

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2022/0025

**IN THE MATTER OF DOCILE BRIGHT INVESTMENTS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:

**LAI WING LUN
(AS SOLE LIQUIDATOR OF DOCILE BRIGHT INVESTMENTS LIMITED
(IN LIQUIDATION))**

Applicant

-AND-

MARINE BRIGHT LIMITED

Respondent

Appearances

Mr. Stuart Cribb and Mr. Dhanshuklal Vekaria of Carey Olsen for the Applicant
Mr. Robert Amey, with him Ms. Sarah Latham of Ogier for the Respondent

2022 July 25
August 23

JUDGMENT

[1] **JACK, J [Ag.]**: In this matter, a liquidator of a company seeks to set aside a transaction with the company. The respondent cross-applies to strike out the liquidator's application.

[2] I shall use the following shorthand in this judgment:

Mr. Briscoe: Mr. Stephen Briscoe, a BVI licensed insolvency practitioner
with FFP

Docile Bright: Docile Bright Investments Ltd, the company over which Mr. Lai is a liquidator, wholly owned by GZHK

The February 2017 letter: a letter sent 9th February 2017 by Marine Bright to Titan confirming that it was an affiliate of GZE

FFP: FFP (BVI) Ltd, a firm of BVI licensed insolvency practitioners

GZE: Guangdong Zhenrong Energy Company Ltd, the holding company of the group, owning all the shares in GZHK

GZHK: Guangdong Zhenrong (Hong Kong) Company Ltd, the owner of all the shares in Docile Bright and itself wholly owned by GZE

Mr. Lai: Lai Wing Lun, the applicant, one of the joint liquidators appointed over Docile Bright, also a non-executive director of Titan

Marine Bright: Marine Bright Ltd, the respondent

The preferred shares: 555,000,000 convertible preferred shares in Titan, consolidated on 5th September 2017 into 69,375,000 shares

Saturn: Saturn Petrochemical Holdings Ltd, a company owned by Warburg Pincus

Ms. Silver: Anna Silver, a BVI insolvency practitioner with FFP

Sino Charm: Sino Charm International Ltd, the petitioner, which presented a winding up petition against Titan in Bermuda claiming to be a creditor of Titan

Titan: Titan Petrochemicals Group Ltd, a company incorporated in Bermuda and listed on the Hong Kong Stock Exchange, the preferred shares of which are the subject of the current proceedings

The Titan scheme: the company restructuring of Titan started in 2012

Toprise: Toprise Global Ltd, the purchaser in June 2020 of all the shares in Marine Bright

The transaction: the sale or purported sale on 9th February 2017 by Docile Bright of the preferred shares to Marine Bright for a consideration of US\$20 million (the payment of which is disputed)

Warburg Pincus: two private equity funds, Warburg Pincus Private Equity IX LP and Warburg Pincus (Bermuda) Private Equity IX LP

The applications

- [3] The first application in time is Mr. Lai's application of 4th February 2022 to set aside the transaction. He alleges that the transaction was (1) at undervalue under section 246 and 249 of the **Insolvency Act 2003**¹ and (2) intended to defraud creditors and

¹ No 5 of 2003, Laws of the Virgin Islands.

thus liable to be set aside under section 91 of the **Conveyancing and Law of Property Act 1961**² and/or the **Fraudulent Conveyances Act 1571**.³

- [4] The second application in time is Marine Bright's cross-application of 27th April 2022 to strike out Mr. Lai's set aside application. The cross-application alleges (1) that there are no reasonable grounds for bringing the set-aside application and (2) that the set-aside application is an abuse of process because (a) Mr. Lai has no authority to bring it and/or (b) it was brought for a collateral purpose.

The undisputed facts

- [5] Docile Bright was incorporated in this Territory on 9th July 2012. It is wholly owned by GZHK. GZHK is in turn wholly owned by GZE. In around March 2007, Titan and Warburg Pincus agreed that Warburg Pincus would invest US\$175 million in Titan. As part of that agreement, Titan issued the preferred shares (valued at HK\$310,800,000) to Saturn, a Warburg Pincus company. By mid-2012, Titan was facing financial difficulties and provisional liquidators were appointed. This led to a restructuring via the Titan scheme, a scheme of arrangement in Bermuda.
- [6] Part of the Titan scheme was the purchase of the preferred shares by Docile Bright from Saturn. On 12th October 2012, a number of documents were executed to affect the sale. These included an instrument of transfer, a declaration of trust and a grant of an irrevocable power of attorney in favour of Docile Bright, so that Docile Bright became entitled to all the benefit of the preferred shares. A straight share transfer was not possible at that time because Titan's bye-laws as they then stood made the preferred shares non-transferrable. On 22nd June 2015, as a further part of the Titan scheme the bye-laws were amended to allow a transfer of the preferred shares, but only to "[GZE] or its affiliates". The restructuring under the Titan scheme completed in mid-2016. The winding up petition presented against Titan was withdrawn. On 14th July 2016 the provisional liquidators were discharged. The next day trading in Titan's suspended shares resumed on the Hong Kong Stock Exchange.

² Cap 220, Revised Laws of the Virgin Islands

³ 13 Eliz I c. 5

- [7] Unfortunately by this time, GZE had itself run into financial difficulties. On 14th July 2016, a winding-up petition in respect of GZHK was presented to the Hong Kong Court of First Instance. An order winding GZHK up was made on 27th September 2017.
- [8] On 9th February 2017, between the presentation and the deciding of the GZHK winding up petition, Docile Bright entered or purported to enter into the transaction which is the subject of the dispute in the current case. By the transaction Docile Bright sold or purported to sell the preferred shares to Marine Bright. The consideration was stated to be US\$20 million. Whether that money was paid is a central issue for determination by me. The same day, Marine Bright sent a letter to Titan (“the February 2017 letter”), which asserted that it was an affiliate of GZE. The expression “affiliate” was undefined in the letter.
- [9] On 26th July 2018, Mr. Lai and Mr. Osman Mohammed Arab (both insolvency practitioners in Hong Kong with the firm of RSMHK) were appointed as non-executive directors of Titan.
- [10] On 4th February 2019, GZHK placed Docile Bright into insolvent liquidation by a resolution made by itself as sole member. Mr. Briscoe was appointed as its liquidator. At a creditors’ meeting on 10th April 2019, Mr. Briscoe’s appointment as liquidator was confirmed. Mr. Lai was appointed as joint liquidator with him.
- [11] On 24th December 2020, Mr. Briscoe resigned due to retirement. This left Mr. Lai as the sole liquidator, but he was not admitted as a BVI insolvency practitioner. As I shall discuss below, this should not have occurred. Instead another BVI insolvency practitioner should have been appointed to replace Mr. Briscoe. The irregularity continued until recently when Ms. Silver, a BVI licensed insolvency practitioner with FFP was appointed as liquidator jointly with Mr. Lai.
- [12] On 13th July 2021, following the service of a winding up petition by Sino Charm, which claimed to be a creditor of Titan, Hargun CJ sitting in the Supreme Court of

Bermuda made an order for the winding up of Titan. The directors of Titan have appealed, but their appeal had not yet been determined when I wrote the draft of this judgment. The learned Chief Justice found in relation to the preferred shares that:⁴

“77. Docile Bright appears to have sold and transferred the Preferred Shares to Marine Bright after the presentation of the [winding up petition against GZHK] at a consideration of US\$20 million on or about 9 February 2017. In a letter written by Conyers BVI, acting on behalf of the liquidators of Docile Bright, to Marine Bright dated 10 July 2019, Conyers referred to the sale of the 555 million Preferred Shares at a consideration of US\$20 million by Docile Bright to Marine Bright and stated:

‘Copies of the Share Transfer and Bought and Sold Notes are attached for your reference. The JLS note that you are the registered shareholder of the Preferred Shares of List Co. However, there is no information to show that the purported consideration of US \$20 million was received by the Company at all. In other words, the Preferred Shares were transferred to you for no consideration.’

78. In his Third Affirmation Mr. Lai seeks to further analyse the beneficial interest which Docile Bright may have in the [preferred shares] and concludes that:

‘The available information may support a view that DBIL may have acquired the beneficial interests of the Preferred Shares on 10 October 2013, DBIL have not (in particular[] it did not in September 2017) make any request for the issuance of the share certificate to itself and/or to register its name in the register of Titan.’

79. In considering this issue the Court reminds itself that the relevant rule is that ‘it is sufficient that there is prima facie case that they are a creditor or contributory, even if their claim so is disputed’ (See **Re Opus Offshore Ltd**⁵).

80. In this case the Court concludes that Marine Bright should be considered as the creditor of the Company for the purposes of this hearing given that:

- (a) The transfer of the shares from Docile Bright to Marine Bright was approved by the directors of the Company.
- (b) A copy of the register of members of the Company dated 20 September 2017 shows that Marine Bright is the registered shareholder in respect of the... Preferred Shares.

⁴ [2021] SC (Bda) 63 Civ (11th August 2021).

⁵ [2017] Bda LR 14 at [22] (Hellman J).

(c) Marine Bright has been issued Share Certificate No 3 by the Company certifying that Marine Bright is the registered shareholder of 69,375,000 convertible redeemable preferred shares issued by the Company.

81. Ms. George, who appears for Marine Bright, supports the position taken by the Petitioner and supports the immediate winding up of the Company and the appointment of Provisional Liquidators with full powers. In the circumstances it would appear that the majority of the creditors of the Company request the Court to make an order for the immediate winding up of the Company.”

Strike out: Mr. Lai’s authority

[13] I turn first to the allegation in Marine Bright’s strike out application that Mr. Lai lacks authority to pursue the set aside application. Mr. Amey puts Marine Bright’s case this way in his skeleton:

“68. As the court will be aware from the hearing which took place in chambers on 23 June 2022, from 24 December 2020 to 11 July 2022, Mr. Lai (who does not hold a BVI insolvency licence) was acting as sole liquidator of Docile Bright in breach of Part XX [of the **Insolvency Act 2003**]. When this was pointed out to him, Mr. Lai applied to extend the time periods in sections 485(2) and 485(3) [of the 2003 Act].

69. At the hearing on 23 June 2022, Marine Bright appeared to make submissions in opposition, but Docile Bright successfully objected to Marine Bright’s appearance at a liquidator’s *ex parte* application in chambers, and Marine Bright therefore did not attend the remainder of the hearing.

70. Marine Bright renews its submission that the court does not have jurisdiction to extend the time period in section 485(3). As to this:

(1) Section 496 provides that the court may extend the ‘time within which an action shall or may be done’ under the Act. Not all time periods within [the 2003 Act] can be extended. For example, the vulnerability period for an undervalue transaction could not be extended under section 496.

(2) Section 496 permits the court to extend the 3-day period specified in section 485(2), since this is a ‘time within which an action shall or may be done’ under the Act.

(3) However, section 485(3) does not specify a ‘time within which an action shall or may be done’. Rather, it creates a deemed defence to the crime created by section 474(2), provided one of its conditions is satisfied.

(4) One of those conditions (in section 485(3)(a)(i)) is that the liquidator files the prescribed notice by a particular time. However, that time period is not ‘a time within which an action shall or may be done’, rather, the subsection simply provides that if the relevant action is done during that time, the liquidator will gain the advantage of a deemed defence.

(5) Accordingly, the time periods in section 485(3) are incapable of extension. This is unsurprising — there is no good policy reason why those time periods should be capable of extension, and every reason why they should not be. If the overseas practitioner’s default was inadvertent and caused no prejudice, then that is a matter that can be taken into account by the DPP when deciding whether it is in the public interest to prosecute, or the court when deciding what sentence to impose. But it is not a basis on which the court can exonerate an individual for what is otherwise a strict liability offence.

71. This being so, the court is invited to set aside its order extending the time period in section 485(3). The natural consequence is that Mr. Lai issued the [set aside application] in breach of a criminal prohibition, and the [application] should therefore be struck out.

72. For completeness, the fact that Marine Bright did not have standing to appear at the hearing in chambers on 23 June 2022 does not preclude Marine Bright from raising the point now. Even though Marine Bright is a ‘stranger’ to the liquidation, the point currently being made goes to jurisdiction, see **PricewaterhouseCoopers v Saad Investments Co Ltd**.⁶

[14] As to this last point, the **PwC** case involved a winding up petition against an overseas company which did not trade in Bermuda, where the petition was presented. The fact that an overseas company carries on business within Bermuda is usually a prerequisite for the Bermuda courts assuming a jurisdiction to wind the company up. The sole reason for presenting a winding-up petition in the **PwC** case was to invoke the Bermuda court’s power to order the delivery up of documents from PwC, who had an office in Bermuda. As to *locus standi* the Privy Council held:

“36 Of course, any court asked to wind up a company should generally be very reluctant to give a person (other than the company, the liquidator or the official receiver), who is neither a contributory nor a creditor, the right to be a party and to be formally heard in support of, or against, the making of

⁶ [2014] UKPC 35, [2014] 1 WLR 4482.

a winding up order. None the less, the Board can see no reason why, in appropriate circumstances, a person who will be directly affected by a winding up order should not have the right to be added as a party to the proceedings. It should be emphasised that the circumstances where such a course would be appropriate will be exceptional. Given that exceptionality is not a very useful guide, it is right to add that the Board considers that the mere fact that a person rightly anticipates that his or her rights will be detrimentally affected as a result of the winding up order would normally be quite insufficient to justify that person being added as a party.

37. In this case, however, the challenge to the winding up order was based on jurisdiction, and the sole ground for making the winding up order was to obtain relief against PwC, which involved interfering with their rights. Accordingly, it would, as already mentioned, be a denial of natural justice if they were denied the opportunity of challenging the making of the order, not merely in an informal amicus capacity, with no right of appeal, but in a formal capacity as a party. On the very unusual facts of this case, the Board considers that PwC had the right to be added as parties to the petition.”

[15] In the current case, there is no issue but that Docile Bright is insolvent. The sole complaint is as to Mr. Lai's failure to take the appropriate steps to have a BVI insolvency practitioner appointed in place of Mr. Briscoe. That is not a matter which affects Marine Bright in any way. It is solely a matter of who should represent the company. It does not in my judgment go to the Court's jurisdiction, which was the issue in **PwC**. If any criminal offence has been committed, that is a matter for the Director of Public Prosecutions, not Marine Bright. Moreover, Ms. Silver has ratified any procedural missteps taken by Mr. Lai.

[16] Further this matter was conclusively decided by me on 23rd June 2022, when in action BVIHC (COM) 2021/0215 I made the following order:

“**UPON** the *ex parte* application by Lai Wing Lun (the "**Applicant**"), as sole liquidator of Docile Bright Investments Limited (In Liquidation) ("**Docile Bright**") filed on 27 May 2022 (the "**Application**")
AND UPON notice of the Application having been given to Marine Bright Limited ("**Marine Bright**"), the respondent in separate proceedings (Case Number BVIHC (COM) 2022/0025) commenced by the Applicant on 4 February 2022 seeking, *inter alia*, an order pursuant to sections 246 and 249 of the Insolvency Act 2003 ("**Act**") to set aside the sale of certain shares by Docile Bright to Marine Bright as a transaction at an undervalue

AND UPON the Court having determined that Marine Bright has no standing to oppose the Application and that it should proceed as an *ex parte* Application in Chambers

AND UPON the Court reading the [evidence]

AND UPON HEARING Mr. Stuart Cribb and Mr. Dhanshuklal Vekaria for the Applicant

IT IS HEREBY ORDERED THAT:

1. pursuant to section 496 of the Act and/or EC CPR 26.1(2)(w) and/or the Court's inherent jurisdiction, the time for the filing of the notices required under section 485(2) of the Act be extended to 16 May 2022;
2. that pursuant to section 496 of the Act and/or EC CPR 26.1(2)(w) [and/or] the Court's inherent jurisdiction, the time under section 485(3)(a)(i) of the Act be extended to 27 July 2022;
3. there be liberty to apply; and
4. there be no order as to costs.

[17] It was open to Marine Bright to apply to become a party to that application and to appeal against that Order, but they have not done so. I had Marine Bright's skeleton argument, which made the same points then as Mr. Amey makes now. The matter in my judgment is *res judicata*. It would be wrong for me to revisit the determination I made earlier and I shall not do so. If I erred, that is a matter for the Court of Appeal on appeal from my judgment in BVIHC (COM) 2021/0125.

“Connected person” and the “vulnerability period”

[18] I turn then to the set aside application. This is put in two ways. Section 246 provides:

“(1) Subject to subsection (2), a company enters into an undervalue transaction with a person if

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and

(c) in either case, the transaction concerned

(i) is an insolvency transaction; and

(ii) is entered into within the vulnerability period.

(2) A company does not enter into an undervalue transaction with a person if

(a) the company enters into the transaction in good faith and for the purposes of its business; and

(b) at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

(3) A transaction may be an undervalue transaction notwithstanding that it is entered into pursuant to the order of a court or tribunal in or outside the Virgin Islands.

(4) Where a company enters into a transaction with a connected person within the vulnerability period and the transaction falls within subsection (1)(a) or subsection (1)(b), unless the contrary is proved, it is presumed that

(a) the transaction was an insolvency transaction; and

(b) subsection (2) did not apply to the transaction.”

[19] Mr. Amey firstly submits that Mr. Lai has not proved that Docile Bright and Marine Bright were “connected persons”. This is important, because Docile Bright only went into liquidation on 4th February 2019, just days short of two years from the date of the transaction on 9th February 2017. It is only if the two companies were “connected” that the liquidator can rely on the extended two year vulnerability period for setting aside transactions at undervalue: 2003 Act section 244. Otherwise he is out of time.

[20] Section 5(1) of the 2003 Act says in relation to a company that a “connected person” includes “a related company”. In turn section 5(2) provides:

“A company is related to another company if —

(a) it is a subsidiary or holding company of that other company;

(b) the same person has control of both companies; and

(c) the company and that other company are both subsidiaries of the same holding company.”

[21] In my judgment, despite the conjunctive “and” used in the definition, the three paragraphs must be read disjunctively. (a) relates to a mother-daughter relationship between the two companies, (c) to a sister, aunt or cousin relationship, whilst (b) covers the lacuna which would otherwise exist where a natural person owns the

shares in two otherwise separate companies. (Although this may be (c)'s main purpose, (c) also covers the case of two companies controlled by a third company; it is not confined to natural persons.) It would not make sense to require a company to satisfy all three requirements simultaneously in order to be "related". If it were otherwise, the paradigm case of a parent company owning all the shares in companies A and B would be excluded, because A and B would not satisfy (a) in the definition.

[22] Mr. Cribb puts his case as follows:

"39. Docile Bright is wholly owned by GZHK, which is in turn wholly owned by GZE. Marine Bright does not appear to dispute this, and it follows that Docile Bright has at all material times been within the control of GZE.

40. At the time of the Transaction, Marine Bright must also have been within the control of GZE. Article 8 of Titan's Amended Bye-Laws provides that '[t]he Preferred Shares shall not be capable of transfer save for a transfer to [GZE] or its Affiliates.'

41. Thus, for the Transaction to be valid under the Amended Bye-Laws of Titan, Marine Bright was required to be an 'Affiliate' of GZE at the material time. If Marine Bright was not an 'Affiliate', the purported transfer to it of the Preferred Shares was in breach of the Amended Bye-Laws, ultra vires and void: **Ashbury Railway Carriage & Iron Co v Riche**,⁷ **Shackleton on the Law and Practice of Meetings**.⁸

42. In this case, Marine Bright confirmed in the 9 February 2017 Letter (signed by its Director, Si Bo, discussed below) that it was an 'Affiliate' of GZE.

43. The term 'Affiliate' is defined by Article 1 of Titan's Amended Bye-Laws: "Affiliates" means with respect to any person/company, any other person/company that, directly or indirectly, controls, is controlled by, or is under common control with such person/company.'

44. Here, the definition of 'Affiliate' could only have been satisfied on the basis that Marine Bright was within the control of GZE. There is no suggestion that Marine Bright controls GZE, nor that Marine Bright and GZE are in the common control of some other entity.

⁷ (1875) LR 7 HL 653.

⁸ 15th Ed (2020) at para 11-12.

45. In fact, Marine Bright's own case as to why this definition of 'Affiliate' was satisfied at the time of the Transaction was that it was within the control of GZE. Indeed, it is not open to it to contend otherwise. If it was not in GZE's control, then it was not an 'Affiliate' of GZE and as set out above, the transfer of the Preferred Shares to it was in breach of the Amended Bye-Laws and void.

46. It appears to be common ground that the key individual in this respect was one Si Bo. Mr. Lai [in his first affirmation at para 34.6] explained that as at 20 October 2017, Si Bo was Marine Bright's sole shareholder and director. He was appointed to that directorship on 9 February 2017, the date the Transaction was purportedly executed.

47. [Mr. Li in his first affirmation for Marine Bright at para 60] goes even further:

'In particular, the sole director and shareholder of Marine Bright at the time when Marine Bright purchased the Preferred Shares from Docile Bright was a Mr. Si Bo, as Mr. Lai refers to in paragraph 34.6 of Lai 1. Mr. Si Bo was an employee of GZE. Toprise was informed during the negotiations for the purchase of Marine Bright that GZE had handled all matters relating to the Transaction. Mr. Si Bo was appointed as the director and shareholder of Marine Bright, which was set up as a holding company for the Preferred Shares.'

48. Marine Bright's own case, therefore, is that:

- (i) GZE handled all matters relating to the Transaction;
- (ii) Marine Bright was set up by GZE as a holding company for the Preferred Shares; and
- (iii) Si Bo, a GZE employee, was appointed as Marine Bright's sole director and shareholder.

In light of that, it is obvious that on 9 February 2017, Marine Bright was under the control of GZE.

49. Accordingly, at the time of the Transaction, both Docile Bright and Marine Bright were in the common control of GZE (the former as its wholly owned subsidiary; the latter because it was under the sole ownership and directorship of a GZE employee appointed for that purpose). That is common ground (and must be if Marine Bright wishes to assert that the Transaction was valid)."

[23] Mr. Amey's answer is:

"63. The sole evidence relied upon by Mr. Lai [to show connectedness] is [the February 2017 letter] stating that Marine Bright was an 'affiliate' (the

term is undefined in the letter) of GZE (not Docile Bright). It is unclear what this means, or the basis on which it was asserted. It is possible that it refers to the fact that Marine Bright's director, Si Bo, was also an employee of GZE. This might make GZE and Marine Bright 'affiliates' in some contexts, but would not render Docile Bright and Marine Bright 'connected persons' for **Insolvency Act** purposes.

64. In any event, the letter does not say that Marine Bright and Docile Bright were 'connected' in the way described in section 5 [of the 2003 Act]. Mr. Lai has the burden of proof, and it is notable that despite investigating the matter for a number of years (with all the powers of a liquidator to compel production of documents and examine witnesses), he has been unable to find any further evidence of a connection."

[24] I disagree that the use of the expression "affiliates" in the February 2017 letter is unclear or ambiguous. In my judgment, it is intended (and was understood) to be a reference to the Amended Bye-laws. That, after all, is why Si Bo had to write the letter: the share transfer could not otherwise be made legally. Nor do I agree that the February 2017 letter was the only evidence of control by GZE. I accept the evidential points put forward by Mr. Cribb. In my judgment Mr. Lai has established a strong case of joint control of Docile Bright and Marine Bright by GZE.

[25] On balance of probabilities, I find that Docile Bright and Marine Bright were at the time of the transaction "connected", so that the extended two year period of vulnerability applies.

The consideration: Was it paid? Was it too little?

[26] I turn then to the question whether the consideration of US\$20 million was paid and whether, if it was, the transaction was nonetheless at undervalue.

[27] Before considering the evidence on payment, I should note that neither Mr. Lai nor Mr. Li, who gives evidence on Marine Bright's behalf, have any personal knowledge as to whether the payment was or was not made. Mr. Lai's first involvement in Docile Bright was after his appointment as liquidator in April 2019; Mr. Li's involvement with Marine Bright was in February 2020, when Toprise were

negotiating the purchase of Marine Bright. Neither side was in a position to offer any oral evidence, nor did either counsel seek an adjournment for that purpose. In particular, neither side called Si Bo. Accordingly, I have to determine the issue of payment or not on the documentary record.

[28] It is common ground between the parties that the only documents evidencing the payment of the US\$20 million are (a) a one-page document dated 9th February 2019 with an entry “Sold Note” and an entry “Bought Note” and (b) a one-page transfer of shares document dated the same day. The former refers to “Consideration Received” and “Consideration Paid” of US\$20 million; the latter to “consideration of USD 20,000,000.00 paid to me”. Marine Bright also sought to rely on a resolution of Titan’s board dated 20th September 2017 which refers to the sale of the preferred shares “at the consideration of USD\$20 million”. However, it is unclear why Titan’s board should have any knowledge of whether the payment was made or not. The resolution would ordinarily be made simply after sight of the share transfer document and perhaps the bought and sold note. I attach no evidential weight to the Titan board resolution.

[29] Mr. Amey submits:

“15. On 9 February 2017, the Share Purchase took place. The individuals currently giving instructions on behalf of Marine Bright were not personally involved in the Share Purchase, since they did not purchase Marine Bright until June 2020. However, the contemporaneous documents demonstrate the following:

- (1) The Preferred Shares were purchased for US\$20 million.
- (2) Docile Bright acknowledged payment of the US\$20 million.
- (3) Titan’s directors passed written resolutions approving the transfer of the Preferred Shares to Marine Bright and issued a share certificate to Marine Bright.
- (4) Marine Bright was listed as the registered shareholder of the Preferred Shares on Titan’s register of members.

16. Although Mr. Lai complains that there is ‘no evidence in the records’ of Docile Bright to verify that the consideration was paid, this is unsurprising, since he also says that Docile Bright ‘did not keep any financial/accounting records’. He has provided no explanation as to why the court should go

behind the various contemporaneous documents evidencing payment, in particular: [and he sets out the three documents I refer to above].

17. Also on 9 February 2017, a letter was written by a Mr. Si Bo on behalf of Marine Bright, saying 'we are the affiliates of [GZE]'... Mr Lai now relies upon this letter as evidence (indeed, the only evidence) that Docile Bright and Marine Bright were 'connected persons' at the time. However, that is simply not what this letter says.

18. Moreover, Mr. Lai has not explained why it is appropriate to place such heavy reliance on the letter saying that Marine Bright and GZE were 'affiliates', while at the same time doubting the veracity of the multiple documents indicating that the US\$20 million consideration was paid."

[30] As to this last point on the February 2017 letter, there is, as I have set out above, other evidence to support the case that Marine Bright was an affiliate of GZE for the purposes of the Titan Amended Bye-laws. The letter has a different legal purpose, namely to document GZE's control. The statements in the bought/sold note and the transfer of shares as to payment of the consideration are not corroborated in the same way.

[31] I turn then to the critical question: was the US\$20 million paid or not? There is a complete absence of any evidence of payment whatsoever. A payment of such a large sum would leave a large paper trail, with instructions to the relevant banks, acknowledgement of payments, entries on bank statements and so forth. Here there is nothing. There are not even any accounting entries in accounts prepared for Docile Bright, Marine Bright or any other GZE entities.

[32] Mr. Amey's point in para 16 of his skeleton that Mr. Lai has given no explanation for going behind the bought/sold note and the transfer of shares document in my judgment is unrealistic. Proving a negative is notoriously difficult. Mr. Lai points out — justifiably in my view — that documentation which must exist, if the payment was in truth made, cannot be traced. That is strong evidence that the payment was not made.

[33] I also agree with Mr. Cribb's point that Toprise showed a remarkable absence of curiosity in carrying out due diligence when buying Marine Bright. The financial report for Titan in the year ending 31st December 2019 at least arguably showed Docile Bright as the holder of the preferred shares. There is a dispute, which I cannot resolve without oral evidence, as to whether a share certificate was properly issued by Titan to Marine Bright, but, regardless of that, no declaration of ownership was made to the Hong Kong Stock Exchange. Mr. Li gives no explanation for the failure of Toprise's due diligence to identify a problem from the above. Indeed he gives no account of what due diligence was carried out at all. The most he says is in his second affirmation, where he says blandly at para 19: "Toprise carried out its due diligence when purchasing Marine Bright and was satisfied that the consideration had been paid."

[34] In my judgment, on balance of probabilities the consideration was not paid.

[35] The subsidiary question as to whether, if the consideration was paid, US\$20 million was nonetheless constituted a sale at undervalue does not arise. If it had, I would have given directions for a trial of that issue with cross-examination of witnesses. I would probably also have directed that a joint expert valuer be instructed. Mr. Amey submits that the Court should make its determination on the evidence available at present and that the absence of expert evidence means I should make a determination in favour of Marine Bright on the undervalue issue. In my judgment, however, Mr. Lai was acting reasonably in putting the case forward as he did. Expert evidence is expensive. He was entitled to take the view that he had a strong case that the consideration was not paid and that incurring the fees of experts would be premature and delay the final determination of the set aside claim. In taking that view, he has of course been vindicated by this judgment.

Non-payment of the consideration: the consequences

[36] What then are the consequences in law of the non-payment of the consideration?
Mr. Amey submits:

“The focus of section 246(1)(a) is on the ‘terms’ of the transaction. If the ‘terms’ of the transaction provide for the company to receive consideration, then the transaction falls outside of section 246(1)(a). If it is suspected that the promised consideration was never actually paid, then the company may have a debt claim for the unpaid balance, but that is not a section 246 claim.”

[37] This is not in my judgment a realistic submission on the facts of this case . This was a transaction between related parties. If the consideration was not paid, then I infer that the reason for that was that it was never intended to be paid. The statements confirming payment of the consideration mentioned in the bought/sold note and the share transfer documents were just so much wallpaper, as the parties must have realised. This was not a case, where a genuine consideration was agreed but remained unpaid; it was a case where the consideration was never going to be paid, as the parties to the agreement knew full well.

[38] Even if the point on section 246(1)(a) were well made, the transaction would in my judgment be caught by section 81 of the **Property and Conveyancing Act 1961**. There is an ongoing question as to whether the **Fraudulent Conveyances Act 1571** is still in force in this Territory: see the discussion in **Great Panorama International Ltd v Qin Hui**.⁹ Further discussion in this judgment is, however, otiose, since both Acts reach the same conclusion. The transaction was entered into when GZE was in financial difficulties and the immediate holding company of Docile Bright, GZHK, was facing a winding up petition, which was ultimately granted. If no consideration was paid and was never intended to be paid, then the transaction was *prima facie* made in order to defraud creditors. There is no evidence to contradict this *prima facie* inference. I find on balance of probabilities that Mr. Lai is entitled to succeed under both Acts as well as under the 2003 Act.

⁹ [2020] ECSCJ No 278 (13th August 2020) at [57].

Collateral purpose and abuse of process

[39] I turn then to Mr. Amey's last point, that Mr. Lai is pursuing the current application for a collateral purpose and that the application is an abuse. Mr. Amey argues:

"52. The Preferred Shares are demonstrably worthless: Titan is in liquidation, and its latest accounts (approved by Mr. Lai himself as Titan's chairman) show insufficient assets to pay ordinary unsecured creditors (as indeed has been the case every year since 2018). Since sums owed to shareholders are subordinated to ordinary unsecured liabilities, there will be no return to shareholders, something which has recently been confirmed by Titan's liquidators.

53. At best, if Mr. Lai persuades the court that an undervalue transaction or a fraudulent conveyance has occurred, he will recover some worthless shares. At worst, he will recover some worthless shares, and will have to return the US\$20 million which Docile Bright received from Marine Bright.

54. The [set aside application] is therefore an abuse of process in at least two respects, and should be struck out:

(1) Under the **Jameel** principle,¹⁰ the [application] is a pointless waste of the parties' resources and the court's resources; 'the game is not worth the candle'. The [claim] will serve no useful purpose.

(2) Further or alternatively, the claim should be struck out since it is being pursued for an impermissible collateral purpose. The only explanation for Mr. Lai's desire to gain control of the Preferred Shares is so that he can prevent an investigation into the transactions referred to at para 21(6) above, by interfering in the Bermuda winding up proceedings and influencing the liquidators of Titan. Were it not for this, Mr. Lai would not have commenced the [set aside claim] at all."

[40] The para 21(6) referred to says (the quotations and paragraph numbering being from the judgment of Hargun CJ):

"Most strikingly, after the winding up petition was presented (and while Mr. Lai was chairman of Titan's board) Titan 'embarked on a wholesale disposal of its most significant assets, for nominal consideration to entities potentially connected with Mr. Zhang and his father' (para 70). Mr. Zhang is one of Mr. Lai's co-directors on Titan's board (para.2). It was 'in the interests of the general body of creditors and the wider public interest that the transfers

¹⁰ Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75, [2005] QB 946.

of property be investigated by independent liquidators appointed by this Court' (para.86)."

[41] The submission that the preferred shares have no value is in my judgment belied by the parties' behaviour. The argument that the set aside application is pointless because the shares have no value applies equally to Marine Bright's behaviour. They have vigorously contested the current set aside application and no doubt incurred significant legal costs. If the shares were truly worthless, then there is no reason for Marine Bright to refuse to return the shares. Likewise, Marine Bright's decision to incur significant costs in the Bermuda proceedings is inexplicable, if Titan is hopelessly insolvent and the holders of the preferred shares are so far down the waterfall as to be entitled to nothing. Mr. Li first alleged that the preferred shares were valueless in his third affirmation, made less than a week before the hearing before me. There was insufficient time for Mr. Lai to answer the allegation.

[42] I put substantial weight on the view expressed by Ms. Silver in her affidavit, where she says:

"I agree with the course of action Mr. Lai has taken in bringing the Setting Aside Application. It is in the best interests of [Docile Bright's] creditors to do so, especially if the application is successful."

As a BVI-admitted insolvency practitioner, her commercial judgment is something to which the Court will pay significant respect.

[43] Once I conclude — as I do — that the preferred shares have a potential value, Mr. Amey's argument that the *only* explanation for Mr. Lai to bring the set aside application is to prevent investigation of the allegations summarised in para 26(1) falls away.

[44] Mr. Cribb submits:

"96. The allegation that the Set Aside Application has been pursued for an improper collateral purpose needs to be put in its proper context. As set out

above, the claim to set aside the Transaction is a strong one. It is also advantageous to Docile Bright's creditors. If the Set Aside Application succeeds, the Preferred Shares in Titan with an estimated value of US\$50 million will be restored to the insolvent estate. That is a substantial benefit.

97. Further, although Titan is in liquidation, the liquidation order is being appealed. If the appeal succeeds and the Preferred Shares have not been revested in Docile Bright, it may not be able to participate in Titan's business, such that the interests of the creditors of Docile Bright would go unrepresented. They might even be harmed, if Marine Bright was permitted to exercise rights of a member that should belong to Docile Bright instead.

98. Given the strength of the Set Aside Application and the obvious benefit to Docile Bright's creditors if it succeeds, the Court should view Marine Bright's suggestion that it is pursued for a 'collateral purpose of affecting the outcome of the winding up proceedings in Bermuda against Titan' with scepticism. In truth, it is a desperate attempt to muddy the water, because Marine Bright knows that its purported defence to the merits of the Set Aside Application is fanciful."

[45] Whether the \$50 million value is correct is not something on which I can adjudicate on the evidence at present, as I explain above. Apart from this, however, Mr. Cribb in my judgment makes good points. If the winding up order is successfully appealed on the basis that Sino Charm's debt is disputed on substantive grounds (as has now occurred), then the value of Titan may well be increased. The Bermudan courts appear to have accepted that Marine Bright's colourable claim to the preferred shares is sufficient to give it status as a supporting creditor, but whether that is sufficient to allow it to be substituted as the petitioning creditor, in the event that the appeal succeeds, is unclear. It is a matter for the commercial judgment of Mr. Lai and Ms. Silver what steps to take to realise the value of the preferred shares, but they cannot start to exercise that commercial judgment until the preferred shares are returned to Docile Bright. The only venue in which they can pursue the set aside application is this Court.

[46] Accordingly, I reject the argument that the set aside application is made for a collateral purpose and is an abuse of process.

Conclusion

- [47] Accordingly I grant the set aside application and dismiss the cross-application.
- [48] Ms. Silver should be added as an additional applicant. She is entitled jointly with Mr. Lai to the relief sought on Docile Bright and her appointment will ratify any technical defects in Mr. Lai's standing.

Postscript: the judgment of the Court of Appeal for Bermuda

- [49] After completing the draft of this judgment and whilst on the point of distributing it to the parties for corrections, the Court of Appeal for Bermuda on 9th August 2022 handed down its judgment.¹¹ It allowed the appeal against the winding-up order and stayed the petition pending the outcome of related litigation between Titan and Sino Charm in Hong Kong.
- [50] I have read the judgment. Nothing in it causes me to change my views in the draft version of this judgment. I do not consider there is any need to have further oral argument or written submissions in consequence of this Bermuda judgment.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

¹¹ [2022] CA (Bda) 13 Civ.