

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO.: BVIHC (COM) 2022//0053 AND BVIHC (COM) 2022/0065

BETWEEN:-

KENWORTH INDUSTRIAL LIMITED

Applicant

-v-

XIN GANG POWER INVESTMENTS LIMITED

Respondent

Appearances:

Mr. John Machel KC, with him Mr. James McDermott of Ogier, for Xin Gang Power Investments Ltd

Mr. Alex Hall Taylor KC, Mr. James Noble, Ms. Helen Wang and Ms. Yan Chng of Carey Olsen for Kenworth Industrial Ltd

2022 October 31
November 11

JUDGMENT

[1] **JACK, J [Ag.]**: This is an application by Xin Gang Power Investments Ltd (“the Company”) to stay proceedings brought by Kenworth Industrial Ltd (“Kenworth”) seeking the appointment of liquidators over the Company on the just and equitable ground. The Company says two issues should be referred to arbitration.

The facts

[2] I can take the facts from the Company’s skeleton as follows:

“5. The Company was incorporated on 14 February 2003 under the laws of the BVI for the purpose of holding the interest of Zhang Baoan (‘Mr. Zhang’) in Anhui Hefei United Power Generation Co Ltd (‘AHUP’). Since 21 February 2003 the directors of the Company have been Mr. Zhang and Tang Chi Chiu.

6. Kenworth is the registered holder of 19,600,000 (49%) out of the 40,000,000 shares of the Company. Kenworth was owned by Huatai Asia Investment Limited and Huang Jian (‘Mr. Huang’), but since 18 January 2022 appears to be owned by Mr. Huang and Helen Yang.

7. The remaining 51% of the Company’s shares were held by Profit Rich Holdings Limited (‘Profit Rich’). On or about 1 March 2021, Profit Rich transferred 400,000 of its shares to Xie Lijuan (‘Ms. Xie’), resulting in Profit Rich holding 50% and Ms. Xie holding 1% of the shares of the Company. Mr. Zhang is the 100% owner of Profit Rich.

8. The Company is the holding company of a Singapore-incorporated subsidiary, United Power Corporation (Singapore) Pte Ltd (‘UPC’). UPC holds 49% of the shares in AHUP, a company incorporated in the PRC. AHUP is the operating subsidiary in the group structure.

...

10. ...Mr. Huang asserts that he and Mr. Zhang agreed Mr. Huang would secure the financing necessary for the Company to purchase the shares in UPC, and, in exchange, Mr. Huang would receive a 50% stake in the Company if the transaction was completed and he was able to raise the capital for the purchase. Mr. Huang asserts that, by this time, Mr. Zhang had made numerous oral representations to him that the Company’s shares were fully paid-up, and that, in the circumstances, he entered into the agreement on the basis that the shares of the Company were all fully paid-up. He sets out the steps he says he took in relation to the financing...

11. ...[Mr. Huang] asserts... that oral representations were made that the shares were fully paid up.

12. Mr Huang’s account is in dispute.

13. Mr Zhang’s evidence is that he told Mr. Huang that the Company’s share capital was not paid up and that the only basis upon which he would cause a transfer of shares in the Company to Mr. Huang was that he would contribute capital to the Company when called upon to do so and so Mr. Zhang denies he ever represented to Mr. Huang that the share capital was paid up. Mr. Zhang has asked Mr. Huang on several occasions to pay up his share capital. Mr. Huang denies this.

14. ...Mr. Zhang explains that he thought that he had no alternative but to accede to Mr. Huang's demand in relation to the shares in the Company. Mr. Huang assured Mr. Zhang that he had the personal means to contribute capital to the Company, and so Mr. Zhang agreed that Mr. Huang could acquire shares in the Company on the condition that he would personally contribute capital to the Company when called upon to do so. Mr. Huang therefore knew that the shares were not paid up. Mr. Zhang specifically rejects the suggestion that he would allow Mr. Huang to acquire shares in the company for zero consideration in circumstances where Mr. Zhang had personally lent the Company US\$17.6 million to acquire a 33% stake in UPC and the Company would shortly thereafter expend US\$85.6 million to acquire the remaining 67% stake in UPC.

15. Mr. Zhang makes the point that Mr. Huang made no personal financial contribution to fund the Company's acquisition of shares in UPC. Nor was he successful in obtaining bank financing on behalf of the Company for the acquisitions. Mr. Huang's role in the acquisition was ultimately limited to his carrying out his duties as general manager of AHUP. During this time, Mr. Huang was remunerated by AHUP as an employee.

16. Mr. Zhang says he met with Mr. Huang at least once per year and each time he asked him to pay the outstanding share capital.

17. Mr. Zhang's evidence is that since around July or August 2019, when the Company began to seek new investment, he has been aware through the Company's due diligence process that the Company's records incorrectly state that its capital is fully paid up and that he took steps to correct the incorrect position. Mr. Huang denies that new investment was required or was the trigger for any investigation...

18. In 2020, the Company's external auditors completed the audit of the Company's accounts dated 2011 to 2016 and identified issues with the Company's register of members. On 19 October 2020 Kelvin Cheung & Co ('KCC'), a law firm in Hong Kong acting on behalf of the Company, wrote to Kenworth demanding payment for the unpaid share capital and did so again on 13 November 2020.

19. On 26 August 2021, the Company's board of directors ('the Board') resolved to appoint an accountant to review the Company's register of members. Upon review of the Company's records, Mr. David Nip, a Certified Public Accountant (Practising) in Hong Kong, took the view that the description that 'the whole of the 40,000,000 issued shares had been fully paid up (at the rate of USD1.00 per share), giving a total share capitalization of USD40,000,000.00' was inaccurate and was contrary to his finding that the share capital of the Company had never been fully paid up at all. Mr. Nip recommended that the register of members be rectified.

20. On 18 October 2021, upon receipt of Mr. Nip's Report, the Board resolved to rectify the Company's register of members and file the rectified register of members with the Register of Corporate Affairs.

21. On 25 October 2021 the Board unanimously resolved to amend the M&A. Mr. Zhang considers those amendments to be in the best interests of the Company. [I interject that this is in dispute.]

22. On 4 November 2021 the Board resolved to issue a 'Notice to All Members of the Company' ('Notice'), which set out proposed members' resolutions to endorse and confirm the amendments to the M&A. The Notice was sent by airmail to all shareholders in accordance with Article 98(a). A copy of the Notice was posted to Kenworth on 4 November 2021. Pursuant to Article 100, the Notice was deemed to have been served on the Applicant 10 days after it was posted. On or around 14 January 2022, Mr. Zhang and Ms. Xie gave their written consents to the proposed members resolutions. Although the Notice was issued in accordance with Article 98(a), Mr. Huang attested that the Notice did not reach Samoa until 29 November 2022 and the Applicant's agent did not receive the Notice until on or about 2 March 2022.

23. On 20 December 2021 KCC wrote on behalf of the Company to Kenworth's legal practitioners in Singapore, WongPartnership LLP ('WongPartnership'), and issued a Notice of Call for Payment of Share Capital requiring Kenworth to pay up the amount of US\$19,600,000.

24. On 28 December 2021 WongPartnership wrote to KCC stating that Kenworth had acquired its 19,600,000 shares in the Company on the basis that they were fully paid up and making a request for documents under section 100 of the **Business Companies Act 2004**¹ ('the Section 100 Request').

25. On 30 December 2021 KCC wrote stating that the shares were not paid up, and by a second letter issued a Notice of Proposed Forfeiture & Cancellation of 19,600,000 shares of the Company dated 30 December 2021.

26. Further correspondence took place...

28. On 13 January 2022 Mr. Zhang executed two Deeds of Set-Off pursuant to which:

¹ No 16 of 2004, Laws of the Territory of the Virgin Islands.

a. US\$20m due to him from the Company was offset against Profit Rich's obligation to pay outstanding share capital in respect of its 20,000,000 shares in the Company; and

b. US\$400,000 due to him from the Company was offset against Ms. Xie's obligation to pay outstanding share capital in respect of her 400,000 shares in the Company.

...

30. On 10 February 2022, the Board resolved to issue a further Notice of Forfeiture & Cancellation of Shares to Kenworth.

31. On 11 February 2022 KCC sent Carey Olsen a Notice of Forfeiture & Cancellation of Shares dated 11 February 2022 in which the Company demanded that Kenworth pay up the share capital of the 19,600,000 shares held in the Company at the rate of US\$1.00 per share within 14 days (i.e. by 25 February 2022) failing which the Company would forfeit and cancel Kenworth's shares without further notice. KCC sent a further letter on 14 February 2022 enclosing an extract of Board Resolutions of the Company dated 10 February 2022.

[3] There was some further correspondence which did not resolve matters.

Procedural

[4] On 11th March 2022, Kenworth applied to this Court for an urgent interim injunction against the Company and its directors etc from forfeiting the 19,600,000 shares held by Kenworth in the Company until the determination of an application by Kenworth to appoint liquidators over the Company on the just and equitable ground. This application for an injunction was given claim number BVIHC (COM) 2022/0053. The same day, the Company provided an undertaking not to forfeit Kenworth's shares pending the *inter partes* hearing of the injunction application. The *inter partes* hearing has since been adjourned to be heard at the same time as Kenworth's application for the appointment of liquidators.

[5] On 25th March 2022, Kenworth issued its application for the appointment of liquidators on the just and equitable ground. This application was given claim number BVIHC (COM) 2022/0065. The two claims have since been consolidated. On 1st June 2022, the Company filed its application for stay, based either on section

18 of the **Arbitration Act 2013**² or on section 162 of the **Insolvency Act 2003**³ in order that the Company and Kenworth be referred to arbitration. In the alternative, it sought orders under sections 162 and 174(1) of the **Insolvency Act** or CPR 26.1(q) or the inherent jurisdiction of the Court staying the just and equitable application.

- [6] On 27th June 2022, the Company commenced an arbitration with the Hong Kong International Arbitration Centre (“the HKIAC”). The main substantive relief sought was a declaration that the Company was entitled to forfeit Kenworth’s 19,600,000 shares due to Kenworth’s failure to satisfy the call on the shares. There were subsidiary claims for damages and costs.

Kenworth’s case

- [7] Kenworth says this in its skeleton argument:

“13. The Winding Up Application is founded on the basis that there is a lack of probity on the part of the Company’s management and/or board of directors in the conduct of the affairs of the Company giving rise to a justifiable lack of trust and confidence of Kenworth in the management and/or board of directors of the Company. This arises in relation to the following issues:

a. The acts of the management and/or board of directors of the Company in issuing capital calls and forfeiture notices to Kenworth, in circumstances where the Company had represented to the world at large for 15 years that all the Company’s 40,000,000 shares were fully paid up and failed to provide a satisfactory explanation for its very recent change in position.

b. The nefarious motives for the Company wanting to forfeit and cancel Kenworth’s Shares. The attempt to forfeit and cancel Kenworth’s shares is part of the bigger scheme by the other shareholders and/or the Company to oust Kenworth as a shareholder of the Company, whilst ensuring that it does not receive any dividends, and thereafter sell the Company to a third party. The Company is pursuing its ulterior motives to favour other shareholders to the detriment of Kenworth in seeking to squeeze

² No 13 of 2013, Laws of the Territory of the Virgin Islands.

³ No 5 of 2003, Laws of the Territory of the Virgin Islands.

Kenworth out on what is known (or ought to be known) to be a false basis. The Company has also not provided any evidence that the call made has resulted in the other shareholders paying in the demanded capital.

c. The failure by the board of directors to sufficiently explain or provide any supporting documents requested by Kenworth in relation to the Company's claims that a subsequent review caused the board to make the decision to demand payment of the outstanding share capital from all its shareholders and that the record and accounts of the Company showed that the share capital of all the issued shares (40,000,000 shares) as at 18 October 2021 remained unpaid.

d. The board of directors' amendments to the MAA [memorandum and articles] of the Company, which had the aim of curtailing Kenworth's rights as a shareholder of the Company, including

- i. the insertion of Article 20A, which had the effect of enabling the Company to issue a forfeiture notice in respect of 'shares that are not fully paid on issue'. This is in contrast to the existing Article 20, which would have only allowed the Company to forfeit and cancel 'any shares for which payment has not been made in full pursuant to a promissory note or other written binding obligation for payment of a debt' and would not have applied to Kenworth. In other words, the insertion of Article 20A was to enable the Company to wrongfully call for payment on and attempt to forfeit Kenworth's Shares, where such right did not exist under the old articles; and
- ii. the insertion of Rider 2 to Article 84 to disable Kenworth's right to receive dividends for as long as a call notice has been issued to it and remains unpaid.

e. In addition, the board's apparent disclosure of the resolutions of directors dated 25 October 2021 approving those amendments to Profit Rich and/or Xie to the exclusion of Kenworth... Further, the inconsistencies in the Company's position regarding the members' resolutions purporting to endorse the amendments to the MAA... raises further questions on the legitimacy of these amendments, and further demonstrates the Company's tendency to change its position and narrative as and when it suits the Company.

f. The failure by the board of directors to account for the sum of RMB30,000,000 that was purported to have been paid to the Company from UPC or to take any step to resolve the issues in relation to the said sum.

g. The conduct of the affairs of the Company in the manner set out above as retaliation against the Singapore Suits which had been brought against Zhang, Xie and UPC.

14. In addition to the grounds set out in the Originating Application, the further exchange of affidavit evidence between the Company and Kenworth has uncovered the following additional wrongdoings of the Company and its management and/or board of directors...

a. purportedly entering into various interest free loans (the existence of which are denied by Kenworth) with Hongshan and Zhang without any written documentation;

b. failing to prepare audited financial statements of the Company from 2017 onwards;

c. purportedly discharging the liabilities of Profit Rich and Xie to pay for the allegedly unpaid capital by setting such liabilities off against the debts purportedly owed by the Company to Zhang; accordingly, no actual payment was received from these shareholders; and

d. concealing from Kenworth its purported change to the Company's register of members and effecting such change without notifying Kenworth, which form part of the continuing narrative that there is a lack of probity on the part of the Company's management and/or board giving rise to a loss of trust and confidence by Kenworth."

Two short arguments

[8] I can deal very shortly with two arguments advanced by Kenworth in opposition to the Company's application for a stay. The first is that the arbitration clause on which the Company relies, the amended Article 103, is not binding on Kenworth, "as it was (i) amended unilaterally by the Company, without reference and notice to and without consent from Kenworth and (ii) introduced after the disputes between Kenworth and the Company had arisen." Amendments, Kenworth says, were allegedly made to the articles by "Resolutions of the Directors dated 25th October 2021 which was purportedly endorsed and confirmed by the 'Members' Resolutions' allegedly passed on 14 January 2022. [T]he 25 Oct 2021 Directors' Resolutions were apparently passed by Zhang and Tang [two directors in the opposition camp],

whereas the 14 Jan 2022 Members' Resolutions were only passed by the other two shareholders of the Company, Profit Rich and Xie, to the exclusion of Kenworth. These resolutions were only brought to Kenworth's attention in February 2022..."

[9] I am willing to proceed on the basis that there is an arguable case that the amended Article 103 is not binding. However, this would leave the unamended Article 103 in full force. The amendment provides for a reference to be made to the HKIAC, whereas the unamended version provides for an *ad hoc* tribunal. Either way, however, the parties have agreed to arbitration. The sole consequence of Kenworth succeeding in its argument is that a fresh arbitration in accordance with the unamended Article 103 would have to be commenced. (In fact, of course the parties would probably agree that the HKIAC panel could double as a panel under the unamended Article 103, although this is not strictly relevant to the issues I have to determine.)

[10] Accordingly, I reject the argument that there is no binding agreement to arbitrate. The sole issue is whether the agreement to arbitrate is under the amended or the unamended Article 103.

[11] The second argument is that the Company has taken steps in the proceedings. However, waiver can only arise at earliest once the party resisting a reference to arbitration submits their first statement as to the substance of the dispute: **Arbitration Act** section 18 (giving force of law to Article 8(1) of the **UNCITRAL Model Law**). That has not occurred here: the reference to arbitration was on 1st June 2022. Mr. Zhang's first affidavit in the current proceedings was filed the following day. See also **Hualon Corporation (M) SDN BHD (in receivership) v Marty Ltd**,⁴ which shows the Court would retain a discretion, even if the reference to an HKIAC arbitration should instead to have been to an *ad hoc* arbitration.

[12] Accordingly I reject these two short points argued by Kenworth.

⁴ [2016] ECSCJ No 55 (Leon J).

The main issue

[13] I turn then to the main issue, whether a stay should be granted of the application to appoint liquidators on the just and equitable ground pending the arbitration which has been commenced before the HKIAC. Three propositions of law are not in dispute. Firstly, an order appointing liquidators can only be made by the Court. The power to make such an order is not arbitrable. Secondly, the automatic stay which applies to “an action” under section 18 of the **Arbitration Act**, does not apply to applications for the appointment of liquidators. Thirdly, the Court has a discretion whether to appoint liquidators or not. However, the existence of an arbitration agreement is relevant to whether to grant a stay of the application to appoint liquidators.

[14] Although this third proposition is not in dispute, very much in dispute is the approach which the Court should take when exercising its discretion in cases where some issues at least are subject to an agreement to arbitrate. It is convenient to look first at cases in which an application to appoint liquidators is made on the grounds of an undisputed debt. There is a large amount of case law on this, because such applications are numerically much more common than applications on the just and equitable ground.

[15] In England, the leading case is **Salford Estates (No 2) Ltd v Altomart Ltd (No 2)**.⁵ Sir Terence Etherton C held:

“My conclusion that the mandatory stay provisions in [the English equivalent of section 18] do not apply in the present case is not, however, the end of the matter. [The English **Insolvency Act 1986**⁶] confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the [**Arbitration Act**]⁷.”

⁵ [2014] EWCA Civ 1575, [2015] Ch 589 at [39].

⁶ 1986 c 45.

⁷ 1996 c 23.

[16] Our Court of Appeal in **C-Mobile Services Ltd v Huawei Technologies Co Ltd**⁸ endorsed **Salford Estates**, in so far as the English court held that there was no automatic stay, but did not accept Etherton C's uncompromising approach to the exercise of its discretion. On the facts of the case our Court of Appeal exercised its discretion by refusing to stay the application for the appointment of liquidators pending an arbitration.

[17] In **Jinpeng Group Ltd v Peak Hotels And Resorts Ltd**,⁹ an application was made under the just and equitable head, but based on an allegedly undisputed debt and a risk of dissipation. Webster JA cited the passage in **Salford** above and said:,

“The position outlined by the Chancellor in these passages comes close to the automatic stay position which is now firmly a part of the learning in connection with section 18 of the **Arbitration Act**. He is saying in very clear terms that a winding up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances. However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the **C-Mobile** case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction under section 162(1)(b) [of the **Insolvency Act**] is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.

[18] Mr. Machel KC reserved the right to challenge the correctness of **Jinpeng** in a higher Court, but the decision is of course binding on me.

[19] Subsequent cases show that the Court in exercising its discretion as to whether to appoint liquidators under section 162(1)(a) will treat as a relevant factor any agreement by the parties to arbitrate any dispute between them. In general the

⁸ [2015] ECSCJ No 195.

⁹ [2015] ECSCJ No 274 at [15].

existence of an arbitration agreement will favour the dismissal or stay of an application to appoint liquidators: **L Capital KDT Ltd v Retribution Ltd; Retribution Ltd v L Capital KDT Ltd**,¹⁰ **IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd**,¹¹ and **Rangecroft Ltd v Lenox International Holdings Ltd**,¹² but not always, for example, where a proposed defence is an obvious “put-up job”: **A Creditor v Anonymous Company**.¹³

[20] It is common ground that the Court also has a discretion when considering an application on the just and equitable ground, section 162(1)(b). There is no case in this Territory which discussed the principles to be applied. (**Jinpeng** was an application on the just and equitable ground, but it was made by a creditor who alleged insolvency, so the Court of Appeal dealt with the case on the basis that it was a creditor’s petition.)

[21] As to the way the Court should exercise its discretion, Mr. Machel KC submits:

“53. The question whether the Company should be liquidated is not itself one that is arbitrable. Nevertheless, disputes or differences between the parties that underlie that question are arbitrable... [I]t is submitted that the proper approach (at least in just and equitable non-debt cases) is to decide whether any of the relevant issues are within the scope of the arbitration agreement and, if they are, to stay the liquidation application pending the arbitration. That approach is consistent with **Zanotti**¹⁴ and applies the dicta of the English Court of Appeal in **Fulham**¹⁵ (and see **Nori Holding Ltd v PJSC ‘Bank Otkritie Financial Corp’n**’¹⁶ and **Bridgehouse (Bradford No. 2) Limited v BAE Systems Plc**¹⁷); and it is consistent with the approach adopted in Hong Kong in **Quiksilver Glorious Sun JV Ltd**¹⁸ and in **China Europe International Business School v Chenwei Evergreen Capital LP**,¹⁹ in Australia in **WDR Delaware Corporation v Hydrox Holdings Pty**

¹⁰ [2016] ECSCJ No 235 at [66].

¹¹ [2020] ECSCJ No 242.

¹² [2020] ECSCJ No 231, [2020] ECSCJ No 384.

¹³ [2021] ECSCJ No 467.

¹⁴ *Ennio Zanotti v Interlog Finance Corp* [2010] ECSCJ No 36 (Bannister J).

¹⁵ *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855, [2012] Ch 333 at [83].

¹⁶ [2018] EWHC 1343 (Comm), [2019] Bus LR 146 *per* Males J at [46]-[66].

¹⁷ [2020] EWCA Civ 759, [2020] Bus LR 2025 *per* Males LJ at [79].

¹⁸ [2014] 4 HKLRD 759 *per* Harris J at [12]-[24].

¹⁹ [2021] HKCFI 3513 at [68] and [72].

Ltd,²⁰ and in Singapore in **Tomolugen Holdings Ltd & Anor v Silica Investors Ltd**.²¹ It is also consistent with **Salford Estates** and the common ground of the parties in **Hermes One Ltd v Everbread Holdings Ltd**.²²

[22] The difficulty with Mr. Machel's reliance on **Zanotti** and **Fulham** is that both were cases of unfair prejudice, which are quintessential disputes internal to the company between shareholders. As such, the automatic stay provisions of the relevant **Arbitration Acts** apply. It is true that Patten LJ in **Fulham** at [83] said that if the underlying dispute could be arbitrated "the arbitration agreement would operate as an agreement not to present a winding up petition [on the just and equitable ground] unless and until the underlying dispute had been determined in the arbitration." However, this should in my judgment be read as an indication of how the Court would generally exercise its discretion; it is not a holding that an automatic stay must be ordered.

[23] **Nori** was a case where the English court held that the existence of a claim in a Russian insolvency court did not prevent it granting an anti-suit injunction in support of an English law and seat arbitration. It does not seem relevant to the exercise in the current case of the Court's discretion. **Bridgehouse** concerned the effect on the alleged termination of a contract of the restoration of the company. Again this was a dispute which only affected third parties tangentially. The English Court of Appeal applied the automatic stay provisions.

[24] The effect of the two Hong Kong cases is summarized in the second of the cases as follows:

"Although winding up proceedings do not fall within section 20 of the **Arbitration Ordinance**,²³ the Court has inherent jurisdiction to grant a stay of a petition presented on the just and equitable ground in favour of arbitration. In considering whether to grant a stay, the Court will first

²⁰ [2016] FCA 1164.

²¹ [2015] SGCA 57 at [100]-[103].

²² [2016] UKPC 1, [2016] 1 WLR 4098 recorded at [7].

²³ Cap 609, Laws of the Special Administrative Region of Hong Kong.

‘identify the substance of the dispute between the parties and ask whether or not the dispute is covered by the arbitration agreement’. Where the substance of the dispute falls within the arbitration clause, the Court may require the parties to have their dispute be determined by arbitration, before the Court considers whether to grant a winding up order.”

- [25] In the Australian case, all the underlying issues were the subject of the agreement to arbitrate. In these circumstances the judge stayed the winding up petition on the just and equitable ground and held at para [164]:

“With the exception of that part of the present proceeding which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration.”

- [26] **Tomolugen** gives an exhaustive view of the caselaw in various jurisdictions. That was a case in which only one issue was the subject of an arbitration agreement, but that issue was caught by Singapore’s automatic stay provisions. The Singapore Court of Appeal stayed as a matter of case management the other issues before the court pending resolution of the issue which stood to be referred to arbitration. The case does not, in my judgment, assist in determining what this Court should do as a matter of discretion in circumstances where there is no automatic stay.

- [27] Both sides relied on the decision of the Court of Appeal of the Cayman Islands in **FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp.**²⁴ That was a case of an application to wind up the company on just and equitable grounds. The Court of Appeal held that, because only the Court could wind up a company on those grounds, the questions as to whether such an order should be granted was a “threshold issue” which was not arbitrable.

²⁴ CICA (Civil) Appeals 7 and 8 of 2019.

[28] Mr. Hall Taylor KC for Kenworth did not press this point before me. Instead, he submitted that as a discretionary matter it was inappropriate to “hive off” to arbitration the issue as to whether Kenworth’s shares were unpaid and whether the Company was entitled to forfeit. Rather, the Court needed to look at the big picture.

[29] I agree. Since the automatic stay provisions do not apply, the Court has a discretion whether to stay the application to appoint liquidators pending determination of the arbitration. The Court has to look at what the interests of justice require in the round, while at the same time honouring this Territory’s policy of favouring arbitration.

[30] Mr. Hall Taylor KC submits:

“The attempt to forfeit and cancel Kenworth’s shares is part of the bigger scheme by the other shareholders and/or the Company to oust Kenworth as a shareholder of the Company, whilst ensuring that it does not receive any dividends, and thereafter sell the Company to a third party. The Company is pursuing its ulterior motives to favour other shareholders to the detriment of Kenworth in seeking to squeeze Kenworth out on what is known (or ought to be known) to be a false basis.”

[31] If there is a reference of the paid up and forfeiture issues to arbitration, there is in my judgment a real risk that the arbitrators may find that the shares were not paid up and that the Company was entitled to forfeit them. That would (at least potentially) be fatal to Kenworth’s claim to have the Company wound up, because Kenworth would have lost its standing as a shareholder to bring the application for the appointment of liquidators. Yet, if Kenworth were to make good its overall case, Kenworth would have (again at least potentially) a good claim for the appointment of liquidators on the just and equitable ground. In my judgment it is not possible to hive off the issue as to whether the shares are paid up and liable to forfeiture from the other issues in the case. They all stand or fall together.

[32] That is sufficient for me to refuse to grant a stay, even taking into account the public policy in favour of arbitration. As a matter of discretion I do refuse the stay.

[33] However, there is a further point. In the current case there is a real problem of the Court and the arbitrators potentially reaching different conclusions, for example, as to the veracity of witnesses. This does of course assume that an arbitration could be followed by the Court determining the application for the appointment of liquidators. This could presumably only happen if the Court continued the injunction against the Company forbidding forfeiture of the shares. Whether that can or should be done is likely to be highly contentious. Mr. Machel KC did not volunteer any form of undertaking not to forfeit Kenworth's shares until the remaining issues could be determined by the Court.

[34] Assuming, however, that there can be and is a second round before the Court, I agree with Mr. Machel KC that there would be an issue estoppel from the arbitrators' award as to the payment or otherwise for the shares and as to the validity of the forfeiture. However, a determination by the arbitrators as to the honesty of witnesses would not bind the Court. The Court would have to reach its own view. Particularly in a case involving allegations of want of probity it is in my judgment highly undesirable that issues as to the credibility of witnesses should be salami sliced and heard by different tribunals of fact. This is so despite the public policy in favour of arbitration.

[35] Again, and as a separate matter, on this ground too, in my discretion I would refuse a stay.

[36] Accordingly, I refuse the Company's application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar