

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCM (COM) 2022/0126

BETWEEN:

**[1] HAPPY LION VENTURES LIMITED
[2] CHINEX LIMITED**

Applicants

and

RZ3262019 LIMITED

Respondent

Appearances:

Adrian Francis, Matthew Freeman and Scott Tolliss for the Applicants
Edward Davies, K.C., with him Sarah Latham and Kay Cheng for the Company
Peter Ferrer and Zachary Van Horn for the First Intervenor
Jerry Samuel for the Second Intervenor
Scott Cruickshank and James Henson for the Joint Provisional Liquidators

2023: February 20; 21;
May 18.

JUDGMENT

- [1] **MANGATAL, J (Ag.):** The application before me ("**the JL Application**") is an Originating Application filed on behalf of Happy Lion Ventures Limited ("**Happy Lion**") and Chinex Limited ("**Chinex**") (together "**the Applicants**") pursuant to section 159(1) of the Insolvency Act, 2003 ("**the Act**"), seeking to have Joint Liquidators ("**the JLs**") appointed over RZ3262019 Limited ("**the Company**"). The Applicants seek to have the Company placed into liquidation under section 162(1)(a) of the Act.
- [2] The JL Application is brought by the Applicants as creditors of the Company on the grounds that it is insolvent, i.e. unable to pay its debts as they fall due.
- [3] By Ordinary Application made *ex parte* without notice on 13 July 2022, the Applicants obtained an order appointing Joint Provisional Liquidators ("**the JPL Order**" and "**the JPLs**", respectively) over the Company.
- [4] The first hearing of the JL Application on 10 October 2022 was ultimately adjourned with directions to allow for the filing of further evidence. At that time, the Applicants had filed evidence, including Affirmations by Raymond Tam, who is a Director of Happy Lion and authorized to give evidence on behalf of Happy Lion and of Chinex.
- [5] The grounds upon which the JPL Order obtained was sought on an *ex parte* basis was that:
- (1) the Applicants had a *bona fide* debt arising from the Vendor Loan Agreement ("**the VLA**"), which had been demanded of the Company and which had remained unpaid as at the date of that application; and
 - (2) The appointment of JPLs was necessary in order to (i) maintain the value of the assets owned and managed by the Company; (ii) investigate alleged improper conduct by each of Yuzhou, the Company and Zhou Ying; and

(iii) cause the Company to seek to intervene in extant proceedings in the PRC, to protect the interest of its creditors.

- [6] Since the JPL Order, the JPLs have taken certain steps which they assert were aimed at securing and maintaining the Company's assets, including by removing the Company's director, Ms. Dong Shuling ("**Ms. Dong**"), and replacing her with Mr. Wai Man Chung ("**Mr. Chung**").
- [7] However, by Ordinary Application dated 7 October 2022 ("**the Company's Application**"), the Company sought (a) the reinstatement of Ms. Dong as a director, as well as (b) the replacement of Mr. Ryan Jarvis, one of the JPLs appointed on 13 July 2022, on grounds of conflict of interest and/or lack of independence, and (c) the removal of Mr. Chung as a director. On 10 October 2022, Jack J (Ag) granted the relief at (a), i.e. he ordered the reinstatement of Ms. Dong.
- [8] According to the Company's Skeleton Argument (all skeleton arguments hereinafter referred to as simply "**SKA**") at paragraph 3, save for the question of costs, the resolution of the JL Application will render the Company's Application largely moot, although if, contrary to the Company's case, the Court is minded to accede to the JL Application, the Company may, when judgment is handed down, resist Mr. Jarvis being appointed as one of the JLs.
- [9] Notices of Intention to Appear and oppose the JL Application have been filed by the Company, Yuzhou and Zhou Ying and there has been evidence filed in opposition.

The Company

- [10] The evidence of Wang TingTing ("**Wang**") stands as the evidence of the Company, along with Dong 2. Ms. Wang states that she is a former Director of the Company,

who served as a Director from 13 August 2021 to 18 March 2022. By its evidence, the Company asserts a number of matters. The Company maintains that:

- (1) The Transaction Documents and the Debt are disputed on genuine and substantial grounds, as evidenced by the Re-Amended draft Statement of Claim ("**the Re-Amended SOC**") in respect of intended proceedings in Hong Kong ("**the Hong Kong Claim**");
- (2) the Company is solvent or, alternatively, its solvency should be viewed in the context of the wider group of companies to which it belongs;
- (3) the conspiracy as alleged by the Applicants is denied; and
- (4) the JPL Order ought not to have been made for reasons including breach of the duty of full and frank disclosure, material omission by the Applicants in their presentation of the JPL Application, and apparent conflict of interest of one of the JPLs, Mr. Ryan Jarvis.

Yuzhou

[11] Kwok Ying Lan ("**Kwok**") states that she is the chairman and an executive director of Yuzhou. Kwok 1 stands as the evidence of Yuzhou. Its position is that the JL Application be adjourned on the basis that:

- (1) it has a financial interest in the Company; and
- (2) it is proposing to restructure and the JL Application, if granted, is likely to derail the intended restructuring of Yuzhou. In its SKA, Yuzhou referred to restructuring proposals in relation to the Company itself for the first time.

Zhou Ying

[12] Dong 1 stands as the evidence of Zhou Ying. By it, Zhou Ying asserts that:

- (1) it is a major creditor of the Company in the sum of approximately U.S.\$645 million by virtue of the Zhou Ying Loan Agreement and the Deed of Assignment;
- (2) Zhou Ying is the sole registered shareholder of the Company; and
- (3) the JL Application, if granted, will not serve the best interests of the creditors as a whole.

The Parties Supporting the JL Application

[13] The parties supporting the JL Application by the Applicants are Ruizhuo and Chinawest Development Holdings Limited ("**Chinawest**"), an indirect subsidiary of Ruizhou.

The Applicants

[14] The main evidence given on behalf of the Applicants comes from Mr. Tam. By that evidence the Applicants contend, as summarized in paragraph 9 (ii) of their SKA as follows:

- (1) The Company's alleged dispute of the Debt and the Transaction Documents is "*bogus*", and amounts to an abuse of process;
- (2) The Company's conduct makes clear that (a) it has always treated the Transaction Documents as valid; and (b) it has always treated the debt as properly due and, since the date of the Demand, owing by it to the Applicants;
- (3) The Re-Amended SOC is manifestly deficient, and does not come close to demonstrating a substantial dispute to the Debt pursued by the Company on genuine grounds;
- (4) The Opposition Evidence, including the Hong Kong Claim, amounts to a "*put-up job*" by the Company, Zhou Ying and Yuzhou acting in concert;
- (5) The Tam evidence sets out a detailed chronology from which the components of a fraud are pellucid, specifically the conspiratorial actions by the Company, Zhou Ying and Yuzhou, to extract value from the PRC Project Company to the detriment of its (and the Company's) creditors in the event that liquidators are ultimately appointed;
- (6) The Zhou Ying Guarantees are not valid, arms-length transactions, and are instead evidence of a mechanism through which the aforementioned fraud was orchestrated;

- (7) The Company is, in any event, woefully and inescapably insolvent, even on its own financial evidence and the evidence of Yuzhou;
- (8) The purported restructuring of Yuzhou is, on its own evidence, irrelevant on the basis that Zhou Ying is now the sole shareholder of the Company; and
- (9) No restructuring proposal is before the court and so, even if it were potentially relevant to the JL Application (which the Applicants say it plainly is not), there is no evidence by which the court can assess the viability of a corporate rescue of the type proposed by Yuzhou.

Ruizhou and Chinawest

[15] The Affirmation of Zhang Shidong, an employee of Ruizhou, and director of Chinawest (**"Zhang 1"**) stands as the evidence of Ruizhou and Chinawest. and by that evidence it is stated and claimed:

- (1) That Ruizhou entered into a Joint Control Cooperation Agreement and supplemental agreement (the **"JCCA"**) with Chengdu Zhouzhou Real Estate Co. Ltd. (**"Zhouzhou"**) and Nanjing Kunhao Hardware Trading Co. Ltd. (**"Nanjing Kunhao"**), which are both subsidiaries of Yuzhou (together, the **"Yuzhou Subsidiaries"**);
- (2) By the JCCA, Ruizhou, on the one hand, and the Yuzhou Subsidiaries on the other, were each to hold a 50% stake in the Company and were to work together on real estate development projects;
- (3) Further, the seals and licenses of the PRC Project Company, which were essential in order for their holders to regulate and oversee the management and operations of the project, would be jointly kept and managed by Ruizhou and Nanjing Kunhao;
- (4) Ruizhou lost control of the PRC Company as a result of illicit conduct whereby the seals and licenses were seized unlawfully from it by the Yuzhou Subsidiaries;
- (5) Without Ruizhou's authorisation, Yuzhou unilaterally arranged for the PRC Project Company (at that time, under Yuzhou's control and not Ruizhou's)

to provide guarantees to Zhou Ying to the value of USD310 million and USD319 million respectively (“**the Zhou Ying Guarantees**”);

- (6) Without Ruizhou’s authorisation, seven parties (including the Company, the PRC Project Company, Yuzhou and Zhou Ying) purportedly entered into a Supervision Agreement (“**the Supervision Agreement**”) , the effect of which was to preserve Yuzhou and Zhou Ying’s control over the Company and the PRC Project Company irrespective of any change to the Company’s beneficial owner;
- (7) Ruizhou and Chinawest express their suspicion that the Supervision Agreement, the Zhou Ying Guarantees, and the subsequent conduct of Yuzhou and Zhou Ying relating thereto (including issuance of the PRC Proceedings) amounted to a “*scheme of collusion or conspiracy between [Yuzhou] and [Zhou Ying] to control the PRC Project Company and to eliminate interference from other parties in their conspiracy to restrain the PRC Project Company and extract value from it*”; and
- (8) “*The liquidation of the Company would bring the largest benefit to its creditors as a whole.*”

The Expert Evidence

[16] The Company raised with the Applicants the question of expert evidence. There was ultimately agreement between the parties that expert evidence of Hong Kong law should be adduced to assist the court in its determination of the JL Application. The Applicants say in their SKA that this agreement was made without prejudice to the Applicants’ position. The Applicants did not consider such evidence would be determinative of the JL Application but were of the view that it may assist the Court to identify whether the Hong Kong law position in respect of the Company’s proposed claims for mistake and frustration was materially the same as in England & Wales. It was common ground that the law in the BVI on these subjects is the same as the law in England & Wales.

[17] The Expert evidence may be summarized as follows:

The Lau Report

The Lau Report stands as the Applicants' expert evidence in support of the JL Application. Ms. Lau posits the following:

- (1) There is no material difference between Hong Kong law and the law of England and Wales when determining claims for mistake and frustration.
- (2) The following must be present if a contract is to be avoided for common mistake:
 - (a) there must be a common assumption as to the existence of a state of affairs;
 - (b) there must be no warranty by either party that the state of affairs exists;
 - (c) the non-existence of the state of affairs must not be attributable to the fault of either party;
 - (d) the non-existence of the state of affairs must render performance of the contract impossible; and
 - (e) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or the circumstances which must subsist if performance of the contractual adventure is to be possible.
- (3) There is no separate equitable jurisdiction for setting aside contracts for common mistake.
- (4) A contract may be terminated by frustration only when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfill the contract or which transformed the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.
- (5) The Company's case is unlikely to be able to satisfy the high threshold required for common mistake and frustration and the Transaction Documents are likely valid and enforceable.

- (6) Frustration cannot lightly be invoked to relieve the contracting parties of normal consequences of a (imprudent) commercial bargain or commercial risk.
- (7) Any independent claim for unjust enrichment would be unlikely to succeed.
- (8) The plea for misrepresentation is defective as the Re-Amended SOC fails to set out the basic elements and particulars required for a claim of fraudulent misrepresentation.

The Wong Report

This report was adduced as expert evidence in support of the Company's position in relation to the JL Application. In his report, Dr. Wong:

- (1) Also confirms that there is no material difference between Hong Kong law and the law of England and Wales when determining claims for common mistake and frustration.
- (2) Takes the same position as Ms. Lau in relation to the component parts required to establish a claim based on common mistake.
- (3) Opines that the Re-Amended SOC shows a valid case of common mistake. His primary reason for reaching this view is that the Common Assumptions were so fundamental to the commercial viability of the Transaction Documents that the performance of them in circumstances where the Common Assumptions were false must be considered impossible. Dr. Wong therefore asserts that the threshold for impossibility to perform has been met.
- (4) Accepts that there is currently no binding appellate authority on whether a separate equitable jurisdiction exists for setting aside a contract on grounds of mistake.
- (5) However, he is of the view that it is at least reasonably arguable that the Hong Kong Court should recognize an equitable doctrine of common mistake.
- (6) Opines that the Company has a valid claim based on frustration.
- (7) Concludes that the Company has no valid claim for misrepresentation.

- (8) In respect of the Applicants' assertion that the concept of affirmation is a possible defence to the Company's claim for restitution, relying upon certain conduct of the Company after the Acquisition had been completed, Dr. Wong opines that the Company's post-contractual conduct does not constitute affirmation so as to preclude the Company from seeking rescission.

The Debt

[18] The Applicants say that the debt is due and owing. The Company seeks to argue that the debt is disputed on genuine and substantial grounds.

[19] It is the Applicants' case that the position is straightforward. They assert that the essence of the position is as follows:

- (1) On 29 August 2019, the Applicants and the Company entered into the VLA, whereby the Applicants agreed to loan to the Company the sum of USD343 million ("**the Loan**") and the Company agreed to repay that amount together with interest;
- (2) The VLA was amended by agreement on two further occasions (17 July and 23 July 2020);
- (3) The purpose of the Loan was to assist the Company in purchasing the shares of Happy Magic and Carton ("**the Shares**"), which the Company did pursuant to the terms of the Share Purchase Agreement ("**the SPA**");
- (4) Under the terms of the VLA, the Company provided security to the Applicants in the form of share charges over the Shares ("**the Carton Share Charge**" and "**the Happy Magic Share Charge**");
- (5) On 15 July 2021, the Applicants, following a number of breaches of the VLA by the Company, called in the Loan, together with accrued interest and all other amounts accrued or outstanding under the VLA, by writing to the Company and demanding payment of the balance due, specifically USD347,493,498.60 ("**the Demand**");

- (6) The Company has not made any payments to the Applicants in respect of the Loan since the Demand;
- (7) The Shares were held by the Company until 8 March 2022 when, following breaches of the terms of the Carton Share Charge, the Applicants appointed receivers over the Shares; and
- (8) The Loan remains unpaid and is due and owing.

Solvency

[20] It is the Applicants' assertion that the Company is plainly insolvent, even on its own evidence, both on the bases of cash flow and balance sheet analyses.

The Company's Position

[21] The Company disputes the alleged debt relied upon by the Applicants and avers that it does so in good faith and on substantial grounds.

[22] The basis for the dispute is that the loan agreement upon which the Applicants' claim is founded, i.e. the VLA, is void on grounds of common or fundamental mistake, or, alternatively (and this ground it seems, from the oral arguments advanced, is not heavily relied upon), under the doctrine of frustration. Furthermore, the Company claims to have a substantial cross-claim in an amount that significantly exceeds the Applicants' alleged debt.

[23] The VLA formed part of a set of transactions that was entered into for the purposes of the Company's acquisition from the Applicants of indirect ownership of a company in the PRC which was a vehicle for a large property development in Chengdu ("**the Project**").

[24] After completion of these transactions, it transpired that the relevant PRC authorities considered that the Project was in violation of certain rules and

regulations concerned with 'land hoarding' and 'property hoarding', which meant that it was exposed to severe sanctions.¹

[25] The PRC authorities then imposed certain penalties and restrictions on the Project, the effect of which was to radically undermine the commercial viability of the Project and to make it a fundamentally different proposition from the opportunity that the parties had understood they were dealing with when they entered into the transactions.

[26] The relevant transactions, and therefore the applicable principles in respect of the doctrines of mistake and frustration, it was submitted, are governed by Hong Kong law, and are subject to jurisdiction clauses in favour of the Courts of Hong Kong. The Company intends to commence proceedings in Hong Kong seeking orders setting aside the transactions relating to the acquisition of the Project, including the VLA.

[27] In the intended Hong Kong proceedings, the Company also proposes to seek restitution from the Applicants of the sums paid to acquire the Project, comprising US\$1.012 billion (offshore) and RMB 474 million (onshore); which sums greatly exceed the amount of the loan claimed by the Applicants, which was in the sum of US\$343 million.

¹ It is noted by learned Counsel Mr. Davies King's Counsel, who appears for the Company, that the parties agreed (the Applicant's Counsel states, solely for the purpose of instructing the experts) that their respective expert reports in respect of Hong Kong law were to be prepared on the basis that the statements in the Re-Amended Draft SOC concerning PRC rules, regulations and sanctions are accurate- see Maples, the Applicant's legal practitioners', letter dated 23 January 2023.

- [28] The Company has exhibited to Wang 5 the draft Re-Amended SOC setting out the claims it proposes to bring in Hong Kong, subject to the JL Application being dismissed.
- [29] The Company's submission continues that, the dismissal of the JL Application, and the consequential termination of the provisional liquidation, would allow the Company to pursue its claim before the Hong Kong Court, which is the appropriate forum for the determination of the dispute concerning the VLA and the other transactions entered into between the Applicants and the Company in relation to the Project. It was the Company's contention that the Applicants chose not to present a statutory demand, even though the Court has repeatedly indicated that it is preferable to do so.
- [30] The Company referred to the decision of the Court of Appeal in **C-Mobile Services Ltd v Huawei Technologies Co Ltd**.², and two decisions of Jack J (Ag) in support of that point, **Rangecroft Ltd. v Re Lenox International Ltd**.³ and **IS Investment Fund Segregated Company v. Re Fair Cheerful Ltd**.⁴
- [31] The submission continues, that instead of serving a statutory demand, the Company chose the highly aggressive strategy of seeking the appointment of JPLs on an *ex parte* application. In this way, the Company asserts, it was deprived of the opportunity which would have arisen if a statutory demand had been served, of objecting to the proposed liquidation proceedings by making an application to set aside such statutory demand under section 156 of the Act. Further, it is argued that the JPLs appointed on the Applicants' application then took the extraordinary step of removing from office the one director of the Company in a position to organize the defence of the proceedings.

² BVIHCMAP 2014/0017 (delivered 15th September 2015).

³ BVIHC(Com) No 37 of 2020 (delivered 6th July 2020).

⁴ BVIHC (COM) 2020/0034 (delivered 16th July 2020).

- [32] The Company submits that it is an abuse of process and always a 'high risk strategy' to bring winding up proceedings in respect of a debt which is disputed. Further, that the Courts have always deprecated the use of winding up proceedings as a means of applying pressure to pay disputed debts.
- [33] The Company argues that the threshold that they have to meet is a low one. Learned Counsel Mr. Davies submits that it is certainly not necessary for the company to establish its case on the facts and reminds that the Court is not to conduct a mini-trial.
- [34] Reference was made to the decision in **Montgomery v Wanda Modes Ltd.**⁵ for the proposition that it is plain that a company may rely upon a cross-claim as a basis for defeating a liquidation application.
- [35] It was submitted that, provided that the cross-claim is a serious and genuine cross-claim and is in an amount which exceeds the amount of the alleged debt, the Court will not make a winding up order. Reference was made to the Court of Appeal decision in **Capital WW Investment Ltd v Tall Trade Ltd.**⁶ Reference was also made to the decision in **Sian Participation Corp (In Liquidation) v Halimeda International Ltd.**⁷ where, at paragraph 58, Henry JA, having quoted from **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**⁸ stated as follows:

"...If there is any doubt regarding the cross-claim, the Court is required to proceed cautiously and would dismiss the winding up application....."

⁵ [2002] 1 BCLC 289.

⁶ BVIHCPMAP2020/025-26, paragraphs 72-74.

⁷ BVIHCPMAP 2021/0017.

⁸ BVI Civil Appeal No. 10 of 2002 (delivered 18th June 2003).

The Applicable Test for a Disputed Debt

- [36] However, the parties are ad idem as to the applicable legal test, i.e. that a creditor is entitled to a winding up order as of right, where the order is sought on the basis of a debt which is due and undisputed.

Reference was made by the Applicants to **McPherson's Law of Company Liquidation**, 1st Ed., at paragraph 3.57, where it is stated that:

"...the rule that a petitioner who can prove that a debt is unpaid and that the Company is insolvent is entitled to a winding up order ex debito justitiae, which has been taken to mean that, in accordance with settled practice, the court can exercise its discretion in only one way, namely by granting the order."

- [37] Both parties referred to the oft-cited dicta of Sir Denis Byron, CJ, in **Sparkasse** where, at paragraph 3, the learned Chief Justice, referring to English authorities and the well-known *Palmer's Company Law*, stated 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.... The dispute must be genuine in both a subjective and an 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 that ought to be tried either before the Court itself or in an action or by some other proceedings....If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial 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 such a petition would be an abuse of the process of the Court. 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..."

[38] The Applicants also refer to the decision of Lord Denning MR in **Re Claybridge Shipping SA**⁹ where the learned Master of the Rolls shone light on what constitutes a substantial dispute when he stated the matter this way:

“I entirely agree that a petition for winding up should not be used as the means of getting in a debt which is bona fide disputed upon substantial grounds-on which the company would get unconditional leave to defend. But I think the Companies Court should be able to look into the bona fides of the defence. If it is obviously a ‘put-up-job’-or if it is so insubstantial that a Queen’s Bench master would only give conditional leave to defend- then I should think the petition to wind up should stand. In short I think that the Companies Court should keep the remedy flexible-for the sake of all creditors-so that the assets may not be disposed of or removed by the company before there is a chance of dealing with them.”

[39] Similarly, in **Re a Company**¹⁰, Chadwick J expressed the point this way:

“In my view those authorities make it clear that the general rule under which this court refuses to entertain a petition founded on a disputed debt applies only where the dispute is a genuine dispute founded on substantial grounds; and does not preclude this court from determining- or entitle this court to decline to determine- the question whether or not there are substantial grounds for dispute. Indeed, in the passage from the judgment of Oliver LJ [in Re Claybridge] he pointed out that the court necessarily has to take a view whether on the evidence there really is substance in the dispute which is raised by the alleged debtor.” (Counsel for the Applicants’ emphasis)

Yuzhou’s Skeleton Argument

[40] Yuzhou opposes the Application on the basis that it is not in the best interests of the Company’s creditors for it to be liquidated. Yuzhou invites an adjournment of the JL Application to enable the exploration of restructuring proposals with the Company. Yuzhou submits that the Company’s continuation as a going concern is much more likely to benefit the Company’s creditors (including Yuzhou) than a liquidation.

⁹ [1997] 1 BCLC 572.

¹⁰ (No.006685 of 1996) [1997] BCC 830.

- [41] Zhou Ying did not file a written SKA, but Yuzhou in its SKA summarizes Zhou Ying's opposition to the application as being on the grounds that:
- (1) the Debt is disputed on substantial grounds as there is a dispute as to the validity of the VLA; and
 - (2) the Company is solvent and able to settle the debt under the VLA.
- [42] Yuzhou claims that it is owed HK \$507,968,834 (approximately US\$64.7 million) by way of an on demand, unsecured loan. Yuzhou states that it previously had an indirect interest in the Company through its 80% stake in Prosper Peak Limited ("**Prosper Peak**"). Prosper Peak in turn held 50% of the Company through Zhouzhou. Yuzhou's equity interest in the Company terminated on 2 March 2022 when Yuzhou transferred its interest to Zhou Ying. According to the SKA, and the arguments advanced on its behalf by Counsel Mr. Ferrer, despite the transfer of Yuzhou's indirect interest in the Company to Zhou Ying on 2 March 2022, Yuzhou continues to oversee the management of the projects undertaken by the PRC Project Company in respect of the Chengdu Project. The Applicants contend that the Company's group personnel are still under the control of the Yuzhou Group and construction on the Chengdu Project is performed by the Yuzhou construction team.
- [43] It is alleged that Zhou Ying is a creditor of the Company owed the aggregate sum of US\$645,798,026.57 as of 1 December 2021. Zhou Ying is also the registered sole shareholder of the Company as of 2 March 2022.
- [44] Yuzhou's position is that it is essential, in order to secure maximum recovery for the Company's creditors that it remain a going concern. It is asserted that Yuzhou is nearing the final stages of completion of the Chengdu Project. Further, that liquidation of the Company would have the following negative effects:
- (1) cause negative media coverage in the PRC that would severely impact Yuzhou's ability to sell the remaining projects in Chengdu;
 - (2) impede other ongoing projects in Chengdu and the PRC;

- (3) trigger a contract termination crisis in respect of the employees in the PRC Project Company who are assigned by Yuzhou to carry out completion of the Chengdu Project; and
- (4) the intervention of liquidators may also protract or hinder the completion of the Chengdu Project. This is because the liquidation of the Company may trigger further claims by contractors and construction parties involved in the project.

[45] Mr. Ferrer submits that the fact that majority creditors oppose the liquidation is a relevant consideration. It was asserted that it is trite law that:

“winding up proceedings are a class remedy...or a process for the collective enforcement of debts....

..the Court is likely to go with the majority view, on the basis that the majority are best able to identify their interests””- Reference was made to the decision in **Bank of America N.A. v Pacific Andes Enterprises (BVI) Ltd. et al.**¹¹

*The creditors are to be treated as on equal footing and “where the overwhelming creditors in number and value oppose the applicant, who is virtually alone, the weight to be given to the opposing creditors, unless there is a reason for disregarding them, will be very great and in the ordinary case in the absence of special circumstances will be decisive”- Pacific Andes Enterprises (BVI) Ltd. et al.”*¹²

[46] Yuzhou refers to the liquidation analysis conducted by FTI. It is contended that the FTI analysis discloses that, on their own, the value of the Company and the PRC Project Company is nil on both a going concern basis and a liquidation basis due to the joint and several liability guarantee provided by the PRC Project Company for debts owed to Zhou Ying.

[47] Further, that in a liquidation, the equity value of the PRC Project Company is deemed to be zero. All the entities below the Company, except for Shun Hong Limited, cannot repay their debts and the recovery rates in respect of the

¹¹ BVIHC(COM) 132, 133 & 134 of 2016 at paragraphs [40] and[41].

¹² [41(1)].

unsecured debts of the Company, Happy Magic and Carton, are zero for the best-case and worst-case scenarios, respectively.

[48] On a going concern basis, the current equity value of the PRC Project Company is also estimated to be zero after consideration of its debts and the joint and several liability guarantee provided by the PRC Project Company.

[49] It was argued that the only solution to secure a return for the Company 's creditors is for the Company to continue as a going concern in order to restructure its debts and liabilities, which will enable the PRC Project Company to complete its ongoing projects.

The Views of the Majority Creditors

[50] Mr. Ferrer submits that, against the backdrop of the foregoing, it is clear why the majority of the Company's creditors both in number and value, that is, Yuzhou and Zhou Ying, are opposing the JL Application. The Company's combined indebtedness to Yuzhou and Zhou Ying is more than twice the debt owed to the Applicants who are, Yuzhou avers, the only creditors seeking a liquidation order.

[51] Yuzhou's position is that the Applicants have made several unsubstantiated allegations of conspiracy involving Yuzhou and Zhou Ying on the basis that they have conspired to divert funds away from the PRC Project Company for the sole benefit of Yuzhou and Zhou Ying, and to the detriment of the creditors of the PRC Project Company and the Company.

[52] Nevertheless, says Yuzhou, these allegations have been addressed at paragraphs 29 to 39 of Kwok 1. It was submitted that despite the allegations of the Applicants, there is no conspiracy and in fact, the Applicants breached their duty of full and frank disclosure in failing to disclose important information to the Court on their *ex parte* application for the appointment of the JPLs.

[53] In the circumstances, the submission concludes, there is no reason for the Court to disregard or discount the views of the majority of the Company's creditors who are clearly in opposition to a liquidation order being granted.

[54] In the circumstances, Yuzhou requests that the Application be adjourned for a period of 6 months to enable it to explore with the Company a restructuring of the Company's debts and liabilities and ultimately a greater return to its creditors than any resultant liquidation.

Zhou Ying

[55] Mr. Samuel made oral submissions on behalf of Zhou Ying. He referred the Court to Dong 1, in particular, paragraphs 17 and 18. Mr. Samuel submitted that, by and large, Zhou Ying is probably the single largest creditor in the proceedings. He too submitted that, as is well-known, the remedy that the Applicants seek is a class remedy, and thus the Court is entitled to take account of the views of creditors, of which Zhou Ying is probably the largest, in making its determination. It was argued that when that standing is considered in tandem with the First Intervenor Yuzhou's position, the Court has a weighty position as to the views of the majority of creditors.

[56] It was submitted that the allegations by the Applicants that suggest there is some sort of fraudulent conspiracy and that the Zhou Ying Loan Agreement is somehow not genuine, are not properly particularized or pleaded and nor are they made out on the evidence to the requisite standard of proof to be met when such serious allegations are made. Counsel submitted that, more importantly, they are clearly disputed facts on the evidence which in principle are not open for determination by this Court on a winding up application.

[57] It was Mr. Samuel's position that Zhou Ying's stance is based upon the same reasons proffered by the Company, which are that there is clearly evidence of a bona fide dispute on substantial grounds as to the validity of the loan agreement relied upon by the Applicants, based upon common mistake, or alternatively frustration. Zhou Ying also relies on the substantial cross-claim that the Company claims to have in excess of the alleged debt.

JPLs

[58] Mr. Cruickshank appeared on behalf of the JPLs but, in light of the fact that no submissions were pursued by the Company seeking the removal of Mr. Jarvis as a JPL, Counsel did not consider it necessary to make any submissions.

[59] In the JPLs' latest Report to the Court dated 15 February 2023, it is concluded that the Company has insufficient assets to meet its liabilities and is therefore insolvent. The JPLs also conclude that it would be in the best interests of the creditors of the Company for liquidators to be appointed for a number of reasons, including in order to investigate the potential assets of the Company.

Mr. Francis' Reply on behalf of the Applicants

[60] In relation to the argument regarding the lack of a statutory demand, Mr. Francis had a number of responses. Firstly, that in the United Kingdom, there are very good reasons why one serves a statutory demand before making an application to wind up. This is because as soon as a petition to wind up is issued, there are provisions that kick in, notably, section 127 of the UK Insolvency Act. The effect of these provisions is that all dispositions of the company's property and assets after that date become void unless the Court orders otherwise. That therefore creates great scope for financial pressure to be brought to bear on a company and it's not something that should be done lightly, because it can cause the company to cease to trade. However, in the BVI legislation, there is no similar provision so there is no effect on dispositions that kicks in when an application to appoint liquidators is issued.

- [61] Secondly, even though there may be this difference between the Statutes in the United Kingdom and the BVI, it is still good practice and fair to issue a statutory demand first in an ordinary case. However, Counsel submitted that where there is a case such as this involving fraud, and risk to assets, there are BVI authorities that accept that in those circumstances, the two stage approach is not appropriate. Reference was made to paragraph 6 of the *IS Investment* case, and to paragraphs 19 and 20 of the *Rangecroft* case. In those instances, the creditor needs to move quickly and quite frequently there is a need to rapidly put JPLs in place, and that cannot be done unless a winding up application is issued. In those circumstances, if the creditor had to go through the two-stage process of issuing a statutory demand first, before issuing the application to appoint liquidators, it would “tip off” the company before he is able to put protection in place. Mr. Francis submitted that these were the reasons for proceeding as the Applicants did in this case. Further, and in any event, the Applicants say that as far as they were aware, the debt was not disputed.
- [62] Mr. Francis went on to argue that there is a logical absurdity in the Company’s argument. He asserts that generally an applicant seeking the appointment of provisional liquidators has to show a risk to assets and very often an element of fraud is involved in the wrongful dissipation of assets. If intervention is most needed where there are allegations of fraud, then if the Court cannot determine the case on a winding up application, that would be absurd. He submits that the simple and unobjectionable position in which the Applicants find themselves is that there is evidence of a serious fraud before the Court, and that the Applicants’ evidence to that effect has not been answered to any significant degree. Further, the allegations of fraud do not form the basis of the debt but they are relevant to the Court’s consideration of whether the debt is disputed on genuine substantial grounds. That it is not only relevant, but it is important to an assessment of the witness’ credibility and the plausibility of the alleged defence.

- [63] Mr. Francis submitted that the reference by Mr. Davies to the two documents not in evidence, but referred to in the correspondence sent to the experts, i.e. the administrative notice, and the credit ban, does not take away from his submission that the allegations in the Company's draft pleading are not supported by the evidence.
- [64] Counsel also clarified that he took the Court to the 25 August 2021 letter and the 8 November 2021 letter because they show that the Company's pleading as to the alleged consequences of the meetings with the Chinese authorities are not true. One specific example coming out of the 8 November 2021 notice is that refinancing was about to take place with Oaktree Capital. That refinancing did not take place because Ruizhou would not agree to it. This, Mr. Francis submitted, demonstrates that the pleading that the Company was unable to refinance because of the property landholding issues is completely untrue. It was further contended that there is no evidence to suggest that either the credit ban or the price ceilings have had any significant effect on the Company's business, let alone the devastating effect it would have to have for a case of common mistake to get off the ground.
- [65] Mr. Francis then turned to the argument on frustration, upon which Mr. Davies conceded that he did not principally rely. Counsel reminded that a claim for frustration arises where, after a contract is entered into, there is some intervening event which renders impossible or nearly impossible the ability of the parties to perform a contract. However, he points out that in this case, the contract has been performed, the transaction was completed, title to the shares passed and the monies were paid. So there is therefore nothing left in respect of which frustration could occur. Counsel submitted that it is important to note that this assertion of frustration is yet another illustration of the scattergun approach, the lobbying in of anything to try and cobble together some case when there is nothing there.
- [66] Mr. Francis also referred to King's Counsel's claim that the Company could not develop the frustration case because it required disclosure. Mr. Francis argued that

the Company ought not to be looking to the Applicants for disclosure since it is the Company that is running itself. It is the Company that is asserting that it cannot perform because of something that happened after the contract was entered into, so there is nothing, Mr. Francis points out, that the Applicants can contribute to that.

[67] Mr. Francis sought to dispel the thought that he had been trying to give any expert evidence, as Mr. Davies K.C's argument appeared to suggest. Counsel made reference to the fact that, even in the letter of 25 August 2021, the Company by its director Mr. Chiu itself referred to issues arising from the drop in the property market. Further, that the 8 November letter referred to the financing issues that are as a result of the intervention of the Chinese Government. It is in that context that Mr. Francis submits that the Reuters article was produced by the Applicants and demonstrates that the issues arose in the Summer of 2020. In other words, Counsel submits that to show that there was a loss caused by price ceilings imposed by the Chinese authorities, the Company would need to show that it is not just the result of what was happening generally, which was a drop in the market. Thus it was clear that there was a falling market after the transaction, and therefore the Company proves nothing if it compares the price at which it sold the properties against the pre-acquisition valuations.

[68] Mr. Francis also responded that, even if the Company can make out that the VLA is void, which the Applicants stoutly say it cannot, there would nevertheless have been a loan upon which demand has been made, and there is therefore a bare loan, and a debt, still a debt claim.

[69] In earlier submissions, the Applicants had made reference to **Seldon v Davidson**¹³ where Willmer LJ held that:

"Payment of the money having been admitted, prima facie that payment imported an obligation to repay in the absence of circumstances tending to show anything in the nature of a presumption of advancement."

¹³ [1968] 1 WLR 1083, at page 1088.

...we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is prima facie repayable on demand."

[70] Mr. Francis then turned to the Cross-Claim and submitted that it is obvious that that too is a "put up job", in respect of which there hasn't been a great deal of investment in terms of time, effort or costs in putting together a claim that can pass muster. The submission continues that it's a high hurdle to cross if one wants to get a common mistake case off the ground in a situation like this where there is a transaction with sophisticated parties, a detailed commercial agreement containing representations and warranties, and allocating risks within itself. Thus, in a case like this, the Court is going to require compelling evidence to be persuaded that the elements of the cause of action of common mistake are satisfied.

Resolution of the Issues

[71] **In discussing the relevant issues, I intend to approach the matter in the following order:**

- (1) The Hong Kong Law Experts-Court's factual findings as to the Law;**
- (2) Is there a genuine dispute of the Debt, founded on substantial grounds?**
 - (a) Conduct**
 - (b) Chronology**
 - (c) Lack of Cooperation**
 - (d) Delay**
 - (e) Common Mistake**
 - (f) Frustration;**
- (3) Is there a genuine Cross-Claim that exceeds the amount of the Debt?**
- (4) Affirmation and Estoppel by Convention;**
- (5) Solvency;**

- (6) **Summary as to Genuine Dispute and Cross-Claim;**
- (7) **Adjournment and Restructuring Proposals; and**
- (8) **Treatment of the views of the Majority of Creditors.**

(1) The Hong Kong Law Experts-Court's factual findings as to the Law

[72] In my judgment, the experts are ad idem on many points, in particular as to there being no material difference between Hong Kong Law and the law of England and Wales in relation to claims at common law for common mistake and frustration.

[73] Thus, they agree that the following must be present if a contract is to be avoided for common mistake:

- (1) There must be a common assumption as to the existence of a state of affairs;
- (2) There must be no warranty by either party that the state of affairs exists;
- (3) The non-existence of the state of affairs must not be attributable to the fault of either party;
- (4) The non-existence of the state of affairs must render performance of the contract impossible; and
- (5) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

[74] However, in relation to the question of whether a separate equitable jurisdiction exists for setting aside contracts for common mistake, the Lau Report, at paragraph 41, states as follows:

*“...there is no separate equitable jurisdiction for setting aside contracts for common mistake: **Szeto Wing Hong v Maintown Industries Ltd. And Anor** [2021] HKCFI 179....”*

[75] On the other hand, in his report, Dr. Wong, at paragraphs 66 and 67, expresses the view that it is at least reasonably arguable that the Hong Kong Court should

recognize an equitable doctrine of common mistake. At paragraph 65, Dr. Wong accepts that at the first instance level in Hong Kong, ***Great Peace Shipping Ltd v Tsavlis Salvage Ltd***¹⁴ has been cited for the proposition that there is no separate equitable jurisdiction to set aside a contract on grounds of mistake, and here reference was made to the same decision referred to by Ms. Lau, viz. the decision of Linda Chan J in ***Szeto Wing Hong***¹⁵ at paragraph 39. Dr. Wong also cites the decision of Keith Yeung J in ***Zhang Qiang v Cisco Systems (HK) Ltd.***¹⁶ at paragraph 83.

[76] However, Dr. Wong opines that in their decision in ***Lo Shing Kin v Sy Chin Mong Stephen***¹⁷, at paragraph 68, the Court of Appeal left open the question of whether the doctrine of equitable mistake is still part of Hong Kong law.

[77] I have looked at the 2013 decision in ***Lo Shing Kin***. At paragraph 64 of the judgment, the Court of Appeal rejected the plea of common mistake presented before it, and stated:

“The plea of common mistake fails at the first hurdle-on the pleading and on the facts as found by the judge.”

[78] Then at paragraph 68 the Court stated that, as the argument in relation to common mistake failed on the facts and on the pleading, it was not necessary to canvass the alternative argument advanced by Counsel as to whether the doctrine of equitable mistake should still be accepted as good law in Hong Kong in view of the ***Great Peace*** case. In my view all that has transpired is that the Court of Appeal simply did not address the argument because it was unnecessary to do so. Plainly the Court was not minded to engage in *obiter dicta*. In my view the statement by the Court does not rise to the level of suggesting that it has left open the question of common mistake in equity.

¹⁴ [2002] EWCA Civ 1407.

¹⁵ [2021] HKCFI 179.

¹⁶ [2021] HKCFI 694.

¹⁷ CACV 148/2012, (8th May 2013).

- [79] On the other hand, however, the decision of Chan J, in **Szeto Wing Hong** at first instance in Hong Kong, has followed **Great Peace** in all material respects. Indeed, at paragraphs 38 and 39, the judge indicates categorically that “*There is no separate equitable jurisdiction to set aside a contract on grounds of mistake (Great Peace...)*” I note that this decision is far more recent than that of the Court of Appeal; it is a 2021 decision whilst the Court of Appeal decision was 2013. Further, Chan J makes no mention of **Lo Shin Kin**, and did not seem to harbour any notion that the question had been left open by the Court of Appeal.
- [80] In sum, a survey of the legal landscape in Hong Kong reveals that there is no Court of Appeal decision supporting the existence of an equitable jurisdiction regarding common mistake. However, there is a first instance judgment applying **Great Peace** and positively rejecting the existence of any such jurisdiction. In my view, there is no convincing or reasonable basis for assuming that a Hong Kong Court should or would recognize the doctrine of equitable mistake, which doctrine was roundly rejected in **Great Peace**. Further, I have not been referred to any other first instance judgment that supports the existence of this equitable jurisdiction, whether decided since **Great Peace** or at all.
- [81] I found that the reasoning put forward by Ms. Lau was more logical and well-reasoned than that put forward by Dr. Wong. Dr. Wong does seem to have ventured into the arena of speculation and at some points appears to have crossed over into advocating the Company’s positions, rather than simply giving independent opinion evidence on the relevant issues. I accept that the law in Hong Kong is the same as in England & Wales and the BVI. I accept and find as a fact that under Hong Kong law, at common law, for a contract to be avoided for common mistake the characteristics set out at paragraph [73] (above) must be present. I also find as a fact that there is no separate equitable jurisdiction to set aside a contract on the grounds of common mistake.

(2) Is there a genuine dispute of the Debt, founded on substantial grounds?

[82] In my view, it is very important to zero in on precisely what is involved in the examination as to whether there is a genuine and substantial dispute.

[83] The guidance provided by Chadwick J in ***Re a Company*** bears repeating; “*The Court must necessarily take a view whether on the evidence there really is a genuine dispute founded on substantial grounds.*”

(a) Conduct

[84] In determining whether there is a genuine and substantive dispute as to the Debt alleged by the Applicants, it is important to look at the Company’s posture and conduct since the date that the SPA and the VLA were entered into.

[85] I accept the Applicants’ submission that, from the commencement of the date of the SPA and the date of the VLA, the Company has treated those agreements as valid and effective and has serviced the debt in acknowledgment that it is repayable. The relevant conduct that speaks to the Company’s and its affiliates’ treatment of the Debt, is as follows:

- (1) Prior to and following the Events of Default under the VLA, the Company made interest payments due thereunder. This comprised a total of USD24,773,551 made by Yuzhou to an affiliate entity of the Applicants, which had been nominated to receive the payments under the SPA and the VLA. These payments it continued to pay until October 2021.
- (2) On 11 February 2021, the Applicants’ legal practitioners sent a letter to the Company notifying it of an Event of Default under the VLA, entitling the Applicants to call in the Debt. To this the Company’s lawyers responded by letter of 22 February 2021, making a number of proposals, including that “*the outstanding amount of RMB 2,400,000,000 and the accrued interest*

under the [VLA] will be paid in accordance with the terms and conditions thereof.”

- (3) On 7 June 2021, the Company countersigned a letter from the Applicants to it accepting that it was required to make certain tax payments under the SPA but would need more time in order to do so. The Applicants agreed to make those tax payments and late payment surcharge to the tax bureau on or before 15 June 2021 on behalf of the Company, with it being liable to repay the Applicants the USD equivalent of the payments, surcharge and liquidated damages on or before 14 October 2021. In order to avoid the late payment surcharge and liquidated damages, the PRC Project Company made the tax payment on 15 June 2021 on behalf of the Company.
- (4) By letter of 25 August 2021 from the Company to the Applicants, the Company confirmed that it was willing to negotiate *“on the performance of the [VLA] and the liquidation of [the Applicants’] existing facility on the basis of the original purpose of cooperation and mutual benefit.”* The Company objected to the Debt being declared due and owing, on the basis that it was a *“rash decision”* by the Applicants. However, it did not assert any dispute over the validity of the Transaction Documents or the Debt. In that letter the Company made clear that it had engaged external legal Counsel to review and investigate the whole transaction. However, it would appear that nothing further was heard by the Applicants from the Company in relation to the engagement of external Counsel or what was the outcome of that consultation, until the Company filed Wang 1, in response to the JL Application. This was some 13 months later.
- (5) Between June and December 2021, the Applicants entered into negotiations with the Company with regard to a supplemental agreement, to enable the Company to (i) rectify the Events of Default; (ii) provide an additional undertaking or pledge to the Applicants; and (iii) release part of the underlying assets of the PRC Project Company in order to repay the Debt by installments.

- (6) On 8 November 2021, a “*Notice Rectifying Default and Making Immediate Repayment*” which is exhibited to Wang 1, plainly acknowledges the Debt and treats it as being due and owing. It reads:

“...and now [the PRC Project Company], its shareholder companies and parent company have defaulted on their debts and the large debts in default are as follows:

...(2) on 15 July 2021, Hutchinson Whampoo sent a solicitor’s letter announcing the accelerated maturity of the RMB 2.4 billion seller’s credit loan and the principal, interest and penalty interest owed on the domestic buyer’s credit loan.”

- (7) According to a press report dated November 2021, Yuzhou attempted to enter into a loan agreement with global asset manager Oaktree Capital for a loan in the amount of RMB 4 billion, the purpose of which was, amongst other things, to refinance the VLA.
- (8) Upon the Receivers’ appointment in March 2022, the Company was informed of the appointment and no challenges were raised by it as to the validity of The Transaction Documents or the Debt. The Share Charges, being the impetus for the Receivers’ appointment, had been given as security for the Loan under the VLA.
- (9) Following the appointment of the Receivers, Mr. Lam Lung ON (Chairman of Yuzhou at the relevant time, and now non-executive director) and Mr. Chiu, also began negotiations with the Receivers on how to settle the Loan under the VLA and/or how to assist in identifying a financier or a buyer to purchase the Debt.

(b) Chronology

[86] I further note that the chronology of the events which, by and large, is not in dispute, is critical to determining whether there is a genuine dispute. I accept the following chronology set out in the Applicants’ SKA :

- (1) On 15 July 2021, the Applicants wrote to the Company calling in the Loan.
-Six weeks later-

- (2) On 25 August 2021 the Company's lawyers write to the Applicants and state that the Company "*will not agree to lost control of the PRC [Project] Company.*"-One week later-
- (3) On 1 September 2021, the Applicants wrote again to the Company repeating that the Loan, along with interest and other amounts, was due and payable. -One month later-
- (4) In October 2021, the Company stopped making interest payments due under the VLA. -Six weeks later-
- (5) On 8 November 2021, the Corporate Seals and Licenses of the PRC Project Company were seized by Yuzhou.-Two weeks later-
- (6) On 24 November 2021, the PRC Project Company issued the Letter of .Guarantee to Zhou Ying as an additional guarantor of the purported Zhou Ying Loan Agreement. -On the same day-
- (7) On 24 November 2021, the Letter of Guarantee was approved by the PRC Project Company by way of a shareholders' resolution executed solely by Mr. Chiu on behalf of the two shareholders of the PRC Project Company (Shun Hong and Carton). Ruizhuo was not aware of, nor did it approve, this shareholders' resolution. -Eight days later-
- (8) On 2 December 2021, Zhou Ying sent a letter of demand to the Company and the PRC Project Company stating that the Company had failed to make its interest payments under the purported Zhou Ying Loan Agreement. As a result, it called in the full loan amount (guaranteed only 8 days prior by the PRC Project Company), plus interest, in an amount totaling USD 325,461,250. -On the same day-
- (9) On 2 December 2021, the Company and the PRC Company (each under the sole control of Yuzhou) sent acknowledgments to Zhou Ying stating that they did not object to the Demand and promising that they would repay the debt per Zhou Ying's requirements. -Thirteen days later-
- (10) On 15 December 2021, less than six weeks after the Letter of Guarantee was provided by the PRC Project Company, Zhou Ying commenced the

PRC Proceedings against the PRC Project Company to enforce the guarantee. -Within one year-

- (11) During December 2022, the PRC Proceedings were determined, on the grounds they were uncontested, in Zhou Ying's favour.

(c) Lack of Cooperation

[87] It was further submitted by the Applicants that had the Company had less nefarious intent, its officers and the Yuzhou and Zhou Ying representatives would have cooperated with the JPLs following their appointment. However, instead:

- (1) Ms. Dong and Ms. Tingting have declined to cooperate with the JPLs and have refused to provide a response to the JPLs' request for information made pursuant to s.277(3) of the Act.
- (2) The JPLs, in their Report, have indicated that they attempted to reach out to Zhou Ying to authenticate the Zhou Ying Loan Agreement and in response Zhou Ying has refused to provide the JPLs with any evidence to support their position that the Zhou Ying Loan Agreement is a *bona fide* loan arrangement and have questioned the JPLs' powers.
- (3) The JPLs have also contacted Shannon Assets, an entity named as "Original Lender B" of the Zhou Ying Loan Agreement, and they have confirmed that they did not provide any financial accommodation nor loan facilities to the Company under the Zhou Ying Loan Agreement.

[88] It was also posited that the evidence in opposition to the JL Application fails to address even some basic issues that an innocent party would be expected to confirm, as a minimum, as for example:

- (1) Whether any monies were in fact transferred under the purported Zhou Ying Loan Agreement, despite the Applicants' case that Zhou Ying did not have the financial capability to advance the monies thereunder;
- (2) The source of wealth or other means by which Zhou Ying was able to extend a USD310 million loan to the Company;

- (3) How the Zhou Ying Loan Agreement and the Guarantee could have been entered into without reference to Ruizhou, and why that decision was taken;
- (4) How the PRC Project Company came to issue the Letter of Guarantee and why that was said to be in its best interests;
- (5) Why, if this was a genuine commercial arrangement, Zhou Ying called in the full amount of the Zhou Ying Loan Agreement within eight days of its issuance without any attempt to negotiate with the principal borrower;
- (6) Why Zhou Ying did not look to pursue the guarantee against Yuzhou, which is a listed company with cash and bank balances of RMB20.9 billion as at 30 June 2021, based on its interim report, which clearly had a stronger financial capability to repay Zhou Ying than the PRC Project Company; and
- (7) How it came to be that the PRC Project Company came to accept the PRC claims on the same day the Demand was issued, presumably without any reflection or benefit of legal advice.

(d) Delay

[89] When assessing the *bona fide* nature of the dispute, the Court is entitled to have regard to the timing and the stage at which it is being alleged that there is a substantial dispute. Further, the Court has to closely scrutinize the exact nature and texture of that which is said to constitute a substantial dispute. Harman J commented in ***Re a Company*** as follows:

“The late raising of the allegations seems to me to show that they are the result of dredging about for any form of defence to avoid payment of this promissory note.”

[90] It seems to me that in the present case, had the Company been genuine in its belief that the Debt was and is disputed, the points now raised in the Re-Amended SOC should have been raised much earlier. On the Company’s case, it became aware of possible breaches from as long ago as 23 July 2020 when it states that representatives of the PRC Project Company met with officials from the relevant

governmental and/or regulatory authorities and were told that the PRC Project Company had been guilty of “property-hoarding”. In fact, 23 July 2020 is the very same day that the SPA (as amended by the Side Letters and Reinstated Agreement) was completed. There has also been no good reason put forward as to why the Company did not litigate the HK Claim at any point prior to the JL Application.

[91] It is hard to see why, if the Company genuinely believed it had a dispute on the grounds of common mistake, on the basis that exposure to penalties based on PRC “*land-hoarding*” regulations made the performance of the SPA and the VLA impossible (or rendered the assumed state of affairs radically different to those contemplated when the contracts were entered into), its Officers would not have notified the Applicants of this on the very day that the Amended SPA was entered into. It is inconceivable, and defies commercial sense, that such concerns would not have been raised at that stage or shortly thereafter. However, the Company did not seek to set aside the Transaction Documents or even to convey these concerns to the Applicants in that regard.

[92] Instead, the Company performed its payment obligations under the terms of the SPA and the Applicants, the Sellers, transferred the Shares to the Company. The Company also affirmed the VLA by paying sums due thereunder, and by acting at all times as if it was the legal owner of the shares generally, and in making representations to third parties that it was the controlling entity of the PRC Project Company.

[93] In my view the Company ought to have been in a position to put forward their concerns even by the time the JL Application was served on it, having engaged external counsel to consider the whole transaction some thirteen months earlier in August, 2021. Indeed, the Company’s officers could have raised these matters in February 2021, in response to the demand, but they did not.

[94] Instead, the Company did nothing until the first hearing of the JL Application when it submitted, on the morning of the hearing itself, the draft Hong Kong Statement of Claim to the Court. This was the first time that the Company had raised the allegations contained therein. That is a period of over two years and seven months after the date that the Company allegedly first became aware of the issues complained of in the Statement of Case (“**SOC**”). The Court further notes that there have been two amendments since, such that there is now a Re-Amended SOC. The Court views these matters as gravely concerning; they cast serious doubt as to the genuineness of the Hong Kong Claim.

[95] This is particularly so, given the other concerns voiced by the Applicants, (and acted on by them in obtaining the JPL Order), when it is considered that in the intervening period between the first hearing of the JL Application and the date of the hearing before me, the PRC Proceedings were determined (during December 2022) in Zhou Ying’s favour, based on the proceedings being unopposed, thereby giving Zhou Ying present rights of enforceability against the assets of the PRC Project Company.

[96] As the Applicants’ SKA notes, it is important to consider the conduct of a party to a contract in the immediate aftermath of discovering some event that may give rise to common mistake or frustration. At paragraph 63 of **Great Peace**, Lord Phillips M.R., quoted from the judgment of Toulson J, the first instance judge, and at paragraph 165, approved this aspect of the Judge’s approach where he had regard to the fact that the appellants did not want to cancel the agreement with the “*Great Peace*” until they knew whether they could get a nearer vessel to assist. The matter was discussed as follows:

“A telling point is the reaction of the defendant on learning the true position of the vessels. They did not want to cancel the agreement until they knew if they could find a nearer vessel to assist. Evidently the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once.”

[97] In my judgment, the late stage at which the Company has raised the alleged dispute and cross-claim demonstrates a lack of sincerity or of conviction. There are many things that do not add up; the delay and tardiness in raising the allegations make no commercial sense. The Company's overall posture is quite incredulous and its rationale lacks a sound commercial basis. I agree with the Applicants' characterization of this matter as having similarities to the facts in **Re a Company (No 001946 of 1991), ex parte Fin Soft Holding SA**, from which I have earlier quoted, where at page 749 a-e, Harman J was driven to comment:

"It follows that I am wholly unsatisfied that the disputes raised here are substantial. They seem to me to be fanciful, bearing in mind that these serious allegations of fraud were never raised until service of the statement of claim. They were never raised in a letter before action. They were never mentioned in the discussion between Mr. Parretti and others, including the English solicitor acting for the petitioner, which led to the clear answer on 12 February, only very shortly before service of the statement of claim, when allegations were made which were rebutted and are now dropped. The late raising of the allegations seem to me to show that they are the result of dredging about for any form of defence to avoid payment of this promissory note.

I believe I am entitled to bear in mind that it appears on the evidence that this company is very likely insolvent. I accept Mr. Siberry's submission that insolvency is not an issue here, what is in issue here is whether the creditor is a true creditor, in the sense of having a debt not disputed upon substantial grounds. None the less, an actual insolvency would give the likely motivation for those controlling the company to raise any form of defence that can be grabbed at and dressed up in some way to avoid payment, and that seems to me to be exactly what has happened in this case. The debt was, as I see it, payable on 7 January. Notice of dishonour was given that day. No payment has been made. No grounds are shown for impugning, in any substantial manner, the validity of that promissory note, and, in my judgment, this application ought to and does fail." (My emphasis)

(e) Common Mistake

[98] One of the authorities to which Ms. Lau refers and which I find useful is that of John Cartwright, **Misrepresentation, Mistake and Non-Disclosure**. The learned author points to the dearth of authorities in which Courts have held that a contract is void

for common mistake. At paragraphs 15-19, 15-28, and 15-29, Common Mistake is discussed as follows:

“The Common Law Rule: A Contract May be Void for Common Mistake

15-19 *The doctrine of mistake is a rule of law, not based on implied terms.* In the previous section we have seen that, if the contract allocates the risk of the so-called “mistake”, the case does not raise an issue of mistake at all. If however, there is no express or implied allocation of the risk in the contract, it is open for a party to claim that a contract is void for mistake.

*The doctrine is a rule of law [and not based on an implied term] This does not, however, mean that the construction of the contract is irrelevant. Indeed, it is fundamental to the application of the test. Before one can decide whether the contract **as provided for in the contract** is possible, it is necessary to decide what exactly the contract provided. The circumstances as they turn out to be must then be measured against the contract, to determine whether it is “impossible” to perform: [per **The Great Peace** at para 82]:*

‘while we do not consider that the doctrine of common mistake can be satisfactorily explained by an implied term, an allegation that a contract is void for common mistake will often raise important issues of construction. Where it is possible to perform the letter of the contract, but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible, it will be necessary, by construing the contract in the light of all the material circumstances, to decide whether this is indeed the case.’

....

15-28 *Examples of mistakes that are not sufficient to render a contract void*

*It is much easier to give examples of the kind of mistake that will not be sufficient to satisfy the common law test. Indeed, Lord Atkin’s speech in **Bell v. Lever Bros Ltd.**¹⁸ contained a passage in which he gave, by way of illustration, situations involving mistakes about the quality of the subject-matter which would not render the contract void, including some illustrations of common mistakes: the contract for the sale of a picture, believed by both parties to be the work of an old master, which turns out to be a modern copy; the lease of an unfurnished dwelling- house which is uninhabitable. The mere fact that the subject-matter is of a bad, rather than a good quality will not suffice; nor will a mistake be within the scope of the*

¹⁸ [1932] AC 161.

test simply because it has an impact-even a devastating impact- on the value of the subject-matter; nor where part of the purpose for which the contract was entered into cannot be fulfilled in circumstances where it is not sufficiently important so as to be fundamental to the performance of the contract as a whole.”

15-29 The paucity of cases on common mistake It is notable that there are relatively few reported cases on common mistake. There are two related explanations for this.

First, although parties may well make common mistakes, the contract will itself very often provide for the risk to be borne by one or other party. This point was made by Lord Phillips in **The Great Peace**, drawing a comparison between mistake and frustration:

‘Circumstances where a contract is void as a result of common mistake are likely to be less common than instances of frustration. Supervening events which defeat the contractual adventure will frequently not be the responsibility of either party. Where, however, the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that, on true construction of the agreement, one or other will have undertaken responsibility for the mistaken state of affairs. This may well explain why cases where contracts have been found to be void in consequence of common mistake are few and far between.

Secondly, whether or not the contract contains an express or implied term allocating the risk of the mistake, the party who seeks to avoid the contract may often be able to do so within the law of misrepresentation. We have already seen that mistakes are commonly induced by misrepresentations; and that a non-fraudulent misrepresentation gives rise to a common mistake. If such a misrepresentation was made, then unless there is some obstacle to rescission of the contract, or the claimant needs to establish that the contract was void, and not merely voidable, he will naturally rely on the misrepresentation since he does not have the hurdle of establishing that the mistake that was induced by the misrepresentation was of a particular degree of seriousness, and he may also have other remedies arising from the misrepresentation. Claims will in practice be based on mistake, therefore, only if there is no contractual allocation of risk, and if there is either no misrepresentation on which the claimant can rely to rescind the contract, or if rescission is now unavailable.” (My emphasis)

[99] In analyzing the Company’s claim that the Transaction Documents should be avoided, I remind myself of the learning from **Bell v Lever Bros**, as expounded upon and quoted from in **Great Peace**, at paragraph 48, which teaches that it is of

paramount importance that contracts be observed, and that if parties honestly comply with the essentials of the formation of contracts-i.e. agree in the same terms as the subject-matter-they are bound, and must rely on the stipulations of the contract for protection from the effects of facts unknown to them.

[100] As remarked by Peter MacDonald Eggers QC, sitting as a Deputy High Court judge in **Triple Seven Msn 27251 Limited v Azman Air Services**¹⁹, at paragraphs 66-69:

“66. ...I consider that the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical.

67. The doctrine of common mistake is not meant to apply to those cases where the shared assumption is not sufficiently fundamental and/or where the difference between the assumed and actual states of affairs is anything less than fundamental or essential or radical. If it were otherwise, the value of certainty attached to a contract would be unjustifiably undermined. Thus, in Associated Japanese Bank (International) Ltd. v Credit du Nord SA [1989] 1 WLR 255, Steyn J said, at p. 257:

“Throughout the law of contract two themes regularly recur-respect for the sanctity of contract and the need to give effect to reasonable expectations of honest men. Usually, these themes work in the same direction. Occasionally, they point to opposite solutions. The law regarding common mistake going to the root of a contract is a case where tension arises between the two themes.”

68. At p. 268, Steyn J said that the first imperative must be to uphold contractual bargains, not to undermine them.

69. There is no precise test to measure what constitutes a fundamental assumption underlying the contract and what constitutes a fundamental or essential or radical difference between the assumed and actual state of affairs. It is obviously a question of degree, but the nature of the test is such that it necessarily applies to a small number of cases, given that the doctrine applies in circumstances which, in Steyn J 's words, are 'unexpected and wholly exceptional' (see also paras. 84-85 of Lord Phillips, MR's judgment in Great Peace..."

¹⁹ [2018] 4 WLR, 97.

[101] In my judgment, the Company's case in the Hong Kong Claim falls far short of raising a genuine and substantial dispute as to the Debt on the basis of Common Mistake. There is a paucity of supporting evidence. Further, the Company's reasons for challenging are set out in the Re-Amended SOC and I find that there are the following deficiencies in this pleading:

(1) The pleading does not actually say that any fundamental consequences have resulted from the 'land-hoarding' or 'property hoarding'" which the PRC Company is said to have committed.

(2) The 'particulars' include:

(a) hypothetical future losses in the event the PRC Project Company is issued with punitive penalties for breach of the relevant laws and/or regulations. To this end, the pleading states that such penalties "could have the effect of depriving the Project of all or substantially all of its commercial value." There is nothing before me to suggest that any such penalty has been issued, nor that the relevant authorities have intimated that it will be. If such had been imposed, they plainly should have been pleaded with particularity.

(b) a claim that the "*land-hoarding and property-hoarding conduct of the PRC Project Company was causative to an imposition by the local governmental and regulatory authority of a price ceiling for the sale of the residential units of the Project which are significantly lower than the value of these units and/or the common expectation of the Plaintiff and the Defendants.*"

However, as pointed out in the Applicants' SKA, no reasons are provided in the pleading as to why the conduct of the PRC Project Company, prior to the Acquisition, is said to have been causative of the price ceiling imposed by the PRC Government. Further, the Company has not attempted to quantify the loss it says it has suffered as a result of this price ceiling.

[102] There is nothing in the pleading to suggest, for example, that confiscation of properties by the PRC Government has taken place. Indeed, at paragraph 35 of Tam 3, it is noted that the PRC Project launched a pre-sale of 36,809 sq/m of residential units in May/June 2021, which suggests that the PRC government did not in fact confiscate the land of the PRC Project Company at that time.

[103] Further, as regards the question of warranty, the Re-Amended SOC contains a plea that there was no warranty in the Transaction Documents. However, on the basis of the actual Transaction Documents before the Court, evidentially, it is quite highly arguable that a warranty was given by the Applicants that there were no outstanding liabilities and that risk was taken by the Company regarding breaches following the commencement of the Transaction Documents. It also appears that the possibility of adverse claims, and indeed a duty on the Company to notify the Applicants of the same, were also provided for in the Transaction Documents. These matters tend to weaken any case that the Company has advanced in the difficult and rare area of common mistake.

[104] As Ms. Lau puts it in paragraphs 31.1 and 31.2 of her well-reasoned report:

“31.1. First, paragraph 13 of Schedule 2 of the Reinstated and Amended SPA contain’s a seller’s warranty [by the Applicants] that ‘Save as disclosed, the PRC Company is not in breach of any applicable PRC law where the PRC Company’s outstanding liability for any fines for such breach exceeds RMB 100,000,000” (emphasis added). Arguably, by the above [the Applicants] had warranted that there were no outstanding liabilities, whereas on the other hand, whether there would be future liabilities was a risk assumed by the [Company] (even if it arose from earlier acts/omissions).

31.2 Secondly, it appears that the possibility of adverse claims had already been provided for, with the [Company] even being under a contractual obligation to notify the [Applicants] of the same. In particular:

31.2.1. Clause 16.11(a) of the Amended and Restated VLA requires the [Company] to promptly upon becoming aware, notify [the Applicants] of: ‘any claim threatened or received or legal action commenced against the PRC Company. which if adversely determined, would or would reasonably be expected to result in a Material Adverse Effect or would entitle any

Governmental Authority of the PRC to re-possess or re-enter any part of the Property...” (emphasis added) “

- [105] However, even if one proceeds on the basis that there had been no assumption of risk by the Company, there are numerous other difficulties with the Company's Common Mistake case.
- [106] First of all, the subject-matter of the SPA itself is the sale and purchase of the Happy Magic and Carton Shares and the assignment of Loans, not the PRC Project Company, the Project or the Project Land. But the Common Assumptions only relate to the PRC Project Company, the Project or the Project Land. The Company accepts that there had been completion.
- [107] However, even if commercial viability and whether the Project could be carried out under normal market conditions lawfully and legitimately were relevant and applicable to this case, on the Company's own plea it was still able to obtain a loan (albeit at a much higher rate) and was able to conduct sales (albeit with a Price Ceiling). I accept that this shows that the Project could still be carried out, albeit less profitably. Further, even if legality of the Project was a part of the common purpose, on the evidence, breaches of PRC Regulations did not render performance of the Project impossible. I accept that there was a drop in the property market after the Transaction. However, for the Company to show that there was a loss caused by price ceilings imposed by the Chinese authorities, it would need to show that such loss that it has outlined was not just as a result of what was happening generally, which was a drop in the market. The Company's pleadings and evidence fall woefully short of that.
- [108] The VLA's purpose was expressly stated as being for funding the Company's payment under the SPA: Amended and Restated VLA, Clause 3.1. If the SPA itself is not void for common mistake, there is no reason why the subject-matter of the

VLA would be essentially or radically different or that the VLA's commercial purpose would be frustrated.

(f) Frustration

[109] In oral arguments, King's Counsel Mr. Davies made it clear that this was not the main ground relied upon by the Company. Nevertheless, it is pleaded in the Re-Amended SOC and submissions have been addressed to this issue. In contrast with common mistake, frustration must be based upon events taking place after the contract was formed.

[110] The Company's plea of frustration is based on a subsequent change in PRC Laws, rules, regulations, provisions, directives and/or government policies, which "*subsequently classified the conduct of the Project as illegitimate 'land-hoarding' and 'property hoarding'.*" The Company avers that (a) the contractual or commercial purpose of the Transaction Documents has been frustrated, (b) was no longer capable of being performed, or (c) the nature of the outstanding contractual rights and obligations were radically different from what the parties could have reasonably contemplated at the time of execution. SOC-paragraphs 33 and 34.

[111] In my judgment, the Company's basis for advancing a case of frustration is very weak. Although there is some affinity between the doctrine of frustration and common mistake, it seems obvious to me that in the circumstances of this case, the Company ought to be able to decide into which category this case falls.

[112] In any event, frustration operates within narrow confines, and like with common mistake, frustration is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains-see **Chitty on Contracts** paragraph 26-003.

[113] Further, for similar reasons analyzed in relation to common mistake, in my view there are no substantial grounds for finding that an event after entry into the

contract occurred which meant that it was commercially impossible to fulfil the contract or such as to render the obligation to perform radically different from that undertaken at the moment of entry into the contract. There is simply no evidential foundation put before me that could raise a claim of frustration with any substance. The Company has therefore failed to raise the prima facie case of triable issues referred to in the **Sparkasse** decision.

[114] For completeness, I point out that, although in its pleading the Company relies upon misrepresentation, that has not been advanced or argued before me and on the evidence, I think rightly so.

[115] As regards the Company's argument about the Applicants' failure to serve a statutory demand, see **C -Mobile Services Ltd v Huawei Technologies Co Ltd.** and the two decisions of Jack J (Ag) in support of that point, **Rangecroft Ltd. v Re Lenox International Ltd.** and **IS Investment Fund Segregated Company v. Re Fair Cheerful Ltd.** However, all three decisions were concerned with the interplay of section 18 of the Arbitration Act 2013 and section 157 regarding service of a statutory demand so they do not in my view take the matter further in the instant case. I entirely accept the arguments advanced by the Applicants as to why it was appropriate and permissible not to serve a Statutory Demand on the Company before proceeding to file the JL Application.

(3) Is there a genuine cross-claim that exceeds the amount of the Debt?

[116] It is the case that the cross-claim is not pleaded in great detail. The Re-Amended SOC avers that, in the event the VLA is set aside or declared void, the outcome would see a repayment by the Applicants to the Company of the proceeds of the Acquisition, namely *"payments from and/or made on behalf of the Company totaling USD1.012 billion offshore and RMB 474 million onshore, as the consideration for the acquisition of the interests in the PRC Project Company-see paragraph 15(1) of the Amended SOC.* The Company makes claims in restitution.

[117] In my view, one of the obstacles to the Company's restitution argument is that counter restitution would just not be possible. Further, I accept that the Company took a number of steps post-acquisition that affected the value of the shares. Had the Company sought the return of the Purchase Price immediately upon allegedly being informed by the authorities and regulators of the land-hoarding issues, which would have been the commercially sensible thing to do if there really was an issue, then the unwinding of the Transaction Documents would have faced fewer obstacles.

[118] I accept as convincing and logical the flow of funds chart set out in paragraph 45 of Tam 3, as well as the reasoning set out in paragraph 46, as to why restitution is impossible. Paragraph 46 states as follows:

"46. ... any claim for restitution or rescission in respect of the Acquisition is now impossible. The transactions that have occurred post-completion are so deeply entrenched they cannot be undone such that both parties can be put back in their pre-bargaining position. Specifically:

- (a) On the Company's own case, the shares in the PRC Project Company are not now worth what the Company paid for them at the time of Acquisition. Whilst it is said much of the lost value is due to issues relating to "land-hoarding", I suggest the key reason is in fact the much publicized property crash and policy changes in the PRC since the Acquisition. In addition, the value of the Shares is predicated on the value of the PRC Project Company. Since the date of the Acquisition, the PRC Project Company issued letters of Guarantee and accepted liability for the amounts due under the Zhou Ying Loan and the Deed of Assignment. If the shares were returned to the Applicants, they would be returned with that liability in place and the Applicants would not be receiving what they sold to the Company. :*
- (b) Zhou Ying would need to withdraw its claim prior to the transfer of the shares to ensure that the Company's liability to Zhou Ying was not transferred to the Applicants. It is pellucid, in the event of rescission, the Applicants would be receiving far less than they gave.*
- (c) As set out above, the Purchase Price was funded by loans from various parties. By the Re-Amended SOC, the Company is not seeking to set aside any of these third party loans as part of the HK Claim, nor has it added the third party lenders as parties to the HK Claim. As such, those debts will remain payable by the Company even if the*

Vendor Loan Agreement was set aside, leaving the Company (still) woefully insolvent.

- (d) Since receipt of approximately USD 669.5 million of the Purchase Price and interest in the amount of USD 24.8 million, the Applicants have declared dividends to their respective shareholders during each of 2020, 2021 and 2022 in the amounts set out below, hence it would not be possible for the Applicants to simply return the Purchase Price and/or interest received:

(i)Happy Lion HK\$2,184,000,000 (year 2020); HK\$75,000,000 (year 2021); HK\$11,710,000 (year 2022); and

(ii)Chinex: HK\$2,149,000 (year 2020); HK\$939,000 (year 2021); HK\$3,596,110,000 (year 2022).”

[119] I found the decision of Field J in **Pathfinder Minerals Plc v Veloso**²⁰ cited by the Applicants, useful on the matters of affirmation, estoppel by convention, and on the impossibility of restitution. In that case, Field J found that the parties had proceeded on shared assumptions of fact and/or law and that an estoppel by convention arose.- see paragraphs 114,115, 130-134 and 163-165.

At paragraphs 114, 115, 133, it was stated:

“114. Still further, any right to rescind has been lost in respect of the 2010 SPA by affirmation arising out of the Defendants’ admitted and continued ownership of the shares in Pathfinder which they acquired pursuant to the 2010 SPA. In addition, it would not be possible to restore to the Defendants their shares in IMM without unwinding the entire 2010 SPA including in respect of all former shareholders in IMM and there is no basis for doing that

115. Moreover, to achieve the re-vesting in the Defendants of their shares in IMM (which on their case they never acquired) all the Agreements would have to be rescinded and restitutio in integrum is impossible since: (i) CMDN and IMM are now materially different companies to what they were in February 2006 (at the time of the Share Option Agreement) and/or June 2009 (at the time of the London Agreement) and/or August 2010 (at the time of the Share Exchange Agreement). In addition, even before the RTO, Mr. Cavaco had sold off 20,000 of the shares in IMM which he received pursuant to the London Agreement.

....

²⁰ [2012] EWHC 2856 (Comm).

133. Where an estoppel is made out on the basis of a shared assumption as to the construction of a contract, the party estopped is precluded from denying the truth of the shared assumption, and cannot operate the contract inconsistently with the estoppel : see *Amalgamated Property Co v Texas Bank...* *Ing Bank v Ros Roca...* Whilst a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, would necessarily have failed : *Amalgamated Property ...* As Mance LJ said in *Baird Textile Holdings Ltd. v Marks & Spencer plc* [2001] CLC 999 at[88], an estoppel “may enlarge the effect of an agreement, by binding parties to an interpretation which would not otherwise be correct.”

(4) Affirmation and Estoppel by Convention

[120] I understand the primary position of the Company to be that the SPA and the VLA are void or voidable on account of common mistake or frustration, which case the Applicants strongly reject.

[121] As I have said, I do not think that there is any genuine or substantial ground to either the dispute of the debt or the cross-claim. However, in any event, I accept the Applicants contention that the Company's conduct since the date of the SPA and the VLA is demonstrative of an ongoing relationship between the parties whereby it would be unjust and unfair for the Company to be allowed to resile from that arrangement now. See the decision in ***Pathfinder*** and ***Spencer Bower :Reliance-Based Estoppel*** , 5th Edition, paragraphs 8.2-8.4, cited by the Applicants.

(5) Solvency

[122] I refer to the conclusion reached by the JPLs in their second Report to the Court dated 15 February 2023, where it was stated as follows:

“...the Company has insufficient assets to satisfy its liabilities and is therefore insolvent”.

[123] In that Report the JPLs state that the Company holds a mere 85 HKD (USD 10.83) in a bank account and just over USD \$125,000 in current accounts with Ruizhou and Zhouzhou. The Applicants say that when one bears in mind that the total liabilities of the Company is in the region of HKD 9,081,445,317.14, it plainly cannot be said that the Company is a solvent entity.

[124] The Applicants also refer to a combination of the following statements made in the evidence in opposition to the JL Application, as well as financial documentation supplied, with regard to the Company's financial status:

- (1) "The Company itself is insolvent by design."-Wang, para 14.
- (2) The Company should be viewed as part of a group of companies, including itself, Carton, Happy Magic, Shun Hong and the PRC Project Company (together, the "**Project Group**") and, on that basis, the Company is "*practically speaking, not insolvent, and should not be deemed to be unable to pay its debts*"-Wang.
- (3) The consolidated statement exhibited to Wang 1 ("**the Consolidated Statement**") is said by the Company to show its financial position in the context of the Project Group as at 31 December 2021, and to demonstrate its solvency.
- (4) The Company says that it is "*willing and able to settle the Loan... if it is found that the Loan is due and payable*".
- (5) Tam 2 highlighted what the Applicants said to be deficiencies in the Consolidated Statement. Exhibited to Wang 2, the responsive affirmation, was a financial statement dated 30 June 2022 ("**the June 2022 Financial Statement**"). Ms. Wang does not actually address the document in her affirmation itself, nor does she state that the June 22 Financial Statement demonstrates that the Company is solvent. She simply identifies and exhibits it in the context of explaining payments made by Yuzhou on the Company's behalf.
- (6) At paragraph 25 of Wang 4, it is stated that : "*The Company is balance sheet solvent in the context of the Project Group*" and "*while the Company*

itself does not hold substantial assets, its interests in its subsidiaries cause it to be balance sheet solvent, and it is able to pay its debts with the support of the Project Group.”

- (7) Although it is the Company that commissioned from FTI what has been termed a “valuation report” (“**the FTI Report**”), it is Yuzhou that exhibited it to Kwok 1. By the FTI Report, Yuzhou states that “*if the Company were wound up immediately, it is anticipated that there would be a severe negative impact resulting in an extremely low recovery, and potentially, nil value, to unsecured creditors. By comparison and given that the assets [of the Company] are critical to the restructuring of Yuzhou, implementing a restructuring proposal of Yuzhou will be beneficial to [the Company’s] creditors as a whole, including the Applicants.*”

[125] The Applicants respond to the Solvency Evidence in Tam 2 and 3, paragraphs 19-21 (the Consolidated Statement), and paragraphs 52-53 (the June 2022 Financial Statement), and paragraphs 55-56, 63-66 and 71 (the FTI Report), respectively. Having reviewed the evidence, I have come to the conclusion that the Company is insolvent on the basis that the Debt has fallen due and it is unable to pay it. It is also very likely insolvent on the basis that its liabilities exceed its assets. The Solvency Evidence, rather than rebutting the assumption that arises when a Company is unable to pay its debts as they fall due, reinforces it.

(6) Summary as to dispute and cross-claim

[126] I am of the view, having looked at the evidence closely, that there is no genuine or substantial dispute as to the Debt. There are merely fanciful grounds raised for disputing it. I base that conclusion upon multiple factors, including the late raising of the allegations, the Company’s prior conduct, the chronology of events, the Company’s likely insolvent state as a motive, and indeed, the nature of the dispute itself, being concerned with an area of the law, i.e., common mistake in which there is a paucity of such cases. The Company has not satisfied me that it has a

substantial dispute based on either of the grounds relied upon, i.e. common mistake or frustration.

[127] There are no grounds shown impugning, in any substantial manner, the Debt and the validity of its underlying documents. In the instant case, the dispute and the cross-claim appear to be tenuous and shaky. In a nutshell, what has happened here is that the Company has engaged in conduct and delay that do not accord with commercial sense. It is relying on the seldom successful plea of common mistake, and on frustration, to disturb transactions entered into by sophisticated parties and on top of it, they do so on a flimsy basis. When those factors are taken together, I remain wholly unsatisfied that there is any genuine or substantial dispute or cross-claim.

[128] It is true that the parties have sought to put an abundance of evidence and material before me. However, as Oliver LJ reasoned at page 576 I of **Re Claybridge Shipping SA**²¹

“Nobody would say that the evidence in this case was jejune. It extends to nine thick volumes of affidavits and exhibits. But the credibility of evidence does not depend upon the number of kilograms achieved on either side, and the two points which ultimately emerge are quite short ones.”

[129] It has also been submitted on behalf of the Company and of Zhou Ying that the allegations of fraud raised by the Applicants show that there are clearly disputed facts on the evidence which in principle are not open for determination by this Court on a winding up application. However, I accept the Applicants’ submission that there is a distinction between an application being advanced to appoint liquidators based upon a case of fraudulent conspiracy, and the instant case where the Applicants rely upon a simple loan debt. I accept the Applicants’ argument that the fraud aspects of the case were raised in support of the *ex parte* application for the appointment of the JPLs and they do not have the effect of cloaking the Company’s alleged dispute with substance.

²¹[1997] 1 BCLC 572.

[130] Further, and in any event, the Company does not dispute that it received the funds, pursuant to the Transaction Documents, in an amount exceeding USD 300 million. Therefore, whether those funds are considered repayable in accordance with the terms of the VLA and SPA, or whether the debt is to be treated as a bare loan repayable on demand, I agree with Mr. Francis that the same analysis applies. The Company does not claim that the funds were advanced to it by way of gift. The Company is indebted to the Applicants in an amount which it is unable to repay.

(7) Adjournment and Restructuring Proposals

[131] Regarding the submissions by Yuzhou, there does seem to have been, what can be termed at the very least, a fundamental misconception in the evidence presented by Yuzhou coming into this hearing. It indicated that the Company was part of its group, and that it retained an economic interest in the Company. However, that was not so, and it is very difficult to comprehend how it would not have been known to not be accurate. It may once have been the case that the Company was part of the Yuzhou Group, but it is clear that that was not so at the time that the affirmation Kwok 1 was done. I have to say that it is difficult to see how one could be mistaken about this if the Zhou Ying transactions were genuine. It seems clear from Kwok 1 that at the date of that affirmation Yuzhou was not treating the Zhou Ying transactions as being of any validity or effect. However, that was what the Court was told, and it is against that faulty backdrop that a suggestion was given that there was a viable proposal for Yuzhou to be restructured. That is troubling.

[132] The Court has also noted that the same affiant, Ms. Dong has led evidence on behalf of both the Company and Zhou Ying. Further, I accept as entirely logical and pertinent Counsel for the Applicants' observation that Zhou Ying's claim that it is the sole registered shareholder of the Company is counter to Yuzhou's position that it has a financial interest in the Company.

- [133] There has been no attempt to explain or account for these glaring inaccuracies, and I agree with the Applicants that it points away from giving any credence to what proposals Yuzhou now puts forward or the opposition to the JL Application. The first mention of a proposed restructuring for the Company, as opposed to Yuzhou, was in the SKA filed for this hearing. I find that there is no evidence to support what might allegedly be achieved by a restructuring. It plainly is not enough to simply suggest that something could be achieved; the FTI Report, put in evidence by Yuzhou shows that on both the liquidation and going concern basis nothing is “coming up” to the Company.
- [134] It is plain that there are cases where the Court seriously considers suggestions that a winding up application be adjourned to allow restructuring to be pursued. This invariably requires the support and buy-in of the Company. I accept Mr. Francis’ argument that if a company does not indicate that it supports or is desirous of restructuring, the Court is not going to allow the proposal to be pursued.
- [135] One of Mr. Ferrer’s submissions was that if there is a liquidation certain creditors of the PRC Project Company might be worse off. However, this Court is not here concerned with those creditors; this application deals with and concerns the creditors of the Company. I accept that it is in the interests of the creditors of the BVI Company that there be a proper and speedy investigation of alleged wrongdoings. This state of affairs demonstrates why there should be no adjournment to pursue an unparticularized proposal which will confer no readily apparent financial benefit on any stakeholder in the Company.
- [136] In the recent *ex tempore* decision of Doyle J, sitting in the Grand Court of the Cayman Islands in ***In the Matter of Shinshun Holdings (Group) Co. Ltd***²² an application by a Company seeking a three month adjournment of a winding up petition was dismissed. The application was dismissed upon a number of bases,

²² FSD 192 of 2022 (delivered 27th January 2022).

including that the Company had had a restructuring plan in the pipeline for nearly a year, and thus had had ample time to finalise any proposed restructuring. The Court did not accept that there was a real prospect of the debt being paid within a reasonable time and did not accept that the Company had demonstrated a serious commitment to bringing forward credible restructuring proposals for the benefit of all creditors in the near future.

- [137] In my judgment, the Yuzhou proposals similarly do not demonstrate credible committed proposals upon which this Court could peg an adjournment for potential restructuring purposes. Indeed, there really is no properly particularized Restructuring Proposal before the Court.

(8) Treatment of the views of the Majority of Creditors

- [138] Mr. Ferrer submitted that the view of the majority of the Company's creditors both in number and value, that is, Yuzhou and Zhou Ying, should carry significant weight with the Court.

- [139] It is common ground that even in an unexceptional case it is not simply a matter of numbers or percentages or a head-counting process. The majority creditors must show their reasons for the stance that they take in opposing a winding up Petition or in seeking an adjournment.

- [140] As stated by Willmer L.J, in *In re P & J Macrae, Ltd*, at page 235:

"It seems to me that, before a majority of creditors can claim to override the wishes of the minority, they must at least show some good reason for their attitude. ... I have no doubt that where a majority of creditors do for good reason oppose a petition for winding up of a company, then, prima facie, they are entitled reasonably to expect that their wishes will prevail, in the absence of proof by the petitioning creditor of special circumstances rendering a winding-up order desirable in spite of their opposition. But I am certainly not prepared to accept the view that the bare fact of opposing creditors being in a majority is of itself sufficient, still less conclusive. So to hold would be to leave the court with virtually no judicial function to

perform, and to take away from it the discretion which the words of the Act plainly confer.”

[141] In the ***Pacific Andes*** case, Davis-White QC (Ag) at paragraphs 39 and 40, pointed out that on a creditor’s winding up application on the basis that the Company is unable to pay its debts as and when they fall due, and the application is not otherwise opposed by other creditors, it cannot be said that there are no circumstances at all in which the court might refuse to make a winding up order. However, such cases are likely to be very rare and wholly exceptional. On the other hand, where there are opposing creditors, the landscape changes because winding up proceedings are a class remedy.

[142] At paragraph [41] (3) it was stated:

“There may be differences in the quality of the creditors. The Court may be suspicious of opposing creditors and the motives actuating them. In such a case the reason for their opposition may be required to be taken into account and if not provided may be required to be given.”

[143] As regards the submissions about the majority creditors, and their views, I accept that in ordinary cases where such creditors are not accused of conspiring or being dishonest as alleged in the instant case, where the majority of creditors oppose the liquidation, their views would be considered and might very well determine the right course to take. However, in my view the majority creditors in the instant case have not put forward good or credible reasons for opposing the JL Application.

Discretion of the Court

[144] In my judgment, neither Yuzhou nor Zhou Ying have demonstrated by way of evidence good or sufficient reasons to move the Court to adjourn the JL Application. Their respective positions before the Court have been, at the very

least, muddled, if not murky and in the circumstances I refuse the application by Yuzhou for an adjournment.

Disposition

[145] I am satisfied that the Debt is due and outstanding. The Company has not discharged the onus of showing that the Debt is disputed on genuine and substantial grounds. In my view the basis advanced for the alleged dispute is flimsy. The Cross-Claim is also far below the threshold; it is fanciful. There is no real question as to whether the Company is liable to pay the debt; it is.

[146] In all of the circumstances of this case, I am not minded to adjourn the JL Application as requested by Yuzhou. I am satisfied that the Applicants are entitled to the relief sought in the JL Application.

[147] There will be another hearing to deal with consequential matters arising and this has been fixed for a date convenient to the parties and to the Court, on 31 May 2023 at 10:00 a.m. for two hours.

[148] I wish to express my gratitude to all Counsel and to those who played a role in instructing. The submissions were well-thought out and of great assistance to the Court.

Ingrid Mangatal (Ag)
High Court Judge

By the Court

Registrar