

**THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC(COM) 2022/0217

**IN THE MATTER OF WIN BUSINESS ENERGY (CAOFEIDIAN) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:

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

Applicants

-and-

WIN BUSINESS ENERGY (CAOFEIDIAN) LIMITED

Respondent

Appearances:

Mr Merrick Ricardo Watson and Mr Timothy de Swardt of Kobre & Kim (BVI) LP for the Applicants
Mr Phillip Riches KC and with him Ms Olga Osadchaya of Harneys for the Respondent

2022: December 14, 23

2023: March 21

JUDGMENT

[1] **SMALL DAVIS, J [Ag.]**: The Applicants seek the winding up of Win Business Energy (Caofeidian) Limited (“the Company”) through the appointment of liquidators. On 23 December 2022 I gave an oral judgment with reasons. An order of the same date setting out the court’s decision was entered by the Registry on 6 January 2023. This is the written judgment.

[2] The Originating Application sets out the ground: the Company is unable to pay its debts and is insolvent pursuant to section 8 (1)(a) and (c) of the Insolvency Act (“the Act”) which define “insolvency” as where a company (a) fails to comply with the requirements of a statutory demand

that has not been set aside; and (c) the value of the company's liabilities exceeds its assets or the company is unable to pay its debts as they fall due.

- [3] The Applicants' case is that the Company is indebted to the Applicants in a sum in excess of US\$7 million. The debt arises from LCIA arbitration awards, and specifically the Final Award on Quantum dated 13 October 2021 in the sum of US\$6,185,886.85 in fees and expenses and arbitration costs of £618,249.91 together with post-award interest at the LIBOR US Dollar 3-month rate on 13 November 2021 plus an uplift of 2% on all amounts due and unpaid from 13 November 2021 until the date of full payment ("the Debt").
- [4] The facts are not substantially in dispute. The Applicants and the Company were parties (along with the Company's parent company) to a Stock Purchase Agreement for acquisition of the shares of a Bahamian company Win Business Energy Caofeidian Limited (formerly known as Kerr-McGee China Petroleum Ltd.) ("KMCPL"). The transaction resulted in tax obligations to the People's Republic of China tax authority, Tianjin Offshore Oil Tax Bureau ("TOOTB"). The Applicants agreed to be responsible for the tax liability of the ordinary business operations of KMCPL up to closing as well as the corporate income tax and business taxes arising from the sale of KMCPL. The Company and KMCPL agreed to be responsible for transfer taxes and VAT. TOOTB issued a series of tax invoices to KMCPL and the First Applicant and set a deadline of 30 September 2015 for payment.
- [5] There was a dispute over which party was liable for the payment of the taxes as notified by the TOOTB in respect of the period prior to completion and pursuant to the transaction itself. The Company and KMCPL initiated arbitration proceedings before the LCIA on 8 June 2015 seeking an award that the Applicants pay the taxes due and owing on behalf of KMCPL. The first Applicant made a payment of US\$193.8 million on 7 December 2015 to the TOOTB on behalf of KMCPL on a without prejudice basis. The Applicants sought to recoup the sums paid for KMCPL's tax liability in further arbitration proceedings.
- [6] The Final Arbitration Award dated 13 October 2021 directed that:
- (a) KMCPL to forthwith pay to the first Applicant:
 - (i) The tax benefit sum of US\$142,943,168;
 - (ii) pre-award interest thereon calculated at \$20,845,860.39 as at 13 October 2021;

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

(b) The Company and KMCPL do jointly and severally pay to the Applicants the Debt, as defined above.

[7] Although it had obtained an extension of time to do so, the Company has not challenged to the Final Award. The Company has been time barred from challenging the Final Award since 24 November 2021.

[8] The Applicants served a Statutory Demand on the Company on 2 March 2022 for the Debt. The Company applied to set aside the statutory demand (“the Set Aside Application”) and after a contested hearing the Company’s application was dismissed, the learned judge holding that there was no bona fide and substantial dispute as to the Debt. The court also authorised the Applicants to proceed with filing a liquidation application and awarded costs against the Company. The Company has appealed the order dismissing the application to set aside the statutory demand and that appeal is pending.

[9] The Company opposed the application for the appointment of liquidators on the ground that it is not insolvent and that there is a bona fide dispute as to the validity of the enforcement of the “Alleged Debt” in the jurisdiction. The Company’s position is that the application ought to be stayed pending determination of the appeal in the exercise of the court’s discretion pursuant to section 167 (1)(c) of the Insolvency Act. Alternatively, the court was invited to exercise its discretion under section 167 (1)(b) of the Act and dismiss the Application on public policy grounds: the Debt created by the Awards should not be given recognition and enforced in the Virgin Islands as the Applicants are seeking to enforce a tax liability to TOOTB in breach of the revenue rule.

[10] There is no challenge to the Applicants’ compliance with the statutory formalities as set out in the Insolvency Act and the Insolvency Rules as to service and advertisement of the Originating Application, the filing of the proposed liquidators’ consents to act, statements as to their eligibility to act and the approval of the Financial Services Commission for the overseas based proposed liquidator.

The Court of Appeal Proceedings

- [11] The grounds of appeal as set out in the Notice of Appeal filed 23 June 2022 are, inter alia, that the judge erred in finding that there is no bona fide substantial dispute as to whether the Debt is due and owing by:
- (a) applying the wrong test to the question of whether the Debt asserted in the demand amounts to vindication of foreign revenue law;
 - (b) failing to properly consider or give sufficient weight to the Company's argument that if the principal amount is unenforceable on public policy grounds, awards like costs (which is what the Debt is), which are parasitic to the principal claim should also be unenforceable;
 - (c) failing to properly consider the jurisdiction issue arising out of the fact that KMCPL was not a party to the arbitration agreement but agreed to join for the limited purpose of bringing a claim but not for the purpose of defending the separate claim made against it. The judge proceeded on the mistaken basis that KMCPL's agreed participation in one limited respect was sufficient to dispose of the jurisdiction issue in its entirety.
- [12] The Company made an application for a stay of execution of the order and an application for leave to adduce further evidence. The Applicants made an application to strike out the Notice of Appeal on the ground that no leave to appeal had been sought, thus rendering the Notice of Appeal null and void. The Court of Appeal dismissed the Applicants' strike out application with costs and dismissed the Company's applications for stay of execution and for fresh evidence.

Should the Application be Dismissed or Stayed Pending the Appeal?

- [13] The Company argued that notwithstanding the dismissal of the Set Aside Application, there remains a bona fide dispute as to the enforceability of the Debt in the jurisdiction which also raises an important technical point of policy which ought to be allowed to be determined by the Court of Appeal before any application to appoint liquidator is entertained. Mr Riches KC says that this court simply cannot decide whether there has been a failure to comply with the requirements of a statutory demand that has not been set aside, and thus whether the Company is insolvent, until the Court of Appeal determines the question on appeal of whether there is a bona fide dispute as to whether the Debt is due at all. Mr Riches says this court cannot decide in the Applicants' favour because the point is arguable, and it falls to the Court of Appeal to decide. He submits that the application ought

to be stayed as the Court of Appeal is entitled to rule on the enforceability of a foreign tax debt in this jurisdiction, which is the substratum of the Debt.

Effect of Pending Appeal

- [14] Does the pending appeal mean that I cannot determine the application for appointment of liquidators because the question of whether there is a bona fide dispute of the Debt on substantial grounds has not been finally determined?

- [15] Mr Riches KC submitted that the existence of the appeal makes the stay necessary because (a) there is a real prospect that the appeal will succeed and the Company will suffer irreparable harm without a stay, in circumstances where such harm may be entirely unjustified should the appeal succeed and (b) there is an important question of public policy which this court should wait for the Court of Appeal to decide first.

- [16] As a secondary argument, Mr Riches said that the appeal will also consider the refusal of the application to adjourn the hearing of the Set Aside Application to allow the Company to put in additional evidence. If the hearing ought to have been adjourned, then there cannot have been a failure to comply with a statutory demand. Therefore, the winding up application is premature and cannot be properly determined until after the determination of the appeal.

- [17] The Company sought to stay the order permitting the Applicants to pursue an application for the appointment of the liquidators. The Court of Appeal refused the stay on two bases. First, that the court would not generally grant a stay of a declaratory order, which was the nature of the orders under appeal. Second, that the grounds of appeal are not strong and only barely arguable and there are no other compelling circumstances that favour a stay.

- [18] Mr Riches submitted that the Court of Appeal's approach to the stay application is different to how this court should approach the consideration of the submission that the application for the appointment of liquidators should be stayed pending the appeal.

- [19] I appreciate that I am to consider the stay myself and that I am not bound by the Court of Appeal's refusal of a stay.

- [20] Mr Riches KC did not argue the merits of the appeal before me beyond his statement that there is a real prospect of succeeding based on Webster JA concluding that the grounds of appeal are arguable. Given that approach, I am within my discretion to consider Webster JA's judgment on the prospects of the appeal and the balance of harm without necessarily binding myself to it. The public policy issue of the indirect enforcement of a foreign tax liability is one of the grounds of appeal and was considered by the court in determining the stay application.
- [21] I approach Mr Riches' submissions on behalf of the Company that the winding up application should be stayed pending appeal by applying the principles as set out in **C-Mobile Services Ltd v Huawei Technologies Co Ltd**¹ guiding the court's consideration on an application for a stay of proceedings pending appeal:
- (a) A stay is the exception rather than the general rule;
 - (b) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;
 - (c) In the exercise of discretion, the court must apply a balance of harm test in which the likely prejudice to the successful party must be carefully considered;
 - (d) The prospects of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).
- [22] On balance of harm, the Company alleges that the very appointment of liquidators will be catastrophic in that "it would most likely be regarded as a change of control"² in China, as a matter of Chinese law. On the Applicants' side, there is harm in that the Debt has been outstanding for a considerable period. There is a real potential for harm on both sides.
- [23] In considering the balance of harm and whether a refusal to grant a stay would render the appeal nugatory, Webster JA looked at the Company's argument that the appointment of liquidators would have a catastrophic effect on the Company and on KMCPL, causing massive ruinous losses. At paragraph 46, Webster JA's assessment was that the Company had not produced cogent evidence by way of expert evidence of the laws of the PRC governing its contractual documents and the

¹ BVIHCPMAP 2014/0017, 15 September 2015.

² Hearing Bundle C, Affidavit of Chiang Chi Kin Stephen, paragraph 46.

likelihood that the appointment of liquidators would constitute a change of control of the Company and potentially trigger takeover of KMCPL's oil contracts said to be worth more than US\$1 billion.

- [24] The general rule is that a stay will not be granted pending an appeal. In **Leicester Circuits Ltd v Coates Brothers plc**³, the court set out various guidelines and said that where the justice of letting the general rule take effect is in doubt, the answer may well depend on the perceived strength of the appeal.
- [25] On the prospects of the appeal, Webster JA said "The grounds of appeal barely meet the threshold of being "arguable"". In assessing the two main grounds of appeal, Webster JA described it as a difficult task to persuade an appellate court to interfere with the judge's rejection of the contention that the statutory demand purports to enforce directly or indirectly a foreign tax liability and pointed out that the Company had not provided any legal authority which suggests that a claim for reimbursement of monies paid to discharge the foreign person's tax liability is an indirect enforcement of a foreign tax liability⁴.
- [26] The Company sought permission from the Court of Appeal to adduce further evidence by way of two letters however the court ruled that the two letters do not meet the *Ladd v Marshall* test.⁵ Importantly, as regards the consideration of whether they would have had an impact on the consideration of the purported substantial dispute, the letters do not assert any claim by the tax authorities. Webster JA came to the same conclusion as Jack J that the tax authorities have no interest and the matter is entirely a private one between contracting parties.
- [27] I am guided by the succinct summarization in **Nam Tai Properties v IsZo Capital LP**⁶ of how the prospects of success of the appeal is to be factored into my consideration:
- "If there are strong grounds of appeal or a strong likelihood of success the court should seriously consider whether the stay should be granted and will usually grant a stay. Conversely, if the grounds of appeal or likelihood of success are only arguable the court should not grant a stay unless there are other circumstances that are compelling such as the appeal being rendered nugatory if the stay is not granted."

³ [2002] EWCA Civ 474.

⁴ Para [48].

⁵ [1954] 3 All ER 745.

⁶ BVIHCMAP 2021/0010, 8 November 2021 at paragraph [16].

[28] All the courts that have considered the Company's argument that the Awards breach the revenue rule have rejected it. This court also rejects it. The tax payable had been determined by TOOTB and was paid by the Applicants. Thereafter, the tax authority confirmed a tax benefit. The Tribunal assessed the value of the tax benefit on its construction of the Sale and Purchase Agreement. The Award is restitutionary: reimbursement to the Applicants of the equivalent sums that they had paid pending resolution of the arbitration of who should bear the liability. The fees and costs incurred by the Applicants follow from their success in the arbitration.

[29] Therefore, this is not a case where a stay is clearly appropriate because there is a strong likelihood of the appeal succeeding.

[30] To justify a stay, the Company should also show additional reasons. As Blenman JA said in **C Mobile Services Limited v Huawei Technologies Co Limited**⁷:

"It is therefore necessary for C-Mobile to provide additional reasons to demonstrate why a stay is justified. It cannot be good enough for C-Mobile to rely on the bald assertion that the risk of C-Mobile being placed in liquidation prior to the hearing of the appeal is, in itself, evidence of the appeal being rendered nugatory. This would provide a means for an appellant facing the prospect of liquidation to circumvent CPR 62.19 and invoke a stay pending any appeal. There is a risk this would become a debtor's charter to frustrate liquidation applications."

Has the Company made out a prima facie case that there is a substantial dispute?

[31] The appointment of a liquidator is discretionary. The guiding principles and the law governing the making of a winding up order is succinctly stated in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**⁸. The court will order a winding up for failure to pay a due and undisputed debt over the statutory limit. The court will not make a winding up order where a debt is disputed on substantial grounds; the dispute must be genuine in both a subjective and objective sense. 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. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself in an action or by some other proceeding.

⁷ Bvihcmap2014/0017, 2 October 2014 at [32].

⁸ BVIHAP, Civil Appeal No 10 of 2002, 18 June 2003.

- [32] The Company had been granted permission to amend the Set Aside Application. The new ground of dispute alleged that the Awards directly or indirectly purport to enforce PRC tax law and are not entitled to recognition or enforcement in the BVI. The issue of whether the Debt (and the underlying Awards) is an indirect enforcement of a foreign tax liability in breach of the revenue rule was squarely before Jack J.
- [33] I undertook a careful review of the judgment delivered on the Set Aside Application. The Company invoked the revenue rule in this way: that the Debt due under the Awards as well as the Statutory Demand arises out of a tax liability to the PRC tax authorities. The Awards concluded that the tax liability was that of KMCPL and the First Applicant was contractually obliged to pay only part of it. Whereas the First Applicant had paid the full amount, the Tribunal concluded that the difference between the gross and net amount due to the PRC tax authorities, being the value of the tax benefit KMCPL had received, had been paid by the First Applicant on behalf of KMCPL who was obliged to repay it.
- [34] The most modern authoritative statement of the revenue rule or the foreign tax principle is set out in **Webb v Webb**⁹. It is simply that the courts will not collect taxes of a foreign state for the benefit of the sovereign of that foreign state because the enforcement of a claim for taxes is an extension of the sovereign power which imposed the taxes and the assertion of sovereign authority by one state within the territory of another is contrary to all concepts of independent sovereignties. The pith of the rule is that a court will not entertain an action by a foreign state directly or indirectly to enforce that foreign state's tax laws.
- [35] The Set Aside Application was determined on the fact that the Applicants paid the liability on behalf of KMCPL and the Company and seeks reimbursement. Jack J found that the Chinese tax authorities were paid in full many years ago and all that is in dispute is which of the three private companies as between themselves is liable to reimburse the other private company or companies. In short, the issue is entirely a private matter between the parties and has nothing to do with the tax authorities which have no interest in the proceedings or the arbitration which preceded them. There was no question of the sovereign nation of PRC enforcing its tax laws.

⁹ [2020] UKPC 22.

[36] The Company's evidence in opposition to the application is set out in the Affidavit of Chiang Chi Kin Stephen. The argument on behalf of the Company is that it is not insolvent and that the statutory demand not being set aside is merely a presumption of insolvency. Citing the dicta of George-Creque JA (as she then was) in **Trade and Commerce Bank v Island Point Properties SA and another**¹⁰ that the failure of a company to challenge a statutory demand does not deprive the court hearing an application for a winding up order from reviewing the statutory demand and that section 8(1)(a) cannot be properly construed to render a statutory demand that is not set aside impregnable or wholly unassailable with the inevitable result that a winding up must follow is wrong as a matter of law and principle, Mr Riches KC submitted that the court is entitled to consider the Company's opposition to the originating application de novo and to exercise its wide discretion in accordance with the circumstances before it.

[37] Mr Riches KC argued that the Company was not precluded from raising a dispute of the Debt on the hearing of the winding up application because this court would be exercising a different power because the test under section 157 is different. I have kept in mind the words of Pereira CJ in **C-Mobile Services Ltd v Huawei Technologies Co Ltd**¹¹:

"[T]he company may seek to set aside the statutory demand either by showing that the debt is bona fide disputed on substantial grounds (section 157(1) IA) or ask the court to exercise its discretion (section 157(2) IA) and set aside the statutory demand by showing that to maintain it would cause substantial injustice. In my view, evidence of a referral to arbitration would be a factor to be considered in the exercise of such discretion."

[38] In **Trade and Commerce Bank**, the court was there dealing with a case where the company had not applied to set aside the statutory demand and was raising a dispute of the debt at the hearing of the application for a winding up order. That must be contrasted with the present situation where there has been an unsuccessful set aside application.

[39] Paragraph 21 of the judgment in **Trade and Commerce Bank** can be used to answer the submission being made on behalf of the Company:

"Lest I be misunderstood, I hasten to make clear that I am in total agreement with the proposition that where a company has been unsuccessful in setting aside a statutory demand having made

¹⁰ BVIHAP Civil Appeal No. 12 of 2009, 13 August 2010.

¹¹ BVIHMAP 2014/0017, 15 September 2015.

a timely application to do so, the company may not seek to resist the application for appointment of a liquidator on the same grounds relied on for setting aside the demand, absent good and substantial reasons. This simply accords with the well settled principles of estoppel.”

- [40] Mr Riches KC submitted that the Company was arguing a different issue, that being the different power of the court to be exercised on a winding up application. I respectfully disagree. The dispute being argued before me is the same as argued on the Set Aside application. The exercise of my discretion on this application will be in the context of the same dispute being raised. The discretion is different, but the dispute is the same.
- [41] The Company raised its dispute to the Debt and the specific dispute has been determined. As was said in **Everbright Sun Hung Kai Company Limited v Walton Enterprises Limited**¹², where the court has considered an application to set aside a statutory demand and refused it, the court will not revisit those issues absent special circumstances.
- [42] Mr Riches KC also argued that the Webster JA’s ruling that the appeal is arguable ties my hands on the substantial dispute point and that I cannot conclude that there is no bona fide dispute on substantial grounds because it is still an open issue.
- [43] Mr Watson relied on **Harvey v Dunbar Assets plc**¹³ to support the point that it is not open to the Company to reargue the failed revenue rule or bona fide dispute points, those points having failed to meet the test to set aside the statutory demand. **Harvey v Dunbar** concerned a second statutory demand. The first statutory demand had been set aside. The debtor succeeded on an appeal of one ground of dispute. When the second demand was issued, the debtor sought to argue a point of dispute which he had previously unsuccessfully argued in the earlier demand. The court held, “absent good reasons, special new, changed or exceptional circumstances, it is not open to a debtor to challenge a second statutory demand on grounds that have been previously rejected on a challenge to a first statutory demand, issued and served in relation to the same debt... that such an approach accorded with the public interest in avoiding wasting court resources on repeat litigation on the same point or similar material.”

¹² BVIHC (COM) 2020/0022, 9 April 2020.

¹³ [2015] EWHC 3355 (Ch).

[44] Mr Watson reinforced the point by citing **Virgin Atlantic Airways Ltd. V Zodiac Seats UK Ltd**¹⁴ in which a very strong panel of the UK Supreme Court addressed the principle of res judicata very comprehensively and the following extract from the ratio distilled in the headnote is to the point:

“...the purpose of the principle of res judicata is to support the good administration of justice in the interest of the public and the parties by preventing abusive and duplicative litigation; that the principle operated in the form of a cause of action estoppel, to prevent a cause of action being raised in subsequent proceedings which was identical to that raised in earlier proceedings between the same parties.”

[45] The Court of Appeal, being seized of the pending appeal and dealing with an application for a stay, made it clear at paragraph 20 of Webster JA’s judgment that the Company can defend any of the grounds set out in an application for the appointment of liquidators except for any ground that has been resolved in the Set Aside Application: “In this case, the issues of disputed debt and the form of the statutory demand were canvassed by the Company in the Set Aside Application and resolved by the Judge in favour of the Respondents. Any attempt by the Company to resurrect them in the winding up proceedings would be met by a plea of issue estoppel.”

[46] A cause of action estoppel is absolute as to points that have been decided in earlier proceedings between the same parties on the same issue. The Company’s dispute of the debt on the grounds raised before me has been determined by a court of equal jurisdiction. That issue cannot be raised before me. Although the decision is the subject of an appeal, at common law a judgment is conclusive unless and until it is overturned on appeal. A court may exercise its discretion to stay the proceedings pending the determination of the appeal. In this case I have taken into account that the Court of Appeal’s assessment of the appeal, specifically the prospects of success as well as the impact on the parties if a stay is not granted. I have not heard anything different or additional (even after Webster JA’s comment on the absence of evidence, including expert evidence) to persuade me to a view that there is a substantial dispute to the Debt or that a stay should be granted.

Should Liquidators be appointed?

[47] The Applicants have satisfied the burden of proving insolvency by the unpaid statutory demand. The burden then shifts to the Company to show that it is in fact solvent.

¹⁴ [2013] 3 WLR 299.

- [48] The Company says that it is solvent and can pay the sum but has not paid because the Debt is disputed. There is nothing before the Court to support that assertion. No documentary evidence was provided. Mr Watson invited me to draw an adverse inference from the Company's failure to adduce documentary evidence of its solvency. The Company points to having paid US\$100,000 as security for the costs of the appeal, satisfying a costs order in Hong Kong and offering to put up part of the Debt as a condition for a stay as evidence of its solvency. The Company submitted that the fact that it failed to pay the security ordered in the enforcement proceedings in Hong Kong is irrelevant. With respect, I disagree. On 9 March 2022 the Applicants had been given leave to enforce the Awards in Hong Kong. On 17 October 2022 the High Court of the Hong Kong Special Administrative Region Court of First Instance ordered the Company to pay 40% of the Awards (including the Debt) as security for its application to set aside the enforcement order, plus costs of HK\$750,000 on its set aside application.¹⁵ The Company did not pay the security. This does not strike me as consistent with the Company being solvent.
- [49] Leave to appeal the orders for security was refused on the basis that the intended appeal did not have reasonable prospects of success.¹⁶ On 22 November 2022 the Hong Kong SAR court entered a final recognition judgment in the terms of the Awards.¹⁷ The judgment remains unpaid. In each of these proceedings the Company argued that the Awards are invalid because they constitute direct or indirect enforcement of tax and/or revenue laws of the PRC and enforcement of the Awards would be contrary to public policy. In each instance the Hong Kong court rejected the Company's argument.
- [50] To my thinking, the failure to pay the security to pursue the application to set aside the enforcement order is more of a signpost of inability to satisfy the judgment. The probability is that a solvent company would pay the security to ensure that it could make its case to avoid an unjustifiable enforcement. As a result of the failure to meet the security in the Hong Kong court, the Company has lost the right to pursue a challenge against the Awards. And as stated above, the Applicants have been granted permission to enforce them.

¹⁵ Hearing Bundle C, Exhibit IWHF-2, pages 1-16.

¹⁶ Hearing Bundle C, Exhibit IWHF-2, pages 17-25.

¹⁷ Hearing Bundle C, Exhibit IWHF-2, pages 26-28.

- [51] Per section 162(1)(a) the court may appoint a liquidator if the Company is insolvent. Consequent upon the failure of the application to set aside the statutory demand, the Company is deemed to be insolvent. Section 8 (1)(a) states a company is insolvent if it fails to comply with the terms of a statutory demand that has not been set aside under section 157. The Applicants' statutory demand had not been set aside. Consequently, the Company is insolvent.
- [52] The Company has not rebutted the presumption of insolvency by producing even a bare minimum of financial information. All the facts point to its insolvency.
- [53] The Company also opposed the application to wind up the Company on the just and equitable ground on the basis that the central question in dispute is underpinned by a legal question regarding the public policy of the British Virgin Islands, and further, that there must be consideration of the harm that would be caused to the Company should the order be made as the effect would be catastrophic, causing damage far in excess of the Debt allegedly due. It would be catastrophic because the fact of the appointment of liquidators would be seen as a change of control. These are the same arguments advanced for a stay or dismissal of the application. There was no evidence whatever to support these arguments. The court's discretion cannot be exercise in a vacuum.
- [54] I accept that on the hearing of the application for the appointment of liquidators the court may consider whether to refuse to appoint a liquidator even where the applicant makes out the ground.
- [55] What is being pursued in the Statutory Demand is the fees, expenses and costs award. Even though the Debt is parasitic on the substantive award, the Company cannot now even challenge the enforcement of the Awards, not having put up the security as directed by the Hong Kong court, and which have been given recognition in Hong Kong as a final order.
- [56] Mr Riches KC submitted in the final alternative that if the court would not dismiss the application, then it could make an order on terms staying it on payment by the Company of a sum less than the Debt. Mr Riches KC suggested a sum equal to half the amount being claimed as the Debt, which could be put in place by 20 January 2023.
- [57] Having carefully considered the matter, I determine that it is just and equitable to make the order appointing liquidators over the Company, being satisfied that the Company is insolvent, and the

Company has not adduced any evidence upon which I can properly exercise any discretion not to make the order.

[58] I will accede to Mr. Watson's submission to stay the appointment of liquidators pending determination of the appeal on the terms that the Company pay the whole Debt into court or into escrow.

[59] For completeness, I will recite the key terms of the sealed order made by the court on 23 December 2022 after the oral delivery of judgment as follows:

1. Wesley Edwards, an insolvency practitioner and Senior Director of Alvarez & Marsal, of P.O. Box 3340, 2nd Floor, Palm Grove House, Road Town, Tortola, British Virgin Islands, and Yeung Mei Lee, Senior Director of Alvarez and Marsal Asia Limited, of Rooms 405-7,4/F, St. George's Building, 2 Ice House Street, Central, Hong Kong, SAR be appointed as joint and several liquidators of the Company ("the Liquidators").
2. The Liquidators shall have the powers necessary to carry out the functions and duties of a liquidator under the Insolvency Act 2003 ("the Act"), in the British Virgin Islands or elsewhere, including the powers specified in Schedule 2 of the Act.
3. The orders above shall be stayed to 20 January 2023 to enable the Respondent to pay into court or the Applicants' legal practitioner's trust account amount of the Debt.
4. If the Company pays the Debt, the order is stayed pending determination of the pending appeal.
5. Costs of the application to be paid by the Company to the Applicants, such costs to be taxed if not agreed within 21 days of the Applicants service of their Schedule of Costs on the Defendant's attorney-at-law.

[60] I wish to take this opportunity to thank learned Counsel for the parties for their detailed submissions and for their assistance to the court during this matter.

Tana'ania Small Davis, K.C.
Commercial Court Judge (Ag)

By the Court

Registrar