OF THE COURT

- 1 Power to pay any class of creditors in full.
- 2 Power to make a compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging that they have any claim against the Company, whether present or future, certain or contingent, ascertained or not.
- 3 Power to compromise, on such terms as may be agreed
 - (a) calls and liabilities to calls, debts and liabilities capable of resulting in debts, and claims, whether present or future, certain or contingent, ascertained or not, subsisting or supposed to subsist between the Company and any person; and
 - (b) questions in any way relating to or affecting the assets or the liquidation of the Company;and take security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.
- 4 Power to commence, continue or defend any action or other legal proceedings in the name and on behalf of the Company.

WITHOUT SANCTION OF THE COURT

- 5 Power to carry on the business of the Company so far as may be necessary for its beneficial liquidation.
- 6 Power to sell or otherwise dispose of property of the Company.
- 7 Power to do all acts and execute, in the name and on behalf of the Company, any deeds, receipts or other document.
- 8 Power to use the Company's seal.

- 9 Power to prove, rank and claim in the bankruptcy, liquidation, insolvency or sequestration of any member or past member for any balance against his estate, and to receive dividends, in the bankruptcy, liquidation, insolvency, sequestration or in respect of that balance, as a separate debt due from the bankruptcy or insolvent, and rateably with the other separate creditors.
- 10 Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company with the same effect with respect to the Company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the Company in the course of its business.
- 11 Power to borrow money, whether on the security of the assets of the Company or otherwise.
- 12 Power to take out in his official name letters of administration to any deceased member or past member or debtor, and to do any other act necessary for obtaining payment of any money due from a member or past member or debtor, or his estate, that cannot conveniently be done in the name of the Company.

For the purpose of enabling the liquidator to take out letters of administration or do any other act under this paragraph, to be due to the liquidator himself.

- 13 Power to call meetings of creditors or members for
 - (a) the purpose of informing creditors or members concerning the progress of or matters arising in the liquidation;
 - (b) the purpose of ascertaining the views of creditors or members on any matter arising in the liquidation; or
 - (c) such other purpose connected with the liquidation as the liquidator considers fit.
- 14 Power to appoint a solicitor, accountant or other professionally qualified person to assist him in the performance of his duties.
- 15 Power to appoint an agent to do any business that the liquidator is unable to do himself, or which can be more conveniently done by an agent.