

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0022

for **IN THE MATTER** of a Petition

leave to appeal to His Majesty in
Council

and

IN THE MATTER of the Virgin
Islands (Appeals to the Privy
Council) Order 1967

BETWEEN:

GOLDEN MEDITECH STEM CELLS (BVI) COMPANY LIMITED

Appellant/Respondent

and

[1] **BLUE OCEAN CREATION INVESTMENT HONG KONG LTD.**
[2] **BLUE OCEAN STRUCTURE INVESTMENT COMPANY LTD.**

Respondents/Applicants

Before:

	The Hon. Mr. Trevor M. Ward	Justice of Appeal
	The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
[Ag.]		
	The Hon. Mde. Petra Nicola Byer	Justice of Appeal
[Ag.]		

Appearances:

Mr. Edward Davies KC with him Ms. Hilary Stonefrost and Ms. Nadine Whyte Laing for the applicant.
Mr. Ben Valentin KC with him Mr. John Carrington KC and Ms. Reisa Singh for the respondents.

2025: October 2

Application for conditional leave to appeal to His Majesty in Council – Appeal against interlocutory decision of the Court of Appeal – Adducing fresh evidence – Summary judgment - Section 3(2)(a) of The Virgin Islands (Appeal to Privy Council) Order 1967 – Matter of great general importance – Whether the intended appeal raises a question that by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council – Whether there is an issue of law which requires some definitive guidance from His Majesty in Council with regard to the applicable principles in relation to the first condition in Ladd v Marshall – Whether there are conflicting decisions of the Court of Appeal in relation to this issue that warrant guidance from the Privy Council – Agency and attribution – Alter ego principle – Whether new category of agency created – Whether there is an issue of great general or public importance – Stay of execution – Whether a stay of execution should be granted pending the hearing of the proposed appeal to the Privy Council

This dispute concerns control over Global Cord Blood Corporation (GCBC). The appellant/respondent Golden Meditech Stem Cells (BVI) Company Limited (“GMSC”) previously held GCBC shares, which were sold to the Ying Peng Fund (via Blue Ocean BVI) in 2018. The applicants assert that full beneficial ownership passed to the Ying Peng Fund through Blue Ocean BVI. GMSC contends, however, that payment was incomplete, treating the unpaid amount as a secured loan supported by documents allegedly signed by Mr. Xu of the applicants and bearing the Ying Peng Fund's chop. Xu denies signing, claiming that the documents are forged.

In October 2020, GMSC served a stop notice related to Blue Ocean BVI shares, leading the applicants to seek court orders restraining GMSC from acting on the alleged charges and declaring them invalid. Initially, GMSC relied on the contested documents but shifted to arguing that Ying Peng Fund held GCBC shares on trust—a claim the judge dismissed. GMSC then pleaded in a re-amended defence which it sought leave to rely on that Mr. Xu had authority, so it was immaterial who signed the documents if done with his consent.

Faced with this re-amended defence, the applicants applied for summary judgment, which Wallbank J granted, dismissing GMSC's application for permission to re-amend. The judge found a triable issue regarding payment for the shares but still granted summary judgment. GMSC appealed, arguing summary disposal was improper. The applicants countered and sought to introduce new evidence, a Hong Kong High Court judgment delivered after Wallbank J's decision. The Court of Appeal refused to admit the new evidence and allowed GMSC's appeal, overturning the summary judgment. The applicants seek conditional leave to appeal to His Majesty in Council against these decisions.

By Notice of Motion filed on 30th July 2025, the applicants sought conditional leave, arguing that there are conflicting Court of Appeal decisions on the first condition of the Ladd v Marshall test: whether the fresh evidence must have existed at trial or if it can include evidence that came into existence afterward. In relation to the summary judgment decision the applicants argued that the Court of Appeal created a new agency category

suggesting Mr. Yuan acted as the principal's alter ego, thereby violating established corporate veil principles. Both issues are said to be matters of great general or public importance which require guidance from His Majesty in Council.

Held: allowing the application for leave to appeal the Court of Appeal's decision in relation to the scope of the first condition of the **Ladd v Marshall** principles to His Majesty in Council, dismissing the application for leave to appeal to His Majesty in Council in relation to the summary decision, dismissing the application for a stay of execution and ordering that costs of the application for leave to appeal be costs in the appeal to His Majesty in Council, that:

1. Appeals to the Privy Council are governed by section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967. It vests a discretion in the Court to grant conditional leave to appeal to the Privy Council on one of two bases. The first is where the Court is of the opinion that the question involved in the appeal is one that by reason of its great general or public importance ought to be submitted to His Majesty in Council. It is understood that a question of 'great general or public importance' arises when there is a significant legal issue at stake, an unsettled constitutional matter, a disputed area of law, or a question whose resolution could have serious or far-reaching effects. A principle is considered "unsettled" if even after being established by the Court, differing opinions or conflicting judgments exist, or genuine uncertainty remains. The second ground on which this Court may exercise its discretion to grant conditional leave to appeal is where the matter, though not of great general or public importance, ought otherwise to be submitted to His Majesty in Council. The term "or otherwise" covers situations where a case does not qualify as one of great public importance but requires clarification and some definitive statement from the apex court. In both circumstances, the Court should strive for consistency in applying the test for conditional leave so that it aligns with current practice and that of other comparable courts, recognizing the significance of invoking the jurisdiction of the highest appellate court.

Martinus Francois v The Attorney General Civil Appeal No. 37 of 2003 (delivered 27th June 2004, unreported) followed; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd** BVIHCMAP2018/0005 (delivered 8th October 2018, unreported) followed; **Multibank FX International Corporation v Von De Heydt Invest S.A.** BVIHCVAP2022/0008; BVIHCVAP2021/0009; BVIHCMAP2022/0032 (delivered 7th July 2023, unreported) followed; **Pacific Wire & Cable Company Limited v Texas Management Limited et al** BVIHCVAP2006/0019 (delivered 6th October 2008, unreported) followed.

2. In **Ladd v Marshall**, Denning LJ established 3 conditions that the Court must consider for granting an application for admitting fresh evidence on appeal: (1) the evidence could not have been obtained with reasonable diligence for use at trial; (2) it 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; and (3) it must be apparently credible, though it need not be incontrovertible. The question the applicants seek clarification from the Privy Council on is whether the first condition can be satisfied

by evidence that did not exist at the time of trial. Conflicting decisions from this Court have emerged. In **Staray Capital Limited v Cha Yang** and **Adam Bilzerian v Weiner**, the Court admitted fresh evidence that came into existence after the trial, suggesting that the first limb extended to evidence that came into existence post-trial. However, in **WWRT v Carosan Trading Limited**, the Court rejected this approach, holding that fresh evidence must have existed at the time of trial, even if it could not have been obtained, and distinguished **Staray Capital** on the basis that the underlying information contained in the evidence existed at the time of trial. Dissatisfied with that decision, WWRT sought conditional leave to appeal to the Privy Council. In a judgment delivered on 11th May 2023, the Court of Appeal, recognizing this conflict, granted leave to seek clarification on adducing evidence that did not exist at the time of trial. The Court accepted that the issue raised a question of great general or public importance. The conflict in the aforementioned appeals, and indeed the leave to appeal decision in **WWRT** provides a clear basis for finding that the question involved in the present appeal is one of great general or public importance and as such a grant of conditional leave to apply to His Majesty in Council concerning the first **Ladd v Marshall** condition is appropriate.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Staray Capital Limited and another v Cha Yang** BVIHCP2013/0009 (delivered 14th July 2014, unreported) considered; **Adam Bilzerian v Gerald Lou Weiner et al** SKBHCVAP2019/0028 (delivered 21st July 2020, unreported) considered; **WWRT Limited v Carosan Trading Limited** (BVIHCP2022/0002 (delivered 20th July 2022, unreported) considered; **Lam Wo Ping and another v Chen Jian Yun and another** BVIHCP2023/0006 (delivered 20th August 2024, unreported) considered.

3. The Court of Appeal in its 9th July 2025 judgment in this matter found that the lower court judge was wrong to grant summary judgment on the actual and apparent authority issues because there were genuine triable issues of fact that required a full trial to resolve. The Court concluded that the issues of the debt, the execution of documents, and the authority of the individuals were all closely intertwined. Since the judge had already found the debt issue to be triable, it was an error to summarily dismiss the authority issue, as the two are linked in the overall factual matrix of the fraud allegations. The Court of Appeal did not thereby create any new concept that ignores normal principles of agency, nor does it amount to a piercing of the corporate veil. The Court of Appeal merely determined that there were triable issues regarding Mr. Xu's actual or apparent authority to execute the documents on behalf of the Ying Peng Fund and the applicants.
4. The application for a stay of execution of the orders of the Court of Appeal was made on the basis that if a stay is not granted, the appeal to His Majesty in Council would risk being rendered nugatory and the parties would incur substantial costs and inconvenience in preparing for the trial in the commercial court, when it may turn out that a trial is unnecessary. The applicants have met the threshold for leave to appeal in relation to the Fresh Evidence Decision but not in relation to the

Summary Judgment Decision. The grant for leave to appeal the Fresh Evidence Decision is on the basis that this Court could benefit from the guidance of the Privy Council on the scope of the first condition of **Ladd v Marshall**. However, the Court of Appeal also found that the second condition of **Ladd v Marshall** had not been satisfied in this case. The Notice of Motion does not seek leave to appeal this aspect of the Fresh Evidence Decision. Accordingly, if a stay is not granted in relation to the Order dismissing the Fresh Evidence Application, this will not render the appeal nugatory in the circumstances of this case. Having regard to all the circumstances; considering that a stay is the exception rather than the general rule; that the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; weighing the balance of harm by considering the likely prejudice to the successful party; and considering that, for the reasons previously stated, the applicants have not shown strong grounds of appeal or a strong likelihood that the appeal will succeed in relation to the Summary Judgment Decision, the applicants have not met the threshold for a stay and the application is accordingly refused.

C-Mobile Services Limited v Huawei Technologies Co. Limited
BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) applied.

JUDGMENT

- [1] **WARD JA:** By Notice of Petition filed on 30th July 2025, Blue Ocean Creation Investment Hong Kong Ltd. and Blue Ocean Structure Investment Company Ltd., (collectively “the applicants”), seek leave pursuant to the provisions of the **Virgin Islands (Appeals to the Privy Council) Order 1967**¹ (“the 1967 Order”) to appeal to His Majesty in Council against the judgment of the Court of Appeal delivered on 9th July 2025 in Civil Appeal No. BVIHCMAP2023/0022. By that judgment, the Court of Appeal dismissed the applicants’ application to adduce fresh evidence (“the Fresh Evidence Decision”) and allowed the appeal of Golden Meditech Stem Cells (BVI) Company Limited (“the respondent”) against the decision of Wallbank J, who by order dated 12th September 2023, granted the respondent’s application for summary judgment (“the Summary Judgment” Decision”).

¹ Act No. 234 of 1967.

- [2] The applicants seek leave to appeal on the grounds that the intended appeal is from a decision in civil proceedings which raise a question that, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council, pursuant to section 3(2)(a) of the 1967 Order.

Brief Background

- [3] A brief summary of the salient background is first necessary to give context to the applicants' submissions. In this regard, I gratefully adopt in large measure the succinct summary outlined in the judgment of Wallbank J.
- [4] The first applicant, Blue Ocean Creation Investment Hong Kong Ltd., is the parent company of the second applicant, Blue Ocean Structure Investment Company Ltd. ("Blue Ocean BVI"). Both companies were the claimants below and are indirectly controlled by an entity called the Ying Peng Fund, which is a limited liability partnership investment fund. These three entities may be collectively referred to as "the applicants' group".
- [5] Golden Meditech Stem Cells BVI Ltd. ("GMSC") (the defendant below) is owned by Golden Meditech Holdings Limited ("GMHL") which is incorporated in the Cayman Islands and conducts its business predominantly in the People's Republic of China ("the PRC"). GMHL was founded by Mr. Kam Yuen ("Mr. Kam") who is its Chairman and Chief Executive Officer. Together these entities may be referred to as "the respondent's group".
- [6] The litigation between the parties is part of a multi-jurisdictional battle fought across the British Virgin Islands, the Cayman Islands and Hong Kong for control of Global Cord Blood Corporation ("GCBC"), a valuable company listed on the New York Stock Exchange since 2009. GMSC was once the holder of certain shares in GCBC until the shares were sold to the Ying Peng Fund, which acquired 65.4% of the total issued ordinary voting shares in GCBC in or about January 2018. The applicants' case is that GCBC was purchased by the Ying Peng Fund and the shares were transferred in the name of Blue Ocean BVI. On that basis, it said that

beneficial ownership of GCBC fully passed to the Ying Peng Fund through Blue Ocean BVI.

- [7]** GMSC admits there was a sale but contends that the full price wasn't paid and that the outstanding amount was treated as a loan, which was secured by charges over the shares in GCBC held by Blue Ocean BVI and the shares in Blue Ocean BVI held by the first claimant, Blue Ocean Hong Kong. In short, GMSC says that there are two share charges which secured the outstanding balance. This arrangement is said to be supported and evidenced by a loan document dated 28th March 2018 and two charge documents executed on behalf of the claimants by Mr. Xu Ping (Mr. Xu), who is a director and authorized signatory of both applicants and that the documents bear the Chop of the Ying Peng Fund. GMSC claims that the loan was not repaid when due in 2018. Mr. Xu denies signing those documents and the applicants contend that both the loan and share charge documents are complete forgeries.
- [8]** On 20th October 2020, GMSC served a stop notice on the Registered Agent of Blue Ocean BVI claiming that it is beneficially entitled to all rights, titles and interest in 72 shares in the share capital of Blue Ocean Hong Kong.
- [9]** On 22nd May 2022, the applicants filed an application in the BVI Court seeking orders to restrain GMSC from taking any steps in reliance on the alleged charge over the shares in Blue Ocean BVI and seeking a declaration that both alleged share charges were invalid. In response to that claim GMSC initially relied upon the share charges and disputed that the signature on those charges and the Ying Peng Chop were forgeries. However, that case fell apart when their own expert agreed with the claimants' expert that the signatures and the chop were forgeries.
- [10]** GMSC then sought to amend its claim to plead that the Ying Peng Fund held the GCBC shares on trust for GMSC, but that application was dismissed by the judge as an obvious "artificial construct". Then on 7th February 2023 GMSC filed an

application to re-amend its defence and counterclaim pleading that Mr. Xu had actual (or alternatively, apparent) authority to act for and represent the Ying Peng Fund and indeed each of the applicants. It was contended that even if someone else had signed Mr. Xu's name on the share charge documents, the signatures were nonetheless applied on behalf of Mr. Xu, who had the requisite authority to act on behalf of the applicants and the Ying Peng Fund, so that it did not matter if Mr. Xu had not signed his name because his name was signed with his authority and he himself had authority to represent and contract on behalf of the Ying Peng Fund.

- [11] Presented with that defence, the applicants applied for summary judgment on 17th February 2023. Wallbank J heard both applications together over four days in February and March 2023. He delivered judgment on 31st July 2023. He granted summary judgment to the applicants and dismissed GMSC's re-amendment application. The learned judge did state, however, that there was a triable issue in relation to the underlying question of whether or not there was any outstanding consideration due in respect to the purchase of the GCBC shares ("the Debt Issue"). At paragraph 213 of his judgment, Wallbank J concluded that his finding on the Debt Issue did not prevent him from ending the matter and granting summary judgment.

- [12] As indicated, GMSC appealed, contending that the learned judge had erred in summarily disposing of the claim and counterclaim. On 5th March 2024, the applicants filed a counter notice seeking a reversal of Wallbank J's finding that there was a triable issue as to whether there was a debt outstanding on the purchase of the GCBC Shares.

- [13] The applicants also filed an application to adduce fresh evidence in the form of a Hong Kong High Court judgment by Justice Linda Chan in *China Stem Cells Holdings Limited v Zheng Ting & Ors*, issued after Wallbank J's decision ("the Hong Kong judgment"). At paragraph 124(2) of her Judgment, Justice Linda Chan

determined, following cross-examination of Ms. Tina Zheng (a director of GMHL) and Mr. Albert Chen, that the claim of default on GCBC shares payment by September/October 2019 was unsubstantiated because this was contradicted by GMHL's 2017/2018 annual report publicly filed while GMHL was listed on HKSE which confirmed full payment was received on 31st January 2018 and verified by auditors. The applicants' position is that this finding made by Justice Linda Chan constitutes a judicial finding, which gives rise to an issue estoppel in the present appeal.

- [14] The Court of Appeal heard the appeal on the 29th and 30th October 2024. It delivered judgment on 9th July 2025. The Court of Appeal refused permission to adduce further evidence for the purposes of that appeal and allowed the GMSC's appeal against the order for summary judgment.

The Motion for Leave to Appeal

- [15] In relation to the Fresh Evidence Decision, the issue as framed by the applicants in the Notice of Motion for leave to appeal to His Majesty in Council is whether the first limb of the **Ladd v Marshall**² principles for adducing fresh evidence on an interlocutory appeal includes not only evidence which was in existence at the date of the hearing but could not have been obtained with reasonable diligence for use at the trial, but also evidence which postdated the hearing in February/March 2023. In this case, that evidence was the finding of Justice Chan as summarised at paragraph 13 above. The applicants sought to rely on this finding to ground an argument of issue estoppel. It is said that the reason why the material is relevant is that it goes to the underlying issue of whether there was any debt outstanding on the purchase of the shares in GCBC. Thus, the finding made in the Hong Kong judgment is not only merely relevant on that issue, but it also actually creates an issue estoppel that is effectively binding on GMSC in these proceedings. If it is the case that there was no outstanding debt that determines these whole proceedings because if there was no debt the alleged charges must be wholly ineffective.

² [1954] 1 WLR 1489.

- [16] The Court of Appeal held that the first limb of **Ladd v Marshall** does not include evidence that did not exist at the time of the trial, or where there was a change of circumstances post trial. Hence the Court of Appeal dismissed the application to adduce the finding contained in the Hong Kong judgment as fresh evidence.
- [17] In relation to the Summary Judgment Decision, it is said by the applicants that in wrongly finding that there is a triable issue as to whether Mr. Yuan was the “alter ego” of the Ying Peng AMC the Court of Appeal purported to create a new category of agency whereby the principal can hold out an individual as its agent when the arrangements are deliberately hidden from the principal. This gives rise to an issue of general public importance given the frequency of disputes involving application of agency principles.
- [18] At the hearing of the Notice of Motion, Mr. Davies KC invited the Court to consider that it was open to it to grant leave in relation to one or both decisions of the Court of Appeal. In relation to the Fresh Evidence Decision, Mr. Davies KC submitted that this is an appropriate case for the Court of Appeal to grant leave to appeal pursuant to section 3(2)(a) of the 1967 Order because the intended appeal raises the following questions that, by reason of their great general or public importance or otherwise, ought to be submitted to His Majesty in Council: (a) whether the first limb of the **Ladd v Marshall** principles for adducing fresh evidence on an interlocutory appeal includes not only evidence which was in existence at the date of the hearing but could not have been obtained with reasonable diligence for use at the trial, but also evidence which did not exist at the date of the hearing in February/March 2023 (“the Fresh Evidence Issue”); and (b) whether in finding that Mr. Yuan was the “alter ego” of Ying Peng the Court of Appeal purported to create a new category of agency whereby the principal can hold out an individual as its agent when the arrangements are deliberately hidden from the principal (“the Authority/Attribution Issue”).

- [19] The applicants also contend that there is reasonable doubt about the Court of Appeal's decisions, warranting submission to His Majesty in Council under the "or otherwise" ground.

Submissions on the Fresh Evidence Decision

- [20] Mr. Edward Davies KC submitted that in the Court of Appeal, the applicants sought to admit the Hong Kong Judgment as fresh evidence in accordance with the **Ladd v Marshall** principles and/or in exercise of the inherent jurisdiction of the Court of Appeal on the bases that: (a) the Hong Kong judgment could not have been obtained for use in the proceedings in the court below as it did not exist at the date of the hearing before Wallbank J; (b) whilst the Hong Kong judgment did not exist at the date of the hearing before Wallbank J, the information and evidence on which the findings in the Hong Kong judgment were made, did exist before that hearing. This information included the fact that GMSC's witnesses participated in the 2019 security arrangement, a fact which was only disclosed in the Hong Kong proceedings. It was argued on the appeal that the Hong Kong judgment is likely to have an important influence on the result of the appeal because it provides the factual basis for the first ground in the applicants' counternotice which seeks to raise an issue estoppel, which by itself is capable of sustaining the grant of summary judgment. Mr. Davies submitted that the reason why the material is relevant is that it goes to the underlying issue of whether there was any debt outstanding on the purchase of the shares in GCBC. Thus, the finding made in the Hong Kong judgment is not only merely relevant on that issue, but it also actually creates an issue estoppel that is effectively binding on GMSC in these proceedings. If it is the case that there was no outstanding debt, that determines these whole proceedings because if there was no debt the alleged charges must be wholly ineffective. Thirdly, the evidence was obviously credible, being the judgment of a high court judge.
- [21] Mr. Davies KC further submitted that while the Court of Appeal adopted the principles laid down in **Ladd v Marshall**, it held that it was settled law that the first

limb of the **Ladd v Marshall** test does not include evidence that did not exist at the time of the trial or a change of circumstances post-trial. The Court in so deciding followed the decision in **WWRT Limited v Carosan Trading Limited**³ and refused to admit the Hong Kong Judgment.

[22] Mr. Davies KC submitted that there are inconsistent decisions in the Court of Appeal on this issue because there are decisions of the Court of Appeal where evidence of matters that happened after the hearing in the lower court was admitted as fresh evidence on appeal. They cite **Staray Capital Limited and another v Cha Yang**⁴, in which two opinions which postdated the trial and came into being shortly before the appeal were adduced as fresh evidence on appeal; **Adam Bilzerian v Gerald Lou Weiner et al**,⁵ in which judgments and an order which postdated the trial were allowed as fresh evidence on appeal; and **Maluf v Durant International Corp et al**⁶, where expert evidence on foreign law was allowed as fresh evidence on appeal, as illustrative of this approach.

[23] Mr. Davies KC sought to distinguish **WWRT**, arguing that that case concerned a rather different situation whereby an entirely new and unforeseen development occurred after the trial on the issue of forum conveniens, which was the invasion of Ukraine by Russia. Faced with an application to adduce new evidence concerning the invasion for the purposes of an appeal, one could readily see why the court refused the application to adduce that as fresh evidence.

[24] Mr. Davies KC submitted that those circumstances are different from the present case because the Hong Kong judgment concerned facts that existed at the time of the trial, albeit the judgment itself was delivered after trial, which distinguishes it from a situation where completely new factual events occurred after trial. It was submitted that there is a clear distinction as a matter of principle that can be drawn

³ BVIHCMAP2022/0002 (delivered 20th July 2022, unreported).

⁴ BVIHCMAP2013/0009 (delivered 14th July 2014, unreported).

⁵ SKBHCVP2019/0028 (delivered 21st July 2020, unreported).

⁶ BVIHCMAP2021/0025 (delivered 13th January 2022, unreported).

between the type of case in **WWRT** and the present case. It was therefore wrong, or at least an overstatement, for the Court of Appeal to say that it was settled law that **WWRT** effectively governed the position in a case such as the present.

[25] While relying to some extent on the case of **Staray Capital**, Mr. Davies KC submitted that the present case presents almost a hybrid type of situation that is not exactly **WWRT** or **Staray Capital**. The position here is said to be slightly different because the applicants do rely upon the particular finding in the judgment that there was no debt to establish an issue estoppel. As such, the applicants do not accept that it was settled law as to how the court should deal with this kind of situation.

[26] By way of contrast, Mr. Davies KC identified the more recent decision in **Lam Wo Ping and another v Chen Jian Yun and another**⁷ as a decision that followed **WWRT** and went the other way in refusing to admit a judgment from the appellate court in the People's Republic of China because it postdated the hearing of the lower court, among other reasons. To similar effect is the fresh evidence judgment in the present case.

[27] Mr. Davies KC submitted that these clear conflicts between certain judgments in this Court regarding the treatment of evidence, particularly evidence in the form of judgments that postdate the hearing but that nonetheless concern facts and matters that predate the hearing would be in itself a sound basis for seeking guidance from His Majesty in Council. Mr. Davies KC supports his argument by noting that in a later Motion for Conditional leave to appeal in **WWRT**, the Court held that guidance from the Privy Council was appropriate due to recognised conflicts in authorities. This prior decision to grant leave is, he asserts, the strongest support for the current application.

[28] In summary, the applicants rely on the apparently conflicting decisions of the Court of Appeal on this issue and say that given the frequency with which this Court is

⁷ BVIHCMAP2023/0006 (delivered 20th August 2024, unreported).

faced with applications to adduce fresh evidence, it is a matter of great general or public importance such that definitive guidance should be obtained from the Privy Council on the scope of the first limb of **Ladd v Marshall**.

The Respondent's Response to the Fresh Evidence Issue

- [29] On behalf of the respondent, Mr. Ben Valentin KC submitted that the only evidence which the applicants wished to adduce in the Court of Appeal was a ruling made by a judicial officer in Hong Kong, which had come into existence after the decision of Wallbank J. He submitted that in its Fresh Evidence Judgment, this Court directly considered whether, in light of the decisions in **Staray Capital** and **WWRT**, it is settled law that the evidence to be adduced must be in existence at the time of the trial and concluded that that was the settled position. The Court rejected the applicants' suggestion that the Court in **Staray Capital** had reached any different conclusion, holding instead that the Court in **WWRT**, had debunked the myth that **Staray Capital** had somehow created a new niche for the usage of fresh evidence that came into existence after trial.
- [30] Mr. Valentin KC further submitted that this was the position adopted by this Court in the 2024 decision in **Lam Wo Ping v Chen Jian Yun**, where the Court also relied on **WWRT** in rejecting an application to adduce fresh evidence where the applicant was seeking to rely on the findings and conclusions in a judgment from the Peoples Republic of China which was not in existence at the time of the trial, rather than on the underlying facts, which were in existence at that time. Mr. Valentin KC submitted that **Lam Wo Ping** held that the relevant principles are well settled; that **Staray Capital** did not decide, that evidence that did not exist before trial would be accepted; and that where a party seeks to rely on the findings of a foreign court in a judgment which post-dates trial, the first limb of **Ladd v Marshall** is not satisfied.
- [31] Mr. Valentin KC sought to distinguish the cases of **Maluf v Durant International Corp** and **Adam Bilzerian** relied on by the applicants by submitting that the

finding in these cases that the first limb was satisfied was on the basis of a concession on this issue and therefore did not involve any decision by the Court that is inconsistent with the settled principle applied in the Fresh Evidence Judgment. In the case of **Staray Capital**, that decision turned on its own different facts. On the facts of the present case, the applicants were seeking to rely on the findings of the Hong Kong court as giving rise to an issue estoppel; not the underlying facts. Since the Hong Kong decision was not in existence at the time the judge granted summary judgment, there can be no dispute that the first limb of **Ladd v Marshall** was not satisfied.

[32] Mr. Valentin KC submitted that in light of the matters set out above, the Court should reject the applicants' contention that this case gives rise to any issue concerning the scope of the first limb of **Ladd v Marshall** on which the guidance of His Majesty in Council is required, and there is therefore no question of great general or public importance, nor is there any other basis under the "or otherwise" limb for granting leave to appeal. The Court's decision in the Fresh Evidence Judgment was plainly correct in concluding that the applicants had not satisfied either the first or second limbs of the test in **Ladd v Marshall**.

[33] In any event, submitted Mr. Valentin KC, this is an issue that concerns local practice and procedure, on which the long-established policy of the Privy Council is to defer to local courts.

[34] For all those reasons, Mr. Valentin KC invited this Court to dismiss the application for leave to appeal in respect of the Fresh Evidence Judgment.

Discussion - The Law

[35] Appeals to the Privy Council are governed by section 3(2)(a) of the **Virgin Islands (Appeals to the Privy Council) Order 1967**, which provides:

"Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases -

(a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings...”

[36] Section 3(2)(a) vests a discretion in the Court to grant conditional leave to appeal to the Privy Council in civil matters on one of two bases. The first is where the Court is of the opinion that the question involved in the appeal is one that by reason of its great general or public importance ought to be submitted to His Majesty in Council.

[37] A series of decisions from this Court have clarified how this provision should be understood. In **Martinus Francois v The Attorney General**⁸, it was decided that a question of ‘great general or public importance’ arises when there is a significant legal issue at stake, an unsettled constitutional matter, a disputed area of law, or a question whose resolution could have serious or far-reaching effects. A principle is considered ‘unsettled’ if, even after being established by the Court, differing opinions or conflicting judgments exist, or genuine uncertainty remains.

[38] In further explaining this concept, in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**.⁹ the Court stated:

“[10] ... Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this

⁸ Civil Appeal No. 37 of 2003 (delivered on 7th June 2004, unreported).

⁹ BVIHCMAP2018/0005 (delivered 8th October 2018, unreported).

Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.

[11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt."

[39] The issue should go beyond private disputes and have broader significance, leading to a decision that sets precedent for others in commercial and domestic matters: **Marinor Enterprises Limited et al v First Caribbean International Bank (Barbados) Ltd.**¹⁰

The "or otherwise" Ground

[40] The second ground on which this Court may exercise its discretion to grant conditional leave to appeal is where the matter, though not of great general or public importance, ought otherwise to be submitted to His Majesty in Council. The jurisprudence of the Eastern Caribbean Court of Appeal is settled on what this alternative basis means.

[41] The term 'or otherwise' covers situations where a case does not qualify as one of great public importance but requires clarification and some definitive statement from the apex court. This may be the case where there is some doubt about the correctness of the decision sought to be appealed. Where the 'or otherwise' ground is invoked, the discretion to allow conditional leave should be exercised sparingly, mindful that it is ultimately the Privy Council's role, not the Court of Appeal's, to determine the correctness of the matters sought to be appealed: **Multibank FX International Corporation v Von De Heydt Invest.**¹¹

¹⁰ DOMHCVAP2013/0003 (delivered 6th July 2016, unreported).

¹¹ BVIHCVAP2022/0008; BVIHCVAP2021/0009; BVIHCVAP2022/0032 (delivered 7th July 2023, unreported).

- [42] These principles guide the Court in exercising its discretion under section 3(2)(a) of the 1967 Order. As noted in **Pacific Wire & Cable Company Limited v Texas Management Limited et al**,¹² the Court should strive for consistency in applying the test for conditional leave so that it aligns with current practice and that of other comparable courts, recognizing the significance of invoking the jurisdiction of the highest appellate court.

Application

- [43] The issue for this Court under section 3(2)(a) is whether the question involved in the appeal is one of great general or public importance or one which for some other sufficient reason justifies allowing an appeal to His Majesty in Council.
- [44] The basis on which the applicants say that the scope of the first condition of the **Ladd v Marshall** test for adducing fresh evidence on appeal is a question of great general or public importance is that there are conflicting decisions of this Court in relation to whether the first limb of the test includes evidence that did not exist at the time of the trial or a change of circumstances post-trial.
- [45] The Court of Appeal held that the first condition of **Ladd v Marshall** does not include evidence that did not exist at the time of the trial, or where there was a change of circumstances post trial. Hence the Court of Appeal dismissed the application to adduce the finding contained in the Hong Kong judgment as fresh evidence. In so holding, the Court followed the previous decisions of this Court in **WWRT** and **Lam Wo Ping**. It followed **WWRT** in distinguishing **Staray Capital** on the basis that the applicant was seeking to adduce two opinions which, although dated after the date of the trial, were based on information or evidence that existed well before the trial.

¹² BVIHCVAP2006/0019 (delivered 6th October 2008, unreported).

[46] To test the respondents' contention, it is necessary to examine the line of cases from this Court in which this discrete issue was engaged. First, however, I will set out what **Ladd v Marshall** held to be the applicable principles where fresh evidence is sought to be adduced. That case involved an application for a new trial on the ground that a witness had told a lie at the first trial. It was sought, to adduce the evidence of that witness admitting they had lied and now wished to tell the truth as fresh evidence. 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 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.”

[47] It is noteworthy that the case does not elaborate on the scope of the first condition. Indeed, the application to adduce evidence in that case turned on the third principle or condition, which was held not to have been satisfied as the witness was not a person to be presumably believed. I turn then to review the local cases cited to us that engaged with the **Ladd v Marshall** principles, and particularly the first condition.

[48] It is convenient to start with **Staray Capital** which was first in time. The case centered on a partnership dispute between Mr. Chen, a Chinese entrepreneur, and Mr. Cha, a legal professional admitted to practise in New York and the Peoples Republic of China. They formed Staray Capital Limited in 2010 to pursue a coal mining project in Canada, with Mr. Chen holding 80% of shares and Mr. Cha 20%. The partnership broke down when Mr. Chen tried unsuccessfully to have Mr. Cha transfer shares to a third party, leading to Mr. Cha's removal as director and amendments to Staray's Articles allowing compulsory share redemption for material misrepresentation or harm to the company. Mr. Chen sought to redeem Mr. Cha's shares over alleged misrepresentations with regard to his position as partner in the law firm King & Wood as well as his eligibility to practise law in the

PRC and the USA. However, Mr. Cha obtained an injunction to block the redemption. The trial judge found the amendment valid but ruled the redemption notice invalid because Mr. Chen did not rely on the representations made by Mr. Cha in agreeing for Mr. Cha to acquire shares in Staray Capital.

[49] On appeal, the appellant applied to introduce fresh evidence regarding Mr. Cha's credentials and nationality in the form of two opinions from the Shanghai Municipal Bureau of Justice dated March and July 2013, which postdated the proceedings in the court below. These opinions stated that Mr. Cha had not disclosed his US citizenship when applying for his PRC legal credentials. The Bureau opined that if Mr. Cha had ceased to be a Chinese national by December 2001 (having acquired US citizenship in September 2001), he would have violated PRC legal requirements for obtaining a Lawyer's Certificate. This evidence was intended to prove that Mr. Cha made material misrepresentations regarding his eligibility to practise law in the PRC and that his conduct put the company at risk of regulatory disadvantage.

[50] The Court of Appeal, (Pereira, CJ, Blenman, JA and Thom, JA (Ag.)), applying the **Ladd v Marshall** principles, allowed the appellants' fresh evidence. The new evidence was deemed likely to influence the outcome regarding Mr. Cha's legal qualification and alleged misrepresentations. In relation to the first condition, the Court held at paragraph [25]:

"It is not disputed that conditions (i) and (iii) of **Ladd v Marshall** are satisfied. The fresh evidence could not have been obtained with reasonable diligence for use at the trial since the opinions are dated 24th March 2013 and 1st July 2013, and the trial was held between 28th and 31st January 2013. The opinions are sufficiently credible as they are from the State Regulatory Authority in the PRC which issued the licence to practise in the PRC to Mr. Cha in the first instance."

[51] On the face of what is said at paragraph [25] of **Staray Capital**, it appears that the first condition in **Ladd v Marshall** was accepted without challenge. Nothing was specifically said in the judgment about the fact that the opinions did not exist at the time of the trial. I venture to suggest that it seems implicit that this fact led to the

conclusion that the first condition was satisfied. The case can be read, and the applicants so read it, as holding without more that the scope of the first condition of **Ladd v Marshall** extends to evidence which did not exist at the time of the trial.

[52] The scope of the first condition of **Ladd v Marshall** was next considered by the Court of Appeal (Blenman, JA, Michel, JA and Farara, JA (Ag.)) in **Adam Bilzerien v Gerald Lou Weiner et al.** In that case the applicants/appellants in five separate matters filed interlocutory appeals challenging a decision made by a judge of the High Court on 25th July 2019. In that decision, the judge had dismissed two applications requesting that he recuse himself from the proceedings. The applicants sought permission to rely on three specific documents that came into existence after the judge's refusal to recuse himself: (i) a written judgment by the judge dated 14th October, 2019, in **Gerald Lou Weiner and Kathleen Ann Weiner v Adam Bilzerian** (SKBHCV2012/0154); (ii) an order made by the judge on 31st October 2019, in **Stephen First and Corporate Capital (Asia) Limited v Gregory Gilpin-Payne and International Investments & Consulting Limited** (SKBHCV2016/0082); and (iii) an order made by the judge on 30th January 2020, in **Adam Bilzerian, Lemon Grove Company Limited, and Caribbean Building Systems (St. Kitts) Ltd v Terence V. Byron, Byron & Byron and Kevin Horstwood** (SKBHCV2017/0072).

[53] The applicants argued that these documents were necessary to support their appeals regarding the judge's alleged bias. They contended that the documents satisfied the **Ladd v Marshall** conditions in that they could not have been obtained earlier with reasonable diligence, they would significantly influence the result, and they were credible. The respondents initially contended in written submissions that the applicants had failed to satisfy the first and second conditions of the **Ladd v Marshall** principles. As to the first condition, it was submitted that since the three documents came into existence after the hearing on 25th July 2019, they did not qualify as 'fresh evidence' which relates to evidence which was in existence at the

time of the hearing below, but which, for whatever reason, was not known to or not available to the applicants with reasonable diligence.

[54] In delivering the judgment of the Court, Farara, JA (Ag.) framed the context in which the concession in relation to the first condition was made as follows:

“[33] In her written submissions before this Court, learned counsel for the respondents, Ms. Jean Dyer, submitted that the applicants have failed to satisfy the first and second limbs of the **Ladd v Marshall** principles. As to the first limb, Ms. Dyer submitted that since the three documents came into existence after the hearing on 25th July 2019, they could not be considered ‘fresh evidence’. In her view, ‘fresh evidence’ relates to evidence which was in existence at the time of the hearing below, but which, for whatever reason, was not known to or not available to the applicants with reasonable diligence. However, at the hearing before us Ms. Dyer, quite correctly, conceded that this did not represent the correct legal position. In this vein, she drew attention to this Court’s decision in **Staray Capital Limited and another v Cha, Yang** (also known as Stanley), where Thom JA, at paragraph 25 of the judgment, ruled that documents which came into existence subsequent to the delivery of the judgment which was subject to appeal, could be admitted as fresh evidence in the appeal notwithstanding that they did not exist at the time of the judgment below.”

[34] Likewise, no issue has been raised (also quite correctly) as to the applicants not having satisfied the third principle or criterion in **Ladd v Marshall**. These three documents being quintessentially a judgment and two orders of the court, are clearly credible evidence.

[35] Accordingly, the success of the Fresh Evidence Applications turns on whether the second limb in **Ladd v Marshall** has been satisfied by the applicants...”

[55] While it is true, as Mr. Valentin KC submitted, that in **Adam Bilzerien v Gerald Lou Weiner et al** it was conceded that the first condition of the **Ladd v Marshall** principles was satisfied, it is important to note that Farara, JA, in endorsing the concession, took the clear view that it had been correctly made in light of the decision in **Staray Capital**, which he read as ruling that documents which came into existence subsequent to the delivery of the judgment which was subject to

appeal, could be admitted as fresh evidence in the appeal notwithstanding that they did not exist at the time of the judgment below. This interpretation and conclusion lends weight to the applicants' argument that that is the purport and effect of the judgment in **Staray Capital**.

[56] Months later, this Court in **WWRT** (Pereira, CJ, Michel, JA and Webster JA (Ag.)) faced with an application to adduce fresh evidence on appeal had to address **Staray Capital** head on as the applicant sought to place reliance on it. The background, shortly stated, is that the High Court had to decide the question whether Ukraine or the BVI was the appropriate forum for trial of the claim. The judge held that Ukraine was the appropriate forum. **WWRT** subsequently appealed.

[57] Prior to the hearing of the appeal, there was an outbreak of war between Russia and Ukraine. At the hearing of the appeal, **WWRT** sought to introduce fresh evidence in relation to the ongoing armed conflict in Ukraine which began in February 2022. It was argued that the evidence to be adduced demonstrated that the conflict rendered Ukraine an unavailable forum and that the Court of Appeal should have this in mind when reviewing the judge's decision as to forum. They relied on **Staray Capital** in support of their argument that such evidence could be adduced even though it became available after the hearing on forum in the lower court.

[58] Counsel for the respondents countered that the Court of Appeal could only admit evidence that existed at the time of the trial in the lower court, that being December 2021 and not evidence that came to light after.

[59] The Court of Appeal rejected the appellant's argument. At paragraphs 80 and 81 the Court held:

“[80] To have succeeded on this first limb of the **Ladd v Marshall** principles, **WWRT** needed to have shown this Court that the

evidence it sought to adduce, could not have been obtained with reasonable diligence for use at the trial.

[81] As it relates to applications to adduce fresh evidence there is no shortage of cases in the Eastern Caribbean, and in the United Kingdom which show that to satisfy this limb of the test the evidence to be adduced must be evidence that existed at the time of the trial but could not have been obtained with reasonable diligence for the use at the trial. Such evidence does include evidence that the applicant was unaware existed at the time [of] trial or evidence that existed at the time but proved difficult to obtain. This limb does not however contemplate that evidence that did not exist at the time of the trial or a change in circumstance post-trial could be evidence adduced before the Court of Appeal. This would surely explain why there was no relevant authority provided by WWRT to substantiate this point.”

[60] The Court further held that the decision in **Staray Capital** neither served nor supported WWRT’s submissions. It held that, carefully read, **Staray Capital** did not decide that evidence that did not exist before the trial would be accepted. It distinguished that case on the basis that while 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/populate those opinions existed well before the trial that took place in January 2013. While the Court did not specifically address Farara JA’s interpretation of **Staray Capital** in the **Adam Bilzerian v Gerald Lou Weiner** case, its conclusion on the issue contradicts Farara, JA’s statement there that **Staray Capital** had ruled that documents which came into existence subsequent to the delivery of the judgment which was subject to appeal, could be admitted as fresh evidence in the appeal notwithstanding that they did not exist at the time of the judgment below.

[61] WWRT, dissatisfied with the decision, sought conditional leave to appeal to the Privy Council. In a judgment delivered on 11th May 2023, the Court of Appeal (Thom, JA, Ellis, JA, Webster, JA (Ag.)) granted leave. The Court noted that while the principles in **Ladd v Marshall** have been applied consistently by this Court in requiring the fresh evidence to have existed at the date of the hearing but which could not have been obtained with reasonable diligence for use at the trial, to the

extent that decisions in **Staray Capital** and **Adam Bilzerian v Gerald Lou Weiner et al**, which admitted documents created after the hearing, may be construed as being inconsistent with the WWRT main decision, the Court saw value in seeking guidance from the Privy Council.

[62] It was further held that the case presented unprecedented circumstances of supervening armed conflict, an issue not previously addressed in Commonwealth Caribbean courts. The parties' counsel could not provide relevant authority for considering such supervening events. That uncertainty affected the case and future cases, and that aspect of the proposed appeal met the criteria of great general importance and the Court would benefit from guidance by the Privy Council in this respect.

[63] In my view, the Court of Appeal's **WWRT** Conditional Leave judgment amounts to acknowledgment that there is at least some conflicting dicta of this Court regarding the issue whether the first condition of **Ladd v Marshall** extends to evidence which did not exist at the date of the hearing below. Clearly, the Court was satisfied that the question involved an issue of great general or public importance.

[64] I do not take the view that the fact that the original position adopted in the main **WWRT** judgment was followed by this Court in either **Lam Wo Ping** (Michel, JA, Ellis, JA, Ward JA) or the Fresh Evidence Judgment in the present case settles the issue. These cases merely illustrate and confirm the apparently conflicting application of the principle when set against other cases, including the case of **Maluf v Durant** where expert evidence which came into being was allowed to be adduced as fresh evidence on appeal.

[65] The very case that **Lam Wo Ping** and the Fresh Evidence Judgment in this case purport to follow has subsequently found that the issue requires clarification from the Privy Council. I do not consider it appropriate to depart from the considered and reasoned opinion of this Court in the **WWRT** Conditional Leave judgment that

this is an issue on which the Court can benefit from the opinion of the Privy Council as I too am of the view that there are conflicting decisions of this Court on the question whether the first condition of **Ladd v Marshall** extends to evidence which did not exist at the date of the hearing below. Such conflict provides a clear basis for finding that the question involved in the appeal is one of great general or public importance such that it could benefit from guidance from the Privy Council.

- [66] Accordingly, I would grant conditional leave to apply to His Majesty in Council in relation to the Court of Appeal's decision on the first condition of the **Ladd v Marshall** principles as contained in the Fresh Evidence Judgment.

The Summary Judgment Decision

- [67] The second decision of the Court of Appeal which the applicants seek leave to appeal to His Majesty in Council is the Summary Judgment Decision, which concerns the principles of agency and attribution of knowledge.

The Applicants' Submissions

- [68] Mr. Davies KC accepted that the principles of agency and attribution of knowledge are well established, and, in particular, that at their root there needs to be someone with actual authority who can be shown to have held out the alleged agent as being authorized to enter into the kind of transaction that was actually entered into. He submitted, however, that the problem for GMSC in the present case is that they cannot establish that basic foundation as they cannot show that there was someone with actual authority to act for the alleged principal and who did hold out the person who is said to have been responsible for entering into the relevant agreements.
- [69] Mr. Davies KC submitted that as a way around this difficulty, the Court of Appeal seemingly introduced a new concept whereby instead of identifying a person with actual authority on the normal principles, the Court said that there is a person namely, Mr. Yuan, who is the alter ego of the principal and who can, in effect, be

treated as if he were the principal and, so the argument goes, he did give the necessary authority to Mr. Xu to execute the loan and charge documents on behalf of the Ying Peng Fund, which was sufficient to enable the agent to proceed.

[70] This approach, submitted Mr. Davies KC, is problematic because not only does it ignore the constitutional and contractual arrangements under which the alleged principle was supposed to operate but also amounts to a piercing, and in fact, a total destruction of the corporate veil. It was submitted that it is not possible to use the notion of an alter ego to circumvent the established principles of agency in this way. Moreover, the problems that arise in relation to the agency issue are compounded when the alter ego principle is applied. In this instance, Mr. Yuan, acting as the so-called alter ego, intentionally concealed the transaction at the centre of the dispute from the duly appointed representatives and organs of the principal, with the counterparty's knowledge.

[71] It is therefore wrong in principle and as a matter of law to hold that effective apparent authority could be established in such circumstances where the agent has deliberately hidden the proposed transaction from the principal.

[72] It is said that given the frequency with which the principles relating to agency are engaged in these courts, this issue is of great general or public importance.

The Respondents' Submissions

[73] GMSC's case below, as re-formulated in its re-amended defence, is that even if the signature of Mr. Xu or the imprint of the company seal (the Chop) of Ying Peng on the March 2018 documents were found not to be the same as the specimen signature of Mr. Xu and the specimen company seal of Ying Peng, they were affixed to those documents with the knowledge and actual authority (or alternatively, with the ostensible authority) of Mr. Xu Ping. The knowledge or acts of Mr. Xu are attributable to the respondents and the Ying Peng Fund because the documents were at all material times presented to GMSC and GMHL by Mr. Xu

and/or his representative as bearing the genuine signature of Mr. Xu and or the genuine company seal of the Ying Peng Fund which constituted an actual (or alternatively, implied) representation of authority. GMSC would not have otherwise accepted the March 2018 documents as being validly executed by the respondents and the Ying Peng Fund.

[74] On behalf of GMSC, Mr. Valentin KC submitted that in relation to the Summary Judgment Decision, the Court of Appeal overturned the judge's decision to grant summary judgment on the basis that the claim and the counterclaim give rise to a series of factual issues which can only properly be determined at the trial.

[75] More specifically, the Court of Appeal held that the judge was wrong to conclude that there was no triable issue of whether Mr. Xu had actual or apparent authority to bind the Ying Peng Fund to the loan agreement and the share charges which is a clearly pleaded issue in the proceedings, particularly in the reply to the defence to counterclaim at paragraph 4 and at paragraph 10 where it was pleaded that Mr. Yuan had authority to make requests on behalf of the Ying Peng Fund and to make promises on behalf of Ying Peng and/or act on behalf of Ying Peng and/or Ying Peng would act in accordance with the directions of Mr. Yuan.

[76] The Court of Appeal stated that one view of the GMSC's case is that Mr. Yuan had actual authority to act on behalf of Ying Peng and gave actual authority to Mr. Xu to execute the documents on its behalf. In the alternative, Mr. Xu separately had actual authority, or at the very least apparent or ostensible authority. These were the issues before the Court, and it is not surprising that the Court decided that there are triable issues in relation to them.

[77] In relation to the applicants' submission that there are two issues of general or public importance, namely whether an agency can be formed or the knowledge of an agency attributed to a principal where the arrangements are to the knowledge of the third party hidden from the principal, and secondly whether there is an

arguable alter ego point given the principles of separate corporate personality, Mr. Valentin KC submitted that in relation to the first of those points it seems not to be based on the pleaded case. GMSC's main case is actual authority; apparent or ostensible authority was the alternative case.

[78] It was submitted that the alter ego principle addressed at paragraph 141 of the Court of Appeal's judgment is simply the court's own gloss or summary of what the case was about; it is not how the case was pleaded and the appellant was not relying on alter ego as a sort of piercing the corporate veil type argument, nor was the case pleaded as such. What matters is that the respondent has pleaded that Mr. Yuan had authority to act on behalf of Ying Peng and that Mr. Xu had authority to sign and execute documents on behalf of Ying Peng and the applicants. These matters give rise to triable issues. The Court of Appeal has not decided that Mr. Yuan was an alter ego, and it has not found that there was an agency relationship because these are all matters for trial, as the Court of Appeal held.

[79] Contrary to the applicants' submissions, in overturning the summary judgment decision, the Court of Appeal has not determined any of the underlying issues in the case, whether legal or factual; it merely decided that there are issues that must be determined at trial. The judge himself considered that one of the central issues in the case - whether or not there was a debt - gave rise to a triable issue which in turn gives rise to various issues in relation to the charges which can only be resolved at trial.

Discussion

[80] The Court of Appeal found that the lower court judge was wrong to grant summary judgment on the actual and apparent authority issues because there were genuine triable issues of fact that required a full trial to resolve. In summary, the Court's reasons for finding the judge erred include, among others: (a) the judge's over-reliance on Constitutional Documents; (b) a too 'rigid and mechanical assessment' of actual authority by focusing almost exclusively on the Ying Peng Partnership Agreement, which seemed to bar Mr. Xu and Mr. Yuan from certain

actions; (c) failing to properly consider the past dealings between the parties and the informal 'reality' of how the companies were actually controlled; (d) focusing too narrowly in failing to see how evidence of a debt issue (which the judge admitted was a triable issue) could provide essential context for the authority and execution issues; (e) making definitive findings on authority despite conflicting affidavit evidence (such as Mr. Kam's evidence that Mr. Yuan controlled Ying Peng), making his authority a triable issue but instead conducting an impermissible 'mini-trial' on the facts and wrongly concluding that there was no triable issue regarding whether Mr. Yuan was the 'alter ego' or actual controller of Ying Peng; (f) failing to consider that had Mr. Yuan actual authority as pleaded, he could have granted actual authority to Mr. Xu to execute the documents, which would satisfy the requirements for apparent authority.

[81] The Court of Appeal concluded that the issues of the debt, the execution of documents, and the authority of the individuals are all closely intertwined. Because the judge had already found the debt issue to be triable, it was an error to summarily dismiss the authority issue, as the two are linked in the overall factual matrix of the fraud allegations.

[82] In my view, Mr. Valentin KC's submissions on this issue are correct and I am of the view that properly analysed, the Court of Appeal merely determined that there were triable issues in relation to the issue regarding Mr. Xu's actual or apparent authority to execute the documents on behalf of the Ying Peng Fund and the applicants. The judgment cannot be read as introducing any new concept that ignores normal principles of agency, nor does it amount to a piercing of the corporate veil. In framing the discussion on the alter ego issue the Court of Appeal was careful to state that this was one way of viewing the respondent's case. I agree that this was no more than the Court's general summary of one view of the respondent's case. Accordingly, no question of great general or public importance arises from its decision nor is there any other cogent reason why this issue should be referred to His Majesty in Council.

- [83] For all the foregoing reasons I would hold that the proposed appeal in relation to the Summary Judgment decision does not raise an issue of great general or public importance, nor should it otherwise be referred to His Majesty in Council.

The Stay Application

- [84] The applicants seek a stay of execution of the orders of the Court of Appeal on the basis that if a stay is not granted, the appeal to His Majesty in Council would risk being rendered nugatory and the parties will incur substantial costs and inconvenience in preparing for the trial in the commercial court, when it may turn out that a trial is unnecessary.
- [85] The respondent opposes the application, submitting that there are no circumstances which call for a stay of execution; that no cogent evidence has been adduced that the appeal will be rendered nugatory because the application for a stay is not even mentioned in the affidavit in support of the Motion; refusing a stay will cause no prejudice to the respondents because they can seek special leave and a stay from the Privy Council. By contrast, if the proceedings are stayed the case cannot be progressed in any way, including making arrangements even for the first case management conference. After such a period of significant delay occasioned by the applicants' applications, a stay would just cause a further delay in the proceedings, pending an appeal whose prospects of success are very weak.

Discussion

- [86] I have found that the applicants have met the threshold for leave to appeal in relation to the Fresh Evidence Decision relating to the first condition of the **Ladd v Marshall** principles but not in relation to the Summary Judgment Decision. In granting leave to appeal the Fresh Evidence Decision, it was on the basis that this Court could benefit from the guidance of the Privy Council on the scope of the first condition of **Ladd v Marshall**. I am mindful, however, that the Court of Appeal also found that the second condition of **Ladd v Marshall** had not been satisfied in this

case. The Notice of Motion does not seek leave to appeal this aspect of the Fresh Evidence Decision to His Majesty in Council. Accordingly, if a stay is not granted in relation to the Order dismissing the fresh evidence application this will not render the appeal to His Majesty in Council nugatory in the circumstances of this case.

- [87] In so far as the stay application relates to the order overturning the judge's decision to grant summary judgment, I have in mind the well-known applicable principles as articulated in **C-Mobile Services Limited v Huawei Technologies Co. Limited**.¹³ Having regard to all the circumstances of the case; considering that a stay is the exception rather than the general rule; that the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; weighing the balance of harm by considering the likely prejudice to the successful party; and considering that, for the reasons previously stated, the applicants have not shown strong grounds of appeal or a strong likelihood the appeal will succeed, I am of the view that the applicants have not met the threshold for a stay. The application is accordingly refused.

Disposition

- [88] I would make the following orders:
- (1) The application for Leave to Appeal to His Majesty in Council the Court of Appeal's decision in relation to the first condition of the **Ladd v Marshall** principles is granted upon the following conditions:
 - (a) the applicants within 90 days of the date hereof do enter into good and sufficient security in the sum of five hundred pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;
 - (b) within 90 days of the date hereof, the applicants take the necessary steps for the purposes of procuring the preparation

¹³ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

of the records, the settling of such records with the solicitors for the respondent to this application, and the certification of the record by the Registrar of the Court of Appeal;

(c) the record shall be prepared in accordance with rules 27 of the **Judicial Committee (Appellate Jurisdiction) Rules Order 2024** (SI2024/997) and Practice Direction 2024 5.3 to 5.8; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted;

- (2) The applicant shall make an application to the Court for final permission to appeal to His Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar.
- (3) The application for leave to appeal to His Majesty in Council in relation to the Summary Decision is dismissed.
- (4) The application for a stay of execution is dismissed.
- (5) Costs of the application for leave to appeal shall be costs in the appeal to His Majesty in Council.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.
Petra Nicola Byer
Justice of Appeal [Ag.]

By the Court

Chief Registrar