

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0034

BETWEEN:

LIM YEW CHENG

Appellant

and

GUANGHUA SS HOLDINGS LIMITED

First Defendant/Respondent

LIN MINGHAN

Second Defendant

Before:

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

The Hon. Mde. Tana'ania Small

Justice of Appeal [Ag.]

Appearances:

Mr. Alexander Cook KC, with him Mr. Guy Olliff-Cooper, Ms. Grainne Hussey and
Mr. Aaron Mayers for the Appellant

Mr. Alex Barden KC, with him Mr. Mark Wells for the Respondent

2025: October 17;

2026: April 24.

Commercial Appeal – Appeal against decision of the learned judge to dismiss adjournment application and an application for a stay of proceedings – Application to adduce fresh evidence – Application to amend notice of appeal – Ladd v Marshall test – Whether the evidence the appellant/applicant sought to adduce was in existence at the time of the hearing in the court below – Whether there are exceptional circumstances that warrant adducing the fresh evidence – Whether the learned judge failed to apply the test for the grant of a case management stay of proceedings - Whether the Hong Kong judgment is final – Whether the judge was wrong not to grant the stay application because the purpose of the enforcement proceedings is to enforce the Hong Kong judgment against the appellant – Whether the judge was wrong to dismiss the adjournment application on the basis that it was so clear that the stay application should be dismissed that nothing counsel for the appellant could say, and none of the evidence that had been filed, could make any difference to the outcome

This appeal concerns a complex dispute over financial transactions and alleged conspiracy related to the enforcement of a Hong Kong judgment from April 2022. Guanghua SS Holdings Limited is the claimant; Lim Yew Cheng (the appellant) and his son, Lin Minghan are defendants. The appellant, the ultimate owner of Xeno Origin Limited, was involved in two \$80 million loan facilities, referred to as Xeno I and Xeno II, each guaranteed personally by him and his son and secured by shares in HK Aether. On 26th October 2018, the Xeno II facility was novated to HK Aether but Xeno Origin remained jointly liable for that facility as chargor, while the appellant and his son remained liable for that facility as guarantors. It was later discovered that Xeno Origin and HK Aether failed to repay their respective facilities on time. On 23rd November 2020, Guanghua appointed receivers over Xeno Origin's shares in HK Aether and other assets. One week later Guanghua commenced proceedings against the appellant and his son in relation to their respective personal guarantees. On 20th April 2022 Mr. Justice Peter Ng granted Guanghua summary judgment (the "Hong Kong judgment").

After default, receivers were appointed by Guanghua, and assets were sold, allegedly at significant undervalue, to Guanghua's parent company and later to a joint venture. The appellant argues that proper valuation would have discharged Xeno Origin's debt without triggering personal liability. On 6th December 2023, the appellant commenced proceedings in Hong Kong, ("the 1976 proceedings"), seeking (i) damages in the sum of US\$944 million, being the difference between what the appellant contends is the true value of the shares and the price at which they were sold; and (ii) a declaration that the appellant and Mr. Lin are not liable for any interest that has accrued under the Xeno facilities after the date that they say the security assets ought to have been sold and Xeno Origin's debt discharged.

On 12th June 2024, Guanghua commenced proceedings in the BVI for the recognition and enforcement of the Hong Kong judgment, inclusive of the interest element ("the enforcement proceedings"). The appellant suggests that this is an attempt to stifle the 1976 proceedings.

On 9th August 2024, the appellant applied to stay enforcement proceedings pending the outcome of the 1976 Hong Kong case and to set aside an alternative service order. Both hearings were scheduled for 14th November 2024, with a 90-minute estimate. Guanghua submitted evidence on 26th August; the appellant requested an extension to reply, serving his affidavit evidence as "Lim 3" on 7th November. The court allowed "Lim 3" and gave Guanghua permission to respond, which was served on 12th November but filed on the hearing day. After receiving Guanghua's evidence, the appellant felt 90 minutes were insufficient and sought an adjournment, requesting a full-day hearing to address all issues and to present new evidence which it had collated since the filing of "Lim 3". The judge dismissed both the adjournment application and the stay application.

Dissatisfied with the judge's orders, the appellant sought leave to appeal and a stay of enforcement proceedings pending determination of the leave application and subsequent appeal. On 21st January 2025, the appellant obtained leave to appeal and an interim stay of the enforcement proceedings pending determination of the appeal.

Subsequent to filing his notice of appeal, the appellant raised two major developments occurring after Mithani, J's decision. First Mr. Ma, the legal owner of Xeno Origin, was granted permission by Wallbank, J on 26th June 2025 to bring derivative claims in the BVI court, which he considered were likely to succeed. The second was that on 22nd August 2025 the appellant and his son initiated proceedings in Hong Kong to set aside the Hong Kong judgment on grounds of fraud. Based on these developments the appellant made two preliminary applications to amend his notice of appeal to argue that a stay of the appeal should be granted pending the determination of the set aside application in the Hong Kong courts ("the fraud proceedings") and the derivative action in the Hong Kong courts ("the new proceedings"). The appellant also made an application to adduce fresh evidence in support of his appeal.

Held: dismissing the preliminary applications and the appeal, lifting the interim stay of proceedings granted by Ventose JA on 21st January 2025 and ordering costs to be assessed if not agreed to the respondent, that:

1. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

Ladd v Marshall [1954] 1 WLR 1489 applied.

2. On the first condition, the question is whether the evidence of the fraud proceedings and the new proceedings could not have been obtained with reasonable diligence. It is not in dispute that the fraud proceedings were not on foot in Hong Kong at the time of the hearing before Mithani J, nor had Wallbank J granted leave to file the derivative claim. In that sense, the documents sought to be adduced were not available for consideration by Mithani J because those circumstances did not exist at the time of the hearing before him. A line of cases emanating from this Court has held that the first condition of **Ladd v Marshall** does not extend to evidence that did not exist at the time of the hearing in the court below.

WWRT v Carosan BVIHCPMAP2022/0002 (delivered 20th July 2022, unreported) followed; **Lam Wo Ping v Chen Jian Yun** BVIHCPMAP2023/0006 (delivered 20th August 2024, unreported) followed; **Geminis Investors Limited v Goods Technology Starting international Limited** BVIHCPMAP2022/0020 (delivered 23rd August 2023, unreported) followed.

3. The appellant's reliance on the Court of Appeal's decision in **Chia Hsing Wang v Real Assets RA** does not avail. **Chia** is distinguishable since even though it stands for the proposition that in exceptional circumstances, evidence that was not in existence at the time of the hearing may yet be admitted as fresh evidence on

appeal, the exceptional circumstance in that case was the judge's unilateral decision to perform independent research on the word "ninja" and to use the "Project Ninja" file name to draw negative inferences about the appellants' strategy, without notice or opportunity provided to the appellant to explain. This circumstance, which produced unfairness to the appellant, was of the judge's own making after arguments had concluded. There are no exceptional circumstances in the present case that would warrant extending the scope of the first condition of **Ladd v Marshall** to material that was not in existence at the time of the proceedings below. Similarly, the other cases relied upon by the appellant, namely **Bilzerian** and **Staray Capital** do not avail the appellant as they are also distinguishable from the present case. In the present case the appellant is the author and creator of the subsequent post-trial events on which they seek to rely. It was Mr. Ma, the legal owner of Xeno, who initiated the application for leave to bring derivative proceedings before Wallbank J and it is the appellant who subsequently initiated the fraud proceedings in Hong Kong. That is a feature that is not present in either **Bilzerian** or **Staray Capital**. In those cases, the subsequent events or evidence did not materialize at the strategic instigation of the applicants. It would seem to be undesirable as a matter of principle to extend the scope of the first condition of **Ladd v Marshall** so as to facilitate a party seeking leave to adduce fresh evidence on appeal, to orchestrate, create or bring about changed circumstances and then to pray in aid his very own creation.

Chia Hsing Wang v XY and Others BVIHCMAP2022/0055 (delivered 6th June 2023, unreported) distinguished; **Adam Bilzerian et al v Terrence Byron et al** SKBHCVAP2019/0032 (delivered 21st July 2020, unreported) distinguished; **Staray Capital Limited et al v Cha, Yang (also known as Stanley)** BVIHCMAP2013/0009 (delivered 14th July 2014, unreported) distinguished.

4. With reference to the application to amend the notice of appeal, parties ought to present all arguments at trial and not save them for appeal. To introduce a new point on appeal, permission is needed, and a cogent explanation must be given for its omission below. New points of pure law may be allowed if they don't require additional evidence, but appellate courts are cautious, especially if further evidence would be needed or if insufficient notice to the other party would result in prejudice. Relevant considerations include: (i) whether there is a real prospect of the amended ground succeeding; (ii) the lateness of the application; (iii) the reasons for that lateness; (iv) the earlier history; (v) the need for an adjournment; (vi) the effect of the application on the litigants and the litigation generally.

Win Business (Caofeidan) Ltd v Anadarko China Holdings Company BVIHCMAP2022/0044 (delivered 5th July 2023, unreported) followed; **Clarke v Lighting and Lamps** [2016] EWCA Civ 5 followed.

5. In this case, the new ground of appeal and the material sought to be adduced as fresh evidence entails a voluminous body of evidence and therefore is not a situation where a pure point of law is being taken. The respondent complained, with justification, that the late filing of this material has not provided them with an

adequate opportunity to properly consider the material and to respond with evidence of their own. Had this evidence been deployed below matters there may certainly have taken a different course because the judge would have had to consider all the evidence, including any adduced by the respondent. Further, no cogent explanation has been given why these proceedings could not have been instituted much earlier. It would be oppressive and unjust to expect the respondent to provide a fulsome response to the new ground on such short notice and without adequate opportunity to meet it. In these circumstances, the proper and just course, which is least productive of prejudice dictated that the application to amend the notice of appeal to add a new ground be dismissed.

6. The nature of the decision under challenge in the appeal is a case management discretionary order in relation to applications to stay proceedings and to adjourn proceedings. To warrant intervention, the appellate court must be satisfied that: (1) in exercising his judicial discretion, the judge erred in principle either by failing to take into account the relevant factors under consideration or by taking into account or being influenced by irrelevant factors and considerations; and (2) as a result of this error or degree of error in principle, the judge's discretion exceeded the generous ambit within which reasonable agreement is possible and may therefore be said to be clearly or blatantly wrong. The test for a grant of a case management stay is whether it is in the interests of justice to grant a stay. The threshold is high and it is only in rare and compelling circumstances that it will be in the interests of justice to grant a stay on case management grounds to await the outcome of foreign proceedings.

Michel Dufour and Others v Helenair Corporation Limited and Employers International v Boston Life and Annuity Company (1996) 52 WIR 188 applied; **Athena Capital Fund v Holy See** [2022] 1 WLR 4570 applied.

7. While it is true that the judge did not expressly articulate the test to describe the matters he considered in deciding to dismiss the application, the factors which he identified are plainly relevant to that question. The judge was clearly of the view that the BVI proceedings were enforcement proceedings that were properly brought by Guanghai in relation to a Hong Kong judgment which had not been appealed and in respect of which no stay had been sought in Hong Kong. The judge determined that in those circumstances Guanghai should be entitled to pursue the enforcement of the judgment, which on the face of it appears to be regularly obtained and should not be deprived of the fruits of its judgment. He saw no reason why the appellant could not seek a stay of the Hong Kong judgment in Hong Kong where it was issued. It was open to the judge to find that the evidence in relation to these matters did not warrant a stay, especially given his clear finding that the Hong Kong judgment seemed to have been properly obtained, had not been appealed, and in respect of which no stay had been sought in Hong Kong. The judge also considered that there was no risk of inconsistent judgments being produced were the enforcement action to proceed.

8. To establish that a judgment is final, it must be demonstrated that the court issuing the decision conclusively and finally established the existence of the debt in question, making it binding as *res judicata* between the parties in this country. At common law, a foreign judgment may be final and conclusive even though an appeal is actually pending in the foreign country where it was given. In the present circumstances, where the Hong Kong judgment has not been appealed, no application has been made to stay it, and where the reliefs sought in the 1976 proceedings do not seek to set aside the Hong Kong judgment, there was no reason to regard the Hong Kong judgment as not final and no reason why the judge could not proceed with the recognition and enforcement claim.
9. Further, the criticism that the judge did not give the appellant an opportunity to be heard on the stay application runs shallow and is unfair in the circumstances since no assistance was given to the judge in relation to this application. The skeleton arguments contained no substantive submissions in relation to the stay application. The only passing reference to it is at paragraph 3.2. which state, “additionally or alternatively, the claim should be stayed for numerous reasons,” and counsel for the appellant did not ask the judge to make any oral submissions on the stay application.

Bussoleno Ltd v Kelly [2011] IEHC 220 followed.

10. In relation to the adjournment application, the judge examined the reasons advanced for the adjournment as contained in the supporting affidavit of Mr. Goldblatt. The judge dismissed it because he did not think that an adjournment would affect the outcome, given the view he took of the evidence and its relevance to the central issue he had to decide. He identified this as whether to grant a stay; not to revisit the substantive claims already decided by the Hong Kong Court. The judge did not err in his understanding of his remit. His decision to dismiss the adjournment application cannot be described as plainly wrong. The appeal against his order on the adjournment application must also be dismissed.

JUDGMENT

- [1] **WARD JA:** This is an appeal against the order of a judge of the Commercial Court in the Territory of the Virgin Islands dated 14th November 2024. By that order the judge (i) dismissed the appellant’s application dated 9th August 2024 for an order that the claim be stayed until further order of the court (“the stay application”); (ii) dismissed the appellant’s application dated 13th November 2024 for an order that the hearing of the stay application, which was listed to be heard on 14th November 2024 be adjourned (“the adjournment application”); and (iii) awarded the respondent its costs of both applications (“the costs order”).

Background

- [2] The dispute between the parties stems from a complex series of financial transactions and allegations of conspiracy regarding the recognition and enforcement of a Hong Kong judgment issued in April 2022. Guanghua SS Holdings Limited (“the respondent or Guanghua”) is the claimant in the proceedings below; the defendants are Lim Yew Cheng, (“the appellant”) and his son Lin Minghan (“Mr. Lin”).
- [3] The appellant is the ultimate beneficial owner of Xeno Origin Limited, a BVI incorporated company. The legal owner of Xeno Origin is Mr. Ma Kwok Leung (“Mr. Ma”). Xeno Origin originally owned 48.999997% of Aether Limited (“HK Aether”), which is a company incorporated in Hong Kong. HK Aether in turn owns Beijing Aether Property Development Limited (“BJ Aether”), which owns a number of valuable properties in Beijing, in relation to which there is an ongoing development project. HK Aether owns 80 % of the economic interests in this project.
- [4] On 21st December 2017, Xeno Origin entered a loan facility for US\$80 million (“the Xeno I facility”) with a company called SCH1 Limited (“SCH1”). The appellant and his son, Mr. Lin, provided personal guarantees. The Xeno I facility was secured by a charge over, among other things, Xeno Origin’s shares in HK Aether.
- [5] On 21st May 2018, Xeno Origin entered into a second loan facility for US\$80 million with Guanghua. This loan facility is referred to as “Xeno II”. The appellant and his son again personally guaranteed Xeno Origin’s liabilities under the Xeno II facility. Simultaneously, the benefit of the Xeno I facility was transferred to Guanghua; the charge was extended to cover Xeno Origin’s obligations under the Xeno II facility; and the appellant agreed to be jointly and severally liable with Xeno Origin for certain fees payable in connection with the Xeno II facility.

- [6] On 26th October 2018, the Xeno II facility was novated to HK Aether but Xeno Origin remained jointly liable for that facility as chargor, while the appellant and his son remained liable for that facility as guarantors.
- [7] For reasons that are immaterial for present purposes, it turns out that Xeno Origin and HK Aether failed to repay their respective facilities on time. On 23rd November 2020, Guanghai appointed receivers over Xeno Origin's shares in HK Aether and other assets. One week later Guanghai commenced proceedings against the appellant and his son in relation to their respective personal guarantees. On 20th April 2022 Mr. Justice Peter Ng granted Guanghai summary judgment, which is referred to herein as the Hong Kong Judgment.
- [8] In due course the Receivers received a number of offers for Xeno Origin's shares in HK Aether. Based on these offers, the appellant infers a valuation for those shares of between US\$ 114 million and US\$ 286 million. However, the Receivers said that they would only entertain these offers if the offerors provided a non-refundable deposit of 10% of their offer prices within five to seven days. It is said that these non-refundable deposits could amount to US\$53 million in some instances. The offerors were unable to agree to such conditions, and the appellant says that in any event it would have been impossible for them to complete their necessary due diligence and prepare and execute the relevant sale and purchase agreement within the short period of time imposed by the Receivers.
- [9] On 25th May 2023, the Receivers entered into a sale and purchase agreement with Guanghai's own parent company, Guanghai SS Finance Limited ("Guanghai SSF") for the sale of Xeno Origin's shares in HK Aether for a purchase price of US\$ 1,000,000. Subsequently, on 1st August 2023, Guanghai SSF transferred those shares to a joint venture vehicle between itself and China Cinda (HK) Asset Management Co. Ltd ("Cinda HK") called Chang An Limited. The appellant contends that the sale was made at a gross undervalue of the shares. It is further argued that had the security assets been realized at a proper value Xeno Origin's debt to

Guanghua would have been discharged without the secondary personal liability of the appellant and his son being engaged.

- [10] On 6th December 2023, the appellant commenced proceedings in Hong Kong, which are referred to as “the 1976 proceedings”. The reliefs sought include: (i) damages in the sum of US\$944 million, being the difference between what the appellant contends is the true value of the shares and the price at which they were sold; and (ii) a declaration that the appellant and Mr. Lin are not liable for any interest that has accrued under the Xeno facilities after the date that they say the security assets ought to have been sold and Xeno Origin’s debt discharged.

The BVI Proceedings

- [11] The battle soon shifted to the BVI when on 12th June 2024, Guanghua commenced proceedings in the BVI for the recognition and enforcement of the Hong Kong judgment, inclusive of the interest element (“the enforcement proceedings”). It is the appellant’s case that this is an attempt to stifle the 1976 proceedings.
- [12] On 9th August 2024, the appellant applied to stay the enforcement proceedings pending the outcome of the 1976 Proceedings in Hong Kong. He also filed an application to set aside a previously granted alternative service order (“the set aside application”). Both applications were subsequently listed for hearing on 14th November 2024 before Mithani, J (Ag.), with a time estimate of 90 minutes.
- [13] On 26th August 2024, Guanghua filed its evidence in response. On 26th September 2024, the appellant applied for an extension of time to file evidence in reply. That evidence was served on 7th November 2024 in the form of the third affirmation of Mr. Lim (“Lim 3”). The court granted Mr. Lim permission to rely on Lim 3 but gave Guanghua permission to file evidence in reply. That reply evidence was served on 12th November 2024 but not filed until the day of the hearing.

- [14] Following receipt of Guanghai's evidence, the appellant formed the view that 90 minutes would be inadequate to properly traverse all the relevant material, especially given that the set aside application was due to be heard at the same time. Accordingly, on 14th November 2024 the appellant applied to adjourn the hearing so that it could be re-listed with a time estimate of 1 day. Additionally, it was explained that the appellant required more time to collate further documents and information which would uncover all of Guanghai's alleged wrongdoing.
- [15] The judge dismissed the adjournment application and denied the appellant the opportunity to adduce new evidence and/or witness statements that he had obtained since the filing of Lim 3. The appellant complains that without affording the appellant's counsel the opportunity to make submissions in support of the stay application, the judge went on to give judgment on that application, which he also dismissed. He awarded Guanghai costs on both applications.
- [16] Being dissatisfied with the judge's orders, on 5th December 2024, the appellant applied for leave to appeal and a stay of the enforcement proceedings pending determination of the leave application and any subsequent appeal. On 21st January 2025, Ventose JA granted leave to appeal and an interim stay of the enforcement proceedings pending determination of the appeal.

The Original Grounds of Appeal

- [17] On 10th February 2025, the appellant filed his notice of appeal. The grounds of appeal as originally filed were that the judge was wrong not to grant the stay application because the purpose of the enforcement proceedings is to enforce the Hong Kong judgment against the appellant. If the appellant's conspiracy allegations are true, given that this matter is already under litigation in Hong Kong, it would be inappropriate for the BVI Court to rule on these facts now, and these proceedings should be stayed pending the conclusion of the 1976 proceedings.

- [18] Secondly, the appellant contends that the enforcement proceedings are designed by Guanghai to leverage the Hong Kong judgment to gain control of Xeno Origin and terminate its claim in the 1976 proceedings. It would be improper and contrary to public policy to permit Guanghai to stifle a claim designed to remedy its own wrongdoing. This provides a further reason to stay the proceedings pending resolution of the 1976 proceedings.
- [19] Third, the judge acknowledged that the Hong Kong judgment is not final and may yet be set aside. This means that it is currently unenforceable and the proceedings should have been stayed pending the determination of its enforceability upon conclusion of the 1976 proceedings.
- [20] Fourth, the judge dismissed the stay application principally it seems on the basis that any application for a stay should be brought in Hong Kong. However, the Hong Kong court cannot grant a stay of the enforcement proceedings and in any event, in relation to the second ground, it is only in this jurisdiction that Guanghai can hope to take control of Mr. Lim's beneficial interest in Xeno Origin and stifle the 1976 proceedings.
- [21] Fifth, the judge was wrong to dismiss the adjournment application on the basis that it was so clear that the stay application should be dismissed that nothing counsel for the appellant could say, and none of the evidence that had been filed, could make any difference to the outcome.
- [22] Sixth, the judge was wrong to award Guanghai its costs as it was wrong to dismiss the stay and adjournment applications.

Subsequent Developments following the Judgment of Mithani J and the Filing of the Appeal

- [23] In addition to the above listed grounds of appeal, the appellant sought to rely on what is said to be two significant developments that occurred after the delivery of the decision by Mithani J. The first is that on 28th January 2025, Mr. Ma, the legal owner of Xeno Origin, applied to the BVI court for leave to bring certain derivative claims, which were advanced as part of the 1976 proceedings on behalf of Xeno Origin. This course was adopted on account of certain points that had been taken in the 1976 proceedings to the effect that certain allegations and claims advanced therein needed to be advanced derivatively by Xeno Origin.
- [24] On 26th June 2025, Wallbank J granted the application of Mr. Ma. In so doing, he concluded that it was more probable than not that the causes of action advanced derivatively by Xeno Origin in the 1976 proceedings would succeed.
- [25] The second development is that on 22nd August 2025, the appellant and his son commenced proceedings in Hong Kong to set aside the Hong Kong judgment on the basis that it had been procured by fraud. In summary, the allegations being made in these proceedings are that Guanghua conspired with the receivers and Cinda HK to ensure that Xeno's 49% shareholding in HK Aether was sold at a mere \$1,000,000.00 value, in circumstances where there had been other interested parties bidding much higher sums for the shares. The sale of the shares at such an undervalue led to the appellant and Mr. Lin being pursued on their personal guarantees.

Preliminary Applications to Amend the Notice of Appeal and Adduce Additional Evidence in the Appeal

- [26] At the hearing of the appeal, the appellant made two preliminary applications grounded in the two developments just described. We dismissed both applications and promised to incorporate our reasons in this judgment.

- [27] The first application, filed three weeks before the date appointed for the hearing of the appeal, sought leave to “amend its notice of appeal to argue that a stay should be granted pending the determination of (1) the setting aside application in the Hong Kong courts (“the fraud proceedings”) and (2) the derivative action in the Hong Kong courts (“the New Proceedings”).
- [28] The second was an application to adduce fresh evidence in support of his appeal against the Order of Mithani, J (Ag.) dated 14th November 2024. That fresh evidence consists of: (i) the Writ of Summons in the fraud proceedings; (ii) the statement of claim in the fraud proceedings; (iii) the statement of Mr. Tang Boo Teck; (iv) the transcript of the judgment of Wallbank, J in the derivative leave application proceedings; and (v) the Writ of Summons in the new proceedings.
- [29] Items (i), (ii) and (iii) are relied upon in relation to the application to amend the notice of appeal, while items (iv) and (v) are relied on in support of the existing grounds of appeal.

Submissions

- [30] As it relates to the application to amend the notice of appeal, Mr. Cook KC began by addressing the appellant’s delay in commencing the fraud proceedings. It will be recalled that these were commenced some three years after the Hong Kong summary judgment was obtained. He submitted that pleading fraud is not something to be done lightly, and that parties and professionals have a duty to ensure that they have sufficient evidence to justify such a serious allegation. Moreover, he argued that the very nature of fraud is such that it is concealed and naturally requires time to uncover. Additionally, he noted that much of the documentary evidence that is relied upon and pleaded in the fraud proceedings was obtained by Mr. Lim through disclosure in the 1976 proceedings, which was only completed in December 2024, after the hearing before Mithani J had already taken place.¹

¹ See para 136 of Statement of Claim in the fraud claim, SB 479.

- [31] Mr. Cook further submitted that the additional ground clearly has a real prospect of success. He raised two points to underpin this submission. First, if these proceedings are not stayed then the appellant intends to amend his defence to the enforcement proceedings to plead that the Hong Kong judgment was obtained by fraud. This would constitute grounds for resisting enforcement, and those amendments will entirely mirror Mr. Lim's statement of claim in the fraud proceedings in Hong Kong. It would clearly be undesirable, not to mention wasteful of costs and court time, to have two courts dealing with overlapping issues, with the additional attendant risk of inconsistent judgments. To avoid this, one or other of the proceedings should be stayed.
- [32] Mr. Cook advanced two reasons why it should be the BVI proceedings that are stayed: (a) a finding of fraud in this jurisdiction wouldn't prevent the issue being litigated in Hong Kong whereas a finding of fraud in Hong Kong would prevent the issue being re-litigated here; (b) alternatively, if the BVI court were to recognize the Hong Kong judgment after a trial, Mr. Lim will say at that stage that the order should be stayed pending determination of the fraud proceedings.
- [33] If the stay is going to be granted post judgment, it makes no sense whatsoever to delay that decision until then; it is far better for the stay to be granted now rather than after trial, by which point both parties will have incurred considerable, further and irrecoverable costs. Accordingly, the existence of the fraud proceedings provides a compelling reason why the enforcement proceedings should be stayed.
- [34] It is further argued that a stay will cause no real prejudice to Guanghai at the end of the day as the only thing that it won't be able to do is to enforce its judgment in the BVI. This is of little moment because (i) Guanghai sat on the judgment for over two years before commencing the enforcement proceedings and (ii) Guanghai seems to take the position that Mr. Lim has no assets in the BVI, judging by its assertion in their summary judgment application that enforcement of any costs

award was likely to be difficult if not impossible. Mr. Cook submitted that if that is their position, it is difficult to see what the point is of recognising the judgment here.

- [35] Given the motive attributed to Guanghai for bringing the enforcement proceedings, it would cause very great prejudice to Mr. Lim to have the 1976 proceedings stifled. Thus, balance of injustice clearly favors granting the stay.
- [36] Mr. Cook KC dismissed any suggestion that the appellant should make a new application for a stay before the Commercial Court in light of the changed circumstances. He argued that it would clearly be a massive waste of costs and further court time to undergo that process. There will be no need for any further evidence to be filed because the BVI court is not going to get into the merits of the fraud proceedings: it is the fact of the existence of those proceedings that matters.
- [37] Furthermore, Guanghai's asserted intention to apply to strike out the fraud proceedings in Hong Kong is irrelevant because this Court can fashion its order to state that the stay is dependent on the continued existence of the two sets of proceedings in Hong Kong. It is irrelevant how long those proceedings last because if it is right in principle to stay the enforcement proceedings pending the outcome of the Hong Kong proceedings, then a stay should be granted irrespective of how long the Hong Kong proceedings take.
- [38] Mr. Cook KC accorded no deference to the argument that Mr. Lim should move the Hong Kong court for a stay of the summary judgment. He argued that even if it is possible for him to apply for a stay in Hong Kong, that is not a reason for this Court to refuse to act to grant a stay if it is in the interest of justice to do so especially where the appellant contends that the enforcement proceedings in the BVI are designed to stifle the 1976 proceedings. This factor makes the BVI the appropriate forum to apply for a stay.

- [39] Finally, Mr. Cook KC submitted that it makes good sense and accords with sound case management practice to add a further ground to the existing appeal rather than to commence a further stay application in Hong Kong or indeed in the BVI Commercial Court.
- [40] In relation to the fresh evidence application, Mr. Cook KC submitted that this being an interlocutory appeal, a more relaxed approach to the application of the **Ladd v Marshall**² principles is warranted per **Adam Bilzerian v Byron**³.
- [41] Mr. Cook KC submitted that all three conditions of **Ladd v Marshall** are satisfied in this case. The first condition is said to be satisfied because Mr. Lim couldn't obtain the writ of summons, the statement of case and the other documents relied on prior to the first instance decision because they didn't exist and could not have been obtained earlier for the reasons already explained above. Similarly, the judgment of Justice Wallbank and the findings that he made there could not have been obtained earlier. Indeed, it is off the back of that judgment that the writ of summons and the new proceedings commenced. All these documents came into existence after the decision of the court below. While acknowledging that certain decisions of this Court have held that this is a reason not to grant permission to rely on such documents, this Court has permitted such evidence in exceptional circumstances as happened in **XYZ and Chia Singh v Real Assets (RA) Global Opportunity Fund I Ltd & Floreat Real Estate Limited**⁴ where it was held that where such evidence is capable of further strengthening the courts determination of an issue or finding it will be admitted on appeal.
- [42] The second condition is said to be satisfied because there can be no argument that the documents sought to be adduced are inauthentic.

² [1954] 1 WLR 1489.

³ SKBHC VAP2019/0032 (delivered 21st July 2020, unreported).

⁴ BVIH CMAP2022/0055 (delivered 6th June 2023, unreported).

- [43] Mr. Cook KC argued that the third condition of **Ladd v Marshall** is satisfied because the evidence provides an additional, stand-alone ground why the decision of the court below should be overturned. The new documents will probably have an important influence on the outcome of the additional ground because they show that the fraud proceedings have commenced, and the statement of claim shows the basis of those proceedings.
- [44] Moreover, if this court is persuaded as part of the appeal that the judge at first instance erred as a matter of principle, such that this court has to exercise its discretion afresh, the Court of Appeal can and should take into account matters as they stand as of the date of this decision. In other words, if this court gets to the place where it has to exercise its own discretion, it can and should look at the position as it stands today: **Kwon Kin Kwok v Yao Juan**.⁵

The Respondent's Submissions on the Preliminary Applications

- [45] On behalf of the respondent, Mr. Alex Barden KC makes four main points which he first set against the backdrop of what he submitted was the proper and relevant test to be applied where a new ground of appeal is sought to be added. Relying on **Clarke v Lighting and Lamps**,⁶ Mr. Barden KC posited that the relevant factors for the Court to consider include whether there's a real prospect of the amendment succeeding; the lateness of the application; the reasons for lateness; the earlier history; the need for an adjournment; and the effect that the application would have on the litigants and the court.
- [46] Applying these factors to the present case, Mr. Barden KC submitted that the proposed new ground was raised extremely late - 3 weeks before the hearing - with the statement of claim produced in the week preceding the hearing. This lateness is entirely caused by the choice of the appellant who has clearly delayed in issuing those proceedings until shortly before the appeal hearing. The earlier history of the

⁵ [2022] UKPC 52.

⁶ [2016] EWCA Civ 5.

proceedings is marked by a failure to raise this point. The timing of the application impacts the respondent who will be forced to deal with a full argument in relation to the fraud proceedings in circumstances where there has been no opportunity either to respond in Hong Kong or to file substantive evidence in the BVI.

[47] Amplifying his four main points, Mr. Barden KC submitted that the central point is that although the application is described as both a further ground application and a fresh evidence application, the main issue in relation to the further ground application is whether the appellant should be entitled to challenge the decision of Mithani J before this Court by reference to completely new proceedings that the appellant has only recently issued in Hong Kong and which was not before Mithani J. It cannot be sensibly suggested that the judge's decision was wrong because he failed to take into account a matter which did not exist at the time of his judgment. The further ground application is, in reality, not an application to appeal against Justice Mithani's decision at all but is properly characterized as a standalone and completely new application based on proceedings that have nothing to do with the decision being appealed.

[48] Rather than inviting this Court to apply the appellate test, which requires a very high threshold to be met to establish that the judge's case management decision was so obviously wrong that it should be overturned, the further ground application invites the Court to engage in a completely different exercise: not to review the judges exercise of discretion but to start again as though this Court were itself hearing a stay application. Put differently, Mr. Barden KC argued that the appellant is attempting to get this Court to essentially ignore the decision of Mithani J and to make a new decision on the basis of material that didn't previously exist, and to do so in circumstances where the respondent has not had a proper opportunity to respond to the voluminous material presented by the appellant. This, he submitted, would be entirely procedurally unfair both to the court and the respondent to be asked to proceed to make a substantive decision now about staying the proceedings on that new ground when the respondent has not had an opportunity to respond.

- [49] Mr. Barden KC's second point is that the application is made very late, which is a consequence of the appellant's own timing. He had the option of challenging the Hong Kong judgment much earlier but did not. Instead, he did so more than three years after the Hong Kong judgment and only filed his Statement of Claim on 10th October 2025.
- [50] Thirdly, Mr. Barden KC argued that it would be premature and unfair for this court to re-hear the stay application on this appeal based on the new material and to rule on a completely new point before the respondents have had a proper opportunity to respond to the Hong Kong case with supporting evidence and considering that the respondent may well move to strike out the Hong Kong proceedings.
- [51] Mr. Barden KC's fourth point is that the proper forum for the appellant to seek to make this new application based on the fraud proceedings is before the High Court in the normal course of the proceedings; a course of action which counsel for the appellant has indicated the appellant intends to take if his application before this Court is unsuccessful. Mr. Barden KC reiterated that the respondent has not yet had the opportunity to respond to this new material. It is argued that if Mithani J had been considering that material at all, he would have had to consider the evidence and submissions from both sides on that material. He submitted that in essence the appellant is saying that because of this new material, a different discretion should be exercised with different outcomes. Mr. Barden KC says this reinforces his first point that in reality this is an invitation to this Court to consider a new application on a completely different basis than the judge did, and to thereby find that the judge committed reversible error, such that the Court of Appeal should exercise its discretion afresh and take the new material into account.
- [52] Mr. Barden KC submitted that such a course is problematic because this Court cannot consider the new material unless the appellant first shows reversible error by the judge on the material before him. The new material is not relevant to this

enquiry. It is only if the Court finds reversible error that the new material is theoretically relevant. Nonetheless, without the respondent having had a fair and proper opportunity to respond, the proper course is to hear the appeal on the existing grounds.

- [53] In relation to the application to adduce the evidence of the observations of Wallbank J in the derivative proceedings, Mr. Barden KC submitted that this fails the **Ladd v Marshall** test because it would not have influenced the result of the stay application. Furthermore, it is irrelevant as the derivative claim - like the related "HK 1976 Action" - is a cross-claim for damages regarding the realization of security; it is not an action to set aside the Hong Kong judgment itself. The existence of related proceedings that do not challenge the validity of the judgment being recognized does not meet the "rare and compelling circumstances" required for a stay of a case management order.

Discussion

- [54] The appellant's application to amend his notice of appeal to argue that a stay should be granted pending the determination of the set aside application in Hong Kong ("the fraud proceedings") and the derivative action in the Hong Kong courts ("the New Proceedings") is contingent upon this Court first granting leave to adduce (i) the Writ of Summons in the fraud proceedings; (ii) the statement of claim in the fraud proceedings; and (iii) the statement of Mr. Tang Boo Teck as fresh evidence on this appeal. From a practical point of view, it made sense to address frontally whether they met the threshold for the grant of such leave. If they didn't, that would be the end of it and the appeal would fall to be considered on the originally filed grounds of appeal. If the **Ladd v Marshall** conditions were satisfied, the key question would be whether the appellant should be permitted to advance an additional ground of appeal challenging the judge's decision on the basis of the new material.

[55] **Ladd v Marshall** is often cited and followed in this jurisdiction as furnishing the guiding principles where fresh evidence is sought to be adduced on appeal. Denning, L.J. stated:

“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use of the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

[56] These principles have been applied in cases such as **Nam Tai Inc v IsZo Capital LP**⁷; **Kevin Gerald Stanford v Stephen John Akers**⁸; **Geminis Investors Limited v Goods Technology Starting international Limited**⁹; **Chia Hsing Wang v XY and Others**.¹⁰

[57] It is now settled that in interlocutory appeals the test is applied with a greater degree of flexibility recognizing that the application is being determined at a time when pleadings are not yet closed.

[58] Applying the **Ladd v Marshall** test, the first task is to ascertain whether the first condition is met. The question is whether the evidence of the fraud proceedings and the new proceedings could not have been obtained with reasonable diligence. It is not in dispute that the fraud proceedings were not on foot in Hong Kong at the time of the hearing before Mithani J, nor had Wallbank J granted leave to file the derivative claim. In that sense, it could be said that evidence of the institution of those proceedings and the documents sought to be adduced were not available for consideration by Mithani J because those circumstances did not exist at the time of the hearing before him. A line of cases emanating from this Court has held that the first condition of **Ladd v Marshall** does not extend to evidence that did not exist at

⁷ BVIHMAP2021/0010 (delivered 4th October 2021 and re-issued on 6th October 2021, unreported).

⁸ BVIHMAP2017/0019 (delivered 12th July 2018, unreported).

⁹ BVIHMAP2022/0020 (delivered 23rd August 2023, unreported).

¹⁰ BVIHMAP2022/0055 (delivered 6th June 2023, unreported).

the time of the hearing in the Court below. Such cases include **WWRT v Carosan**¹¹, **Lam Wo Ping v Chen Jian Yun**¹² and **Geminis**.

[59] The appellant is undeterred and does not see this as a bar to satisfying the first condition. They rely on paragraph 79 of **Chia Hsing Wang v Real Assets RA Global Opportunity Fund I Ltd and Floreat Real Estate Limited** where the Court stated:

“To satisfy the first criteria, the basic principle is that the evidence sought to be relied on must have existed at the time of the trial or hearing, but could not have been obtained with reasonable diligence by the applicant. However, in exceptional circumstances, the court has a discretion to admit, at the appellate stage, evidence which did not exist (essentially ‘new’ evidence) at the hearing of an interlocutory application where such evidence is capable of further strengthening the court’s determination of an issue or finding. It is to be stressed that such circumstances are exceptional, and there must be compelling reasons why ‘new’ evidence ought to be admitted.”

[60] A brief summary of the nature of the fresh evidence application in that case provides helpful context. The proceedings in the court below were determined in February 2022. On appeal, the appellant made three separate applications to adduce fresh evidence, which the Court resolved applying the three **Ladd v Marshall** criteria.

[61] The fresh evidence application sought to introduce a claim form filed in an English Claim, an English judgment dated 22nd September 2022, a letter authored by the appellant’s counsel, Carey Olsen dated 20th September 2022; an affirmation filed in Cayman Islands proceedings on 16th March 2022 (“Borelli 3”); two reports of Joint Provisional Liquidators JLP dated 14th March 2022 and 14th August 2022; an affidavit by Andrew Ford explaining the origin and reasons for the usage of the filename ‘Project Ninja’ which the judge had explored in his judgment; amended claim form and particulars of claim in the English claim including further claims of dishonesty by the Floreat parties involving a Cayman Fund; an affidavit and exhibits

¹¹ BVIHCMAP2022/0002 (delivered 20th July 2022, unreported).

¹² BVIHCMAP2023/0006 (delivered 20th August 2024, unreported).

("TTC-4") relating to winding up proceedings in the Cayman Islands and the making of certain winding up orders by the Cayman Islands Grand Court in May 2023 in relation to 2 of 3 Cayman Funds.

[62] In relation to the English Claim Form, the Court rejected the application, holding that the claim form did not exist at the time of the original hearing; would not have had an important influence on the outcome of the applications or the appeal; and there were no exceptional circumstances which would warrant granting permission to admit it on appeal. The same fate befell the application to adduce the amended claim form and particulars of claim. The Court also found them to be the work product of lawyers representing the JLPs, and the causes of action and the allegations therein, not being actual evidence of wrongdoing, were all matters for trial and would not have an important influence on the results of the appeal.

[63] In relation to the English judgment, this too was refused on the basis that the judgment failed the first limb of **Ladd v Marshall** because although it was available at the time of the original hearing it was not properly placed before the judge and he could not consider it. The Court further held that a judgment from another court between different parties was not important evidence that could further advance or have an important influence on the issues in and the outcome on the appeals or the proceedings below.

[64] In relation to counsel's letter, the Court ruled that these were not "evidence" in any sense but rather the work product of lawyers representing a party to litigation. It could not be taken into account because it was devoid of any probative or evidential value and could have no influence on the determination of the court below or on appeal.

[65] In relation to the affirmation filed in the Cayman Islands proceedings (Borelli 3), this too was rejected because it was filed after the conclusion of the proceedings below and did not advance or add to the important issues resolved by the judge below.

- [66] In relation to the two JPL's reports, this evidence was held to have failed the first and second limbs of **Ladd v Marshall** because they did not exist at the time of the hearing and there were no exceptional circumstances justifying their admission. Secondly, they contained no conclusive findings, and any conclusions reached were preliminary in nature and were matters for trial. Further, they did not address the central issue on the appeal, which was whether there was material non-disclosure by the appellant at the ex parte application below to appoint receivers and the Court was not satisfied that they would probably have an important influence on the result of the appeal.
- [67] In relation to the application to adduce evidence of the Cayman Proceedings and orders made therein, that application was rejected because it did not exist either at the time of the hearing of the applications before the judge below or on the hearing of the appeal, and there were no exceptional circumstances warranting their admission. The Court was also not satisfied that any of that material would have had an important influence on the outcome of the proceedings below or on appeal.
- [68] The only fresh evidence application that succeeded was in relation to the affidavit of Andrew Ford speaking to 'Project Ninja'. The Court of Appeal reasoned that since the judge had performed independent research on the word "ninja" and used the "Project Ninja" file name to draw negative inferences about the appellants' strategy without giving them a chance to explain, fairness required the explanation in relation to the origin and reasons for the filename 'Project Ninja' to be admitted. These were not matters dealt with during argument before the judge but came to the judge's attention only when he received the speaking notes of counsel for the appellant which were headed 'Project Ninja'.
- [69] In my view, while **Chia** suggests that in exceptional circumstances 'new evidence' will be admitted on appeal even though it fails the first condition of **Ladd v Marshall** because it was not in existence at the time of the hearing, it does not decide that

the fact that evidence came into being after the original hearing constitutes exceptional circumstances. **Chia** in fact acknowledges that evidence that did not exist at the time of the original hearing takes the material outside the scope of the first limb of **Ladd v Marshall**¹³, but creates a carve out for such evidence to be adduced on appeal if the applicant can demonstrate exceptional circumstances warranting its admission.

[70] For this latter proposition **Chia** cites two cases in apparent support at footnote 49. The first is **Adam Bilzerian et al v Terrence Byron et al**¹⁴, a case in which evidence (judgments and orders) that did not exist at the time of the hearing in the High Court were admitted on appeal. The second is **Staray Capital Limited et al v Cha, Yang (also known as Stanley)**¹⁵ which was applied in **Adam Bilzerian**. In **Staray Capital**, the Court of Appeal admitted fresh evidence in the form of opinions by the Shanghai Municipal Bureau of Justice which did not exist at the time of trial.

[71] However, it is important to note that **Staray Capital** was subsequently distinguished in **WWRT v Carosan** on the basis that although the production of the opinions by the Shanghai Municipal Bureau of Justice took place sometime after the trial, the information or evidence used to generate or populate those opinions existed well before the trial that took place in January 2013. As such, Pereira, CJ held that the case did not decide that evidence that did not exist before the trial would be accepted as fresh evidence on appeal. **WWRT** has been subsequently followed and applied in cases such as **Lam Wo Ping**.

[72] Even though **Chia** stands for the proposition that in exceptional circumstances, evidence that was not in existence at the time of the hearing may yet be admitted as fresh evidence on appeal, the case is distinguishable because the exceptional circumstance said to justify the admission of new evidence in the form of Forde 1 on appeal was the judge's unilateral decision to perform independent research on

¹³ See footnote 48 in which **WWRT Limited v Carosan Trading Limited et al** BVIHCMAP2022/0002 is cited.

¹⁴ SKBHCVP2019/0032 (delivered 22nd October 2021, unreported).

¹⁵ BVIHCMAP2013/0009 (delivered 14th July 2014, unreported).

the word "ninja" and to use the "Project Ninja" file name to draw negative inferences about the appellants' strategy, without notice or opportunity provided to the appellant to explain. This circumstance, which produced unfairness to the appellant, was of the judge's own making after arguments had concluded. In my view, there are no exceptional circumstances in the present case that would warrant extending the scope of the first condition of **Ladd v Marshall** to material that was not in existence at the time of the proceedings below.

[73] Similarly, **Bilzerian** and **Staray Capital** do not avail the appellant as they are also distinguishable from the present case. A peculiar feature of the case at bar is that the appellant is the author and creator of the subsequent post-trial events on which they seek to rely. It was Mr. Ma, the legal owner of **Xeno**, who initiated the application for leave to bring derivative proceedings before Wallbank J and it is the appellant who subsequently initiated the fraud proceedings in Hong Kong. That is a feature that is not present in either **Bilzerian** or **Staray Capital**. In those cases, the subsequent events or evidence did not materialize at the strategic instigation of the applicants.

[74] It would seem to me to be undesirable as a matter of principle to extend the scope of the first condition of **Ladd v Marshall** so as to facilitate a party seeking leave to adduce fresh evidence on appeal, to orchestrate, create or bring about changed circumstances and then to pray in aid his very own creation. That potentially presents a charter for abuse as this could be used as a tactical device to procure a different outcome on appeal by placing material before the Court of Appeal that was not before the judge at first instance.

[75] For all the foregoing reasons, I would hold that the application fails on the first limb of **Ladd v Marshall** because the evidence sought to be adduced as fresh evidence did not exist at the time of the hearing before Mithani, J and were in fact procured at the instigation of the appellant after the judge had delivered his ruling. Furthermore, they remain untested and unproven allegations that fall to be resolved

at trial. It cannot be said that that evidence would probably have an important influence on the result of the case, either below or here; the issue here being whether the judge erred in the exercise of his case management discretion to refuse the applications for an adjournment and a stay. The second condition of **Ladd v Marshall** has therefore not been met.

Adding a New Ground of Appeal

[76] This Court considered further, that even if all three **Ladd v Marshall** conditions were satisfied, a further question would be whether the appellant has met the test to add a new ground of appeal. This is different consideration altogether from the **Ladd v Marshall** test.

[77] Part 62 of the **Civil Procedure Rules (Revised Edition) 2023** governs appeals to the Court of Appeal. Where an appellant seeks to rely on any ground of appeal not mentioned in the notice of appeal, rule 62.5 is immediately engaged. So far as relevant it provides at subrules (7), (8) and (9):

“(7) The appellant may, except on an interlocutory appeal, amend the grounds of appeal once without permission at any time within 28 days from receiving notice under rule 62.12(1)(a), (b) or (c) that a transcript of the evidence and the judgment have been prepared.”

(8) The appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court.

(9) The court is not confined to the grounds set out in the notice of appeal, but may not make its decision on any ground not set out in the notice of appeal unless the respondent has had sufficient opportunity to contest such ground.”

[78] In summary, the position is that except for interlocutory appeals, the appellant can amend their grounds of appeal once without permission, provided this is done within 28 days of receiving notice under rule 62.12(1)(a), (b) or (c) that the transcript of evidence and judgment are available. The appellant must obtain the court's permission to rely on any ground not listed in the notice of appeal; and the court is not confined to the grounds stated in the notice of appeal: it may decide the case

on a ground not taken at all, but it cannot do so unless the respondent has had sufficient opportunity to address it.

[79] This being an interlocutory appeal, the appellant requires permission to amend the notice of appeal to add a ground. Such an application therefore engages the court's discretion. Case law provides some guidance as to the factors that should inform the exercise of that discretion.

[80] The Court of Appeal is generally reticent when it comes to entertaining a new ground of appeal. The court's approach is succinctly stated in **Win Business (Caofeidan) Ltd v Anadarko China Holdings Company**¹⁶:

"Parties should argue all their points at first instance and a trial is not the dress rehearsal for the appeal. When a party seeks to raise a new point on appeal, the party should seek the Appellate Court's permission to so do, and a cogent explanation should be given as to why the point was not raised below. A case need not be exceptional before a new point may be argued on appeal, however, whether or not an Appellate Court will permit a new point depends on where such new point lies on the spectrum between pure points of law that can be argued on the findings of the judge below, and those which, had they been raised below, might have changed the course of the evidence given at trial. Where a new point would require further evidence or, had the new point been argued below it would have resulted in different evidence being filed, an Appellate Court should err on the side of caution in allowing such new points to be raised. This caution is even greater where the other party has not had adequate time to deal with the new point."

[81] In summary, parties should present all arguments at trial, not save them for appeal. To introduce a new point on appeal, permission is needed, and a cogent explanation must be given for its omission below. New points of pure law may be allowed if they don't require additional evidence, but appellate courts are cautious, especially if further evidence would be needed or if insufficient notice to the other party would result in prejudice.

¹⁶ BVIHCMAP2022/0044 (delivered 5th July 2023, unreported).

[82] I consider also that the guidance offered in **Clarke v Lighting and Lamps** is persuasive. Relevant considerations include: (i) whether there is a real prospect of the amended ground succeeding; (ii) the lateness of the application; (iii) the reasons for that lateness; (iv) the earlier history; (v) the need for an adjournment; (vi) the effect of the application on the litigants and the litigation generally.

[83] In this case, the new ground of appeal and the material sought to be adduced as fresh evidence entails a voluminous body of evidence and therefore is not a situation where a pure point of law is being taken. The respondent complains, with justification, that the late filing of this material has not provided them with an adequate opportunity to properly consider the material and to respond with evidence of their own. Had this evidence been deployed below matters there may certainly have taken a different course because the judge would have had to consider all the evidence, including any adduced by the respondent.

[84] Further, no cogent explanation has been given why these proceedings could not have been instituted much earlier. As Mr. Barden KC argued, the appellant was in possession of information which could have formed a basis for bringing the fraud action earlier. I find apposite the dicta in **Thune and Another v London Properties Ltd and Others**¹⁷ (cited approvingly by this Court in **Chia**):

“There is nonetheless a clear duty on parties to present their full case at first instance, and it is very undesirable if interlocutory disputes are argued out afresh on appeal on different materials never put before the judge whose primary discretion it is.”

[85] In our view, it would be oppressive and unjust to expect the respondent to provide a fulsome response to the new ground on such short notice and without adequate opportunity to meet it. The appellant’s argument that this Court is not being asked to adjudicate on the material is beside the point as fairness requires the respondent to be afforded sufficient opportunity to digest the material thoroughly in order to prepare an informed response and, if thought necessary, deploy evidence of its own.

¹⁷ [1990] 1 WLR 562 at 571.

[86] In these circumstances, the proper and just course, which is least productive of prejudice dictated that the application to amend the notice of appeal to add a new ground be dismissed. Even if the appeal as originally cast is dismissed, the appellant has stated its intention to bring a fresh application to stay the proceedings, based on the new material. Conversely, even if the appeal were allowed, given the large volume of evidence sought to be adduced and the short notice given to the respondent to address it, and indeed to this Court to properly digest it, the circumstances make it just that the matter should be remitted to be properly dealt with by the court below so that there is a first instance decision based on the new material that was never placed before that court.

[87] The foregoing reasons informed the Court's decision to dismiss the application to amend the notice of appeal.

The Substantive Appeal

[88] I turn now to address the substantive appeal as originally framed. The broad question for this Court is whether the judge erred in the exercise of his case management decision to refuse the appellant's application for an adjournment and for a stay of the recognition and enforcement proceedings. A brief recap of the procedural history before the court below will provide relevant context for the discussion that follows.

[89] On 12th June 2024, the jurisdiction of the BVI Court was engaged when Guanghai commenced an action to secure the recognition and enforcement of the Hong Kong judgment in the BVI. The Court made orders for alternative service on the appellant and his son, Mr. Lin. On 9th August 2024, the appellant filed an application to set aside the order for alternative service and to stay Guanghai's recognition action. Both applications were subsequently listed for hearing on 14th November 2024 before Mithani J (Ag.), with a time estimate of 90 minutes. However, in relation to

the service point, it is noted that the appellant was served personally on 30th August 2024.

[90] On 26th August 2024, Guanghua filed its evidence in response. On 26th September 2024, the appellant applied for an extension of time to file evidence in reply. That evidence was served on 7th November 2024 in the form of the third affirmation of Mr. Lim (“Lim 3”). The court granted Mr. Lim permission to rely on Lim 3 but gave Guanghua permission to file evidence in reply. Guanghua’s reply was served on 12th November 2024 but not filed until the day of the hearing.

[91] After reviewing Guanghua’s evidence, the appellant formed the view that 90 minutes would be insufficient for the hearing, especially since the set aside application was listed to be heard at the same time. Thus, on 14th November 2024 Mr. Lim applied to adjourn the hearing so that it could be re-listed with a time estimate of 1 day and explained that more time was needed to collate further documents regarding Guanghua’s alleged misconduct.

[92] The judge gave an oral judgment dismissing both the adjournment and stay applications and awarding costs to Guanghua. I will return to his reasons later in this judgment.

The Appellant’s Submissions

[93] In relation to the dismissal of the stay application the appellant argues that the judge failed to apply the proper legal test for a stay. The judge applied a narrow ‘stay pending appeal’ test instead of the test set out in **Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See**¹⁸, which is whether in the particular circumstances it is in the interests of justice for a case management stay to be granted.

¹⁸ [2022] 1 WLR 4570.

[94] The appellant advances three reasons why it is said to be in the interest of justice to have granted a stay in the circumstances of this case:

- (1) **Public Policy and Wrongdoing:** The appellant alleges that the Hong Kong judgment exists only because Guanghai conspired with receivers to sell assets at a gross undervalue. Therefore, the BVI court should not facilitate Guanghai profiting from its own wrongdoing. This is a critical factor which the judge simply failed to take into account, and therefore erred.
- (2) **Improper Motive - Stifling of Claims:** The appellant alleges that the BVI proceedings is a tactical move by Guanghai to seize control of Xeno Origin Limited which is pursuing the 1976 proceedings in Hong Kong, thereby "stifling" that claim. The judge's answer that he had never heard of such an argument does not mean that the argument is bad. This is another relevant factor which the judge failed to take into account.
- (3) **The "Final and Conclusive" Requirement:** The appellant contends that the judge erred in law in refusing the stay because under BVI common law, a foreign judgment can only be enforced if it is "final and conclusive." The appellant argues that since the 1976 proceedings in Hong Kong seek to reduce the interest liability under the Hong Kong judgment in part, that judgment is not truly "final." Although the judge acknowledged that the Hong Kong judgment might be set aside or modified in whole or in part, he wrongly concluded that this possibility was irrelevant to his determination on whether to grant a stay. This is an error in principle because where a judgment is final and conclusive but under appeal the Court ensures that the interest of those with the right of appeal are protected. Where the judgment is not final or conclusive, the case for protection of that interest is even stronger.

[95] It is further said that the judge committed three errors of law in disposing of the stay application. First, the judge's suggestion that the appellant should have sought a stay in Hong Kong was erroneous as even though the Hong Kong Court could grant a stay in Hong Kong, only the BVI court could stay the recognition proceedings. Furthermore, the appropriate court to advance the "stifling" argument is the BVI since the only purpose of the enforcement proceedings was to take control of Xeno Origin, which is a BVI company.

[96] There is also a procedural complaint that the judge erred in giving judgment on the stay application without hearing submissions from counsel.

[97] As it relates to the dismissal of the adjournment application, the appellant submitted that the judge's refusal to grant a one-day adjournment was "plainly wrong" and procedurally unfair as the case involved nearly 100 pages of evidence and over 2,000 pages of exhibits which the judge admitted he had not fully digested. Nonetheless, he dismissed the application without hearing full oral submissions from counsel specifically on the stay.

[98] The appellant contends that the errors identified above mean that the judge's decision is plainly wrong as he erred in principle in several respects. His reasons were unsatisfactory and he did not grapple with the issues raised. Such errors entitle this Court to intervene and exercise its own discretion. The Court is urged to allow the appeal and set aside the orders of November 14th, 2024; stay the BVI proceedings until the conclusion of the Hong Kong 1976 proceedings; and award costs to the appellant for both the first-instance hearing and the appeal.

The Respondent's Submissions

[99] The respondent contends that the appellant has failed to meet the high threshold required for a case management stay to await the outcome of foreign proceedings. Such a course is exceptional and requires "rare and compelling" circumstances which would make it in the interests of justice to justify such a stay. The appellant was in effect seeking a temporary interlocutory stay. A stay application is not the proper forum for substantive arguments. The appellant remains free to file a defence and raise these points at a final hearing of the recognition and enforcement action. The respondent argues the appellant chose the sequence of proceedings and cannot now use the Hong Kong 1976 proceedings to hold up the BVI Recognition Action.

[100] The respondent meets the argument that public policy grounds make it in the interest of justice to grant a stay by describing the appellant's "stifling" argument as "extremely weak". It is said that the appellant has identified no evidence to support

this allegation, and which would demonstrate on an objective assessment that the respondent is not genuinely seeking the relief it seeks in the recognition action. They argue that seeking to enforce a valid foreign judgment is a legitimate purpose, not an abuse of process. Furthermore, apart from a passing reference to the timing of the enforcement proceedings no submission was made to the judge in relation to the “stifling” argument. In any event, this was not an issue the judge could determine on an interlocutory basis. It is open to the appellant to make his public policy argument at a final hearing of the recognition action.

[101] In relation to the issue whether the Hong Kong judgment is final, the respondent asserts that it is indisputably so and has not been appealed. The 1976 proceedings do not seek to set aside that judgment: it only seeks to potentially recover damages that could be used as an offset.

[102] In relation to the alleged legal errors concerning the forum for a stay application, the respondent argues that the Hong Kong court is the proper forum for such a request and suggests that the appellant is “forum shopping” in the BVI and points out that the appellant never applied to the Hong Kong court for a stay of the original judgment. A similar attempt to stay enforcement of the Hong Kong Judgment in Singapore failed. The judge did not err in deciding not to determine this issue on an interlocutory application and was right to observe that there was no reason why the appellant could not seek a stay in Hong Kong. This makes logical sense because the Hong Kong court has jurisdiction over the Hong Kong Judgment and the 1976 proceedings. The appellant has offered no explanation why he has not applied to the Hong Kong court for a general stay of the Hong Kong judgment, the effect of which would be that the respondent could not enforce the judgment in the BVI. Yet further, argues the respondent, the BVI court has the option to stay the enforcement of its own Order should it recognize the Hong Kong judgment. This is another reason why it was not necessary for the judge to determine the stay application on an interlocutory basis, and it was within the generous ambit of his discretion to allow the recognition action to proceed.

[103] In response to the appellant's criticism that the judge's reasons were unsatisfactory and did not grapple with the issues raised, the respondent argues that an ex-tempore (oral) judgment should not be subjected to narrow textual analysis. On examination, the judge provided a "perfectly rational explanation" for his order. Furthermore, the appellant's skeleton arguments below did not articulate substantive arguments for the stay application, neither did it furnish any legal authority on the point. Counsel was given the opportunity to make submissions and did so. If counsel felt that the reasons given were inadequate in any way, it was his responsibility to draw this to the judge's attention. They failed to state that they had not been heard on the stay application or to raise any issue.

[104] In so far as the adjournment application is concerned, the respondent maintains the judge was "plainly entitled" to reject the adjournment on account of its lateness, having been made only one day before the hearing without proper notice. The judge correctly concluded that even if the adjournment was granted, the additional time would have made no difference to the outcome of the case. In any event, submitted the respondent, the original adjournment application is "now irrelevant" because the Court of Appeal is now hearing the matter in full.

Discussion

[105] The nature of the decision under challenge is a case management discretionary order in relation to applications to stay proceedings and to adjourn proceedings. The principles that govern appellate restraint in orders of this nature are well known and have been recited in judgments of this court such as **Michel Dufour and Others v Helenair Corporation Limited**¹⁹ and **Employers International v Boston Life and Annuity Company**.²⁰ To warrant intervention, the appellate court must be satisfied that: (1) in exercising his judicial discretion, the judge erred in principle either by failing to take into account the relevant factors under consideration or by taking into

¹⁹ (1996) 52 WIR 188.

²⁰ BVIHC VAP2007/0005 (delivered 4th July 2007, unreported).

account or being influenced by irrelevant factors and considerations; and (2) as a result of this error or degree of error in principle, the judge's discretion exceeded the generous ambit within which reasonable agreement is possible and may therefore be said to be clearly or blatantly wrong.

[106] Appellate restraint is required because this Court is not permitted to reverse the order of the judge merely because we might have exercised the discretion differently. The reason is that different individuals reviewing the same evidence might reach very different conclusions without either being appealable. Accordingly, a decision may only be properly regarded as exceeding the generous ambit within which reasonable disagreement is possible and plainly wrong where no reasonable judge exercising his mind over the same material could have come to the decision under appeal. This may be the case, for example, where the judge has misdirected himself on the law or the facts to such an extent that the decision cannot legally or rationally be sustained.

[107] In so far as it relates specifically to the judge's decision on the stay application, the appellant requested that the BVI Court proceedings be stayed until after the Hong Kong proceedings were resolved. Thus, the situation was one where a court having undoubted jurisdiction to deal with proceedings before it, is asked to defer to proceedings being conducted in a foreign jurisdiction. There is useful and persuasive learning emanating from the United Kingdom on the applicable principles and the test which the court must apply when faced with this type of situation. Both parties have cited **Athena Capital Fund v Holy See**²¹ as a defining authority. The appellant relies on it as establishing that the test is whether it is in the interest of justice in the particular circumstances to stay the proceedings. It is argued that this authority undermines the respondent's contention that it is only in rare and compelling circumstances that a stay should be granted.

²¹ [2002] 1 WLR 4570.

[108] In my view, on a proper analysis, the judgment supports the view that while the test is whether it is in the interest of justice to order a stay, the presence of rare and compelling circumstances is a relevant factor in the exercise of the discretion to stay proceedings pending the outcome of foreign proceedings.

[109] Males LJ articulates the test at paragraph 48 of the judgment. He first referred to the court's inherent power to stay proceedings, recognized by section 49(3) of the Senior Courts Act 1981, and stated, 'the test is simply what is required by the interests of justice in the particular case.' He gave what he called "obvious examples" of when it might be in the interest of justice to stay proceedings, such as to await the outcome of an appeal in another case, to await compliance with an order for security for costs, and to await the outcome of mediation. Males LJ clearly did not intend thereby to suggest whether rare and compelling circumstances exist is an irrelevant consideration. This much seems clear from what he says immediately giving his examples:

"Cases which speak of "rare and compelling circumstances" (or similar phrases) being necessary have nothing to do with these kinds of commonplace example. They have generally been concerned with stays which have been imposed in order to allow actions in other jurisdictions to proceed, the usual assumption being that the outcome of the foreign proceedings will or may render the proceedings here unnecessary."

[110] Males LJ commented that in some later cases the expression 'rare and compelling circumstances' has been 'sometimes treated as if it were in itself the applicable test.' He found it interesting that an observation of Lord Bingham, CJ that one need not be concerned with a floodgates argument in relation to applications to stay English proceedings to await the outcome of foreign proceedings because in fact it would only be in rare cases, where there was a compelling reason to do so, that such a stay would be granted, 'has been elevated almost into a legal test that "rare and compelling circumstances" must exist before the apparently unfettered jurisdiction to grant such a stay can be exercised.'

[111] Males LJ then summarized the correct position at paragraph 59:

“There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I've cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted.”

[112] From the foregoing, it seems to me quite clear that the test is whether it is in the interests of justice to grant a stay, but it is only in rare and compelling circumstances that it will be in the interests of justice to grant a stay on case management grounds to await the outcome of foreign proceedings. On any view, this is a high threshold.

[113] Before turning to apply these principles to what happened in this case, it is necessary to briefly recap the manner in which matters proceeded below.

[114] The judge commenced the hearing by identifying the applications to be heard. He stated:

“Mr. Mayers, it's your application. Effectively what you are asking me to do is to stay these proceedings or to adjourn, adjourn the application. So please make your application and I will hear what submissions you have to make.”²²

[115] Mr. Mayers, who represented the appellant below, responded saying:

“Thank you, My Lord and to clarify and as it seems you've been made aware, there is the application to adjourn this hearing, but this hearing consists of dealing with two issues. One is whether the Order of the 23rd July should be set aside and the other, as you say, My Lord is the issue of whether the proceedings should be stayed.”²³

²² Transcript of proceedings, p. 11 of Appeal Hearing Bundle (Part 1) filed on 11th February 2025.

²³ Ibid.

- [116] It is clear from this that both the Court and counsel were clear as to the matters on the agenda for hearing. These were the application to set aside the alternative service order, the application to stay the recognition proceedings and the application to adjourn both of these applications.
- [117] Immediately following Mr. Mayer's clarification, the judge engaged him in relation to the setting aside application by asking counsel why the order for alternative service should be set aside given that the proceedings had already been served personally. From what follows thereafter, it seems clear that the judge was interrogating the set aside application and Mr. Mayers made submissions in response to the judge's queries, as recorded at pages 91 to 95 of the transcript of the hearing.
- [118] However, counsel soon managed to steer the discussion back to the adjournment application, which he sought permission to address. His submissions on the adjournment application are recorded at pages 97 to 105. Mr. Mayers concluded his presentation with a summary of the reasons for the adjournment: pressure of time, the need for a longer hearing; the need to retain appropriate counsel, by which he meant King's Counsel; and the need to apprise the court of ongoing developments in the Hong Kong proceedings. He invited the Court to consider the terms of a draft order which the appellant had filed if the court were minded to accede to the adjournment application.
- [119] The judge proceeded almost immediately to deliver a ruling. He said:
"Mr. Ferrer, I do not need to trouble you but after hearing what I have to say if there is anything that I've not covered properly, then by all means you can come back."²⁴
- [120] He then delivered his ruling on each of the three applications, which he dismissed. He dealt first with the set aside application which he dismissed on the basis that Mr. Lim had already been successfully served personally by the time of the hearing. Additionally, he appears to have accepted Guanghua's written skeleton

²⁴ Transcript of proceedings, p. 26 of Appeal Hearing Bundle (Part 1) filed on 11th February 2025.

arguments that none of the required legal grounds for setting aside the service (such as a lack of a good cause of action) were applicable, as the claim was based on a final judgment and the BVI was the appropriate forum.

[121] In relation to the stay application, the judge's primary reasons for dismissing it included: (a) the nature of the proceedings, which he emphasized were enforcement proceedings based on a Hong Kong judgment; (b) insufficiency of evidence, which, he concluded disclosed nothing that warranted granting a stay; (c) the judge considered that the appropriate forum for bringing an application for a stay should be in the Hong Kong court (the jurisdiction that issued the judgment) rather than the BVI; (d) the judge referred to the "fundamental rule" that a party who has obtained a judgment should not be deprived of its "fruits"; and (e) although he was prepared to proceed on the assumption that the Hong Kong judgment might not be "final" or could be set aside in the future due to the ongoing "1976 Proceedings" in Hong Kong, the judge determined this was irrelevant to whether a stay should be granted at that stage.

[122] As it relates to the adjournment application, the judge dismissed this on the basis that the matters the appellant wished to raise, even if dealt with at a later date, would not make "any difference" to the case before the Court. He saw "no purpose being served" by an adjournment and believed the Defendant's position would not be improved by a later hearing. He defined the scope of the issue before him and identified the central question to be whether the court should grant a stay, not the "more difficult question" regarding the underlying substance of the claims that had already been adjudicated by the Hong Kong Court.

Analysis

[123] Because the central thrust of the oral arguments before this court focused on the decision in relation to the stay application, I will deal with this first. The appellant contends that the judge failed to apply the proper test: whether it was in the interests of justice in the particular circumstances of the case to stay the BVI proceedings.

While it is true that the judge did not expressly articulate this test to describe the matters he considered in deciding to dismiss the application, the factors which he identified are plainly relevant to that question.

[124] The judge was clearly of the view that the BVI proceedings were enforcement proceedings that were properly brought by the Guanghai in relation to a Hong Kong judgment which had not been appealed and in respect of which no stay had been sought in Hong Kong. The judge determined that in those circumstances Guanghai 'should be entitled to pursue the enforcement of the judgment, which on the face of it appears to be regularly obtained and should not be deprived of the fruits of its judgment. He saw no reason why the appellant could not seek a stay of the Hong Kong judgment in Hong Kong where it was issued. That makes perfect sense, because as Mr. Barden KC argued, that would mean that it could not be enforced in the BVI. While the appellant is correct to argue that only the BVI Court can stay the enforcement proceedings, this does not attenuate the point that a stay of the Hong Kong judgment seems an obvious and effective way to bring a halt to the enforcement proceedings. The appellant has offered no reason why this course was not pursued, or as the judge put it, why he has chosen to look at matters "from the wrong end of the telescope".

[125] Furthermore, the judge was not satisfied that the evidence presented by the appellant warranted a stay. Much is made of the fact that the judge stated that he had not considered the evidence in as much detail as he should have. He explained:

"...I have not read all the evidence in any great amount of detail and I do not think that in an application like this it's appropriate for a judge to read every document that is put before it. It's only necessary to read those documents that are relevant in order to decide whether the application made is meritorious."

[126] Clearly, the judge did not ignore the evidence. In relation to the stay application specifically, he stated:

"On the last occasion when this matter was before me, I said that if it was obvious to me that there was some merit in an application to stay these proceedings, I might be, I would be persuaded to give directions for the

exchange of evidence and then to list the matter for a substantive hearing on that issue.

I have considered the evidence *de bene esse* in the sense that I have not really considered questions relating to admissibility and the like, but I have considered the evidence not in as much detail as I might have done, but I have looked at the evidence and frankly there is nothing in it that would warrant a stay being granted.”²⁵

- [127] A judge cannot possibly be expected to read every single document that is filed in relation to an application. This is the very reason why it is common practice in the BVI for counsel to specifically identify in their skeleton arguments the material that they wish the judge to pre-read in advance of the hearing. What is required, and what the judge clearly stated, is that he had read such evidence as was necessary in order to adjudicate on the merits of the applications.
- [128] This was not an unreasonable approach to take given that at the eleventh hour the judge was deluged with over 100 pages of evidence with over 2000 pages of exhibits for his consideration. All of this consisted of allegations yet to be proven at trial. This included the improper “stifling” motive attributed to Guanghai for commencing enforcement proceedings in the BVI, as well as the assertion that Guanghai had engaged in wrongdoing, which public policy demands it should not benefit from. There is nothing to suggest that he did not appreciate what the appellant’s case was in relation to the stay application. In fact, from his recital of the background, it is evident that he knew the case well.
- [129] In my view, it was open to the judge to find that the evidence in relation to these matters did not warrant a stay, especially given his clear finding that the Hong Kong judgment seemed to have been properly obtained, had not been appealed, and in respect of which no stay had been sought in Hong Kong. The judge also considered that there was no risk of inconsistent judgments being produced were the enforcement action to proceed.

²⁵ Ibid at p. 32-33.

[130] In so far as the appellant complains that the judge erred in law in refusing the stay although he was prepared to proceed on the basis that the Hong Kong judgment was not final and that there may well be issues arising in relation to it which means that it may ultimately be set aside either in whole or in part, **Dicey, Morris & Collins on the Conflict of Laws 16th Ed.** is instructive as it relates to the common law. The learned authors instruct at 14-207:

“No foreign judgement will be recognized or enforced in England at common law unless it is “final and conclusive”... The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. “In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties”: it follows that the possibility of an appeal to a higher court does not alter the finality of the judgment.”

[131] And further at 14-030:

“At common law, a foreign judgment may be final and conclusive even though an appeal is actually pending in the foreign country where it was given”.

[132] At footnote 125, Dicey cites **Bussoleno Ltd v Kelly**²⁶ for the proposition that “a judgment is also still final if separate (but related) proceedings which may be brought in same court may result in a judgment which may then be set off against, or otherwise used to abate the sum due under the original judgment”.

[133] It follows from these principles that in the circumstances of this case, where the Hong Kong judgment has not been appealed, no application has been made to stay it, and where the reliefs sought in the 1976 proceedings do not seek to set aside the Hong Kong judgment, there was no reason to regard the Hong Kong judgment as not final and no reason why the judge could not proceed with the recognition and enforcement claim.

²⁶ [2011] IEHC 220.

- [134] I agree with Mr. Barden KC's submissions that it would still be open to the judge upon giving judgment to stay any recognition and enforcement order. If the appellant succeeds in the Hong Kong proceedings, then given the remedies sought there, it will be open to the BVI court to set off or abate the sums due under the Hong Kong judgment.
- [135] In relation to the procedural complaint that counsel was not heard on the stay application, a few points need to be made. At the commencement of the hearing, the judge invited Mr. Mayers to make his application. Counsel addressed the judge on the setting aside application and the adjournment application, then took his seat. It is not clear what submissions counsel wished to make on the stay application as the appellant's written submissions in relation to that application, filed on the morning of the hearing, were pithy indeed. Mr. Cook KC candidly admitted that the skeleton arguments contained no substantive submissions in relation to the stay application. The only passing reference to it is at paragraph 3.2. which states, 'additionally or alternatively, the claim should be stayed for numerous reasons.'
- [136] No assistance was given to the judge therein in relation to this application and counsel for the appellant did not ask the judge to make any oral submissions on the stay application. Yet the judge's decision in relation to the stay application was the centre piece of arguments before this Court. The judge could only exercise his discretion on the material presented to him. It was the duty of counsel to assist the judge and to point out any omission or error on the judge's part in dealing with any aspect of the applications before him. Instead, there was silence. The criticism that the judge did not give the appellant an opportunity to be heard on the stay application runs shallow and is unfair in the circumstances.
- [137] In my view, all of the matters which the judge considered and which informed his decision to dismiss the stay application were relevant, and his conclusions were within the generous ambit within which reasonable disagreement is possible. I am of the view that there was nothing before the judge that amounted to rare and

compelling circumstances such that it was in the interests of justice to stay the BVI proceedings. There is nothing that distinguishes this case from the ordinary run of cases that seek a stay pending the outcome of foreign proceedings. It cannot be said that no reasonable judge could have arrived at the same decision. It is not therefore blatantly wrong. The appellant has not crossed the high threshold that would justify appellate intervention. I would dismiss the appeal in relation to the judges' order on the stay application.

[138] In relation to the adjournment application, the judge examined the reasons advanced for the adjournment as contained in the supporting affidavit of Mr. Goldblatt. The judge dismissed it because he did not think that an adjournment would affect the outcome, given the view he took of the evidence and its relevance to the central issue he had to decide. He identified this as whether to grant a stay; not to revisit the substantive claims already decided by the Hong Kong Court. The judge did not err in his understanding of his remit. His decision to dismiss the adjournment application cannot be described as plainly wrong. I would dismiss the appeal against his order on the adjournment application also.

[139] It follows from the conclusions I have reached, the appeal against the judge's costs order must also be dismissed.

Disposition

[140] For the reasons outlined in this judgment, the appeal against the Order of Mithani J made on 14th November 2024 is dismissed. Having now determined the appeal, the interim stay of proceedings granted by Ventose, JA on 21st January 2025 is lifted. The appellant shall pay the respondent's costs to be assessed by a judge of the Commercial Court if not agreed within 21 days of the delivery of this judgment.

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.

Tana'ania Small
Justice of Appeal [Ag.]

By the Court

Chief Registrar