

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0017

BETWEEN:

SIAN PARTICIPATION CORP (IN LIQUIDATION)

Appellant/Applicant

and

HALIMEDA INTERNATIONAL LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Tom Smith, KC with him Mr. Paul Fradley, Mr. André McKenzie and
Ms. Jhneil Stewart for the Appellant/Applicant

Mr. Paul Lowenstein, KC with him Mr. Rupert Hamilton, Mr. Andrew Willins and
Ms. Tamara Cameron for the Respondent

2023: March 7;
April 24.

*Leave to appeal to His Majesty in Council – Section 3(1)(a) of the Virgin Islands
(Appeals to the Privy Council) Order 1967 – Whether intended appeal lies of right –
Whether the decision of the learned judge to appoint liquidators over Sian was a final
decision - Whether the appeal involves directly or indirectly a claim to or question*

respecting property or a right valued at £300 or more – Whether the appeal concerns the liquidation of a company in respect of an alleged debt in excess of US\$226 million

In September 2020, the respondent, Halimeda International Limited (“Halimeda”) filed an application pursuant to sections 159(1)(a) and 162(1)(a) of the Insolvency Act 2003, to appoint liquidators over Sian Participation Corp (“Sian”), a company incorporated under the Laws of the Territory of the Virgin Islands (“the BVI”), in respect of an alleged debt of approximately US\$226,000,000. Halimeda’s application was on the ground that Sian was unable to pay its debts as they fell due and was therefore insolvent. Sian resisted that application on several bases including *inter alia* that it was not insolvent, the debt was not due and owing and that the existence of an arbitration clause in a loan agreement between Sian and Halimeda meant that, in the absence of exceptional circumstances, the liquidation application should be dismissed or stayed as a matter of course in favour of arbitration proceedings (the “Arbitration Issue”).

In May 2021, the learned judge held that the loan in the sum of US\$226,000,000 was due and owing and that Sian had failed to show that the debt was disputed on genuine and substantial grounds or that there were other reasons why the liquidation application ought to be dismissed or stayed. In doing so the judge found that the Arbitration Issue had been raised too late by Sian. Consequently, the learned judge granted Halimeda’s application and made an order appointing liquidators over Sian. The judge also refused to admit Sian’s further evidence in the form of a witness statement, an affidavit and their accompanying exhibits.

Sian appealed to the Court of Appeal on several grounds against the learned judge’s decision. Sian also filed two applications to adduce additional evidence in the appeal. The Court of Appeal, in its judgment delivered on 11th November 2022, upheld the decision made by the learned judge in the court below and refused Sian’s applications to adduce fresh evidence on appeal. Sian now seeks leave to appeal to His Majesty in Council against the decision of the Court of Appeal, on the bases that: (i) the intended appeal lies as of right within the meaning of section 3(1)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 (“the 1967 Order”) as the matter in dispute is of the value of 300 pounds sterling or upwards or involves directly or indirectly a claim to or question respecting property or a right of the value of 300 pounds sterling or upwards; (ii) the intended appeal is from a decision in civil proceedings which raises questions of great general or public importance or otherwise ought to be submitted to His Majesty in Council within the meaning of section 3(2)(a) of the 1967 Order; and (iii) leave ought to be granted to appeal pursuant to section 3(2)(a) of the 1967 Order against the Court of Appeal decision refusing to admit certain documents as fresh evidence in the appeal.

Held: dismissing the application for conditional leave to appeal to the Privy Council and awarding costs of the application to the respondent to be assessed by a judge of the court below if not agreed within 21 days, that:

1. It is well-settled that winding-up orders are considered final judgments in civil proceedings which can be appealed as of right. While the intended appeal to His Majesty in Council emanates from a winding-up order and as such, is a final decision of the court below, this alone does not satisfy all the requirements

of section 3(1)(a) of the 1967 Order relating to an appeal as of right. The requirements that (i) the matter in dispute on the intended appeal to His Majesty in Council be of the value of £300 sterling or upwards, and/or (ii) the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of £300 sterling or upwards, must also be satisfied.

Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported) followed; **Walter Fletcher v Income Tax Commissioner** [1972] AC 414 applied; **Alceo Zuliani and others v Vernon S. Viera** [1994] 1 WLR 1149 followed; **Meghji Lakhamshi & Bros. v Furniture Workshop** [1954] AC 80 applied.

2. In this case, neither of these requirements have been satisfied by Sian. It is not enough that the dispute relates in some way to property or a right that is worth more than the threshold amount. The fact that the winding-up was ordered because of an unpaid debt of US\$226 million does not mean that the value threshold test is met. It is the value of the dispute itself that must meet the threshold amount. In the court below, the learned judge determined that the debt was not disputed on genuine and substantial grounds. Further, in relation to the Arbitration Issue, the learned judge found that it had been raised too late. These decisions of the learned judge were upheld by the Court of Appeal in the substantive appeal. Moreover, as this Court found in the appeal that the judge in the court below did not make any determination concerning Sian's interest in any property, the intended appeal cannot involve directly or indirectly a claim to or question respecting property of the value of £300.
3. The Court has the power to refuse leave to appeal to His Majesty in Council where there is no genuine dispute, even where, in the circumstances, the applicant is entitled to leave to appeal as of right. In this case, while the Arbitration Issue does raise a question of law, that question is not one of great general or public importance or which otherwise which ought to be submitted to His Majesty pursuant to section 3(2)(a) of the 1967 Order. It is not sufficient to satisfy the requirement of that sub-section that this issue will or may be encountered by other parties from time to time. Further, the issue of law has been settled in the BVI in the decision of this Court dated 8th December 2015 in **Jinpeng Group Limited v Peak Hotels and Resorts limited** and does not require resolution, and Sian's complaint that the case of **Jinpeng Group Limited** took a different approach to that taken by the English Court of Appeal in **Salford Estates (No. 2) Ltd** does not make the Arbitration Issue one of "great general or public importance" or which otherwise requires the attention or determination of the Privy Council..

Meyer v Baynes [2019] UKPC 3 followed; **Water and Sewerage Authority of Trinidad and Tobago v Sahadath and another** [2022] UKPC 56 applied; **Jinpeng Group Limited v Peak Hotels and Resorts Limited** BVIHCMAP2014/0025 and BVIHCMAP2015/0003 (delivered 8th December

2015, unreported) considered; **Salford Estates (No. 2) Ltd v Altomart Ltd** [2014] EWCA Civ 1575 considered; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**. BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; **Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al** BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported) followed.

4. Sian has not shown how the rejection of the fresh evidence application can properly be placed before the Board. Without sight of the arbitration award, the Court is not in a position to determine whether its contents would have an important bearing on the outcome of this appeal. Consequently, this Court is not in a position to find that there are issues of great general or public importance or any point of law on which the Court could benefit from the guidance by the Board.

JUDGMENT

[1] **FARARA JA [AG.]:** The appellant/applicant, Sian Participation Corp (“Sian”) seeks leave to appeal to His Majesty in Council against the decision of the Court of Appeal delivered on 11th November 2022, dismissing the appeal, affirming the decision of the learned judge and awarding costs of the appeal to Halimeda International Limited (“Halimeda”), to be assessed by the court below if not agreed within 21 days. Sian contends that this is a suitable case for this Court to grant leave to appeal to the Judicial Committee of the Privy Council in all the circumstances and on the following grounds:

- (i) an appeal lies as of right within the meaning of section 3(1)(a) of the **Virgin Islands (Appeals to the Privy Council) Order 1967**¹ (“the 1967 Order”) against the Winding-Up Order (defined below) as it is a final decision in civil proceedings and concerns a matter in dispute in the intended appeal to His Majesty in Council of the value of £300 sterling or upwards and/or a question respecting property or a right of the value of £300 sterling or upwards, in particular, the intended appeal concerns

¹ S.I. No. 234 of 1967.

the liquidation of a company in respect of an alleged debt in excess of US\$226,000,000.

- (ii) this is an appropriate case for the Court of Appeal to grant leave to appeal to His Majesty in Council pursuant to section 3(2)(a) of **the 1967 Order** because the intended appeal is from a decision in civil proceedings which raises questions that, by reason of their great general or public importance or otherwise, ought to be submitted to His Majesty in Council.
- (iii) leave be granted to appeal to His Majesty in Council pursuant to section 3(2)(a) of **the 1967 Order** against the Court of Appeal decision whereby the Court of Appeal refused to admit certain documents as fresh evidence in the appeal.

[2] More specifically, Sian claims that the appeal should be referred to His Majesty in Council against the decision of this Court delivered on 11th November 2022 wherein the Court dismissed with costs:

- (i) The appeal against paragraphs 2 and 3 of the order made by the learned judge on 19th May 2021 appointing liquidators of the appellant/applicant (“the Winding-Up Order”);
- (ii) The appeal against paragraph 1 of the Winding-Up Order whereby the learned judge refused to admit the appellant/applicant’s further evidence in the form of (i) the Witness Statement of James Curle dated 3rd February 2021 and Exhibit JC-1 and (ii) the Affidavit of Christopher Bromilow dated 29th January 2021 and Exhibit CB-1; and
- (iii) The Court refused to admit as fresh evidence, (i) the outcome of a confidential LCIA Arbitration which took place between the indirect shareholders of the appellant/applicant; and (ii) the decision of the learned judge made at an in-camera hearing in the BVI Commercial

Court in claim number BVIHCOM2020/0153 on 31st March 2022, that conflict liquidators be appointed over the appellant/applicant.

Background

[3] The relevant background to this matter is that Halimeda filed an application on 29th September 2020 to appoint liquidators over Sian in respect of an alleged debt of approximately US\$226,000,000. Halimeda's application for the appointment of liquidators was made pursuant to sections 159(1)(a) and 162(1)(a) of the **Insolvency Act 2003**² on the grounds that Sian is unable to pay its debts as they fall due and is therefore insolvent.

[4] Sian resisted that application on several bases including:

- (i) the appellant/applicant was not insolvent;
- (ii) the debt was not due and owing;
- (iii) the debt was an intra-company debt which neither party intended would be enforced by the appointment of liquidators;
- (iv) there was an operative and binding arbitration agreement between the parties;
- (v) the appellant/applicant had a cross-claim against Halimeda and others for a sum in excess of or equivalent to the debt which entitles it to a set-off against the disputed debt; and
- (iv) Halimeda initiated the application for an improper purpose and therefore it is an abuse of the process of the court.

² Act No. 5 of 2003, Laws of the Virgin Islands.

- [5] On 19th May 2021 the learned judge delivered an oral judgment where he found³ that the loan in the sum of US\$226,000,000 was due and owing and that Sian had failed to show that the debt was disputed on genuine and substantial grounds or that there were other reasons why the liquidation application ought to be dismissed or stayed. Consequently, the learned judge granted Halimeda's application and made an order appointing liquidators over Sian. The judge also refused to admit Sian's further evidence in the form of the Witness Statement of James Curle dated 3rd February 2021 and Exhibit JC-1 and the Affidavit of Christopher Bromilow dated 29th January 2021 and Exhibit CB-1.
- [6] Sian appealed to this Court on several grounds against the learned judge's decision. On 17th December 2021 and 5th May 2022 respectively, Sian also filed two applications to adduce additional evidence in the appeal. The proposed evidence consisted of the FESCO Report, the Maersk Report and the Hapag-Lloyd Report (together "the first application"); and the outcome of a confidential LCIA Arbitration ("the Arbitration Award") and the decision of the learned judge made at an in-camera hearing on 31st March 2022 ("the Judgment") (together "the second application"). The Court of Appeal in its judgment dated 11th November 2022 upheld the decision made by the learned judge in the court below and refused Sian's applications to adduce fresh evidence on appeal.

The application under section 3(1)(a)

- [7] Section 3(1)(a) of **the 1967 Order** provides:

"3.-(1) Subject to provisions of this Order, an appeal shall lie as of right from decisions of the Court to [His] Majesty in Council in the following cases—

- (a) Where the matter in dispute on the appeal to [His] Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards, final decisions in any civil proceedings;"

³ Transcript of hearing pgs. 13, 16-17, 19-21, 24-25.

Final decision

[8] It is convenient to deal with whether the decision of the learned judge to appoint liquidators over Sian was a final decision. Mr. Tom Smith, KC, learned counsel for Sian, argues that the Winding-Up Order is one matter from which an appeal to His Majesty in Council lies as of right within the meaning of section 3(1)(a) of **the 1967 Order** in that

- (i) it is a final decision in civil proceedings; and
- (ii) the matter in dispute on the intended appeal to His Majesty in Council is of the value of £300 sterling or upwards and/or the appeal involves directly or indirectly a claim to or a question respecting property or a right of the value of £300 sterling or upwards. In particular, the intended appeal concerns the liquidation of a company in respect of an alleged debt in excess of \$226,000,000.00

[9] Counsel for Sian posits that the Winding-Up Appeal is plainly a final decision and referred to the case of **Cukurova Holdings A.S. v Sonera Holding B.V.**⁴ where this Court at paragraph 5 stated:

“It is also beyond contention that the applicable test in determining whether an order is interlocutory or final is the application test. Thus in *Oliver McDonna v Benjamin Wilson Richardson*, Barrow JA said at paragraph 19:

“The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order but is an interlocutory order.”

⁴ BVIHCVAP2012/0029 (delivered 5th December 2012, unreported).

[10] Counsel for Sian submits that the order being appealed to His Majesty in Council is this Court's order affirming the order of the learned judge in the court below to grant the liquidation application, appoint liquidators and wind-up Sian. That order, counsel submits, is plainly a final order or decision. Applying the application test, the judge's order was finally determinative of the question on the application that was before him. The Court of Appeal, by affirming that order, also finally determined the said issues. Further, if the learned judge had decided the application the other way, by dismissing it, that would equally have been determinative of the issues. There would have been no appointment of liquidators and Sian would not have been wound up. Equally, if the Court of Appeal had set aside the judge's order, that would have determined the said issues between the parties. Therefore, this was a final determination and not a step in the application to appoint liquidators and finally determined the issues before the court one way or the other.

[11] Mr. Smith, KC relies on the case of **Re Reliance Properties Ltd**⁵ where Sir Raymond Evershed MR stated that:

“It would be difficult to think of any order made by the court which in substance or character was more final than a winding-up order. So far as the court was concerned, it was a final decision in the proceedings.”

[12] Halimeda, in opposing the application to His Majesty in Council, submits that it is doubtful whether the decision to make the Winding-Up Order, or this Court's decision to uphold it, can qualify as a final decision. In summary, Halimeda argues that leave should be refused and that:

- (I) none of the limbs of the appeal qualifies for leave to appeal as of right pursuant to section 3(1)(a) of **the 1967 Order**;

⁵ [1951] 2 All ER 327.

- (II) none of the limbs of the appeal satisfies the test for the Court to grant leave to appeal pursuant to section 3(2)(a); and
- (III) further, even if Sian were (as it claims) *prima facie* entitled to leave as of right in respect of one limb of the appeal, leave should nevertheless be refused on the basis that this limb of the appeal by itself does not give rise to any genuine dispute.

[13] Halimeda points out that the basis of Sian's application for leave to appeal in respect of paragraphs 2 and 3 of the Winding-Up Order is an argument that the existence of an arbitration clause (the "Arbitration Agreement") in the loan agreement between Sian and Halimeda means that, in the absence of exceptional circumstances, the liquidation application should have been dismissed or stayed as a matter of course in favour of arbitration proceedings (the "Arbitration Issue"). However, Halimeda counters that it is doubtful whether the decision to make the Winding-Up Order or this Court's decision to uphold it can qualify as a final decision as the judge's decision below to reject the Arbitration Issue on the basis of lateness was not a final decision within the meaning of section 3(1)(a) of **the 1967 Order**. It further submits that the learned judge rejected the Arbitration Issue in the exercise of his discretion effectively as a case management issue, on the basis that Sian raised the point too late in the day.

[14] According to Halimeda, the challenge faced by Sian in seeking to overturn the Winding-Up Order (and this Court's decision upholding that order) on the basis of the Arbitration Issue is that Sian must establish before the Privy Council not only (i) that it is right on the Arbitration Issue as a matter of substance but also (ii) that Sian should have been permitted to rely on it, and that this Court was wrong to have upheld the learned judge's discretionary decision to reject the Arbitration Issue on the basis that it was raised too late (the "Lateness Issue"). Put shortly, it is not sufficient for Sian to win before the Privy Council on the Arbitration Issue alone, Sian must also win on the (discretionary) Lateness Issue.

Discussion and Conclusion

- [15] I adopt the dicta of this Court in the recent decision of **Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al**⁶ where Webster JA [Ag.] stated:

“It is settled law in the Eastern Caribbean that the court applies the application test to determine whether an order is final or interlocutory. This was settled by this Court on 18th September 1995 in Othniel [R.] Sylvester v Satrohan Singh.”

- [16] It is well established that appeals of insolvency-related judgments have the same characteristics as civil proceedings. Final judgments can be appealed as of right. It is also well-settled that winding-up orders are considered final judgments, indeed it is difficult to see how it can be said not to be.

- [17] I conclude therefore that the intended appeal to His Majesty in Council emanates from a final decision of the court below in civil proceedings, making a winding-up order, which decision has been upheld by this Court. However, that alone does not satisfy all of the requirements of section 3(1)(a) of **the 1967 Order** relating to an appeal as of right. I must now also consider whether the matter in dispute on the intended appeal to His Majesty in Council is of the value of £300 sterling or upwards, and/or the appeal involving, directly or indirectly, a claim to or a question respecting property or a right of the value of £300 sterling or upwards.

The Value Threshold

- [18] Learned counsel for Halimeda, Mr. Paul Lowenstein, KC argues that the matter in dispute giving rise to the intended appeal (i) is not “of the value of £300” or more and (ii) does not involve “property or a right of the value of £300” or more, as required by section 3(1)(a) of **the 1967 Order**. Counsel stressed in his written and oral submissions before this Court, that it is crucial to understand that this Court found that the learned judge rejected the Arbitration Issue in the exercise of his discretion on the basis that Sian raised the point too late in the day, and if Sian

⁶ BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported) at para. 6.

wishes to overturn the Winding-Up Order (and this Court's decision upholding that order) on the basis of the Arbitration Issue then it must establish before the Privy Council not only (i) that it is right on the Arbitration Issue as a matter of substance but also (ii) that Sian should have been permitted to rely on it, and that this Court was wrong to have upheld the learned judge's discretionary decision to reject the Arbitration Issue on the basis that it was raised too late.

[19] As mentioned above, Halimeda also posits that it is not sufficient for Sian to win before the Privy Council on the Arbitration Issue alone, Sian must also win on the (discretionary) Lateness Issue. Consequently, the Lateness Issue does not relate to a final decision nor does the intended appeal meet the value threshold of £300. Accordingly, Sian cannot obtain leave to appeal the Lateness Issue as of right. Further there is no justification for granting leave to appeal in respect of the Lateness Issue then it follows that there can be no justification for granting leave in respect of the Arbitration Issue either.

[20] I will now consider the issues which Halimeda submits is the subject of this application namely (i) the Lateness Issue and (ii) the Arbitration Issue coupled with the valuation threshold which essentially hinges on the exercise of the judge's discretion, and whether these satisfy the criteria for the grant of leave to His Majesty in Council.

The Lateness Issue

[21] With respect to this issue Halimeda asserts that it is not enough that the dispute relates in some way to property or a right that is worth more than the threshold amount; it is the value of the dispute itself that must be more than the threshold amount. However, it does not follow from the fact that the winding-up was ordered because of an unpaid debt of US\$226 million that the value threshold test is met, in that (i) the Appeal Judgment did not decide whether that debt was in fact due and owing; (ii) nor did the Court's decision affect Sian's alleged conspiracy claim against Halimeda, which was said to be for an amount exceeding the value of the

debt. Also, the fact that the intended appeal relates to large sums in general terms is not relevant nor is the possibility that someone other than Sian itself (e.g. its shareholders or creditors) might stand to lose or gain more than £300 if the intended appeal were allowed. This Court did not make any determination concerning Sian's interest in any property and the intended appeal therefore likewise cannot "involve directly or indirectly a claim to or question respecting property ... of the value of £300".

[22] Sian, in response, argues that there is no order in respect of the "Lateness Issue" which Sian could seek to appeal from. The judge's view that Sian had raised the arbitration clause late was simply one of a number of reasons the judge gave when making the Winding-up Order. Sian contends that the Winding-Up Appeal does involve directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards. In particular, Sian argues that it involves a question respecting Halimeda's alleged claim against Sian. That question is Halimeda's right to invoke the collective winding-up process on the basis of its alleged debt. The amount of that debt exceeds US\$226 million. Absent any evidence to the contrary, there is no basis for proceeding on the footing that the value of Halimeda's right is anything other than the amount which it is seeking to claim from Sian, namely, US\$226 million. That is presumably the amount for which Halimeda would seek to prove in any liquidation of Sian and the amount which it would seek to recover from Sian's assets.

[23] Sian further submits that Halimeda wrongly focuses on what monetary benefit Sian will gain from the Winding-Up Appeal itself.⁷ Section 3(1)(a) of **the 1967 Order** is not concerned with that question – the question is whether the appeal directly or indirectly involves a claim to or question respecting a right worth more than £300. Plainly it does; it is related to Halimeda's alleged claim against Sian.

Discussion and Conclusion

⁷ See Halimeda's Skeleton Argument filed on 1st March 2023 at para. 24.

- [24] The Privy Council in **Walter Fletcher v Income Tax Commissioner**⁸ stated:
- “Whether an appeal is competent under a provision such as this must be decided upon the basis of the judgment against which it is sought to appeal, and depends upon whether that judgment affected the interest of the party prejudiced by it to an extent not less than the specified amount where a taxpayer desires to appeal... it is impermissible to go behind the sum claimed to some other figure upon which the ultimate liability may depend. As an analogy, if the claim were one for commission on a transaction, the relevant amount must be the amount of the commission and not that of the transaction which gives rise to it.”
- [25] The Board in **Alceo Zuliani and others v Vernon S. Viera**⁹ opined:
- “In providing that the automatic right of appeal should arise only where the matter in dispute was of the value of (or in excess of) a precise figure the legislature has chosen not to include an award of unliquidated damages. In the view of their Lordships this provision should be strictly construed. No doubt there will be many cases, of which the present is one, where it can be said as a matter of the utmost probability, or even of virtual certainty, that the damages ultimately awarded will be in excess of E.C.\$5,000, and in such cases the Court of Appeal may very well think it right, as general rule, to grant leave in the exercise of its discretion. Equally, however, there may be cases — and again the present case may serve as an example — where the likely amount of damages is at or above the statutory threshold, but which are so lacking in merit that the Court of Appeal in its discretion would refuse leave.”
- [26] Also, in **Meghji Lakhamshi & Bros. v Furniture Workshop**¹⁰ the Privy Council held that:
- “Under whichever limb of article 3 (a) of the Order in Council a case may fall, the "value" must be looked at from the point of view of the appellant.”
- [27] Taking these authoritative statements into account, I agree with the submissions of Halimeda that it does not follow that once the winding-up was ordered because of an unpaid debt of US\$226 million that the value threshold test is met. Further the fact that the intended appeal relates to large sums in general terms is not relevant. It was not in dispute between the parties, either in the court below or in the appeal or before this Court at the hearing of the application for leave to

⁸ [1972] AC 414 at 419.

⁹ [1994] 1 WLR 1149.

¹⁰ [1954] AC 80.

appeal, that the debt of US\$226 million was in fact due and owing. The issue which confronted the learned judge was whether this debt was disputed on genuine and substantial grounds. The judge found it was not. Specifically in relation to the Arbitration Issue, the learned judge found that it had been raised too late. These decisions of the learned judge were upheld by this Court in the substantive appeal.

- [28] This Court found that the judge in the court below did not make any determination concerning Sian's interest in any property. The intended appeal therefore cannot "involve directly or indirectly a claim to or question respecting property ... of the value of £300". In the premises, the application for leave to appeal to His Majesty in Council pursuant to section 3(1)(a) of **the 1967 Order** fails.

The Arbitration Issue

- [29] With respect to this issue, Sian argues that the judge's view that Sian had raised the arbitration clause late was simply one of a number of reasons the judge gave when making the Winding-Up Order. Further the Court of Appeal and the learned judge erred in law in failing to hold that the Liquidation Application should be dismissed, or alternatively stayed, because there is a dispute as to whether the debt is owed (on the basis of a cross claim or set-off) which falls within the scope of an arbitration agreement and there are no exceptional circumstances on the facts to conclude that the arbitration agreement ought not to be upheld and the Liquidation Application stayed or dismissed.
- [30] For its part, Halimeda argues that if leave is denied on the Lateness Issue, no leave should be allowed to appeal on the Arbitration Issue. Additionally, it is pointed out that this Court ruled that the judge had the right to reject the Arbitration Issue on the basis of the Lateness Issue without considering its merits. The result, contends Halimeda, if leave to appeal the decision on the Lateness Issue is denied, any appeal on the Arbitration Issue will unavoidably be otiose because, taken alone, the Arbitration Issue does not give rise to any

substantive dispute between the parties, and the outcome of an appeal on that issue alone will be of no more weight than academic interest.

[31] Halimeda further urged that even if Sian would otherwise have been entitled to leave to appeal on the Arbitration Issue as of right, the Court can and should, following the guidance in **Meyer v Baynes**¹¹ and **Water and Sewerage Authority of Trinidad and Tobago v Sahadath and another**,¹² refuse to grant leave in any event.

[32] In **Meyer v Baynes**, the Privy Council at paragraphs 22-23 stated:

“[22] ..[F]or present purposes it is only necessary to refer to the recent decision of the Board in *A v R (Guernsey)* [2018] UKPC 4, in an appeal from the Court of Appeal of Guernsey. Lord Hodge, giving the judgment of the Board, explained that an appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. He continued (para 8):

“Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court has power to make sure there is a genuinely disputable issue within the category of cases which are given leave to appeal as of right. Thus in *Alleyne-Forte v A-G* [1997] 4 LRC 338 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (at 343):

'An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this *is* required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case ...”

[23] The Board considers that this reasoning is also applicable to appeals from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda). Mr. Meyer made an entirely proper application to the Court of Appeal by notice of motion for leave to appeal. But the Court of Appeal has a right to police applications of this kind and to consider whether any proposed appeal raises a genuinely disputable issue. In this case the Court

¹¹ [2019] UKPC 3.

¹² [2022] UKPC 56.

of Appeal exercised that right, refused leave to appeal and dismissed the application. In so doing, it did not exceed its jurisdiction, and it made no error in approaching the application in the way that it did.”

- [33] Lord Leggatt in **Water and Sewerage Authority of Trinidad and Tobago v Sahadath and another** stated:¹³

“31. Where, as in this case, an appeal lies to the Board as of right, it is still necessary to obtain leave from the court appealed from or from the Board itself. Leave may be refused if the applicant fails to comply with any condition that may be imposed under the local law but also if it is clear that there is no genuinely disputable issue or that the appeal is an abuse of process:”

- [34] It is clear from the foregoing that this Court has the power to refuse leave to appeal to His Majesty in Council where there is no genuine dispute even where there is leave to appeal as of right.

The application under section 3(2)(a)

- [35] Halimeda posits that the question of law identified by Sian is not of “great general or public importance” as required by section 3(2)(a) of **the 1967 Order**, and it is insufficient that the issue will or may be encountered by other parties from time to time.

- [36] Section 3 (2)(a) of **the 1967 Order** provides:

“(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to [His] Majesty in Council with the leave of the Court in the following cases-

(a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to [His] Majesty in Council, decisions in any civil proceedings;”

- [37] Sian submits its proposed grounds of appeal raises points of law that are of great general or public importance, or which should otherwise be submitted to the Privy Council for consideration within the meaning of section 3(2)(a) of **the 1967**

¹³ Ibid.

Order. Further the intended appeal raises several grounds of appeal, including the questions as to: (i) the correctness of the decision of the Court of Appeal in **Jinpeng Group Limited v Peak Hotels and Resorts Limited**;¹⁴ (ii) whether a company subject to an application to appoint liquidators should be debarred from raising a defence based on an agreement to arbitrate on the basis that it was raised ‘too late’ in the proceedings in light of the serious and final nature of an order appointing liquidators; and (iii) whether the Court of Appeal was in fact correct to say that the judge had decided the arbitration point solely on the basis that it had been raised ‘too late’.

[38] Sian contends that the decision in **Jinpeng** was wrongly decided and does not represent the law of the Territory of the Virgin Islands (“the BVI”) and that this Court erred in not following the decision of the English Court of Appeal in **Salford Estates (No. 2) Ltd v Altomart Ltd**.¹⁵

[39] Counsel urged that Sian’s case raises clear points of great general and public importance which the Judicial Committee ought to consider. Alternatively, even if the test of great general or public importance is not met, the Court still retains the discretion to allow the appeal to the Privy Council based on the ‘or otherwise’ category in section 3(2)(a) of **the 1967 Order**. This Court therefore retains a wide discretion as to the circumstances in which leave will be granted to appeal to the Privy Council.

[40] Halimeda, in opposition, claims that while the Arbitration Issue does raise a question of law, that question is not one of “great general or public importance or otherwise” as required by section 3(2)(a) of **the 1967 Order**, and it is insufficient that the issue will or may be encountered by other parties from time to time. Further, the issue of law has been settled in the BVI and does not require resolution, and that the Arbitration Issue does not answer to any of the

¹⁴ BVIHCP2014/0025 and BVIHCP2015/0003 (delivered 8th December 2015, unreported).

¹⁵ [2014] EWCA Civ 1575.

descriptions of the classes of questions that will meet the standard of being of great general or public importance, as identified in **Inderjit Kaur Chhina**, and **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**.¹⁶

[41] The Court of Appeal in **Inderjit Kaur Chhina** held at paragraph 22 that:

“The test of what amounts to a matter of great general or public importance or otherwise was authoritatively described by Saunders JA (as he then was) in **Martinus Francois v The Attorney General**¹⁷ at paragraph [13] of the judgment of the Court of Appeal -

Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘great general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.”

[42] In **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**, this Court, in examining the applicable principles to be considered when examining of whether there is a genuine dispute, at paragraphs 10 and 11 held:

“[10] ...Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships’ Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.

¹⁶ BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 8th October 2018, unreported).

¹⁷ SLUHCVP2003/0037 (delivered 7th June 2004, unreported).

[11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt."

[43] Halimeda argued that Sian essentially appealed against the judge's exercise of his discretion in ordering the winding-up.¹⁸ It is trite law that the determination of a liquidation application is a discretionary function. The rejection of the Arbitration Issue on grounds of lateness was a matter of discretion and case management based on the particular facts and circumstances of this case.

[44] In response to Sian's argument that its appeal raises an important issue of great general or public importance as to whether **Jinpeng** was correctly decided, Halimeda makes a number of submissions. Firstly, in **Salford Estates (No. 2) Ltd** the English Court of Appeal held that where parties had agreed to refer disputes to arbitration, if a dispute as to the existence of a debt came within the scope of the arbitration clause, the court should, save in wholly exceptional circumstances, exercise its discretion so as to dismiss or stay the petition so as to compel the parties to resolve their dispute by arbitration. The Court of Appeal in **Jinpeng** at paragraph 47 said in relation to the **Salford Estates (No. 2) Ltd** approach:

"[47] The position outlined by the Chancellor in these passages comes close to the automatic stay position which is now firmly a part of the learning in connection with section 18 of the Arbitration Act. He is saying in very clear terms that a winding-up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances. However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the C-Mobile [Services Limited v Huawei Technologies Co. Limited] case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too

¹⁸ See *Sian Participation Corp. (In Liquidation) v Halimeda International Limited* (delivered 11th November 2022, unreported) at paras. 7, 11, 25, 42, 45 - 47, 50, 54 and 74 - 75.

firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction under section 162(1)(b) is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.” (Emphasis added)

[45] Secondly, the Court of Appeal addressed the issue of **Jinpeng** in the judgment delivered in this appeal and at paragraph 39 stated:¹⁹

“Sian acknowledged that it is now settled, on the authority of **Jinpeng**, that the statutory jurisdiction to make a liquidation order on a creditor’s application under section 162(1) of the **Insolvency Act [2003]** is satisfied if the debt is not disputed on genuine and substantial grounds, without the necessity of proving exceptional circumstances. In such cases, a debtor is not entitled to an automatic stay of the liquidation proceedings under section 18(1) of the Arbitration Act by merely invoking the existence of an arbitration agreement.”

Accordingly, Halimeda submits that there is no reason why this Court should proceed in exactly the same manner as courts in other common law jurisdictions. Each individual case turns on its own facts.

[46] Thirdly, Halimeda argues further that Sian’s complaint that **Jinpeng** takes a different approach to that taken by the English Court of Appeal in **Salford Estates (No. 2) Ltd** is not one of ‘great general or public importance’ that requires the attention of the Privy Council in that: (a) the Court in **Jinpeng** had close regard to the decision in **Salford Estates (No. 2) Ltd** and made a positive decision to take a different approach. Also, there is no suggestion that **Jinpeng** was decided per incuriam; (b) in any event, the difference of approach is not a fundamental one: The Court in **Jinpeng** at paragraph 49 and **Salford Estates (No. 2) Ltd** at paragraph 39 both recognise that the court has a discretion whether to stay or dismiss a liquidation application in favour of arbitration proceedings; the departure relates only to the general approach as to how that discretion should be exercised, and whether there should be a strong

¹⁹ See *Sian Participation Corp. (In Liquidation) v Halimeda International Limited* (delivered 11th November 2022, unreported).

presumption in favour of staying or dismissing liquidation applications (as in **Salford Estates (No. 2) Ltd**) or whether this should only be done in exceptional circumstances (as in **Jinpeng**); and (c) it was entirely legitimate for this Court to determine for itself in **Jinpeng** what approach should be taken in BVI to the exercise of a discretion that arises under a local statute (section 162 of the **Insolvency Act 2003**); and this Court in the Appeal Judgment was correct to follow established Court of Appeal authority in **Jinpeng**.²⁰

- [47] Having examined and considered the oral and written submissions put forward by the parties, I find the submissions by Halimeda on this issue more convincing. Accordingly, I find the issues arising in this case, including the Arbitration Issue and whether **Jinpeng** was correctly decided by this Court, do not amount to a matter of great general and public importance.²¹ Neither are there any points of law or procedure that could benefit from the pronouncement of and guidance by the Board. Consequently, Sian's dissatisfaction with the decision of the Court of Appeal and High Court is not a reason to grant leave to appeal to His Majesty in Council. Accordingly, the application fails under this ground as well.

The Fresh Evidence Applications

- [48] On 17th December 2021 and 5th May 2022, Sian filed two applications to adduce additional evidence on the appeal.²² The Court of Appeal found at paragraph 37²³ that:

“[37] Furthermore, without sight of the Arbitration Award, the Court is not in a position to determine whether its contents would have an important bearing on the outcome of this appeal. Sian has therefore failed to satisfy that requirement for admission of new evidence and its application fails on this basis. It is not necessary to consider the third element of the **Ladd v Marshall**²⁴ test. I would accordingly refuse Sian's second application to introduce new evidence by way of the Arbitration Award.”

²⁰ See Halimeda's Skeleton Argument filed on 1st March 2023 at para. 43.

²¹ Supra n. 16 at paras. 57, 58, 59 and 60.

²² Supra n. 16 at paras. 19 - 37.

²³ Supra n. 19.

²⁴ [1954] EWCA Civ 1.

[49] Sian however argues that in refusing to admit this evidence, the Court of Appeal prevented them from relying on evidence which could not, with reasonable diligence, have been put before the learned judge at first instance. Thus, in refusing to allow the fresh evidence application, Sian was unable to put its entire case forward in defence of the application to appoint liquidators thereby resulting in the making of the Winding-Up Order. Additionally, the issue of the refusal to admit Sian's further evidence is so intertwined with and incidental to, the overall decision to appoint liquidators over Sian that this would be an appropriate case for the Court to grant leave to appeal against the totality of its decision, including its decision not to admit their further evidence, so that all the matters in dispute between the parties on the application can be fully ventilated before the Judicial Committee of the Privy Council.

[50] Halimeda on the other hand, submits that neither party had seen a copy of the Arbitration Award and there was no copy of it before the Court. Sian had not taken steps to obtain permission from the parties or the arbitral tribunal to allow it to put the award before the Court, nor grappled with the issue of whether the Court could or should require the parties to the arbitration to provide copies of the award. In the circumstances, the Court was inevitably unable to determine whether the award might have had an important bearing on the appeal so as to justify granting that limb of the application. Thus, Sian has no entitlement to appeal from the Court's rejection of the Further Evidence Application as of right and Sian did not, in its Permission Skeleton make any effort to identify how any intended appeal could satisfy the requirements of section 3(2) of **the 1967 Order** so as to justify the Court granting permission. No question of law is identified that might be the subject of appeal, still less a question of great general or public importance. Consequently, there is no basis for granting leave to appeal the decision to reject the Fresh Evidence Application.

[51] For my part, I agree that Sian has not shown how the rejection of the fresh evidence application can properly be placed before the Board. I repeat the words

of the Court of Appeal and that “without sight of the Arbitration Award, the Court is not in a position to determine whether its contents would have an important bearing on the outcome of this appeal.” Consequently, I do not find that there are issues of great general or public importance and no point of law which the Court could benefit from guidance by the Board.

Order

[52] For the foregoing reasons, I would dismiss Sian’s application for conditional leave to appeal to the Privy Council and award costs of the application to Halimeda to be assessed by a judge of the court below if not agreed within 21 days.

I concur.

Mario Michel
Justice of Appeal

I concur.

Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar