

**EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

**CONSOLIDATED HIGH COURT INTERLOCUTORY APPEALS
BVIHCMAP2014/0025
BVIHCMAP2015/0003**

BETWEEN:

JINPENG GROUP LIMITED

Appellant

and

PEAK HOTELS AND RESORTS LIMITED

Respondent

BEFORE:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Paul Webster, QC

Justice of Appeal [Ag.]

The Hon. Mde. Joyce Kentish-Egan, QC

Justice of Appeal [Ag.]

APPEARANCES:

Mr. Antony Zacaroli, QC, with him Mr. Matthew Abraham for the Appellant

Mr. John Brisby, QC, with him, Mr. Alexander Cook for the Respondent

2015: October 1;
December 8.

Interlocutory appeal – Commercial appeal – Loan agreement between appellant and respondent – Interpretation of clauses of Memorandum of Understanding – Conversion of loan into equity – Appointment of liquidators – Winding up – Whether appellant became shareholder of respondent by implied agreement to convert loan to equity in respondent or whether appellant continued to be creditor of respondent and was entitled to appoint liquidators of respondent – Whether learned judge erred in striking out appellant's application to wind up respondent on just and equitable ground – Whether learned judge applied wrong test in determining nature of dispute between the parties – Whether learned judge erred in finding that dispute between the parties was sufficient to remove appellant's standing as creditor given that further agreement was necessary to convert shares to equity and respondent failed to discharge evidentiary burden of proving such agreement – Whether learned judge erred in exercise of his discretion – Arbitration – Effect of arbitration

clauses in agreements and s. 18 of Arbitration Act, 2013 on dispute between the parties and proceedings before the court

Aman Resorts is a chain of luxury resorts with locations in Asia, Europe and the Americas. The respondent, a company incorporated in the British Virgin Islands ("the BVI"), received a loan of US\$35 million from the appellant, for the purpose of assisting with the acquisition of Aman Resorts. The US\$35 million had been lent to the appellant by a tourism service enterprise group out of China known as Beijing Tourism Group Company ("BTG") for on-lending to the respondent. BTG was interested in participating in the acquisition of Aman Resorts. The terms of the loan were set out in a Memorandum of Understanding ("the MOU") and a loan agreement ("the Loan Agreement"), both dated 24th January 2014.

The loan carried an interest rate of 6% per annum and was repayable in 1 year unless the parties agreed otherwise. The MOU stipulated that the appellant had the option of converting the loan into equity in the respondent which would give it an 8.75% indirect interest in Aman Resorts. If the appellant opted to convert the loan, the obligation to repay it would naturally fall away and an associated company which would have been established by the appellant and BTG ("the Associated Company") would take title to the shares and become an 8.75% shareholder of the respondent. The MOU provided that the respondent would conduct 'substantial consultation' with the Associated Company or the appellant and BTG regarding the issue of the conversion of the loan into shares, and if the terms of the conversion were agreed, they would be set out in a subscription agreement. If the respondent failed to sign this agreement by 1st May 2014, it would have to repay the loan plus interest to the appellant by 5th May 2014. Following the signing of the MOU and the Loan Agreement, the representatives of the appellant and the respondent entered into negotiations for settling the terms of the conversion of the loan into shares. However, no agreement was formally concluded by 1st May 2014. Notwithstanding this, an issue arose between the parties as to whether the appellant had agreed to convert the loan to shares and thereby become a shareholder of the respondent. The appellant argued that it did not agree to convert the loan to shares and therefore remained a creditor of the respondent for the amount of the loan. Accordingly, it was entitled to apply to the court as a creditor for the appointment of liquidators of the respondent. The respondent on the other hand, contended that there was an implied agreement between the parties for the conversion of the loan into equity and therefore, the appellant became a shareholder of the respondent and did not have standing to apply to the court for the appointment of liquidators.

On 18th September 2014 the appellant filed the following in the BVI Commercial Court: (i) an originating application for the appointment of joint official liquidators of the respondent ("the Originating Application"), as creditor of the respondent on the just and equitable ground (pursuant to section 162(1)(b) of the Insolvency Act, 2003); and (ii) an ordinary application in the same proceedings for the appointment of three joint provisional liquidators of the respondent ("the JPLs"). On 25th September the respondent filed an ordinary application for an order striking out the Originating Application. The learned judge heard the appellant's ordinary application for the appointment of the JPLs ex parte but on notice to the respondent on 25th and 26th September 2014. He appointed the JPLs on the ground that he was satisfied that the assets of the respondent were possibly 'in some jeopardy'. The return date for the ex parte order, 15th October 2014, was used for the

hearing of the respondent's strike out application on the understanding that if it failed, the JPLs would remain in office and the court would proceed to hear the Originating Application. At the completion of the hearing of the strike out application on 17th October 2014, the judge granted the respondent's application, struck out the application to wind up the respondent and discharged the JPLs. In coming to a decision on the matter, the learned judge expressed his reluctance to use the winding up court to resolve disputes about debts or to decide issues of fact on a summary basis, and carried out a very limited analysis on the nature of the dispute between the parties. He ultimately made the statement that any challenge by the respondent, other than a 'hopeless' one, would be sufficient to establish a sufficient dispute for the purpose of removing the appellant's status as a creditor.

The Loan Agreement and MOU have provisions requiring the parties to submit disputes relating to the agreements to arbitration. The learned judge did not have to deal with these provisions because he struck out the Originating Application.

The appellant appealed the learned judge's decision,¹ on grounds that the learned judge applied the wrong test in determining the nature of the dispute between the parties, and erred in finding that the dispute was sufficient to remove the appellant's standing as a creditor, given that a further agreement was necessary to convert the shares, and the respondent was unable to prove such an agreement.

The learned judge's order on the Originating Application had made provision for treasury bonds representing the US\$35 million loaned to the respondent to be kept in an account in the respondent's name or to its order. In December 2014, the respondent's English solicitors advised the court and the other parties that the bonds were not in the account and in fact could not be located. To date the respondent has not been able to locate the missing bonds and they remain unaccounted for. In January 2015 the appellant applied ex parte in separate proceedings for a freezing order over the assets of the respondent and for the appointment of a receiver. A limited freezing order was granted on 26th January 2015. On the hearing of the application to continue the freezing order on 2nd February 2015, the learned judge refused the application to appoint a receiver or to re-appoint the JPLs. He continued the freezing order over the respondent's assets, but refused to grant the substantial disclosure provisions claimed by the appellant. The second appeal² is against the judge's orders made on the 2nd February 2015.

The First Appeal – BVIHCMAP2014/0025

Held: allowing the First Appeal and setting aside the order of the learned judge dated 17th October 2014 striking out the appellant's Originating Application and setting aside the appointment of the joint provisional liquidators; reappointing the three joint provisional liquidators of the respondent; restoring the Originating Application for further hearing by the Commercial Court; and awarding costs of the appeal and the proceedings in the court below to the appellant, that:

¹ In BVIHCMAP2014/0025 ("the First Appeal").

² BVIHCMAP2015/0003 ("The Second Appeal").

1. While the learned judge was correct to observe that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis, the court has a duty to carry out a preliminary investigation of the facts to determine whether a dispute that a debtor company raises in relation to a debt in winding up proceedings is one which has been raised on genuine and substantial grounds. The learned judge erred in failing to apply the correct legal test in the circumstances, which was whether the dispute raised by the respondent was one that was raised on genuine and substantial grounds.

Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) followed.

2. The learned judge erred when he decided that the dispute between the parties as to the appellant's status as creditor of the respondent was, in effect, a genuine and substantial dispute that should not be tried in winding up proceedings. There was no evidence to support a finding that any agreement had been reached by the parties for the conversion of the loan into shares and accordingly, the appellant never became a shareholder of the respondent. Furthermore, the learned judge failed to identify any evidentiary basis for his conclusion that he should not determine the nature and quality of the dispute between the parties. He erred by not conducting a proper examination of the evidence to determine if it reached the threshold of raising a dispute on genuine and substantial grounds.

Re Claybridge Shipping Co SA [1997] 1 BCLC 572 applied.

3. The learned judge not having applied the 'genuine and substantial dispute' test properly, nor having considered evidence that was relevant to the dispute whether the appellant was a creditor or shareholder of the respondent, his decision to strike out the winding up application was outside the generous ambit within which reasonable disagreement is possible and was therefore liable to be set aside.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

4. Notwithstanding that the Originating Application was presented by the appellant as creditor on the just and equitable ground alleging misconduct, it is still a creditor's application and therefore, the applying creditor is seeking a collective remedy on behalf of itself and all the other creditors of the respondent. It is not a claim by the appellant to recover its debt from the respondent company.

C-Mobile Services Limited v Huawei Technologies Co. Limited BVIHCMAP2014/0017 (delivered 15th September 2015, unreported) followed.

5. While the arbitration clauses in this case are designed to resolve disputes between the contracting parties, once the appellant submitted this dispute to the court as the basis of a creditor's winding up application it became an issue between the respondent and its creditors over the company's ability to pay its debts as they fall due. This form of proceeding is not covered by the arbitration clauses in the agreements or section 18(1) of the **Arbitration Act**. Therefore the court should not grant an automatic stay of the application under section 18(1) just because the respondent has raised a dispute over the appellant's status to apply for a winding up order. Furthermore, a creditor does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. The statutory jurisdiction under section 162(1)(b) of the **Insolvency Act, 2003** is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.

Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2015] 3 WLR 491 applied.

The Second Appeal – BVIHCMAP2015/0003

Held: allowing the Second Appeal, confirming the reappointment of the joint provisional liquidators; confirming the freezing injunction and disclosure orders contained in the order dated 2nd February 2015; and awarding costs of the appeal and in the court below to the appellant, that:

1. The fact that the order striking out the Originating Application has been set aside, the Court can order the re-appointment of the joint provisional liquidators and it is no longer necessary to decide the other main issue in the Second Appeal, which is whether the judge was correct in finding that he did not have jurisdiction to appoint a receiver under the **Arbitration Act, 2013**.

JUDGMENT

[1] **WEBSTER JA [AG.]** On 21st April 2015 a single judge of the Court of Appeal ordered the consolidation of Commercial Appeal No. 2014/0025 ("the First Appeal") and Commercial Appeal No. 2015/0003 ("the Second Appeal"). The consolidated appeals were heard on 1st October 2015 and this is the Court's decision.

THE FIRST APPEAL

Background

- [2] Aman Resorts is a chain of luxury resorts founded by Mr. Adriaan Zecha (“Mr. Zecha”) with 28 locations in Asia, Europe and the Americas.
- [3] In December 2013, the owners of Aman Resorts, DLF Global Hospitality Limited, entered into a share purchase agreement with a subsidiary of the respondent for the sale of the entire share capital of Silverlink Resorts Limited, the holding company of Aman Resorts, for a total consideration of approximately US\$358 million.
- [4] The respondent is a BVI company incorporated on 14th January 2014. The driving force behind the respondent company is Mr. Omar Sharif Amanat (“Mr. Amanat”). He was the sole director of the company until he resigned on 25th September 2014. His family trust is the beneficial owner of the majority of the shares of the respondent and its related companies. The company was funded in part by a loan of \$35 million from the appellant which is the subject of this case. The only other known creditor of the respondent is Sherway Group Limited which loaned the respondent US\$50 million. Both loans were to be used in the acquisition of Aman Resorts.
- [5] Beijing Tourism Group Company is a tourism service enterprise group out of China (“BTG”). BTG was interested in participating in the acquisition of Aman Resorts and agreed to lend the US\$35 million to the appellant for on-lending to the respondent. The terms of the loan are set out in a Memorandum of Understanding between the appellant, the respondent, BTG and Mr. Zecha (“the MOU”), and a loan agreement between the appellant and the respondent (“the Loan Agreement”), both documents dated 24th January 2014. The interpretation of the MOU plays a critical role in this case and its essential terms are summarised below followed by references to the detailed provisions.

- [6] The loan carries interest at the rate of 6% per annum and is repayable in one year unless the parties agree otherwise. The appellant had the option of converting the loan into equity which would give it an 8.75% indirect interest in Aman Resorts. If the conversion took place the obligation to repay the loan would naturally fall away and an associated company to be formed by the appellant would take title to the shares and become an 8.75% shareholder of the respondent.
- [7] The dispute between the parties to this appeal surrounds the respondent's contention that the appellant agreed to convert the loan to shares and become a shareholder of the respondent. The appellant disputes this and contends that it did not agree to convert the loan and remained a creditor of the respondent for the amount of the loan. Therefore, it was entitled to apply to the court as a creditor for the appointment of liquidators of the respondent.
- [8] The starting point in the analysis of this dispute is to look at the relevant provisions of the MOU and then apply them to the facts as they emerged between the parties. The following are the relevant provisions of the MOU:
- "Clause 1.1(c):
"Unless this MOU provides otherwise, subject to the prior conversion of the loan into the Shares, the Borrower [the respondent] shall repay the loan and all interest thereon on the date falling 1 year from the date of this MOU or such other date as may be agreed between Jinpeng and the Borrower."
- "Clause 1.1(d):
"If the Parties agree on the terms on which the loan shall convert into the Shares, the Borrower shall procure that the Shares shall be issued to the Associated Company at the price of USD 35,000,000 and the interest which price shall be offset against the corresponding amounts the Borrower owes Jinpeng under the loan at the time of the transfer."

The reference to the Associated Company is to the company that the appellant and BTG would establish to take title to the shares upon conversion.

[9] Clause 1.2 provides that within 5 days of the completion of the equity transaction (the purchase of the shares of Silverlink) BTG and Jinpeng would begin discussions to establish the Associated Company, and if the Associated Company could not be established due to unforeseen reasons before 31st March 2014, BTG would be entitled to a refund of the 35 million US dollars plus interest.

[10] By clause 2.2 the respondent agreed to conduct substantial consultation with the Associated Company or Jinpeng and BTG for the conversion of the loan into shares.

[11] The all-important clause 2.4 provides that:

“Under any circumstance, except for getting written consent from BTG, if Borrower fails to sign an equity subscription agreement regarding equity in the Borrower representing an indirect interest of not less than 8.75% of the Aman Resorts group of companies with the Associated Company before 1 May 2014, Jinpeng and Borrower should refund 35 million US dollars and the interest to BTG before 5 May 2014.”

Implicit in this clause is that if a refund of the loan became necessary the respondent would refund the loan plus interest to the appellant which in turn would refund it to BTG.

[12] In summary, the parties agreed that following the signing of the MOU and the disbursement of the loan, the appellant had the option to convert the loan to equity. If the terms of the conversion were agreed they would be set out in a subscription agreement and if the respondent failed to sign the agreement by 1st May 2014, it would have to repay the loan plus interest to the appellant by 5th May 2014.

[13] Following the signing of the MOU and the Loan Agreement, the representatives of the appellant and the respondent entered into negotiations for settling the terms of the conversion of the loan to shares. However, no agreement was concluded.

- [14] Leading counsel for the appellant, Mr. Antony Zacaroli, QC, submitted that the appellant's position is that clause 2.4 requires an express agreement between the parties for the conversion of the loan and there was no such agreement, express or by implied, by 1st May 2014. The discussions between the parties did not go beyond the stage of negotiations and necessary due diligence exercises. The parties did not come to final or any agreement on the terms for the conversion of the loan. The court was referred to the correspondence between the solicitors for the parties up to and after 1st May 2014 which, counsel submitted, did no more than show that the parties were involved in due diligence exercises and pre-contract negotiations. There was no agreement to convert the loan. As there was no agreement by 1st May 2014, clause 2.4 does not come into play and the appellant did not become a shareholder of the respondent by the conversion of the loan to equity. The appellant continued to be a creditor of the respondent for its loan of \$35 million. As a future creditor of the company it has standing to apply for the appointment of liquidators of the respondent on the just and equitable ground.
- [15] Leading counsel for the respondent, Mr. John Brisby, QC submitted that the issue of the appellant's status as a creditor or shareholder of the respondent is not as simple as outlined by Mr. Zacaroli, QC. He conceded that there was no express agreement but submitted that the correspondence between the parties shows that there was an implied agreement for the conversion of the loan to shares. He referred to the fact that the basic terms of the conversion – price and the number of shares to be issued – were already settled by the MOU and the Loan Agreement, and that the subsequent negotiations covered the other details of the conversion. Further, that the proper interpretation of the MOU and the correspondence led inevitably to the conclusion that there was an implied agreement for conversion.
- [16] I will return to the parties' respective positions on the facts but before doing so I will deal with the proceedings in the Commercial Court and the relevant law.

Proceedings in the Commercial Court

[17] On 18th September 2014 the appellant filed the following applications in the Commercial Court:

(a) Originating Application for the appointment of joint official liquidators of the respondent (“the Originating Application”). The Originating Application was filed by the appellant as both a present and future creditor of the respondent on the just and equitable ground.

(b) Ordinary application in the same proceedings for the appointment of Edward Middleton, Fergal Power and Russell Crumpler as joint provisional liquidators of the respondent (“the JPLs”)

[18] On 25th September 2014 the respondent filed an ordinary application for an order striking out the Originating Application.

[19] The appellant’s ordinary application for the appointment of the JPLs was heard ex parte but on notice to the respondent on 25th and 26th September 2014. The learned judge appointed the JPLs because he was ‘satisfied that the assets of this Company [the respondent] are possibly in some jeopardy’.³ The return date for the ex parte order was set for 15th October 2014. However, that date was used for the hearing of the respondent’s strike out application on the understanding that if it failed the JPLs would remain in office and the court would proceed to hear the Originating Application. At the completion of the hearing of the strike out application on 17th October 2014 the judge granted the respondent’s application, struck out the application to wind up the respondent and discharged the JPLs. The appellant appealed against this decision with the leave of the Court of Appeal.

[20] The notice of appeal lists eight grounds of appeal numbered 4-11 which can be compressed into the following issues:

³ See p. 8, lines 11-12 of the Transcript of Chambers Proceedings on 26th September 2014.

- (a) Grounds 4-7 and 11 complain that the learned judge was wrong to strike out the Originating Application to appoint liquidators. They are not drafted as grounds of appeal but rather give a brief overview of the applications that were before the judge and the decision that he made allowing the strike out application and dismissing the Originating Application. They do not require further comment at this stage and will be dealt with in the analysis of the actual grounds of appeal.
- (b) Grounds 8 and 9 allege that the judge applied the wrong test in determining the nature of the dispute between the parties.
- (c) Ground 10 lists 5 sub-issues relating to the alleged agreement between the parties to convert the loan to equity. The issues listed amount to saying that the learned judge erred by finding that the dispute was sufficient to remove the appellant's standing as a creditor given that a further agreement was necessary to convert the shares and the respondent, who would have had details of any such agreement as well as the evidentiary burden of proving the agreement, did not do so.

The dispute between the parties and the test to be applied

- [21] Grounds 8 and 9 challenge the test used by the judge in analysing the dispute between the parties. In dealing with this issue it is important to identify just what was the dispute between the parties.
- [22] The application to appoint liquidators was filed by the appellant as both a present and a prospective creditor of the respondent. Its status as a present creditor derives from clause 2.4 of the MOU⁴ as interpreted by ground 3 of the notice of application to appoint liquidators. The appellant claims in ground 3 that since the respondent had not signed a subscription agreement for the issue of the shares by

⁴ See para. 11 above.

1st May 2014, the loan became repayable on 5th May 2014 and it is therefore a present creditor for the amount of the loan. This ground of the application was never withdrawn or abandoned by the appellant although Mr. Zacaroli, QC submitted that it was not the appellant's primary ground.

[23] The pre-condition for clause 2.4 to apply is that the parties must have agreed to convert the loan to equity in the respondent by the stipulated date. If a subscription agreement had been presented to the respondent before 1st May 2014, and it failed to sign it by that date, the loan would become repayable by 5th May 2014. This is how the judge interpreted the MOU in paragraph 14 of his judgment even though he did not refer specifically to clause 2.4 in that paragraph of the judgment.

[24] It is apparent that the appellant treated the MOU as giving it the right to demand early repayment of the loan so long as a subscription agreement was not signed by the respondent by 1st May 2014, irrespective of whether an agreement to convert the loan had been concluded by the parties. It made demands for payment on 2nd May 2014 and 16th June 2014. Both demands appear to be based on an assumption that the failure of the respondent to sign a subscription agreement by 1st May 2014, without more, was sufficient to trigger the accelerated repayment provision in clause 2.4 of the MOU. However, as the judge rightly pointed out in paragraph 14 of the judgment, the accelerated repayment would only be triggered if there was an agreement to convert the loan and the respondent failed to sign the resulting subscription agreement by 1st May 2014. Based on my conclusion below that there was no concluded agreement between the parties, express or implied, to convert the loan, the appellant was not entitled to demand early repayment, and in the absence of such an agreement the demands for payment were not in accordance with the terms of the MOU.

[25] In his written and oral submissions Mr. Zacaroli, QC moved away from relying on the position that the appellant became a present creditor of the respondent. He

emphasised the alternative position that the appellant had not asked for nor agreed to convert the loan, the loan was payable in January 2015, and the appellant never became a shareholder of the respondent.

- [26] The real dispute between the parties is therefore whether the appellant became a shareholder of the respondent by an implied agreement to convert its \$35 million loan to equity prior to 1st May 2014, or continued to be a creditor of the respondent with the expectation of repayment of the loan at the expiration of the one year on 24th January 2015.

The test for a disputed debt

- [27] Returning to the test to be applied when dealing with a disputed debt, this has been settled by various authorities in the Eastern Caribbean and England. The case that is most often cited in the Eastern Caribbean courts is **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**⁵ where Sir Dennis Byron CJ set out the test and the reasons for it as follows:

“The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly.¹ [*Re Taylor’s Industrial Flooring Ltd. (1990) BCC 44*] But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up.² [*Tweeds Garages Ltd. (1961) 1 Ch. 406*] To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding.³ [*Palmer’s Company Law Vol. 3 Para 15.214*] A creditor who has served a statutory notice on the company is not entitled to a winding up order if the

⁵ BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) at para. 3.

company bona fide disputes the debt and there is no evidence of the insolvency of the company.⁴ [*In re London and Paris Banking Corporation* (1874) LR 19 Eq. 444] If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court.⁵ [*Mann v Goldstein* (1968) 2 All ER 769] The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court.⁶ [*Re Ringinfo Ltd* (2002) 1 BCLC 210]” (Underlining added)

The test is usually summed up in the expression ‘the debt must be disputed on genuine and substantial grounds’.

- [28] The learned judge’s analysis of the dispute in relation to the debt and with it, the appellant’s status as a creditor or shareholder of the respondent is set out in paragraphs 15 and 16 of his judgment and needs to be repeated for its full context:

“[15] I have to remind myself that the Court, in exercising its winding up jurisdiction, must be very cautious about deciding disputes about debts. I have serious doubts whether, in proceedings to resolve the question whether Jinpeng had accepted an allotment the Company would be successful but, as I understand it, serious doubts are not enough. I must resist the temptation to decide issues of fact on a summary basis, particularly against a background where Jinpeng has executed a very considerable swerve between its original position, which appears at first blush to have been founded upon a contention that the Company wrongly deprived it of the right to an allotment, and its present position, which is that it has never agreed to accept one. I accept that these are not, as a matter of strict logic, mutually exclusive positions, but they do not contribute to a feeling that the Company has nothing to argue about. It further seems to me (although this point is peripheral only) that clause 1.2 (referred to in paragraph [6] above) raises questions about the precise nature of the parties’ relationships *inter se* which might, if explored, throw light upon the underlying rights and wrongs of the matter.”

[16] In those circumstances, it seems to me that the Company's application succeeds. As Lord Hoffmann said when sitting at first instance, in circumstances such as these the Court may be left with the uneasy feeling that somehow the company has got away with it. But the authorities are clear. Those who apply for drastic remedies in this area of the law must take into account the risk of failure should any other than a hopeless challenge be made to their standing as creditors." (Underlining added)

[29] The judge was correct to observe that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis. But the court has a duty to carry out a preliminary investigation of the facts to determine whether the dispute that the company has raised about the debt is on genuine and substantial grounds. The analysis that the judge carried out was limited to referring to the appellant's 'considerable swerve' regarding its status which he said did not 'contribute to a feeling that the [respondent] has nothing to argue about'. He expressed doubts about the respondent's chances of proving that the appellant had accepted an allotment of shares in the respondent, but decided that 'serious doubts are not enough'. And finally, he suggested that any challenge, other than a 'hopeless challenge' by the respondent would be sufficient to establish a sufficient dispute for the purpose of removing the appellant's status as a creditor. The question that the judge did not ask himself was whether the dispute raised by the respondent is one that is on genuine and substantial grounds. In my opinion, this is a higher standard than one that I would associate with expressions used by the judge such as 'serious doubts are not enough' and 'hopeless challenge'. The judge did not assess the dispute by the tried and tested expression that the debt and the appellant's status as a creditor are 'disputed on genuine and substantial grounds'. He did not apply the standard set by the former Chief Justice Sir Dennis Byron's judgment in the **Sparkasse Bregenz Bank** case.⁶ Accordingly, I would allow this ground of appeal.

⁶ See para. 27 above.

Ground 10 – The sub-issues: the agreement to convert

- [30] Even if I am wrong and the judge did apply the correct test there remains the issue whether the judge applied the test correctly to the facts of the dispute. The key issue, as stated above, is whether there was a separate agreement between the appellant and the respondent for the appellant to convert the loan to equity and sign a subscription agreement, and the respondent then failed to sign that agreement by 1st May 2014. The respondent argues that there was an agreement and therefore the loan converted and the appellant became a shareholder of the respondent. But this is not borne out by the evidence.
- [31] The relevant clause of the MOU is 2.4 and it requires the signing of an equity subscription agreement by 1st May 2014. Clearly no such agreement was signed by the cut-off date. The correspondence between the parties up to 1st May 2014 shows a clear pattern of two parties signing an agreement in principle (the MOU) and thereafter carrying out the due diligence exercise contemplated by clause 2.2 of the MOU. It is undisputed that there was no express agreement for the conversion of the loan and the evidence does not suggest that such an agreement can be implied from the parties' conduct. In fact the evidence is to the contrary. It shows that on 5th May 2014, after the deadline had expired on the 1st May 2014, the respondent's solicitors sent a draft subscription agreement dated 1st May 2014 to the appellant. The draft was never agreed, far less signed by the appellant. Thereafter, on 29th May 2014, the respondent purported to complete the registration of the appellant and BTG as shareholders of the company. However, these are unilateral acts by the respondent coming after the contractual deadline in an obvious attempt to bolster its claim that there was sufficient conduct prior to 1st May 2014 to allow the court to draw the inference that the parties had made an agreement to convert the loan to equity.
- [32] But the most important evidence on this issue is the letter from the respondent's Hong Kong solicitors, Minter Ellison, on 25th July 2014, long after the parties had had time to reflect. The solicitors wrote to the appellant's solicitors in London

giving a brief history of the issues and confirming that 'As terms for the equity subscription were never agreed, Clause 2.4 simply does not apply'. This is clear evidence that the parties had not agreed the terms of the conversion of the loan and the allotment of the shares to the appellant. Therefore, the appellant did not become a shareholder of the respondent and remained a creditor for the repayment of the loan of \$35 million.

- [33] The judge did not make a finding that there was no agreement to convert the loan because of his understandable and stated reluctance to '[decide] disputes about debts' in summary proceedings for the winding up of a company⁷. However, this must be balanced against the equally compelling principle that the dispute about a debt must have substance.⁸ As Lord Denning MR said in **Re Claybridge Shipping Co SA**:⁹

"[I]t is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all, but the matter should be left to be determined in some other proceedings."¹⁰

Lord Denning's description of the court's approach in this situation was a little more graphic on page 575 when he said:

"But I think the Companies Court should be able to look into the bona fides of the defence. If it is obviously a 'put-up job' – or if it is so insubstantial that a Queen's Bench master would only give conditional leave to defend – then I should think the petition to wind up should stand."

- [34] In my opinion the judge erred, albeit on the side of caution, when he decided that the dispute between the parties as to the appellant's status as a creditor of the respondent was in effect a genuine and substantial dispute that should not be tried in winding up proceedings. My reasons for differing from the learned judge are:

⁷ See para. 15 of the learned judge's judgment.

⁸ Per Sir Dennis Byron CJ in the Sparkasse Bregenz Bank case at para. 24 above.

⁹ [1997] 1 BCLC 572.

¹⁰ At p. 579.

- (a) The judge applied a lower standard for deciding whether the dispute between the parties was on genuine and substantial grounds.¹¹
- (b) The MOU clearly contemplated that the conversion of the loan to equity required a signed subscription agreement. There is no evidence that such agreement was made or signed. In fact the evidence is that there was no agreement.
- (c) There is no evidentiary material on which to infer an agreement. Even if an agreement could be inferred, the required subscription agreement was not signed by the respondent, nor is there evidence that the respondent refused to sign an agreement before 1st May 2014. Therefore, clause 2.4 did not come into play and the appellant never became a shareholder of the respondent.
- (d) Apart from a reference in paragraph 15 of the judgment where the judge said that the appellant executed a 'very considerable swerve' from saying at first that the respondent had deprived it of the right to an allotment of the shares, to its present position that it had never agreed to an allotment, the judge did not identify any evidentiary basis for his conclusion that he should not determine the nature and quality of the dispute between the parties.

[35] For all of the above reasons I think that the learned judge erred by not conducting a proper examination of the evidence to determine if it reached the threshold of raising a dispute on genuine and substantial grounds. The judge was not being asked to determine the merits of the parties' respective positions on the dispute, only to determine if the dispute was genuine and substantial. In fact, the judge seems to have come close to adopting the approach that is now followed in applications to stay court proceedings in favour of arbitration – once the defendant

¹¹ See para. 29 above.

raises the issue of dispute a stay is automatically granted, and the quality of the dispute is irrelevant.¹² However, in an application to appoint liquidators of a BVI company the nature and quality of the dispute are important and the judge is required to examine the evidence to see if it reaches the threshold of being a dispute on genuine and substantial grounds.

[36] This court is normally reluctant to interfere with the exercise of a trial judge's discretion unless the judge erred in principle or in his approach by taking into account or being influenced by irrelevant factors and considerations, or failing to take account of or giving too little weight to relevant factors, and that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.¹³ In this case I am satisfied that the judge did not consider evidence that was relevant to the dispute whether the appellant was a creditor or shareholder of the respondent and did not apply the proper test in analysing the dispute. As a result, his decision to strike out the winding up application was outside the generous ambit within which reasonable disagreement is possible and is liable to be set aside by this Court.

[37] In all the circumstances and considering the evidence that was before the judge, I find that the appellant has status as a creditor of the respondent. The underlying debt is disputed but not on genuine and substantial grounds. As a result, the appellant has standing under section 162(1)(b) of the **Insolvency Act, 2003** to apply for the winding up of the respondent and the appointment of liquidators. But that is not the end of the matter because there are arbitration clauses in the MOU and the Loan Agreement which I will now consider.

¹² See for example *Halki Shipping Corp v Sopex Oils Limited* [1998] 2 All ER 23 which was followed by *Bannister J [Ag.] in Applied Enterprises Limited v Interisle Holdings Ltd et al* (BVIHCV (COM) 2012/0135 (delivered 21st June 2013, unreported)), and now section 18(1) of the Arbitration Act, 2013 of the Laws of the Virgin Islands. These cases and the new Act are discussed under the sub-heading "Arbitration" below.

¹³ Per Chief Justice Sir Vincent Floissac in *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188.

Arbitration

[38] The learned judge did not have to consider the issue of the effect of the arbitration clauses in the MOU and the Loan Agreement because he decided that there was no substantial dispute between the parties and struck out the application. Having found that the dispute is not genuine and substantial, and that the appellant has standing to apply for the winding up of the respondent, I will now consider the effect of the arbitration clauses and section 18 of the **Arbitration Act, 2013** on the dispute between the parties and the proceedings before the court.

[39] Clause 6 of the MOU provides that the governing law of the agreement is the law of Hong Kong and that:

“Any dispute in connection with or arising from this MOU shall be submitted to Hong Kong International Arbitration Centre according to its effective “Administered Arbitration Rules of Hong Kong International Arbitration Centre” to get a solution. The arbitration location shall be Hong Kong.”

Clause 11.2 of the Loan Agreement is in even wider terms:

“Any dispute, controversy, difference or claim arising out of or relating to this Agreement, including but not limited to that regarding the existence, validity, construction, performance, breach or termination hereof, or any non-contractual dispute arising out of or relating to this Agreement, shall be submitted to the Hong Kong International Arbitration Centre (“HKIAC”) and finally and conclusively settled under the HKIAC Administered Arbitration Rules in force at the time when a notice of arbitration is submitted.”

[40] Section 18(1) of the **Arbitration Act, 2013**, which became effective on 1st October 2014, and therefore applies to this case, is also relevant. The section reads:

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

This section replaces the equivalent section 6(2) of the repealed **Arbitration Act**¹⁴ (“the Repealed Act”) which, insofar as it is relevant, reads:

“If any party to an arbitration agreement ... commences any legal proceedings in any court against any other party to the agreement ... in respect of any matter agreed to be referred, ... any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”

The new section 18(1) is wider in scope than the repealed section 6(2) in at least two ways. Firstly, the new section covers all matters that are ‘the subject of an arbitration agreement’ and not simply matters the parties ‘agreed to be referred’ to arbitration as in section 6(2) of the Repealed Act. Secondly, the words ‘or that there is not in fact any dispute between the parties’ in section 6(2) are not included in section 18(1). This brings section 18(1) in line with the provisions of the English **Arbitration Act 1996** and the UNCITRAL Model law on arbitration.

[41] Section 18(1) covers all disputes that are the subject of an arbitration agreement between the parties. The equivalent section under the **Arbitration Act 1996** in England has been interpreted to mean that the court will grant a stay of court proceedings once the defendant raises the issue of dispute, regardless of the level or quality of the dispute. Merely asserting a dispute in the court proceedings is enough to get an automatic stay. This is the effect of the decisions of the **Halki Shipping Corp v Sopex Oils Ltd**¹⁵ which was followed in the BVI in **Applied Enterprises Limited v Interisle Holdings Ltd et al.**¹⁶

[42] The first step in the dealing with the arbitration issue is to determine whether the dispute between the parties falls under and is subject to either one or both of the arbitration clauses. I have already said that the dispute relates to the status of the

¹⁴ Cap. 6, Revised Laws of the Virgin Islands 1991.

¹⁵ See para. 35 above.

¹⁶ See para. 35 above.

appellant as a creditor or shareholder of the respondent, which in turn depends on the dispute over the conversion of the loan to equity. In my opinion, this dispute is caught by the words 'any dispute in connection with or arising from' in both clauses as well as by the words 'any non-contractual dispute arising out of or relating to this agreement' in clause 11(2) of the Loan Agreement. The issue of the conversion of the loan or the time for repayment thereof is a pure contractual dispute between the parties while the appellant's status to apply for the winding up of the respondent can be classified as a non-contractual dispute arising out of or in relation to the Loan Agreement. The dispute must now be placed in the context of the on-going litigation.

- [43] The appellant applied under section 162(1)(b) of the **Insolvency Act, 2003** as a creditor of the respondent for the appointment of liquidators of the respondent on the just and equitable ground. The factual basis of the application is that the appellant has lost trust and confidence in the management of the respondent largely because of the alleged fraudulent conduct of Mr. Amanat. The appellant is also concerned about the disappearance of the \$35 million that it loaned to the respondent in January 2014, and which it said will become payable in January 2015. We are now long past that date. The application also alleges in ground 3 that the respondent is presently insolvent and unable to pay its debts, and in ground 4 that on account of Mr. Amanat's fraudulent activities regarding the company's assets the respondent will be insolvent and unable to pay its debts in January 2015 when the loan becomes payable. It therefore seeks the appointment of liquidators on the just and equitable ground to investigate the respondent's affairs, and to collect and distribute its assets in an orderly manner. The appellant is therefore a contingent creditor of the respondent concerned about how the company is being run and how this will affect the repayment of its debt. Therefore it is entitled to apply to wind up the respondent on the just and equitable ground. If authority is needed for this point it is **Re a Company (No 003028 of 1987)**.¹⁷

¹⁷ [1988] BCLC 282.

[44] Notwithstanding that the application is presented by the appellant as creditor on the just and equitable ground alleging misconduct, it is still a creditor's application and therefore the applying creditor is seeking a collective remedy on behalf of itself and all the other creditors of the respondent. It is not a claim by the appellant to recover its debt from the respondent company. This is an established principle and was recently confirmed by this court in **C-Mobile Services Limited v Huawei Technologies Co. Limited**.¹⁸ The judgment of the court was delivered by the Chief Justice, Dame Janice Pereira. The Chief Justice dealt with the nature of a creditor's winding up application and concluded succinctly at paragraph 9 that:

"It is important to bear in mind that in winding up proceedings one is considering always a class remedy and not a private [one] between the petitioner and the company."

This is an accurate summary of the essential characteristic of a creditor's application to wind up a company on the basis of a company's inability to pay its debts.

[45] The arbitration clauses in this case are designed to resolve disputes between the contracting parties, and I have already found that the dispute between the parties is covered by the clauses.¹⁹ However, once the appellant submitted this dispute to the court as the basis of a creditor's winding up application it became an issue between the respondent and its creditors over the company's ability to pay its debts as they fall due. This form of proceeding is not covered by the arbitration clauses in the agreements or section 18(1) of the **Arbitration Act, 2013**. Therefore the court should not grant an automatic stay of the application under section 18(1) just because the respondent has raised a dispute over the appellant's status to apply for a winding up order. This is confirmed by the decision in **Salford Estates (No 2) Ltd v Altomart Ltd (No 2)**.²⁰ At paragraph 35 the Chancellor said:

¹⁸ BVIHCMAP2014/0017 (delivered 15th September 2015, unreported).

¹⁹ See para. 42 above.

²⁰ [2015] 3 WLR 491.

“Furthermore, it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts.”

This passage was cited with approval by the Chief Justice in the **C-Mobile** case.²¹ It follows that the respondent is still required to prove that the appellant’s status is disputed on genuine and substantial grounds, which I have found it has failed to do. However, this is still not the end of the matter.

[46] The **Salford Estates** case also makes the point that even though section 18 (the automatic stay) does not apply to a creditor’s application, where the disputed debt falls under the arbitration clause, the court retains its wide discretionary powers under section 122(1)(f) of the **Insolvency Act 1986** in England (section 162(1)(b) of the BVI **Insolvency Act, 2003**) to stay or dismiss the application. At paragraph 39 the Chancellor said:

“It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficulty to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 [Arbitration] Act.”

And at paragraph 40:

“It would be anomalous, in the circumstances, for the Companies’ Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding-up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration.”

And finally at paragraph 41:

“For the reasons I have given, I consider that, as a matter of the exercise of the court’s discretion under [section 122(1)(f) of the 1986 Act], it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.”²²

²¹ See para. 11 of the C-Mobile judgment.

²² Per Chancellor Sir Terence Etherton in the Salford Estates case at para. 41.

- [47] The position outlined by the Chancellor in these passages comes close to the automatic stay position which is now firmly a part of the learning in connection with section 18 of the **Arbitration Act**. He is saying in very clear terms that a winding up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances. However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the **C-Mobile** case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction under section 162(1)(b) is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.
- [48] This situation did not arise in the **C-Mobile** case because the Court of Appeal decided that the dispute in that case fell outside the arbitration clause and therefore there was no basis for compelling the parties to resolve their dispute by the chosen method (arbitration). On the other hand, the disputed debt in the **Salford Estates** case was covered by the arbitration clause. The trial judge found that the debt was not disputed on genuine and substantial grounds but went on to grant a stay of the petition in favour of arbitration. The court of appeal dismissed the appeal against this decision and confirmed the stay, albeit for different reasons.
- [49] The debt in the case at bar is not disputed on genuine and substantial grounds and it falls under the terms of the arbitration clauses. Therefore, the court has a wide discretion under section 162 of the **Insolvency Act, 2003** to stay or dismiss the Originating Application and to force the parties to resolve the dispute by arbitration. However, the appellant does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up

order. It has to show that the dispute is not on genuine and substantial grounds and leave it to the court to exercise its discretion under section 162 on the usual bases.

[50] In considering how this Court should exercise its discretion, I have had regard to the following:

(a) The parties have already resorted to arbitration proceedings in the Hong Kong International Arbitration Centre. The issues before the arbitration tribunal include whether the appellant's loan was converted into equity thereby making the appellant a shareholder of the respondent company. This is the issue that I have found does not amount to a dispute on genuine and substantial grounds, but on the facts that were presented to the Commercial Court, it is a factor that favours granting a stay of the Originating Application pending the outcome of the arbitration.

(b) This has to be balanced against the fact that most of the loan proceeds in the loan in the form of the treasury bonds have gone missing and still cannot be accounted for in circumstances that I find to be unacceptable.²³ The learned judge's order on 17th October 2014 striking out the Originating Application and setting aside the appointment of the JPLs was conditional on, inter alia, the treasury bonds being in an account controlled by the respondent and being kept in that account or to the respondent's order. It turned out that the bonds were not in the account and still have not been located.

[51] In the circumstances where I have found that the dispute between the parties is not on genuine and substantial grounds, and the respondent cannot account for the treasury bonds, it is incumbent on this Court to make an order for independent

²³ See para. 55 below.

persons to be responsible for investigating what has happened with a view to recovering the company's assets. This is so even though the parties are now arbitrating the dispute over the appellant's status as a creditor of the respondent. I would also add that if the appellant is required to prove exceptional circumstances to continue the Originating Application in accordance with the judgment in the **Salford Estates** case, which I have found that it does not have to do, I find that special circumstances exist in this case having regard to the allegations made against Mr. Amanat and the missing assets.

- [52] In summary, the appellant's status to apply for the appointment of liquidators is not disputed on genuine and substantial grounds and the Originating Application should be restored to the hearing list; one of the conditions attached to the discharge of the JPLs has turned out to be baseless and the loan proceeds are still missing; and there is an urgent need to re-appoint the JPLs.

Orders on First Appeal

- [53] I would make the following orders on the First Appeal:

- (1) The appeal is allowed and the order of learned judge dated 17th October 2014 striking out the Originating Application and setting aside the appointment of the JPLs is set aside.
- (2) Edward Middleton, Fergal Power and Russell Crumpler are re-appointed as joint provisional liquidators of the respondent pending further order of this Court. The powers of the JPLs are set out in the Schedule below.
- (3) The Originating Application is restored for further hearing by the Commercial Court.
- (4) Costs of the appeal and the proceedings in the court below to the appellant.

SCHEDULE
(Powers of the JPLs)

1. Subject as set out below, the JPLs shall have the following powers which may be exercised without further sanction or intervention of this Honorable Court.
 - (a) To preserve the books and records of the respondent, to identify any assets of the respondent, and to protect any such assets from removal or dissipation;
 - (b) To recover all assets of the respondent (including any assets in which the company has a beneficial interest) and take all such proceedings as they see fit to take for that purpose (including the power to place themselves on the mandate of any account to which the company has a beneficial interest);
 - (c) To give good receipt in the name and on behalf of the respondent;
 - (d) To take all necessary steps to obtain from any person documents or copy documents which belong to the respondent or have been created or maintained on its behalf and which the JPLs reasonably require for the purpose of their powers set out in (a) to (c) above;
 - (e) To appoint an agent including a solicitor, or accountant to do any business that the JPLs are unable to do themselves, or which can be more conveniently done by an agent;
 - (f) To apply to the Court for directions concerning any matter arising out of the exercise of the above powers; and
 - (g) To do all other things as may be incidental to the exercise of the above functions and powers.

2. The sole director of the respondent, being Ms. Carolyn Turnbull, shall, notwithstanding the provisional appointment of the JPLs, be entitled to take all steps necessary for the purpose of pursuing (1) the proceedings in which the respondent is currently involved in the High Court in London, (2) the proceedings in which the Company is currently involved before this Court and the Court of Appeal, (3) the arbitration proceedings in Hong Kong (4) any application provided for in paragraph 7 below (collectively, “the Litigation”). For the avoidance of doubt:
 - (a) The powers of the JPLs do not extend to giving instructions or taking steps in relation to the Litigation;
 - (b) Save in so far as the same is necessary for the purpose of protecting or recovering the assets of the respondent, the JPLs shall not be entitled to require or obtain books, records, documents, copy documents or information which are privileged or confidential; and
 - (c) The respondent shall be entitled to make payments to its lawyers conducting the Litigation in discharge of their fees and disbursements in relation to the Litigation and the JPLs shall on behalf of the respondent cause such payments to be made.
3. The JPLs shall not disclose to any person, other than agents and legal counsel appointed by them as above, any information relating to the respondent, its business, or assets without the permission of the Court.
4. Subject to section 172 of the **Insolvency Act, 2003** (“the Act”) and to the general principles specified in section 432 of the Act, the remuneration and expenses of the JPLs be payable from the assets of the respondent.

5. During the period of their appointment, any act required or authorised to be done by the JPLs may be done by any one of them.
6. The JPLs are not required to provide security.

The respondent and the JPLs be at liberty to apply to seek directions regarding the exercise of the powers of the JPLs on giving 48 hours' notice.

THE SECOND APPEAL

- [54] I will deal with this appeal very briefly because its outcome is largely determined by the findings and decision in the First Appeal.
- [55] The judge's order on the Originating Application made provision for treasury bonds representing the \$35 million loaned to the respondent be kept in an account in the respondent's name or to its order. On the 31st December 2014 the respondent's English solicitors advised the court and the other parties that the bonds were not in the account and in fact could not be located. To date the respondent has not been able to locate the missing bonds and they remain unaccounted for. On 23rd January 2015 the appellant applied ex parte in separate proceedings (BVIHC(COM) 2014/116) for a freezing order over the assets of the respondent and for the appointment of a receiver. A limited freezing order was granted on 26th January 2015. On the hearing of the application to continue the freezing order on 2nd February 2015, the learned judge refused the application to appoint a receiver or to re-appoint the JPLs. He continued the freezing order over the respondent's assets, but refused to grant the substantial disclosure provisions claimed by the appellant. The Second Appeal is against the judge's orders made on the 2nd February 2015.
- [56] At the hearing of the appeal Mr. Zacaroli, QC told the court that his client's preference is for the appointment of liquidators because liquidators have wider investigative powers than receivers. He also conceded that the court cannot

appoint liquidators if the order striking out the Originating Application stands. Now that the order striking out the Originating Application has been set aside and the application has been restored, this Court can order the re-appointment of the JPLs and this order was made on the First Appeal.

[57] This makes it unnecessary to decide the other main issue in the Second Appeal: whether the judge was correct in finding that he did not have jurisdiction to appoint a receiver under section 43 of the **Arbitration Act, 2013**.

[58] Finally, the freezing injunction and limited disclosure orders contained in the order dated 2nd February 2015 in the court below are confirmed and no further disclosure is granted. If the JPLs need guidance and directions in carrying out their duties they can make the appropriate applications to the court below.

Orders on the Second Appeal

[59] I would make the following orders on the Second Appeal:

- (1) The Second Appeal is allowed.
- (2) The re-appointment of the JPLs is confirmed.
- (3) The freezing injunction and disclosure orders contained in the order dated 2nd February 2015 are confirmed.
- (4) Costs of the appeal and in the court below to the appellant.

[60] I express my deep appreciation to all counsel for their very helpful written and oral submissions.

Paul Webster, QC
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Joyce Kentish-Egan, QC
Justice of Appeal