

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0017

BETWEEN:

SIAN PARTICIPATION CORP. (IN LIQUIDATION)

Appellant

and

HALIMEDA INTERNATIONAL LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mde. Esco L. Henry

Justice of Appeal [Ag.]

Appearances:

Mr. Tom Smith KC with him, Mr. Paul Fradley, Mr. Phillip Kite and

Ms. Francesca Gibbons for the appellant

Mr. Paul Lowenstein KC with him, Mr. Rupert Hamilton, Mr. Andrew Willins

and Ms. Tamara Cameron for the respondent

Mr. Stuart Cribb and Ms. Sara Malik for the liquidators (holding a watching brief)

2022: May 11 & 12;
November 11.

Commercial appeal – Insolvency – Winding up application - Appeal against grant of a winding up application – Whether judge applied the incorrect test for the appointment of liquidators – Arbitration clause – Whether judge erred in law and in the exercise of discretion in finding that the arbitration point was raised too late – Appellate interference with judicial discretion – Cross-claim in an amount equal to or greater than the debt – Abuse of process – Unlawful means conspiracy – Whether judge erred in failing to conclude that the liquidation application was made for an improper purpose – Application to adduce fresh evidence – Principles in Ladd v Marshall

The appellant, Sian Participation Corp. (in Liquidation) (“Sian”) is indebted to Halimeda International Limited (“Halimeda”) for over US\$150 million, with interest, under a loan

agreement made between them on 7th December 2012. The agreement stipulated that Sian would repay the loan by 31st December 2018. Sian did not repay the debt on the termination date.

Halimeda wrote to Sian demanding payment of the debt but Sian did not reply. By 15th September 2020, the outstanding debt had risen to US\$226,365,598.31. Halimeda applied to have liquidators appointed in respect of Sian. Sian filed a Notice of Opposition (“NOO”) denying that the debt was currently due and payable. Sian subsequently applied to the Court to strike out the winding up application and sought leave retrospectively to adduce further evidence in the form of a witness statement and an affidavit.

In the court below, Sian contended that it is not insolvent; that the debt is not currently due and owing; that the debt is an intra-company debt which neither party intended ought to be enforced by the appointment of liquidators; that there is a substantial dispute as to whether the debt is due and owing; that Halimeda has made no unqualified demand for repayment of the debt and failed to issue a statutory demand under section 155 of the Insolvency Act, 2003 (“the Insolvency Act”); and that Halimeda, along with certain hostile parties, are engaged in an unlawful means conspiracy (“UMC”) against Sian and its affiliates, aimed at preventing a planned restructuring of the disputed debt with the objective of depriving Sian of its substantial indirect shareholding in Far-Eastern Shipping Co PJSC (“FESCO”), Halimeda’s parent company; and ultimately wresting control of Sian’s operations.

Sian asserted that (a) consequent on the UMC, it has a cross-claim against Halimeda and others for a sum in excess of or equivalent to the debt which entitles it to a set-off against the debt; and (b) that Halimeda initiated the liquidation application for an improper purpose and therefore it is an abuse of the process of the court. In its strike-out application, Sian averred that Halimeda did not authorize the winding up application and that the loan agreement contains an arbitration clause which mandates that any dispute arising from the loan agreement be resolved through arbitration.

The learned judge concluded, among other things, that Sian ‘has failed to show that the debt is disputed on genuine and substantial grounds or that there are other reasons why the liquidation application ought to be dismissed or stayed.’ He appointed liquidators and ordered that Sian be put into liquidation. Sian’s strike-out application was dismissed and its application to present further evidence was refused. Costs were awarded to Halimeda.

Being dissatisfied with the decision of the learned judge, Sian appealed to this Court. The 5 main issues which fell for determination were: (i) whether the judge erred in law in applying the wrong test – the Sparkasse test – in assessing the liquidation application, in the face of an arbitration agreement; and erred in law and in the exercise of his discretion by concluding that the arbitration point was raised too late and was not available as a defence because Sian had not commenced an arbitration; (ii) whether the judge erred in law and in the exercise of his discretion by finding that Sian had failed, by its allegations of a UMC, to make out a genuine and substantial prima facie claim with a real belief in its substance, based on which it was entitled to a set-off of the debt; (iii) whether the judge erred in law or in the exercise of his discretion by failing to address the dispute in relation to the Intercreditor Agreement dated 7th December 2012; (iv)

whether the learned judge erred in law in holding that Halimeda's liquidation application was authorized; and (v) whether the learned judge erred in the exercise of his discretion or in law in dismissing the application to adduce further evidence.

On 17th December 2021 and 5th May 2022 respectively, Sian also filed two applications to adduce additional evidence on the appeal. The proposed evidence consisted of: the FESCO Report, the Maersk Report and the Hapag-Lloyd Report (together "the first application") and the outcome of a confidential LCIA Arbitration ("the Arbitration Award") and the decision of Wallbank J [Ag.] made at an in-camera hearing on 31st March 2022 ("the Judgment") (together "the second application").

Held: dismissing the appeal, affirming the decision of the learned judge and awarding costs of the appeal to Halimeda, to be assessed by the court below if not agreed within 21 days, that:

1. Sian having conceded that the material contained in the FESCO report, the Maersk report and the Hapag-Lloyd report would not be determinative of the appeal, the first application to adduce fresh evidence was dismissed. Sian having conceded further that the lower court's order dated 31st March 2022 would neither be determinative of the appeal nor have a significant bearing on the outcome, leave to adduce the decision as fresh evidence was refused.
2. The second and third limbs of the Ladd v Marshall test for admitting fresh evidence presuppose that the proposed new evidence is available to the court considering the application. The Arbitration Award was not available to the Court for consideration due to the confidentiality restrictions governing LCIA arbitration. As Sian and Halimeda were not parties to those arbitration proceedings, neither of them could have legitimately secured the removal of the confidentiality constraints. Without sight of the Award, the Court was not in a position to determine whether its contents would have an important bearing on the outcome of the appeal. Sian therefore failed to satisfy that requirement for the admission of fresh evidence and the application was refused.

Ladd v Marshall [1954] 3 All ER 745 applied; Article 30 of the **LCIA Rules** applied.

3. A company faced with an application to wind it up, in a matter that is the subject of a valid and operative arbitration agreement, must file and serve a request for referral to arbitration, not later than when submitting its first statement on the substance of the dispute, in order to secure an automatic arbitration referral order from the court, provided that the agreement is capable of performance. It must, not later than 7 days before the date fixed for the hearing of the application, file and serve a notice setting out the grounds on which it opposes that application. Sian's first substantial statement to the court regarding the dispute (the NOO) was filed after the time limit and did not raise the issue of arbitration. Neither party expressly invoked section 18(1) of the Arbitration Act by requesting the court to refer the matter to arbitration. In those circumstances, the judge's determination that the issue of arbitration was raised late and was

thereby invalidated, is eminently reasonable. Furthermore, Sian neither identified any relevant factors to which the judge attributed either too much or too little weight, nor any irrelevant factors he took into account, which constituted an error in principle with the result that he made a blatantly wrong decision outside the ambit of reasonable disagreement. Accordingly, the learned judge did not err in law or in the exercise of his discretion in concluding that the arbitration issue was raised too late and was not available as a defence.

Section 18(1) of the **Arbitration Act, 2013**, Act No. 13 of 2013, Laws of the Virgin Islands applied; Rule 164 of the **Insolvency Rules** S.I. No. 45 of 2005, Laws of the Virgin Islands applied; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 followed.

4. For a company advancing a cross-claim to succeed in opposing a winding up application, it must put forward a prima facie genuine and substantial case, supported by evidence. The onus remains on that company to satisfy the court of the substantive nature of the dispute including presenting adequate evidentiary material in support of the contention that the value of the cross-claim is at least equivalent to the debt and capable of set-off against it. If there is any doubt regarding the cross-claim, the Court is required to proceed cautiously and would dismiss the winding up application. If there is no dispute about the debt and there is a failure to pay it, even in the absence of proof of insolvency the Court will make a winding up order. It is a question of fact whether a debt is disputed on substantial grounds and it is not open to an appellate court to simply substitute its evaluation of facts for that of the trial judge.

LDX International Group LLP v Misra Ventures Ltd. [2018] EWHC 275 (Ch) applied; **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation** BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) followed; **C-Mobile Services Ltd v Huawei Technologies Co. Ltd (Statutory Demand)** BVIHCMAP2014/0006 (delivered 15th September 2015, unreported) followed.

5. Judgment creditors who are owed significant amounts of money are entitled as a matter of right to a liquidation order, except if it is established that the application for such order is actuated by some improper ulterior motive. However, a debtor may successfully defeat a winding up application, if the Court is satisfied that the application was launched solely or primarily for an improper purpose such as putting pressure on the debtor or pursuant to a UMC. A winding up application does not constitute an abuse of process if the applicant is partially motivated by a genuine desire to recover its debt while benefiting other creditors in his class, but also has some other purpose that he has not disclosed to the other creditors, provided that the latter purpose will not cause them harm. The learned judge rejected the argument of abuse of process on the bases that there was no prima facie case of a UMC and that the winding up application was an incident of doing business, implying that he was satisfied that the real purpose of the application was to recover the debt. He applied the applicable law and

having assessed the evidence, arrived at conclusions, which were reasonable and justifiable on the evidence before him.

Ebbvale Ltd v Hosking [2013] UKPC 1 applied; **In re Amalgamated Properties of Rhodesia** [1917] 2 Ch 115 applied; **Re Southard & Co Ltd** [1979] 1 WLR 1198 applied; **Re a Company** [1983] BCLC 492 applied.

JUDGMENT

Introduction

- [1] **HENRY JA [AG.]**: This appeal raises several issues related to the Court's approach in considering an application for a winding up order, where the respondent company asserts that it has a serious and substantial cross-claim against the applicant, which makes the application an abuse of the Court's process. The factual matrix necessitates consideration of the legal principles applicable to a cross-claim involving an unlawful means conspiracy ("UMC") and the effect of an arbitration agreement on the outcome of a liquidation application.
- [2] The appellant, Sian Participation Corp. (in Liquidation) ("Sian") is indebted to Halimeda International Limited ("Halimeda") for over US\$150 million, with interest, under a loan agreement made between them on 7th December 2012. The agreement stipulated that Sian would repay the loan by a specified termination date which was subsequently¹ fixed at 31st December 2018. By 1st December 2017, Halimeda had advanced a total of US\$148 million to Sian. Sian is incorporated in the Territory of the Virgin Islands ("the BVI") while Halimeda is registered in Cyprus.
- [3] Between June 2013 and 22nd December 2016, Sian executed account reconciliations and signed a letter confirming those advances. It did not repay the debt on the termination date. Halimeda wrote to Sian on 12th February 2020 demanding payment of the debt. Sian did not reply. By 15th September 2020, the outstanding debt had risen to US\$226,365,598.31. On 29th September 2020, Halimeda applied to have liquidators appointed in respect of Sian. Sian filed a Notice of Opposition² ("NOO") denying that the debt was currently due and

¹ By deed of Amendment dated 11th December 2013.

² On 27th November 2020.

payable. The NOO was amended³ and re-amended⁴. Sian subsequently applied⁵ to the Court to strike out the winding up application. It also sought the court's leave retrospectively to adduce further evidence outlined in a witness statement⁶ filed belatedly on 3rd February 2021, and an affidavit⁷ proposed to be used in the hearing.

[4] In the court below, Sian contended that it is not insolvent; that the debt is not currently due and owing; that the debt is an intra-company debt which neither party intended ought to be enforced by the appointment of liquidators; that there is a substantial dispute as to whether the debt is due and owing; that Halimeda has made no unqualified demand for repayment of the debt and failed to issue a statutory demand under section 155 of the **Insolvency Act, 2003** ("the Insolvency Act");⁸ and that Halimeda, along with certain hostile parties, are engaged in a UMC against Sian and its affiliates, aimed at preventing a planned restructuring of the disputed debt with the objective of depriving Sian of its substantial indirect shareholding in Far-Eastern Shipping Co PJSC ("FESCO"), Halimeda's parent company; and ultimately wresting control of Sian's operations. FESCO is the parent company of a Russian transportation and logistics group which operates ports, rails, logistics and shipping. Among its assets is the port of Vladivostok, Russia.

[5] Sian asserted further that (a) consequent on the UMC, it has a cross-claim against Halimeda and others for a sum in excess of or equivalent to the debt which entitles it to a set-off against the debt; and (b) that Halimeda initiated the application for an improper purpose and therefore it is an abuse of the process of the court. In its strike-out application, Sian averred that Halimeda did not authorize the winding up application and that the loan agreement contains an arbitration clause which mandates that any dispute arising from the loan agreement be resolved through arbitration.

³ On 19th March 2021.

⁴ On 23rd March 2021.

⁵ By Notice of Application filed on 30th January 2021.

⁶ See witness statement of Mr. Curle filed on February 3rd 2021.

⁷ Affidavit of Mr. Christopher Bromilow dated 1st February 2021.

⁸ Act No. 5 of 2003, Laws of the Virgin Islands.

[6] By an *ex tempore* decision delivered on 19th May 2021, the learned judge concluded, among other things, that Sian 'has failed to show that the debt is disputed on genuine and substantial grounds or that there are other reasons why the liquidation application ought to be dismissed or stayed.' He appointed liquidators and ordered that Sian be put into liquidation. Sian's strike-out application was dismissed and its application to present further evidence was refused. Costs were awarded to Halimeda. Being dissatisfied with the judgment, Sian appealed to this Court.⁹

[7] Among other things, Sian contends that the learned judge erred in law and in the exercise of discretion by (a) holding that the arbitration point was raised too late; and (b) by not finding that Halimeda is party with others to a UMC, and consequently the liquidation application is an abuse of the court's process. Sian submitted that the learned judge erred in law and in the exercise of his discretion in evaluating the underlying factual background and legal principles; and in refusing the application to adduce further evidence. Before this Court, Sian filed two applications to introduce new evidence for the purposes of its appeal.

[8] Halimeda resists the appeal. It argued that the learned judge applied the correct tests and legal principles with respect to all of the issues and did not err in his assessment and determination of either application. The appeal was heard on the 11th and 12th of May, 2022. The appeal is dismissed for the reasons outlined below. Sian's application to adduce fresh evidence on appeal is refused.

Application for appointment of liquidator

[9] Halimeda's application for the appointment of liquidators was made pursuant to sections 159(1)(a) and 162(1)(a) of the **Insolvency Act** on the grounds that Sian is unable to pay its debts as they fall due and is therefore insolvent. Those provisions provide respectively: -

"159(1)(a) The Court may appoint the Official Receiver or an eligible insolvency practitioner as liquidator of a company, on an application under section 162;"

⁹ By Notice of Appeal filed on 30th June 2021 which was amended on 5th November 2021.

“162(1)(a) The Court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if the company is insolvent;”

Section 8 of the **Insolvency Act** states that a company is insolvent if it is unable to pay its debts as they fall due.

Lower court's decision

[10] In the court below, the learned judge delivered an ex-tempore judgment.¹⁰ He found¹¹ that:

- (1) The loan is owing and due, Sian having so acknowledged. Further, that Sian had failed to show that the debt is disputed on genuine and substantial grounds or that there are other reasons why the liquidation application ought to be dismissed or stayed.
- (2) There was no evidence to support Sian's assertions that the debt is an intra-company debt which neither party intended to enforce through liquidation proceedings.
- (3) Sian raised the arbitration point too late and it is not the law that the existence of an arbitration agreement precludes a creditor from applying for a winding up order and there is no mandatory stay of liquidation proceedings in favour of arbitration. As was held in **Jinpeng Group Limited v Peak Hotels and Resorts Limited**,¹² proceedings in which a creditor's wind-up application are initiated are not covered by arbitration agreements or section 18(1) of the **Arbitration Act, 2013**¹³ but rather become an issue between the debtor and the creditors over the debtor's liability to pay its debts as they fall due.
- (4) Under section 162(1)(b) of the **Insolvency Act**, and as held in **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**,¹⁴ the jurisdiction or relevant test for a winding up order is

¹⁰ On 19th May 2021.

¹¹ Transcript of hearing pgs. 13, 16-17, 19-21, 24-25.

¹² BVIHCMAP2014/0025 and BVIHCMAP2015/0003 (delivered 8th December 2015, unreported) at para 45.

¹³ Act No. 13 of 2013, Laws of the Virgin Islands.

¹⁴ BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

satisfied where a creditor grounds its application on a debt that is not disputed on genuine and substantial grounds.

- (5) As to whether a genuine cross-claim has been established on a prima facie basis, the learned judge found further that there is a lack of evidence of Halimeda's role in the alleged conspiracy and therefore no prima facie case against Halimeda based on the alleged UMC on which the cross-claim is anchored, that would introduce doubt about Sian's liability for the debt.
- (6) A purpose on the part of business rivals to wrest control of a group does not by itself turn an application into an abuse of process.
- (7) Sian has failed to show that the debt is disputed on genuine and substantial grounds.

Grounds of appeal

[11] Sian appealed against the learned judge's decision. It advanced 7 principal grounds of appeal, and several sub-issues. For expediency, and intending no disrespect to counsel, I have taken the liberty to condense them into 5 main grounds:

- (1) The learned judge erred in law in applying the wrong test – the **Sparkasse** test – in assessing the liquidation application, in the face of an arbitration agreement; and erred in law and in the exercise of his discretion by concluding that arbitration was raised too late and was not available as a defence because Sian had not commenced an arbitration.¹⁵ (“the arbitration point”)
- (2) The learned judge erred in law and in the exercise of his discretion by finding that in all the circumstances Sian had failed by its allegations of a UMC to make out a genuine and substantial prima facie claim with a real belief in its substance, based on which it was entitled to a set-off of the debt. That the judge thereby erred by (a) not concluding that

¹⁵ Grounds of appeal 4(a), (b) and (c).

knowledge of the UMC and liability therefore could be imputed to Halimeda; and (b) that its purpose for making the liquidation application was to wrest control from Sian and rendered the application an abuse of process.¹⁶ (“cross-claim, set-off and abuse of process point”)

(3) The learned judge erred in law or in the exercise of his discretion by failing to address the dispute in relation to the Intercreditor Agreement dated 7th December 2012.¹⁷ (“the intercreditor issue”)

(4) The learned judge erred in law in holding that Halimeda’s liquidation application was authorized.¹⁸ (“the authority point”)

(5) The learned judge erred in the exercise of his discretion or in law in dismissing the application to adduce fresh evidence.¹⁹ (“the further evidence issue”)

[12] Sian’s arguments before this Court are largely the same as those presented in the lower court. One notable departure is that the ‘abuse of process’ point featured much more prominently at this stage than before the learned judge. Consideration of the fresh evidence applications must logically precede the review of the substantive appeal grounds for the obvious reason that if the applications are granted, the new evidence will be taken into account in determining the appeal. But first, a synopsis of the corporate structure.

Corporate structure

[13] The corporate structure within which Sian and Halimeda were established and which give rise to this case, is somewhat convoluted. A summary of those inter-relationships will provide very useful context to the dispute between the parties. Sian and Halimeda are members of the same corporate group, Halimeda being one of Sian’s indirect subsidiaries. The Court was advised by learned King’s Counsel Mr. Lowenstein that the appeal was being prosecuted not by the

¹⁶ Grounds of appeal 4(d)(ii), (iii), (iv), (v) and (f).

¹⁷ Ground of appeal 4(d)(i).

¹⁸ Ground of appeal 4(e).

¹⁹ Ground of appeal 4(g).

liquidators but by Mr. Ziyavudin Magomedov, who indirectly holds the majority of shares in Sian, by virtue of his shareholding in SGS Universal Investment Holdings (BVI) ("SGS") and the latter's relationship with other companies within the corporate structure. Throughout the proceedings the parties referred to the chain of companies through which Mr. Magomedov holds an interest in FESCO as 'SGS Investment Branch'.

[14] Mr. Magomedov's and by extension, Sian's interests were advanced throughout this case by Sian's director Mr. Sagav Gadzhiev, who is said to be Mr. Magomedov's nephew. Mr. Gadzhiev's affidavit testimony supplied details about the corporate structure within which the parties operate. On Halimeda's behalf, its director Mr. Konstantin Privalov outlined a substantial part of its case. He accounted for Mr. Magomedov's absence from the proceedings by explaining that he has been the subject of criminal investigations and charges in Russia which have resulted in his arrest and imprisonment. He averred that Mr. Magomedov has been charged with a number of criminal offences including being the leader of organized crime, being involved in large-scale criminal fraud, misappropriation, racketeering and embezzlement of State funds. As a consequence, some of his assets have been frozen and criminal investigations are said to be ongoing.

[15] With respect to the corporate structure within which Sian and Halimeda function, there are two significant opposing factions. On the one side is Mr. Magomedov. He owns 100% of the shares in SGS, which is the major shareholder (with 65.09% shares) in Intimere Holdings Investments Ltd (BVI) ("Intimere") a company incorporated in the BVI. TPG Felix LP ("Felix") owns the remaining 34.91% shares in Intimere. Intimere in turn is the lone shareholder in Hellicorp Investments Ltd (BVI) ("Hellicorp") and Hellicorp owns all of the shares in Sian. Under Sian in the corporate structure, is another company – Maple Ridge Limited (Cyprus) ("Maple Ridge") a wholly owned subsidiary of Sian. Maple Ridge is the sole owner of Wiredfly Investments Ltd (Cyprus) ("Wiredfly"). Wiredfly's two subsidiary companies are Smartilicious Ltd (Cyprus) ("Smartilicious") and Enviartia Consulting Ltd (Cyprus) ("Enviartia"), each of

which owns 24.999% of FESCO's shares. FESCO is the sole direct shareholder in Halimeda.

[16] On the other side is another large shareholder in FESCO namely Domidias Limited ("Domidias") which is owned by one Mr. Mikhail Rabinovich. Domidias, by virtue of various subsidiaries, ultimately holds 23.765% shares in FESCO. That group is referred to as the 'Domidias Investment Branch'. Mr. Rabinovich is also said to have an interest in a company called Ermenossa Investments Ltd, which in turn holds Felix. Mr. Magomedov through the SGS Investment Branch and Mr. Rabinovich through the Domidias Investment Branch are portrayed as the opposing protagonists in the proceedings.

[17] It is worth noting that the Domidias Investment Branch and Zutrek Holdings Ltd. (a BVI company) each acquired shares in FESCO²⁰ at the same time as the SGS branch did. At that time, Mr. Magomedov's former business associates Mr. Mark Garber and Mr. Sergei Bazylev were the ultimate beneficial owners respectively of the shares in those entities. Mr. Garber's interests have since been acquired by third parties allegedly affiliated with Mr. Rabinovich.²¹ Other shareholders in FESCO are 000 Novator Invest and 000 Nautilus with a combined 9% shareholding, while a further 8.5% is listed on the MICEX Stock exchange in Russia.²² Against this background, I turn next to consider the fresh evidence applications.

Fresh evidence applications

[18] **Ladd v Marshall**²³ sets out the principles which guide the Court in its determination of applications to admit fresh evidence. It is now established that three main elements must be present. Firstly, it must be demonstrated that it was not possible to obtain the proposed new evidence with reasonable diligence, for use in the court below. Secondly, the material if admitted, need not be determinative of the appeal but must be such that it would likely have an

²⁰ Zutrek's shareholding in FESCO amounted to 9.76%.

²¹ See Mr. Gadzhiev's affidavit filed on 27th November 2020, at paras. 9-14.

²² See Mr. Gadzhiev's affidavit filed on 27th November 2020, at paras. 15-16.

²³ [1954] 3 All ER 745. See also *Emmerson International Corporation et al v Viktor Vekselberg* BVIHCMAP2020/0011 (delivered 8th October 2021, unreported).

important influence on the outcome of the appeal. Thirdly, it must constitute evidence which is apparently credible, but not necessarily incontrovertible. It is intuitive that the second and third limbs of this test presuppose that the proposed new evidence is available to the court considering the application.

[19] On 17th December 2021 and 5th May 2022, Sian filed two applications to adduce additional evidence on the appeal. The proposed evidence consists of:

(1) (a) FESCO 2020 Annual Report (the FESCO Report); (b) Maersk Group Q3 2021 interim report dated 2nd November 2021 (the Maersk Report); and (c) Hapag-Lloyd Quarterly Financial Report 9M 2021 published 12th November 2021 (the Hapag-Lloyd Report), (together “the Reports”); (“the first application”); and

(2) (a) The outcome of a confidential LCIA Arbitration (“the LCIA Arbitration”) which took place between SGS and Felix LP, the (indirect shareholders of Sian); (b) The decision of Wallbank J (Ag) made at an in-camera hearing in the BVI Commercial Court in claim number BVIHCOM2020/0153 on 31st March 2022, that conflict liquidators be appointed in the current liquidation (“the Judgment”). (together “the second application”)

[20] During arguments in Court on 12th May 2022, learned King’s Counsel Mr. Smith indicated that with respect to the first application, Sian was seeking to introduce the referenced documents because they are relevant to its cross-claim. He accepted that, as submitted by Halimeda, while much of the information set out in FESCO’s 2020 Annual Report was before the court below in a different form (by way of the 2020 financial statements) the material contained in it would not be determinative of the appeal.

[21] In relation to the Maersk and Hapag-Lloyd Reports in the first application, Mr. Smith KC said that they were not available at the time of the hearing, and in the absence of FESCO’s 2021 Annual Report, Sian was seeking to introduce them to support the quantum of damages in the cross-claim, by providing information to demonstrate that ports and logistics businesses comparable to

FESCO's main asset, performed well in 2021. Mr. Smith KC quite properly accepted that this proposed evidence does not satisfy the requirements for admission of fresh evidence, as it is not essential to Sian's case and would not be determinative of the appeal. He withdrew this part of the application.

[22] In a similar fashion, in relation to the second application, he accepted that the lower court's order dated 31st March 2022, appointing conflict liquidators would neither be determinative of the appeal nor have a significant bearing on the outcome. He also withdrew that item from consideration. In view of Sian's concessions and withdrawal of those aspects of the applications to adduce fresh evidence, it is not necessary to examine them. Based on those concessions, I would dismiss the first application. In respect of the second application, I would refuse leave to Sian to adduce the decision of 31st March 2022 appointing the conflict liquidators. This leaves for consideration the confidential LCIA arbitral decision arising from the arbitration between SGS and Felix.

[23] Mr. Smith KC maintained that the outcome of the confidential LCIA arbitration is relevant and satisfies the requirements for admission as fresh evidence. He argued that the arbitral determination was only released on 28th April 2022. He said that it was relevant to the consideration of the UMC claim and supportive of the assertion that there had been a breach of the shareholder's agreement (which was upheld by the tribunal). He argued further that it would be influential to the Court's decision as it supports the existence of the conspiracy and the merits of the pleaded statement of claim in the cross-claim.

[24] The evidence in support of the second application is contained in Gareth James Keillor's first witness statement.²⁴ He averred that he is one of Sian's instructing solicitors and was authorized by Sian to provide the witness statement. By way of an update on the LCIA Arbitration between SGS and Felix, he asserted that the tribunal issued a confidential Partial Final Award ("the Arbitration Award") on 28th April 2022. The subject matter concerned the dispute over SGS' assertions that Felix had breached the Shareholders' Agreement between them by not

²⁴ Filed on 6th May 2022.

honouring a right of first offer (“ROFO”) in respect of the sale of shares in Intimere.

- [25] Sian’s and Halimeda’s respective positions within the SGS Investment Branch assume significance with respect to the outcome of the LCIA arbitration. It is noteworthy that the SGS Investment Branch which is wholly beneficially owned by Mr. Magomedov, indirectly owns 49.99% of the shares in Halimeda and 65% of the shares in Intimere with the remaining 34.91% said to be held by Felix. This demonstrates that within this intra-group arrangement, Sian and Halimeda are both subsidiaries of SGS. Halimeda is also a subsidiary of the Domidias Investment Branch through Felix. Significantly, by initiating these liquidation proceedings, Halimeda, a subsidiary of Sian, has embroiled both entities in a dispute which potentially could result in the latter’s demise.
- [26] On 21st December 2012, SGS and Felix entered into a shareholders’ agreement by which it was agreed that if it was proposed that either shareholder would be subject to a change of control, that party was obliged to offer its shares in Intimere to the other – a right of first offer (“ROFO”). SGS contended that Felix had failed to honour this agreement. SGS initiated arbitration proceedings against Felix for this alleged breach.
- [27] Mr. Keillor asserted that the arbitral tribunal held that Felix had breached the Shareholders’ Agreement by failing to transfer the shares in Intimere to SGS pursuant to its exercise of the ROFO, and consequently SGS owns 100% of Intimere, either legally or beneficially. He asserted further that the tribunal has declared that Felix’s 34.91% shareholding in Intimere is being held on trust for SGS since 13th October 2020 and further that Felix is expressly obliged to exercise its rights as shareholder in accordance with SGS’s instructions.
- [28] He pointed out that in light of Article 30 of the **LCIA Rules**, consideration is being given to whether the Arbitration Award can be provided to this Court notwithstanding its confidentiality. He noted that exceptions to such confidentiality are permitted ‘to the extent that disclosure may be required of a **party** by legal duty, to protect or pursue a legal right, or to enforce or challenge

an award in legal proceedings before a state court or other legal authority.’ (Emphasis added) Mr. Keillor undertook that if ordered by this Court to disclose the Arbitration Award, Sian would provide it forthwith.

[29] Learned King’s Counsel Mr. Smith argued that the tribunal’s partial final determination mandates Felix to offer shares in Sian’s indirect parent to SGS. He submitted that the Arbitration Award having only recently been released, precluded the introduction of those details at an earlier stage. He contended that it is likely to influence the Court’s decision because it goes to the conspiracy question. In this regard, he submitted that one of the elements of the pleas to the conspiracy claim was that SGS’s rights under the Intimere Shareholders’ Agreement to acquire the remaining shares in Intimere had been wrongly frustrated.

[30] Learned King’s Counsel Mr. Lowenstein did not expressly oppose the application for admission of the Arbitration Award as fresh evidence. He submitted that the fact that it exists reveals nothing to the Court such as the basis for the dispute between Felix and SGS, or about the arguments before the arbitrator, or the basis of the Arbitration Award. He stated that it is not clear whether ‘some sort of default award’ was made. He noted that although the Arbitration Award was issued on 28th April 2022, the instant application was not filed until 6th May 2022. As to whether the evidence is likely to be influential, he contended that it cannot be.

[31] He submitted further that Sian has not said whether they have asked the arbitrator to release the Arbitration Award from the confidentiality restraints or approached the parties to the Arbitration Award to make such representation to the arbitral tribunal for its release. He rejected the contention that it is an ‘additional building block to anything’.

[32] It is clear that the Arbitration Award did not exist at the time of the learned judge’s deliberations in the lower court. Accordingly, the first requirement in **Ladd v Marshall** has been satisfied in relation thereto. As to whether such evidence would have an important influence on the outcome of the appeal, the Court is at

a disadvantage because without a court order mandating its release, the Arbitration Award is not available for consideration, due to the confidentiality restrictions governing LCIA arbitration. Moreover, Sian and Halimeda were not parties to those arbitration proceedings. It goes without saying that under the **LCIA Rules**, neither of them could legitimately have intervened in the arbitration proceedings to secure the removal of the confidentiality constraints. Sian has not indicated whether it attempted to do so.

[33] Significantly, Sian referred to Article 30 of the **LCIA Rules**. Sub-Article 30.1 states:

“30.1 **The parties** undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, **save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider.**” (Emphasis added)

Equally relevant is sub-Article 30.3 which provides, ‘**The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.**’ (Emphasis added)

[34] I am concerned that Sian, a non-party to the tribunal proceedings, has not presented to this Court the written consent of the parties and that of the Arbitral Tribunal for the publication or release of the Arbitration Award, yet inferentially, seeks an order from this Court directing its disclosure pursuant to Article 30 of the **LCIA Rules**. Sian does not contend that disclosure of the Arbitration Award is required by it pursuant to the rules of court. It did not assert that the Arbitration Award is legitimately in its custody, possession or control and subject to a duty of disclosure in these proceedings.

[35] By necessary implication, it appears that Sian’s application for admission of the Arbitration Award is predicated on the presumption that a court order founded on the contents of Mr. Keillor’s witness statement would without more,

automatically activate the lifting of the confidentiality stipulation in the **LCIA Rules**. This Court would be presumptuous to so conclude and by making such an order would effectively signal its disregard for the established protocols and rules by which LCIA arbitration is conducted. Such an approach is to be resisted as being unconventional and discourteous to the LCIA forum, which is an established legal and legitimate alternative process for resolving commercial disputes. It could also demonstrate a disregard for comity between law courts and arbitration systems.

[36] While it is possible that the Arbitration Award may be partially or wholly influential on the outcome of the appeal, the procedural issues with which this Court would be required to grapple and navigate to secure the release and admission of its contents into evidence, involve too much uncertainty and potential irregularity to justify such an attempt. Taking into account the confidentiality dictates which preclude the release of the Arbitration Award other than through a court order obtained by one of the parties or by consent of the parties and the tribunal; that neither Sian nor Halimeda was a party to the arbitral proceedings; their consequential incapacity to consent to the release of Arbitration Award; lack of evidence as to the relevant parties' and the arbitrator's inclination to consent to such release; I am of the considered opinion that this Court must refuse the implicit request by Sian for an order directing such 'disclosure'.

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

Arbitration point

[38] Sian contended initially that the **Sparkasse** test had no utility in liquidation proceedings involving disputes falling within the scope of an arbitration

agreement. It was asserted that the learned judge erred in law in holding that Halimeda is entitled to expect the appointment of a liquidator 'unless there are exceptional circumstances'.²⁵

[39] However, in submissions, Sian retreated from that position. It accepted that while that is the state of the law in England as reflected in **Salford Estates (No 2) Ltd v Altomart Ltd (No 2)**,²⁶ in the BVI it is different. Sian acknowledged that it is now settled, on the authority of **Jinpeng**, that the statutory jurisdiction to make a liquidation order on a creditor's application under section 162(1) of the **Insolvency Act** is satisfied if the debt is not disputed on genuine and substantial grounds, without the necessity of proving exceptional circumstances. In such cases, a debtor is not entitled to an automatic stay of the liquidation proceedings under section 18(1) of the **Arbitration Act** by merely invoking the existence of an arbitration agreement.

[40] Sian's argument morphed instead into an insistence that the existence of an arbitration agreement is highly relevant to the court's determination. It cited in support **Rangecroft Ltd v Lenox International Holdings Ltd**,²⁷ **IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd**²⁸ and **A Creditor v Anonymous Company Ltd**.²⁹ I make the observation that while it is self-evident that an arbitration agreement would be relevant to a court's consideration of a liquidation application, this contention did not feature in the grounds of appeal.

[41] In similar fashion, Sian omitted from the grounds of appeal any assertion that if a creditor fails without good reason to serve a statutory demand thereby depriving the company of its absolute right to a stay under section 18 of the **Arbitration Act**, it would be inappropriate for the court to assess the merits of the defence for the purposes of **Sparkasse**. However, it was included in submissions. Counsel for Halimeda quite properly took issue with Sian doing

²⁵ Ground of appeal 4(a).

²⁶ [2015] Ch 589.

²⁷ BVIHC(COM)2020/0037 (delivered 6th July 2020, unreported).

²⁸ BVIHC(COM)2020/0034 (delivered 16th July 2020, unreported).

²⁹ (delivered 28th January 2021, unreported).

so, on the basis that no related ground was articulated in the Notice of Appeal. For that reason and in accordance with CPR 62.4(8) neither of those arguments would attract this Court's consideration, without its permission. No application was made for such permission. The impugned submissions are therefore disregarded.

[42] A further ground of appeal is that the learned judge erred in law or in the exercise of his discretion by holding that the arbitration point was raised by Sian too late in the proceedings. It was also postulated that the learned judge erred in law by holding that it was necessary for Sian to commence arbitration in response to the winding up petition to be able to rely on it.

[43] On Sian's behalf, learned King's Counsel, Mr. Smith submitted that it is not clear why the learned judge considered that it was too late to raise the arbitration agreement and argued that there is no requirement for Sian to have commenced arbitration in order to rely on the arbitration clause since the parties are thereby bound to resolve their dispute through arbitration, irrespective of whether or not any arbitration has actually been started.

[44] Halimeda contended that without seeking or obtaining permission to amend the NOO, Sian did not raise the arbitration issue in the lower court until 19th and 23rd March 2021, when it filed its Amended NOO, and sometime after filing its original NOO and long after the time stipulated in rule 165 of the Insolvency Rules. Halimeda submitted further that the judge did not say that Sian's failure to commence arbitration by itself acted as an absolute bar to it relying on the arbitration clause but rather, he factored it into his deliberations as a relevant consideration.

[45] It is trite law that the determination of a liquidation application is a discretionary function. As will be demonstrated by reference to the applicable law, this discretionary function extends to aspects of the Court's decision as to whether to stay the proceedings in favour of referral to arbitration. The jurisdiction of an appellate Court to reverse the decision of a lower court in respect of the exercise of discretion is circumscribed by well-known settled legal principles.

[46] **Dufour and Others v Helenair Corporation Ltd and Others**³⁰ is often cited as the leading authority from this Court in relation to an appellate Court's stance when invited to disturb a lower court's exercise of discretion. It is the law that an appellate Court is slow to interfere with the decision of a judge arising from the exercise of a judicial discretion. It will only do so if satisfied that the judge erred in principle by having regard to irrelevant factors or by failing to take into account or giving too much or too little weight to relevant factors; and by reason of such error in principle, his decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore blatantly wrong. I bear this principle firmly in mind as I consider Sian's submissions that the learned judge erred in relation to the arbitration point.

[47] I remind myself that it is beyond dispute that an appellate Court should refrain from over-analyzing the decision of a lower court and 'resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.'³¹ This was underscored by the Board in **Ming Siu Hung and others v J F Ming Inc and another**.³² With those principles firmly in mind, I turn my attention to the referenced arbitration contentions.

[48] The learned judge did not explain why he concluded that the arbitration point was raised late. Sian contends that the learned judge erred in law or in the exercise of his discretion by so finding. Arbitration was advanced as a live issue on 1st February 2021, when Sian filed its Notice of Application to Strike out the winding up application. By then, Sian had already filed its original NOO (27th November 2020). Four months had elapsed since the liquidation application was filed and served. It would be another three weeks before Sian amended its NOO to invoke the arbitration agreement.

³⁰ (1996) 52 WIR 188.

³¹ *Pigłowska v Pigłowski* [1999] 1 WLR 1360 at 1372, per Lord Hoffmann.

³² [2021] UKPC 1.

[49] The BVI **Arbitration Act**³³ incorporates the UNCITRAL Model Law as a Schedule. Section 18 also enacts Article 8 of the UNCITRAL Model Law. Both mandate a court to refer to arbitration, parties to an arbitration agreement, if one party requests such referral in its first statement to the court on the dispute. This obligation on the court does not arise if the court finds that the agreement is null and void, inoperative or incapable of being performed. Both provisions state: -

“(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.” (Emphasis added)

[50] This sub-section and Article 8 impose a mandate on the Court to refer to arbitration disputes that are the subject of an arbitration agreement provided that a request for such referral is made in the respondent’s first statement to the Court on the substance of the dispute. Implicitly, this stipulation becomes a discretion after the first statement is filed, to be exercised under the over-arching umbrella of fairness and just disposition, important components of which include consideration of all relevant factors such as the timing of the request.

[51] Also relevant is rule 164 of the BVI **Insolvency Rules**³⁴ (“the Rules”) which stipulates that a company faced with an application to wind it up, must file and serve a notice setting out the grounds on which it opposes that application not later than 7 days before the date fixed for the hearing of the application. It provides: -

“If a company intends to oppose an application for the appointment of a liquidator it shall, not less than 7 days before the date fixed for the hearing of the application, file with the Court and serve on the applicant –

- (a) a notice setting out the grounds on which it opposes the application;
and
- (b) an affidavit verifying the matters stated in the notice.”

[52] The referenced provisions demonstrate that a company faced with an application to wind it up, in a matter that is the subject of a valid and operative arbitration agreement, must file and serve a request for referral to arbitration,

³³ Section 2(2).

³⁴ S.I. No. 45 of 2005, Laws of the Virgin Islands.

not later than when submitting its first statement on the substance of the dispute, in order to secure an automatic arbitration referral order from the court, provided that the agreement is capable of performance. Sian's first substantial statement to the court regarding the dispute (the NOO) was not only filed after the time limit in rule 164, but it did not raise the issue of arbitration. Neither party expressly invoked section 18(1) of the **Arbitration Act** by requesting the court to refer the matter to arbitration. In those circumstances, the learned judge's statement and ultimate determination that the issue of arbitration was raised late and was thereby invalidated, is eminently reasonable, being as it was, grounded in the factual background and supported by the legal provisions underpinning the automatic referral mandate in section 18(1) the **Arbitration Act**. For those reasons, I am of the considered opinion that Sian's argument that the learned judge erred in law on this score is not sustainable.

[53] It is equally understandable that the learned judge did not set out chapter and verse of the relevant law since Sian highlighted it in its submissions,³⁵ demonstrating that its legal practitioners and by extension Sian, were aware of and familiar with the provision. Moreover, in light of the fact that the decision was an oral one, it is perhaps unreasonable to expect the learned judge to capture all of the legislative provisions, particularly those which could be considered uncontroversial.

[54] As to the contention that the learned judge erred in the exercise of his discretion by holding that the arbitration point was raised too late, Sian has neither identified any relevant factors to which the judge attributed either too much or too little weight nor any irrelevant factors he took into account, which constituted an error in principle with the result that he made a blatantly wrong decision outside the ambit of reasonable disagreement. I perceive no such deficiency in his analysis. I would not interfere with his decision. And I would therefore dismiss ground 4(b) of Sian's grounds of appeal.

³⁵ Sian's skeleton argument filed on 14th April 2021 at para. 86.

[55] The foregoing determination affords a complete refutation of the arbitration point. It is accordingly unnecessary to consider ground 4(c) of the grounds of appeal by which Sian contends that the judge erred in law by holding that Sian had to commence arbitration in order to be entitled to rely on an arbitration agreement in response to a winding up application. However, for completeness, I make the observation that the learned judge did not say that Sian had to commence arbitration before it could rely on the arbitration clause. What he said was: -

“Sian’s reliance on the arbitration agreement in the loan agreement is a hopeless objection. Why? Well, it was raised late. ... Secondly, Sian failed to commence an arbitration. They invoked the arbitration agreement, but they have not sought to bring one. Instead they have started claims on matters that would require arbitration on their case, or might require arbitration on their case, but they haven’t done so in arbitration.”

[56] I make the observation that taken in isolation, the second reason advanced by the learned judge is open to being interpreted to mean that Sian had to initiate an arbitration in order to invoke the arbitration clause in the present proceedings. However, when read in context, it highlights the obvious point that on the one hand, Sian is pressing the arbitration avenue as one which the Court should enforce by referral pursuant to section 18(1) of the **Arbitration Act**; while it has on the other hand, deliberately and intentionally elected to forgo arbitration in respect of its cross-claim against Halimeda, when it was open to it to pursue that course. In my opinion, the learned judge is addressing what could be considered a double-standard that undermines Sian’s belated entreaty for referral to arbitration in respect of the liquidation proceedings. Sian’s contention that he erred in law in this regard is without merit and I would also dismiss this ground of appeal.

Cross-claim, Set-off and Abuse of process point

[57] Further grounds of appeal dissect the learned judge’s analysis and treatment of Sian’s cross-claim, its avowed entitlement to off-set damages claimed therein against the debt; and its abuse of process contentions. A cross-cutting element of several of these grounds of appeal touch and concern the applicable test governing the grant of a winding up order where the debt is undisputed or disputed. It is therefore necessary to outline the legal bases for granting or

refusing a winding up order in such circumstances to frame the consideration of those issues and the legal principles applicable to cross-claims and abuse of process in insolvency proceedings.

[58] With respect to the issue of a cross-claim, the law is settled. As stated in **Sparkasse**, for a company advancing a cross-claim to succeed in opposing a winding up application, it must put forward a prima facie genuine and substantial case, supported by evidence. The onus remains on that company to satisfy the court of the substantive nature of the dispute including presenting adequate evidentiary material in support of the contention that the value of the cross-claim is at least equivalent to the debt and capable of set-off against it. If there is any doubt regarding the cross-claim, the Court is required to proceed cautiously and would dismiss the winding up application: see **LDX International Group LLP v Misra Ventures Ltd.**³⁶ If there is no dispute about the debt and there is a failure to pay it, even in the absence of proof of insolvency, the Court will make a winding up order.

[59] The following passage from **Sparkasse** summarizes the material principles:

“The law governing the making of winding up orders is well settled... The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. [Re Taylor’s Industrial Flooring Ltd. (1990) BCC 44] But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. [Tweeds Garages Ltd. (1961) 1 Ch. 406] To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding. [Palmer’s Company Law Vol. 3 Para 15.214] A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company. [In re London and Paris Banking Corporation

³⁶ [2018] EWHC 275 (Ch).

(1874) LR 19 Eq. 444] If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. [Mann v Goldstein (1968) 2 All ER 769] The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court. [Re Ringinfo Ltd (2002) 1 BCLC 210]³⁷

[60] It is settled law that it is a question of fact whether a debt is disputed on substantial grounds. As held in **C-Mobile Services Ltd v Huawei Technologies Co. Ltd (Statutory Demand)**: ‘It is not open to an appellate court to simply substitute its evaluation of facts for that of the trial judge’.³⁸ The term ‘evaluation of facts’ is perhaps more appropriately expressed as ‘assessment of evidence’ which describes the exercise that the Court is required to conduct.

[61] Turning now to the law regarding UMC. The elements of a UMC were summarized in **Taylor v Van Dutch Marine Holdings Ltd and others** as follows:

“The constituent elements of unlawful means conspiracy ... are: (i) an agreement, combination or understanding involving two or more persons; (ii) to take action which is unlawful; (iii) with the intention (but not necessarily the predominant purpose) of injuring the claimant; (iv) damage caused to the claimant by the unlawful means.”³⁹

[62] To recover damages against named co-conspirators, the claimant must establish that each alleged act was executed as part of the conspiracy and contributed to the damage sustained. An alleged co-conspirator is not liable for any loss that arises from the conspiracy before he became a party to it.⁴⁰ It is not necessary for every co-conspirator to participate actively in the agreed course of unlawful activity. It suffices if there is agreement among all parties to the unlawful conspiratorial undertaking.⁴¹

³⁷ BVIHCVAP2002/0010 at para. 3 (delivered 18th June 2003, unreported).

³⁸ BVIHCMAP2014/0006 at para. 10 (delivered 15th September 2015, unreported).

³⁹ [2019] EWHC 1951 (Ch) at para 289.

⁴⁰ Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama As [2009] EWHC 1696 (Ch).

⁴¹ Barclays Pharmaceuticals Ltd v Waypharm LP [2013] EWHC 503 (Comm).

[63] As to what amounts to abuse of process in liquidation proceedings, the Board's decision in **Ebbvale Ltd v Hosking**⁴² is instructive as to the circumstances which would justify the dismissal of a liquidation application on that basis. The Board re-affirmed that the starting point is that judgment creditors who are owed significant amounts of money are entitled as a matter of right to a liquidation order, except if it is established that the application for such order is actuated by some improper ulterior motive: See **In re Amalgamated Properties of Rhodesia**.⁴³ In **Re Southard & Co Ltd** Buckley LJ expressed the principle as follows:

“where the debt is established and not satisfied and there are no exceptional circumstances, the creditor is entitled to expect the court to exercise its jurisdiction in the way of making a winding up order.”⁴⁴

The term ‘exceptional circumstances’ is sometimes rendered ‘special circumstances’ as in **Re Bayoil SA; Seawind Tankers Corp v Bayoil SA**.⁴⁵

[64] In a similar vein, a debtor may successfully defeat a winding up application, if the Court is satisfied that the application was launched solely or primarily for an improper purpose such as putting pressure on the debtor or pursuant to a UMC. A winding up application does not constitute an abuse of process if the applicant is partially motivated by a genuine desire to recover its debt while benefiting other creditors in his class, but also has some other purpose that he has not disclosed to the other creditors, provided that the latter purpose will not cause them harm.⁴⁶

[65] As explained by Harman J In **Re a Company**:

“The true position is that a creditor petitioning the Companies Court is invoking a class right... and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view.

... the only proper purpose for which a petition can be presented is for the proper administration of the company's assets for the benefit of all in the

⁴² [2013] UKPC 1.

⁴³ [1917] 2 Ch 115 at p. 121.

⁴⁴ [1979] 1 WLR 1198 at pg. 1203.

⁴⁵ [1999] 1 All ER 374.

⁴⁶ *Maud v Aabar Block SARL* [2015] EWHC 1626 (Ch). See also *Re Maud* [2019] Ch 15.

relevant class. To hold otherwise would be to confuse motive, which is past, with purpose, which is future.

... the true question is 'for what purpose does the petitioner wish to wind up this company'. ... If the petitioner can show that he and his class stand together and will benefit or suffer rateably, then his ill motive is nothing to the point".⁴⁷

I bear the foregoing legal principles in mind as I consider the related grounds of appeal.

- [66] Halimeda objected to Sian's inclusion of the abuse of process ground of appeal and submissions on the ground that the point was not taken in the lower court. Its contention that Sian did not elaborate on the abuse argument in the lower court deserves attention. Suffice it to say that while Sian downplayed this part of its case before the lower court, it was a feature in its NOO and remained a part of the Re-Amended NOO up to the hearing on 13th May 2022. Sian's statement⁴⁸ at the time that no separate point arises for consideration is contradicted by its later assertion: '(1) it is an abuse of process for there to be an application for the appointment of liquidators where the debt is disputed on substantial grounds (see e.g. *Re A Company* [1992] 1 WLR 351...; (2) the application is also an abuse of process because it is brought in furtherance of the Conspiracy'.⁴⁹ Having presented extensive submissions on the abuse point, it cannot be said that Halimeda is prejudiced by the issue re-appearing in full force on the appeal. In fact, it made fulsome submissions on this aspect of the appeal. In the premises, it would be unjust to deny Sian the right to pursue this line of argument.

Analysis – UMC, Cross-claim and Abuse of Process

- [67] Essentially, Sian's complaint regarding the UMC is that the learned judge erred in law in his analysis of the evidence and consequently with respect to certain findings as to Halimeda's role in the alleged conspiracy; and as to whether it had caused loss to Sian. In this regard, Sian submitted that its UMC claim is necessarily inferential at this stage based on the pleadings. The learned judge

⁴⁷ [1983] BCLC 492.

⁴⁸ In its speaking notes filed on 12th May 2021, para. 71.

⁴⁹ At para. 72 of the speaking notes.

correctly made the point that while it is possible to draw inferences, they must be based on the evidence.

[68] The judge found that there is a lack of evidence in relation to every element of the alleged UMC including any connection between Halimeda and the alleged improper actions which predated its filing of the liquidation application and the alleged consequential damage. The evidence which was intended to lay out the prima facie case of a UMC is set out in Mr. Gadzhiev's affidavit filed on 27th November 2020. Apart from his reference to Halimeda's application for the Cypriot injunctions and the liquidation application, his affidavit comprised much by way of supposition and speculation about Halimeda's participation in the alleged corporate raid and the UMC, and little substance.

[69] It has not gone unnoticed that at the hearing before this Court, Sian argued that Halimeda's 12th February 2020 letter of demand was issued pursuant to the UMC. It had not taken this position in the lower court, either in the affidavit evidence or skeleton arguments. Quite tellingly, in its speaking note⁵⁰ Sian identified the three actions undertaken by Halimeda pursuant to the UMC. They are the Cypriot injunctions, the filing of the originating application for a winding-up order and its claim against Maple Ridge. While Mr. Gadzhiev mentioned the letter of demand in his affidavit,⁵¹ he did not seek to link it to the alleged UMC. He introduced it for the singular purpose of positing that 'it was by no means an unqualified demand for payment because it purported to offer Maple Ridge and Sian an opportunity to suggest an alternative repayment plan'.

[70] The judge was accordingly entitled to find as he did that (a) there was a lack of evidence of Halimeda's role in the alleged conspiracy and certain actions and knowledge could not be imputed to Halimeda; (b) Project Moonlight did not involve the release or extension of the Sian debt; (c) Halimeda cannot be held responsible for the alleged loss which occurred before Halimeda is alleged to have joined the conspiracy; (d) the debt was not disputed on genuine and substantial grounds; and (e) no real dispute based on the UMC was put forward

⁵⁰ At para. 63.

⁵¹ At para. 41.

with a real belief in its substance, that satisfied the **Sparkasse** test. I am satisfied that the learned judge did not err in law in arriving at those conclusions. There is no legal basis to interfere with those findings.

[71] Sian's appeal against the judge's findings on the abuse point relies partially on the UMC claim. Its case is that the winding up application is an abuse of process because (a) of Halimeda's involvement in the UMC; and/or (b) the real purpose it was brought was in furtherance and performance of the UMC. Sian contends that the judge erred by not finding that it was an abuse of process for either reason.

[72] The learned judge rejected the argument of abuse of process for two reasons. The first is based on the finding that there is no prima facie case of a UMC. That finding logically erodes the foundation for an abuse of process determination. In the second, the judge found that the winding up application was an incident of doing business, implying that he was satisfied that the real purpose of the application was to recover the debt. Those findings were open to him on the circumstances of this case. The judge applied the applicable law and having assessed the evidence, arrived at those conclusions, which in my estimation were reasonable and justifiable on the evidence before him.

[73] I am satisfied that the learned judge did not err in finding that the application was not an abuse of process. For the reasons outlined above I would not disturb his findings on this issue. I would therefore dismiss grounds of appeal 4(d)(ii), (iv), (v) and (f).

Further evidence issue

[74] A substantive ground of appeal concerned the learned judge's decision to disallow the introduction of Mr. Curle's and Mr. Bromilow's testimony by witness statement and affidavit respectively. Being satisfied that the learned judge did not err in the exercise of his discretion in appointing liquidators of Sian, this disposes of the appeal. It is therefore unnecessary to consider the final ground of appeal regarding his refusal to admit Mr. Curle's and Mr. Bromilow's

testimonies. Suffice it to say that I agree with the learned judge's reasons for his decision and I would also dismiss that further ground of appeal – (4g).

Authority point and intercreditor issue

- [75] The other grounds of appeal charge that the learned judge erred in law or in the exercise of his discretion by failing to address the dispute in relation to the Intercreditor agreement; and in holding that the liquidation application was authorized. Sian did not advance any arguments in respect of either ground of appeal - 4(d) (i) and (e). They have thereby been abandoned and are accordingly dismissed.

Disposition

- [76] For the foregoing reasons, I would dismiss Sian's appeal against the learned judge's order appointing liquidators of Sian; and against his refusal to admit new evidence. I would affirm the learned judge's decision. I would award costs of the appeal to Halimeda International Limited to be assessed by the court below if not agreed within 21 days.

Miscellaneous

- [77] Finalization of this judgment has taken longer than intended for reasons largely beyond the author's control. Apologies are in order to the parties whom I trust have not been unduly inconvenienced by the delay. Their patience and forbearance are appreciated. Counsel on both sides made thorough written and oral submissions. I gratefully acknowledge their assistance.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar