Neutral Citation Number: [2023] CA (Bda) 5 Civ

Case No: Civ/2021/13

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 383

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12
Date: 02/03/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL SIR ANTHONY SMELLIE

- -

Between:

TITAN PETROCHEMICALS GROUP LIMITED

Appellant

-and-

SINO CHARM INTERNATIONAL LIMITED

Respondent

-and-

(1) FAME DRAGON INTERNATIONAL INVESTMENT LIMITED
(2) DOCILE INTERNATIONAL INVESTMENT LIMITED
(3) DOCILE BRIGHT INVESTMENTS LIMITED
(4) SINO TEAM INVESTMENT LIMITED
(5) MARINE BRIGHT LIMITED

Interested Parties

Mr. Alexander Potts QC and Mr. Rhys Williams of Conyers Limited for the Appellant
Mr. Steven White and Mr. John McSweeney of Appleby (Bermuda) Limited for the Respondent
Mr. Matthew Mason and Ms. Kehinde George of ASW Law Limited for the 5th Interested Party
Mr Kevin Taylor and Mr Tim Molton, Walkers (Bermuda) Limited, for the Joint Provisional Liquidators of the Company
Hearing date(s): Matter determined on the papers.

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APPROVED RULING ON COSTS

CLARKE P:

1. In our judgment of **9 August 2022** we allowed the appeal of Titan Petrochemicals Group Limited ("Titan Group"/"the Company"), set aside the order that had been made for it to be wound-up and the appointment of joint and several provisional liquidators ("JPLs"), and stayed the winding up petition until further order of the Supreme Court. We now have to determine what order should be made as to the costs of the appeal and of the proceedings below in respect of the costs of (i) Sino Charm International Limited ("Sino Charm") the Respondent, and (ii) Marine Bright Limited ("Marine Bright"), one of the interested parties. We also have to consider who should be responsible for the remuneration and expenses of the JPLs.

2. The factual situation that we had to consider was complicated. For present purposes it is sufficient to summarise it as follows. Sino Charm subscribed for HK $ 78,000,000 of Bonds issued by Titan Group. The Bonds matured on **28 April 2018**. Titan Group failed to honour them. On **15 July 2019** Sino Charms issued a Statutory Demand for the principal due plus interest, totalling HK $ 96,571,078.77. The Demand was not honoured and, as a result, Sino Charm presented, on **20 September 2019** a Petition asking that the Company be wound up under the provisions of section 161 (e) of the *Companies Act 1981* The Petition was heard by the Chief Justice on **12-13 July 2021**. On **11 August 2021** he ordered that the Company be wound up and appointed three persons as JPLs.

3. The Chief Justice held that the debt claimed by Sino Charm was not *bona fide* disputed by Titan Group on substantial grounds. The Company had claimed that the funds used to pay Sino Charm the Subscription Sum had been siphoned from the Titan Group and paid to Sino Charm through a series of fraudulent transactions. The issuance of the Bonds was said to have been in breach of fiduciary duty on the part of Dr WeiBing, the then Chairman and Mr Tang, the then CEO of the Titan Group. Sino Charm was said to be aware of their wrongdoing because it was controlled by, or closely connected to, those two individuals. The issue of the Bonds was said to have been made in order that Dr WeiBing and Mr Tang might entrench their control of the Company; personally benefit from the proceeds of the Bonds and put themselves in a better position to extract a ransom from potential purchasers of shares in the Company. To this end Dr WeiBing and Mr Tan were said to have used a series of suspicious and coordinated transactions, conducted using the Company's subsidiaries Petro Titan (HK) Limited ("Petro Titan", sometimes known as "HT 01") and Brilliance Glory Limited ("Brilliance Glory"), in order to cause funds to be diverted from the Company to Sino Charm, which were then used to finance the Subscription Sum. Accordingly, so it was said, the Subscription Agreement was void or unenforceable.

4. Meanwhile the Company, together with Petro Titan had begun proceedings in Hong Kong against six defendants, including Sino Charm, Dr WeiBing and Mr Tang. In those proceedings the Company alleged that at all material times Dr WeiBing and/or Mr Tang had been, and still were, the ultimate controllers of Sino Charm and/or had acted and still acted as shadow directors of Sino Charm by virtue of their real influence over its affairs; and that until their respective departures

from Titan Group the two of them were the ultimate controllers of Titan Group's then board of directors; and that Uni-Loyal and Sino Champion (two other defendants to the Hong Kong proceedings) were at all material times controlled and/or directed by Dr WeiBing and Mr Tang and/or their close associates.

5. As I recorded in my judgment, with which my Lords agreed:

> "*16 By the time of the hearing before the Chief Justice the following events had occurred. The Statement of Claim was produced, dated **3 February 2020**. Chan Shu Leung and Sino Champion had filed their defences (on 27 April and **14 May 2020**), and the Plaintiffs had made a request for further and better particulars of Chan Shu Leung's defence and thereafter issued a summons for an order requiring further and better particulars which was fixed for a hearing on **1 September 2021**. On **12 August 2020** the plaintiffs had applied for leave to serve the Writ of Summons dated **21 October 2019** and their Statement of Claim dated **3 February 2020** outside the jurisdiction on Sino Charm, WeiBing and Tang. That application was successful – the order was made **on 28 August 2020** - on the basis, as claimed in the affidavit of Mr Zhang, that there was a serious issue to be tried and a good arguable case that the claims fell within one or more the relevant jurisdictional gateways for service out under Order 11 of the Rules of the High Court, and that Hong Kong was clearly and distinctly the forum conveniens.*
>
> *17. Service was made on Sino Charm on **14 October 2020** at its registered address in the BVI. Sino Charm never disputed that leave to serve out of the jurisdiction was correctly granted and it served its defence on 7 **April 2021**. Sino Charm took out a summons for security for costs – an application which, itself, assumes or at least contemplates that there will be a trial - in the sum of HK $ 2.85 million, against Titan Group and Petro Titan on **25 May 2021,** which was due to be heard on **13 August 2021**; and the Plaintiffs made a request for further and better particulars of the Sino Charm defence on **2 July 2011.** The Plaintiffs were in the course of arranging service out of the jurisdiction on Dr WeiBing and Mr Tang in China. Uni-Loyal had not filed any defence. In short, by the time of the hearing before the Chief Justice the litigation was, as Mr Potts put it, "rumbling towards quite a developed stage".*

6. The diversion of the Company's funds was said to have taken place in three stages. They are described in [18] – [26] of the Chief Justice's judgment, cited at [27] of my judgment, and are expressed diagrammatically in the chart which appears at [28] of my judgment.

7. The first stage:

> "18 ……*related to the transfer of funds from HT01 and Brilliance Glory to Max Joy. By a trading contract dated 18 April 2017, HT01 agreed to purchase and Max Joy agreed to sell 20,000 metric tons of bitumen mixture at the price of US $335 metric ton. On 20 April 2017, HT01 paid Max Joy US $6,700,000.*
>
> *19. By a trading contract dated 18 April 2017, Brilliance Glory agreed to purchase and Max Joy agreed to sell 5600 metric tons of mixed aromatics at the price of Hong Kong $4,624 per metric ton. On 20 April 2017, Brilliance Glory paid Max Joy HK $25,986,880\".*

The second and third stages consisted of purchases which had the effect that money passed from Max Joy to Uni-Loyal and from Uni-Loyal to Sino Charm, for Sino Charm to provide to Titan Group in order for Titan Group to subscribe to the Bond.

8. The Chief Justice concluded that the resistance to the Petitioner's claim was not being pursued *bona fide* and on substantial grounds. He did so by reference to six sets of circumstances. The first was that the debt was never disputed until Mr Zhang, by then the sole executive director of Titan Group, swore his first affirmation on 27 October 2019 and referred at [34] – [51] to the three stages.

9. The second was that the allegation that funds were divested from the Titan Group, first made in Zhang 1, was misleading. The suggestion that the monies paid to Max Joy by HT 01 and Brilliance Glory to purchase 20,000 metric tons of bitumen mixture and 5,600 metric tons of mixed aromatics were never recovered by HT 01 and Brilliance Glory appeared, he held, to be demonstrably false.

10. The reason why the allegation appeared to be false was that the contracts referred to in the description of the first stage in Zhang 1 were the **buy** contracts under which HT01 and Brilliance Glory purchased 20,000 tons of bitumen mixture and 5,6000 of mixed aromatics. But Zhang 1 (and the Writ in the Hong Kong Proceedings) made no mention of the **sale** contracts.

11. As to the sale contracts the Chief Justice said this:

> *"43 The First Affirmation of Mr. Zhang and the pleaded case in the Hong Kong proceedings failed to point out that HT01 and Brilliance Glory in fact* ***sold*** *these two commodities, purchased from Max Joy, to Grand Treasure International (UK) Limited, a Hong Kong based private company ("Grand Treasure"). The sale contracts are signed on the same date as the buy contracts, 18 April 2017. In relation to the contract for 20,000 metric tons of* ***bitumen mixture****, HT01 purchased this commodity from Max Joy at a price of US $335 per ton and sold it to Grand Treasure at a price of US $338.35 per ton. In relation to the contract for 5,600 metric tons of* ***mixed aromatics****, Brilliance Glory purchased this commodity from*

> *Max Joy at a price of HK $4,624 per ton and sold it to Grand Treasure at a price of HK $4,670.25 per ton.*
>
> *44. The First Affirmation of Mr. Zhou confirms that HT01 received the sale price from Grand Treasure, in respect of the sale of 20,000 metric tons of the bitumen mixture, on 27 December 2017 and that payment is confirmed by the relevant bank statement of HT01's current account statement from DBS Bank. Mr. Zhou also confirms that the sale price from Grand Treasure, in respect of 5,600 metric tons of mixed aromatics, was received by Brilliance Glory on (sic) such on 30 June 2017 and 29 November 2017, in the total amount of HK $26,153,400. The receipt of these payments is not disputed by the Company."*

12. As I said at [42] of my judgment:

> "*42 It is not surprising that the Chief Justice found the position presented by Zhang 1 in respect of the contracts for the purchase of bitumen and mixed aromatics misleading, since the affirmation appeared to suggest that money had simply passed from HT01 and Brilliance Glory to Max Joy, without mentioning the fact that HT01 had made a profit from the sale of that which it had purchased".*

13. But, as I went on to say, even looking at the contracts for the bitumen mixture and the mixed aromatics alone, the purchase and sale contracts had markedly different dates for payment which would mean that the purchase price could be used in the interval in the circle of payments leading eventually to Sino Charm.

14. More importantly the three-stage fund flow set out above was only one of three cash flow cycles. The other two are set out, both verbally and diagrammatically in [47] – [53] of my judgment. Taken in the aggregate the figures show that the US$ 10 million needed for the purchase of the Convertible Bonds was sourced from the Titan Group and taken out of the commodities trading transaction chain, leaving an amount of $ 10 million outstanding from Top Win (a company said to be under the control of Dr WeiBing and Mr Tang), as an outstanding debt. The figures, which are complicated, are set out in [54] – [59] of my judgment. They are derived from the second affirmation of Mr Lai Wing Lun sworn on 13 March 2020 , i.e. some 16 months before the argument before the Chief Justice ("Lai 2"), and are expressed in detail in Appendix 1 to Lai 2, which is appended to my judgment. Mr Lai was the non-executive Chairman of the Titan Group and had the day-to-day conduct of the liquidation of Fame Dragon International Investment Limited, ("Fame Dragon"), a 66.46% shareholder of the Titan Group, whom I regarded as "*particularly well qualified to assist the Court in an analysis of the facts at issue" [*44],

15. As I observed at [60] of my judgment there was very limited reference in the Chief Justice's judgment to Lai 2; he made no mention of the evidence of Mr Lai which I summarised in my

judgment (and above); nor did he give any reason for discounting it in its entirety, if that is what he did (as opposed to ignoring it). I, also, said this:

> *"61 The Chief Justice was not assisted by the restricted reference that was made to Mr Lai's evidence by counsel in the course of oral argument. Mr Potts' written and oral submissions focused on the generally endorsed writ in the Hong Kong proceedings, the more particularised Statement of Claim, and Zhang 1 and 2 to substantiate the Company's "funds flow" argument[1]. At the very end of his submissions Mr Potts invited the Chief Justice to read carefully through his written skeleton "and also obviously to have regard to our affirmation evidence as well as Mr Lai's' evidence, although the latter affidavits were filed on behalf of through Mr Robinson's team. So I'll let him take you through that evidence".*
>
> *62 This was a prospect which did not materialise. At the very end of his submissions Mr Robinson, counsel for Fame Dragon and Docile Bright, said this:*
>
> > *"I don't intend, my Lord, I don't think it would be helpful to go over Mr Lai's evidence with regard to the flow of funds. Mr Potts has dealt with that on the company's evidence, Mr Lai, of course, does go over that, my learned friend Mr White objects[2] but I simply invite my Lord to consider the whole of Mr Lai's evidence in support of both Fame Dragon as the majority contributory and also Docile Bright we say as a majority of the creditor[s]."*

16. In the argument before us Lai 2 took centre stage. As I said:

> "*64 The slenderness of reference to Lai 2 in the judgment stands in marked contrast to the "centrality" which, in the submissions before us, it was said to have. However, as it seems to me, properly analysed Lai 2 provides strong support for the proposition that what was happening was that Petro Titan and Brilliance Glory, the two Titan Group subsidiaries, and the circle participants Max Joy, Uni-Loyal, Sino Charm, Top Win and China Oceans, were companies under the control of Dr WeiBing and Mr Tang which were being used as vehicles to move money round in circles so as to enable Sino Charm to finance the purchase of the Bonds with money*

[1] This and the following two footnotes were in the judgment: "*An approach which may have been affected by the time constraints applicable to the zoom hearing and, perhaps, by the possibility that the time extension in respect of Lai 2 might not be granted, Whether it should be appears to have been left open because the Chief Justice said, on Day 1 , that he was "presently advised, not minded to shut that evidence out" to which Mr White responded that he was pragmatic and suspected that the Court had already read it, as the Chief Justice said that he had."*

[2] "*Lai 2 had been filed late in the day on behalf of Fame Dragon and Docile Bright and the evidence in it relating to fund-flows re-introduced much of the evidence in relation to the first fund-flow that had previously been struck out of Zhang 2 by an order dated 21 February 2020. This reintroduction of evidence was something of which the Chief Justice expressed considerable disapproval".*

> *derived from Titan Group subsidiaries, the money being taken out of the commodity transaction chain, and its extraction from the chain resulting in the bad debt owed by Top Win.*
>
> *65. Whilst it is possible that these transactions were all entirely run of the mill commodity trading transactions, a combination of factors provides significant support for the proposition stated above*."

17. I then set out the four factors that I had in mind., which included at (iv) 10 anomalies to which Mr Lai had drawn attention. Having done that, I said this:

> *"68 Lastly, whilst Sino Charm is presently under no obligation to reveal the precise source of its investment in the Bonds, it would have been the work of a moment to do so. What was said (Zhou 1 [30]-[31]), affirmed on 7 January 2020 i.e. after the writ was issued in the Hong Kong action, and after Mr Zhang's extensive affirmation of 22 October 2019), was that Sino Charm was funded by a number of "seasoned and reputable investment professionals" – including Mr Yun Yong ("Mr Yun"), Mr Chen Xi and Mr Wu Wensheng – and that the money came from "investment capital".[3] This looseness of expression, which reveals nothing about who paid what amount to Sino Charm, when, and how, in order to finance the subscription price of the Bond, or, more particularly, as to any fund from which payment of the subscription price came and how it did so, does little to rebut, and, in my view, tends to support the inference which, on the present material, I would draw that the price was derived from the flow of funds from Titan Group.*
>
> *69. In the light of Lai 2 it does not seem to me possible to say that the defence being put forward is a sham and that the claim being made in the Hong Kong action is abusive. Rather the defence is one of substance which cries out for proper examination following pleadings, disclosure and evidence*."

18. The third matter to which the Chief Justice referred was that the issuance of the Bond had been announced to the shareholders and the investing public on 28 April 2017 following approval of the terms of the Bond and the purposes for which it was required by the entire Board on **12 April 2017**; and that the funds received were used for the approved purposes. I considered that point in depth at [71] – [[84].

19. The fourth matter was the progress of the Hong Kong proceedings which were plainly commenced in retaliation to the presentation of the winding up petition. The Chief Justice drew attention to the affirmation of Mr Zhang in the application for service out where under the section headed "*Full and frank disclosure*" he referred to the diversion of funds amounting to approximately HK $ 78

[3] "I*n his third affirmation Mr Zhou said that Sino Charm's source of funds was none of Titan's business*."

million from Titan Group to Sino Charm via Max Joy and Uni-Loyal just before the subscription, without pointing out that HT01 and Brilliance Glory entered into separate contracts in relation to the same commodities for which they received the purchase price, leaving the Hong Kong Court with the erroneous impression that HT01 and Brilliance Glory were out of pocket in approximately the amount of the payment made by Sino Charm for the purchase of the Bonds.

20. As to that I said:

> "*87 As I have already said, the misleading nature of Zhang 1 understandably casts a shadow over the bona fides of the dispute and formed a basis for the submission to us that Lai 2 was a belated attempt to remedy the deficiency of the case as put in Zhang 1. But the detailed analysis in Lai 2, with supporting material, is not misleading and supports Titan Group's contentions. Further, although the Hong Kong Proceedings can be looked at as a form of retaliation against Sino Charm, they were plainly under consideration before the Petition."*

I then set out the sequence of events which supported the last sentence, including in particular Conyers' letter of **2 August 2019** as to which I said this:

> "89 *On 2 August 2019 Conyers wrote to Appleby again. The letter recorded that the Board (meaning the current Board) had no knowledge of the circumstances surrounding the Bonds as they were not in office in April 2017. It set out a number of preliminary findings which led them to suspect that Mr Chan and Sino Charm must have been fronting for a third party; and said that a full investigation was needed in respect of the Bonds and the background to Sino Charm's subscription before Sino Charm proceeded with a winding up petition, adding:*
>
> > *"As the matter now stands, the Company disputes the existence or genuineness of the debt demanded under the Statutory Demand".*
>
> *90. The letter said that the public interest required that a full investigation in respect of the Bond and the true background of Sino Charm must be carried out*[4] *before Sino Charm proceeded with a winding-up petition, and that the Board would require at least 3 months' investigation and invited confirmation that no winding-up petition would be presented in the interim. It also invited disclosure of all documentary evidence demonstrating the ultimate source of the subscription sum (which has never been provided). On 12 August 2019 Appleby offered to hold off winding up proceedings for a further 14 days to allow Titan Group time to put forward substantive grounds of dispute. This was not done within that timescale;*

[4] "*In [10] of Lai 2 Mr Lai explained that Titan had faced tremendous difficulty in gathering all the evidence that could be made available to dispute the alleged debts despite Titan's best efforts to retrieve documents internally, as well as request relevant documents from third parties".*

nor was any application made for an order striking out the petition, or preventing its continuance; nor was any affidavit filed in opposition.

91. But this is not a case, as the Chief Justice characterised it, where "it does not appear that the debt was disputed by the Company until Mr Zhang filed his first affirmation on 27 October 2019" [37]. Conyers had made clear that there was a dispute, although no evidence had yet been produced which would show that any dispute was bona fide and on reasonable grounds. Nor is this a case where there was no change of management between the dates of the events complained of and the date of the petition with no claim (or only a different one) being made before then. There had been a fundamental change in the membership of the Board in mid-2018, when Mr Lai became the nonexecutive Chairman and a non-executive director. Mr Zhang was the sole executive director. There were also a number of other non-executive directors.

92. Moreover, no step has ever been taken by Sino Charm to challenge the validity of the Hong Kong proceedings. Sino Charm has filed a defence (consisting for the most part of denials or non-admissions). In particular Sino Charm has never challenged the leave given by the Hong Court to serve it outside the jurisdiction, which order was made on the basis that there was a serious issue to be tried and that there was a good arguable case that each of the substantive claims fell within at least one of the gateways. In successfully obtaining leave Titan must have satisfied the Hong Kong Court that there was a good arguable case that Titan and/or HT01 had suffered damage within the jurisdiction (as attested to in Zhang 1 [81] – [83]) as a result of the tort of unlawful means conspiracy committed by the defendants including Sino Charm. There is no evidence that the Hong Kong Court regarded itself as misled".

21. I. also, said this:

"*94 The Chief Justice held [50] that the Hong Kong court had been seriously misled because of the failure to refer to the relevant sales contracts with Grand Treasure, so that, as he put it, "the impression left with the Hong Kong Court is that as a result of the contract entered into with Max Joy, the two subsidiaries HT01 and Brilliance Glory were out of packet". This may have caused him to attribute no significance to the fact that no challenge had been made by Sino Charm to the service of the proceedings out of the jurisdiction. But, as Lai 2 indicates, the omission of reference to those sales does not have the significance attributed to it by the Chief Justice. Moreover an examination of paragraphs 33-35 of the generally endorsed writ, shows that the details of transaction PT 2017 0006, which led to the outstanding figure of HK $ 87,505.463.39 (i.e. US $ 11,218,649,16) are set out in support of the proposition that the outstanding receivable from Top Win of c HK $ 87.5 million shows that Sino Charm did not have the financial ability to*

> *finance the purchase of the Bonds by itself and that part of the outstanding debt which should have been paid to the Titan Group had been siphoned off to Sino Charm for the purchase of the Bonds. Put another way, the Titan Group never received the amount of the Bonds from Sino Charm because what it received had been derived from itself, with the result that the series of round robin transactions ended up with an amount outstanding which was close to the amount of the Bonds.*
>
> *95. I readily confess that the discovery of this link between the figures in Lai 2 and the general endorsement of the writ was something which I was only able fully to appreciate after significant consideration of the considerable complexities of Lai 2 and the underlying documents."*

22. The fifth matter on which the Chief Justice relied was that the Company was, it was said, insolvent.

23. The sixth matter was that, at about the time when the Company first took the position that Sino Charm had acquired the Bonds by using the funds of the Company, and that Dr WeiBing and Mr Tang had acted in breach of their fiduciary duty to the Company, the Company embarked on a wholesale disposal of its most significant assets for nominal consideration to entities potentially connected to Mr Zhang and his father.

24. In the light of the six matters to which I have referred the Chief Justice held the following to be reasonably clear:

> *"71 (a) The debt in question was never disputed by the Company until Mr. Zhang filed his First Affirmation on 27 October 2019, thirty months after the Bonds were issued by the Company, three months after the service of the Statutory Demand was served and one month after the filing of the Petition seeking a winding up order.*
>
> *(b) HT01 and Brilliance Glory had suffered no financial loss as a consequence of entering into the contracts signed on 18 April 2017 to purchase 20,000 metric tons of bitumen mixture and 5,600 metric tons of mixed aromatics from Max Joy. Indeed, the position was that, as a consequence of entering into the corresponding sales contracts in relation to the same commodities, HT01 and Brilliance Glory (and indirectly the Titan Group) had made a trading profit and had been paid the funds due under the sales contracts.*
>
> *(c) The issuance of the Bonds was announced to the shareholders and investing public on 28 April 2017; following approval of the terms and purpose for which the Bonds was required by the entire Board of Directors of the Company on 12 April 2017. The Board of Directors unanimously decided that the Company required additional capital and that purpose was announced to the existing shareholders*

> *and to the investing public. The funds raised by the issuance of the Bonds were largely expended on the stated purpose*
>
> *(d) It was plain that the Hong Kong proceedings were commenced in retaliation to the presentation of the winding up Petition in Bermuda. The winding up Petition was presented to the Court on 20 September 2019 and the Hong Kong proceedings were commenced on 21 October 2019. The proceedings were not served upon Sino Charm until 14 October 2020, leave to do so having been sought on 12 August 2020.*
>
> *(e) There was persuasive evidence that the Titan Group was in fact insolvent and was likely to have been insolvent at the time of the presentation of the Petition;*
>
> *(f) The Company's auditors, Elite Partners CPA Limited, had resigned as auditors of the Company with effect from 21 November 2019 expressly pointing out that "In view of the extent of the material uncertainties relating to the results of the measures to be undertaken by the Group which might cast a significant doubt on the Group's ability to continue as a going concern, we have disclaimed our audit opinion on the consolidated financial statements."*
>
> *(g) Soon after the presentation of the Petition the Company had engaged in wholesale disposition of its property apparently for nominal consideration to entities associated with Mr. Zhang and/or his father."*

25. In the light of those matters the Chief Justice concluded that the Company's dispute in relation to the Petitioner's debt was not being *bona fide* disputed on reasonable grounds.

26. In my judgment I made plain that the major reason why the Chief Justice took that view was because, contrary to the misleading impression given by Zhang 1, the purchase contracts in respect of bitumen and mixed aromatics had been matched by sales of the same amount at a modest profit. But, in my judgment that was not the end of the story because:

> "*112 ..... A careful consideration of Lai 2 (which, as I have said, received scant consideration) gives, in my view, a clear (and sound) basis for the contention that the funds of the Titan Group's subsidiaries, transmitted in the first of three round robin transactions, were used to enable Sino Charm to fund the purchase of the bonds, and that the absence of any payment of the purchase price of the Bonds by Sino Charm, unfinanced by Titan Group's subsidiaries, was hidden in the outstanding debt from Top Win to Titan HK."*
>
> *113 I see no good reason to accept the suggestion that Mr Lai's analysis of the circular fund flows should be regarded as tainted by "confirmation bias". On the*

> *contrary his analysis addresses all the nine commodities transactions executed by the Titan Group in 2017; sets out the receipts and payments in chronological order; and indicates the process of reasoning (not speculation) by which he draws the inferences that he does. (I do not regard the fact that there a number of such inferences as rendering the analysis no more than speculative). The transactions and the receipts and payment are constituted, or evidenced, by the contracts and bank documents produced. There is no indication that he has ignored inconvenient facts. Further Sino Charm has not put together an alternative analysis based on the materials exhibited. Whether or not in the end the defence put forward turns out to be well founded, and the Court finds that all the transactions are entirely regular and/or that the companies in the apparent chain were not under the control of Dr WeiBing/Mr Tang and/or that the amount owing by Top Win represents no more than a run-of the mill bad debt - will, of course, depend on the totality of the evidence, including, but not limited to, what is produced (or not produced) on discovery*."

27. I reached the view that those circumstances alone meant that the debt should not be assessed as one which was not *bona fide* in dispute and on substantial grounds. I also concluded that the other matters that were relied on were not sufficient to justify a decision that there was no *bona fide* dispute. It is not necessary to repeat the reasons which I gave, which were extensive. I expressed my conclusion as follows:

> *"131 Accordingly, in my judgment, the debt which forms the basis of the Statutory Demand is one that is bona fide disputed on substantial grounds and crosses, comfortably in my view, the low threshold provided by that test. The several factors referred to by the Chief Justice do not negate bona, or establish mala, fides or lack of substance, in the defence. The dispute is not grabbed at or dredged up, nor do I regard the extensiveness and complexity of the evidence as a mask to hide the absence of any real defence, to use the expressions used in some of the cases.*
>
> *132 ……. Further, whilst the Chief Justice set out clearly the several matters which had led him to his conclusion, he did not in his judgment address what, as can now be seen, was of fundamental importance, namely the analysis made by Mr Lai as well as a number of other matters to which I have referred above. He thus "failed to analyse properly the entirety of the evidence", to use the criterion approved as a basis for appellate intervention in Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21. per Lord Hodge at [12] (citing with approval Choo Beng v Choo Kok Hong [1984] 2 MLJ 165 per Lord Roskill at 168-9)26. The absence of reasoning for what was in effect a finding that Lai 2 was without material significance meant that a "building block of the reasoned judicial process" was missing, to use the phraseology of Henry LJ in Glicksmam v Redbridge Healthcare NHS Trust [2001] EWCA Civ 1097 at [6].*

28. My conclusion was that the Court of Appeal should stay the Petition until further order of the Court in order to permit the Hong Kong action to consider the issues. I reached that decision for the following reasons:

> "*172 ....*
>
> *(a) the debt upon which the petition is based is, I doubt not, bona fide disputed;*
>
> *(b) in those circumstances the court will not normally make a winding up order;*
>
> *(c) there are no sufficient grounds for departing from this rule;*
>
> *(d) it is preferable that the complex question of whether the debt exists at all should be determined by a judge in Hong Kong, the law of which will govern much of the dispute, in proceedings in which Sino Charm has taken no steps to set aside the order giving leave to serve out of the jurisdiction. These proceedings will involve relevant parties other than Sino Charm, who have no link to Bermuda. They will be conducted by those familiar with the underlying issues and having an economic stake in the outcome, rather than by office holders, who lack these qualities, the introduction of whom would add another very significant layer of avoidable expense and yet further delay. Hong Kong or the PRC is, also, the location of the most important witnesses and Hong Kong is the court entitled to (non-exclusive) jurisdiction under the Bonds, which are governed by Hong Kong law. Determination of the dispute in Hong Kong will involve the parties giving disclosure, which is potentially of great importance;*
>
> *(e) if this step is taken Sino Charm will not be left without a remedy since they can counterclaim in the Hong Kong proceedings;*
>
> *(f) the proof of debt procedure could not give Titan Group all the relief that it seeks in the Hong Kong action, for which separate proceedings would be needed in any event.*
>
> *(g) a stay:*
>
> *(i) would avoid the risk that creditors might be prejudiced by the loss of the commencement date of the petition, e.g. under section 166 (1) of the Companies Act 1981 which renders void dispositions of property made by the company after the commencement of the winding-up unless approved by the court*

> *(ii) is a flexible remedy in that it can be lifted or varied at any time if circumstances change;*
>
> *(iii) affords the opportunity to secure a restructuring which would meet any potential liability to Sino Charm, although I recognize that an extant, albeit stayed petition, may make raising finance more difficult;*
>
> *(iv) will enable the Company to retain its listing on the Hong Kong Stock Exchange of which a winding up order would deprive it*.

29. I. also, declined the invitation made to us by Mr White for Sino Charm that we should wind up Titan Group of our own motion.

Titan Group's submissions

30. Titan Group submits that, in those circumstances, we should order Sino Charm to pay (i) its costs both before us and before the Chief Justice and (ii) the remuneration and expenses of the now discharged JPLs. Reliance is placed on the following propositions in relation to the costs of the appeal:

(i) the "*normal course*" is to issue a writ; see Sat-*Elite v Strong (UK) Ltd* [2003] EWHC 2990 (Ch) per Evans-Lombe J at [17], citing the decision of Warner J in *In Re Cannon Screen Entertainment Limited* [1989] BCLC 660 at page 662;

(ii) the general rule is that a successful appellant gets his costs of the appeal; *Re Winson* (1875) 1 Ch D 113, page 114;

(iii) the appellant is indisputably the successful party;

(iv) where a debt is genuinely disputed it is wrong of the petitioner to move forward with the petition and seek a winding up order. By setting it aside the Court has held that the winding-up order was wrongly made.

Accordingly, seeking the winding up of the Company was an abuse of process and costs ought to be awarded to the Company on the indemnity basis. *Paramount House Property Estates Ltd v Koshal* [20151 EWHC 1097(Ch) per Warren J at [3]; *Re Hyundai Engineering & Construction Co Ltd* [2002] 2 HKLRD 71 per Kwan J; See, also, the decision of the BVI Court of Appeal in *Pacific China Holdings Limited V Grand Pacific Holdings Limited [2012]* ECSC J05143, per Pereira JA at [39] .

31. In relation to the costs at first instance Titan Group relies on the following:

(i) the usual order in favour of a successful appellant is that the respondent should pay the successful appellant's costs in the court below.

(ii) there is no reason to depart from the usual order. The Petitioner was fully aware that the debt was disputed prior to the hearing of the Petition but chose to "*try its luck*" and seek a winding up order instead.

32. In support of this submissions Mr Alex Potts KC for Titan Group referred to the extensive citation by Snowden J in *Re Sykes & Son Limited* [2012] EQHC 1005 (Ch) from the decisions of Warner J in *Re Fernforst Ltd* [1990] BCLC 693 and Blackburn J in *GlaxoSmithKline Export Ltd v UK (Aid) Ltd* [2004] BPIR 528 noting that it is a risk the petitioner runs when, without the benefit of judgment he launches winding up proceedings where there are assertions which are irreconcilable and it is likely that one side is telling the truth and the other is not. Even if the petitioner believes that there is no substance to the dispute it is, nonetheless, a "*high risk strategy*" to continue with proceedings.

33. In this case, Mr Potts submits, the Petitioner was informed prior to presenting the Petition that the debt was disputed. Instead of issuing a writ it chose to take the risk that the Court would conclude that there was no substance to the dispute. That risk ultimately failed. Even if one were to take the view that the substance of the dispute was not fully set out until Mr Zhang's first affidavit, it was at that point at the latest that the Petitioner knew that there were serious allegations that could only be resolved with disclosure and cross-examination. If the Petitioner had then accepted that the debt was disputed, as it ought to have done, the Petition would have been stayed and the costs of the hearing at first instance would not have been incurred. And, if the Petitioner had shown that the source of the funds was a source other then the Company it is likely that no hearing would have been required.

34. Substantially all of the evidence, the parties' submissions and the Court time at the hearing both at first instance and on appeal was spent on the issue of whether or not the debt was *bona fide* disputed. Substantially all of the costs incurred would have been avoided had the Petitioner conceded this issue. In those circumstances there is no basis for the costs incurred after Zhang 1 to be either reserved or costs in the Petition. The fact that Sino Charm might succeed at trial is irrelevant. If it does the costs incurred in the winding up will still have been unnecessarily and unreasonably incurred.

Sino Charm's submissions

35. Sino Charm relies on the decision in *Sykes & Son Limited* [2012] EWHC 1005 (Ch). In that case there was at the time that the Petition was presented a small undisputed debt which was not subject to a serious cross-claim. That debt was paid shortly after the Petition was presented. A much larger part of the debt claimed in the Petition was subject to a dispute which it was not appropriate to

resolve in the Companies Court. Richard Snowden QC, sitting as a Deputy Judge of the High Court, ordered that the Petition should be dismissed. The question was what order should be made in respect of the costs incurred after the undisputed part of the debt was paid.

36. Mr Snowden considered the two classic cases in which the court has ordered the petitioner to pay the costs of the dismissed petition: Warner J in *Re Fernforest Limited* [1990] BCLC 693; Blackburne J in Re *UK (Aid) Limited* [2003] 2 BCLC 351. In the latter case, the judge had entertained doubts about the genuineness of some of the documents and about the accuracy of the assertions of a witness, but rejected the argument that he should not order the Petitioner to pay the costs on the grounds that he had come close to dismissing the Petition.

37. Mr Snowden accepted that the general rule in CPR 44.3 was that the losing party should bear the costs of the successful party. As to that what he said was as follows:

> "*22 There is no doubt that the general rule in CPR 44.3, that the losing party should pay the costs of the successful party in litigation applies with added force in the context of winding up petitions. It is well-known that the presentation of a winding up petition can put heavy pressure to pay upon a respondent company, and the Companies Court always has been assiduous to discourage the use of a winding up petition as a short cut instead of issuing a claim form to establish liability in the normal way. I also accept Warner J' s observation that the court should do nothing to encourage any belief that a person who thinks that he has a claim against a company can first try his luck in the Companies Court on the basis that if he fails, the costs of that exercise will simply be added to the costs of a subsequent Part 7 claim. There is therefore considerable merit in adhering to the principle that save in exceptional circumstances, a petitioner whose petition fails on the basis that the debt is genuinely disputed on substantial grounds should pay the costs of that failure.*
>
> *23 However, in considering whether there are exceptional circumstances to justify a departure from the general rule, I think that the court is entitled to take into account the communications between the parties prior to the presentation of the petition. In Re Fernforest there had plainly been an attempt, albeit apparently not very convincing, by the company to set out the grounds upon which it disputed the debt, and I think that Mr. Nersessian was right when he observed that Warner J's comments were addressed to the more limited question of whether a company facing a claim is under a duty to instruct lawyers to prepare a detailed defence prior to a claim being issued. Likewise, in Re UK (Aid) Limited. Blackburne J' s conclusion that the petitioner had adopted a high risk strategy that had failed, was made against the background (which appears plainly from the report at [2003] 2 BCLC 351), that the company's stance had been set out at length by its solicitors in correspondence prior to the petition being presented.*

> *24 I also consider that Blackburne J's comments at paragraph 7 of the judgment in UK (Aid) Limited, to the effect that a petitioner who launches winding up proceedings without the benefit of a judgment runs the risk that there may be irreconcilable assertions where it is likely that one side is telling the truth, and the other is not, must be read in context. A petitioner who, as in that case, is aware of the basis upon which the company is disputing the debt, but takes the view that the court can conclude that there is no substance in the company's case, indeed takes the risk that the court will conclude that it cannot resolve the dispute without disclosure or cross-examination; and the fact that it may later turn out that witnesses on behalf of the company were lying or had produced false documents to support their stated case will not prevent the court from holding that the petitioner must pay the consequences of choosing an inappropriate procedure.*
>
> ……
>
> *28 But I do not think that Blackburne J can have meant that a petitioner who presents a winding-up petition must necessarily be taken to have assumed the risk that the company may, after presentation of the petition, raise a false defence supported by fabricated documents. The law turns its face against the use of fabricated documents in litigation, and I cannot see how the policy of the Companies Court in discouraging the misuse of winding up petitions would be advanced by rewarding companies which resort to lying to avoid paying their debts, and penalizing petitioners who are belatedly met by false defences that they could not have evaluated prior to presenting their petition."*

38. In relation to the facts of the case before him Mr Snowden accepted that *"notwithstanding that the Petitioner gave it every reasonable opportunity to do so, the Company did not set out the basis for its dispute in relation to the Final Account in any, or any meaningful way, prior to the presentation of the Petition*". The Company had made a denial of receipt of a Final Account which was untrue and a statement made in a letter from the company was inconsistent with an assertion subsequently made. The position ultimately taken in the Company's evidence was not explained, clearly or at all, in the Company's evidence in support of its application for an injunction and it was only when the evidence in reply was served that there was a proper exposition of the Company's case on a critical matter and only then the critical documents, said to have been prepared contemporaneously, were produced. These documents were the ones that tipped the scales against the petitioner.

39. He regarded the combination of those circumstances as exceptional and as justifying a departure from the general rule as to costs. As to what he should do he said the following:

> *"35 Because I cannot resolve the crucial factual issues now, it therefore seems to me that I have a choice. I can either adopt a necessarily rough and ready approach and make no order as to costs, which at least balances the risk of injustice to each side and reflects the inadequacies of the Company's response to the Petitioner's claim and the unsatisfactory manner in which it adduced certain important parts of its evidence. Or I can adjourn the question of costs to await the outcome of proceedings to resolve the dispute, which is a variant of the course which was rejected in Re Fernforest and UK (Aid) Limited, but adopted by Neuberger J in Re a Company (No. 0012209 of 1997)."*

40. The decision that he made was to adjourn the determination of the costs of the application (for an injunction restraining publication of the Petition) and of the Petition (after the date when the undisputed part of the debt was paid) generally with permission to either side to apply to a judge for the determination of such costs on 14 days' notice in writing to the other side to be given in the event that the petitioner did not institute proceedings in relation to the unsatisfied debt claimed in the Petition by a specified date or, if such proceedings were commenced, after they had been finally determined or compromised.

41. As this and other cases show the general rule is inapplicable in exceptional circumstances. Sino Charm submits that there are exceptional circumstances in this case in that:

(a) the Company failed to present its case properly and fully, in particular its evidence, before the Supreme Court; and it was those errors in presenting its evidence that led to the appeal and the costs associated with it;

(b) serious allegations raised against the Company remain to be determined as does the status of Sino Charm's debt; the Petition itself has not been dismissed with the consequence that the winding up of the Company could eventually take place under the Petition.

Accordingly, the costs of the appeal should be adjourned until the determination of the Petition by the Supreme Court or, alternatively, each Party should bear its own costs. The question of costs in the Supreme Court should be stayed to be dealt with by the Supreme Court when the Petition is determined.

42. As to (a) Counsel failed to raise various pieces of evidence contained in Lai 2, which affirmation proved important and, indeed, determinative on the appeal, in relation to the critical question as to whether funds had been improperly diverted: see [69] and [81] of my judgment. What was relied on by the Company's counsel below was the deficient Zhang 1 evidence which led the Chief Justice to make the decision that he did. The failure to draw the Court's attention to the proper evidence was the fault of the Company. It delayed doing so until the appeal. The case is in a similar category to *Sykes* where late evidence turned the matter in the company's failure. If the Company

had properly presented its evidence an appeal of the Petition would probably have been unnecessary.

43. The Company's "evidential failures" – as Sino Charm characterises them – were rightly acknowledged by Mr Potts at the hearing in the following terms:

> *"21 The Company's evidential failures were rightfully acknowledged by its counsel at the hearing of the appeal. Further, Mr. Potts Q.C. made a further corresponding admission, in line with Sykes, that proper cross-examination of witnesses with respect to the serious allegations against the Company remain outstanding:*
>
> > *"Now, yes, there's a degree of misfortune, procedural misfortune in all of those series of events and in a sense I as counsel am imperfect and so perhaps have to take my fair share of the blame in not taking another two hours to take the chief justice through the detail of those appendices.*
> >
> > *But if I may so, by way of self-defence, we were focused on the lone threshold of arguability…*
> >
> > *…But we all approached this as a low threshold of arguability and with that all said, where I really want to in a way end up in reply, is to remind Your Lordships of the irrelevance we say of all of that background noise about bona fides or credibility because that's all the baggage you get at the trial when you are criticizing witnesses in cross-examination.*
> >
> > *So again, I apologise in the sense that I am the source of the problem. It should not be held against the client that the result is this evidence is utterly ignored.*

44. Further the Chief Justice made several findings of potential dishonesty and fraudulent activity on the part of the Company in the light of its recent wholesale disposal of assets. These findings have not been disproved. They will have to be determined after cross-examination of witnesses and a full testing of the Company's evidence. It was the concern about disposal of assets which was part of the reason for staying rather than dismissing the Petition so that the creditors would enjoy the protection of section 166 (1) of the *Companies Act*. That there was a stay and not a dismissal was a significant victory for Sino Charm and ensures that the debt may still be proven and the Company wound up under the current Petition. The fact that the debt and the allegations about fraudulent disposal of assets await final determination is a further factor weighing in favour of adjourning the question of costs or making no order.

45. In relation to the points made in the last paragraph it is necessary to note that I reviewed the evidence about property disposals and concluded that it did not provide significant support to the proposition that the transactions were improper: [118] – [129].

Conclusion

46. I am not persuaded that the circumstances of this case were of such an extraordinary character that we should not adopt the normal approach. As to the costs of the appeal before us I am wholly satisfied that Sino Charm should bear Titan Group's costs. They were the losers and should pay the winner's costs. The proposition that Titan Group should not be entitled now to recover its costs of the appeal is, in my judgment, simply wrong.

47. The more difficult question is as to the incidence of the costs below. In relation to that the position stands thus. That the validity of the alleged debt was in issue was apparent from Conyers' letter of 2 August 2019, written after there had been a change of control at Titan Group, and in circumstances where the underlying position was not wholly clear to those concerned and, in their view, called out for investigation. Thereafter the evidence came in and all of it, including Lai 2 was before the Chief Justice. I fully accept, as I said in my judgment, that he was understandably concerned by what appeared to be the potentially misleading reference in Zhang 1 to purchase contracts, without reference to the corresponding sale contracts, and that he was not assisted by the limited reference to Lai 2. At the same time Lai 2 was in evidence before the Chief Justice; he was expressly invited to have regard to and consider the whole of it; it was read by him and we have held that his failure to appreciate its significance – in substance to ignore it - was an error – understandable but an error nonetheless.

48. Sino Charm suggests that, if Lai 2 had been properly deployed there would probably have been only one hearing. That seems to me highly debatable, particularly, as we were told Sino Charm seeks to appeal our judgment to the Privy Council. And there is a consideration that goes the other way. As I held, it would have been the work of a moment for Sino Charm to reveal the exact source of the Subscription Amount. But it never did so. In those circumstances it does not seem to me to lie in Sino Charm's mouth to rely on the suggestion that, if Lai 2 had been differently deployed, the answer would have been quicker and shorter.

49. In those circumstances I do not think that we should depart from the usual course of giving the successful party his costs here and below. That is particularly so in circumstances where (a) the normal approach is designed to deter litigants from trying their luck with a winding-up petition; (b) the threshold for a bona fide dispute on reasonable grounds is relatively low; and (c) Sino Charm had available to it the data which is contained in Lai 2.

50. Accordingly, I would order that Sino Charm should pay Titan Group its costs both here and below; and, since the use of the winding-up procedure when there is a genuine dispute is an abuse of the process of the court, should do so on the indemnity basis.

The position of Marine Bright

51. Before the Chief Justice there was a dispute between Docile Bright Investments Limited ("Docile Bright") and Marine Bright as to the ownership of certain convertible redeemable preference shares, which had been redeemed such that the owner was a substantial creditor of the Company. Docile Bright opposed the Petition, Marine Bright supported the Petition. The Chief Justice decided (i) that Marine Bright should, for the purposes of the hearing, be treated as a creditor in respect of the debt arising from those shares; and (ii) that it appeared, therefore, that the majority of the creditors requested the winding up of the Company [81].

52. I acknowledged, in my judgment [133], that the views of creditors and contributories at first instance were important. But I also held that, whilst there was a *prima facie* case that Marine Bright was the creditor, there was an almost equally strong *prima facie* case that Docile Bright was the creditor [166]. For this reason, I declined to treat Marine Bright alone as the creditor for the purpose of the Petition, nor its views as entitled to preference over those of Docile Bright.

53. In those circumstances there seems to me no proper basis on which the Company ought to be ordered to pay Marine Bright's costs at first instance. The result that Marine Bright sought and obtained – immediate winding-up – has been overturned; and we have determined that little assistance was to be found from the rival views [167].

54. As regards the costs of the Court of Appeal, Docile Bright chose not to appear – a stance that Marine Bright could, itself have taken, no relief being sought against it. Marine Bright appeared and sought to uphold the Judge's decision at first instance. In the course of his submissions Counsel for Marine Bright told the Court that he had no instructions to seek to have Marine Bright substituted as the petitioning creditor, in the event that the Petitioner was held not to have standing. Shortly thereafter he acquired such instructions from his solicitors. That such substitution might be sought had never been suggested before the Chief Justice; nor was it contained in any Respondent's notice; or in any skeleton argument.

55. I held (a) that Marine Bright could not be treated as the creditor of the Company and that the Court would not take its views into account; and (b) that I would not permit substitution in circumstances where the debt purportedly owed to Marine Bright was disputed.

56. Marine Bright was therefore entirely unsuccessful in the Court of Appeal, save in one respect, namely that the Petition was stayed, and not dismissed. I cannot regard this as a major success. The central question was whether the winding up order should be set aside; and it was. The decision to stay the Petition rather than to dismiss it was made in order that Sino Charm could, in the event

that it was successful in establishing the debt it claimed, and a winding up order was made, take the benefit of section 166 (1) of the *Companies Act 1982*.

57. Whilst the Company could seek an order that Marine Bright pay the Company's costs in dealing with the points it raised, it does not do so on the basis that those costs can equally be attributed to the Petitioner, who relied on the support of Marine Bright in seeking the Winding-Up Order.

58. In those circumstances the Court should, in my judgment, make no order as to Marine Bright's costs either at first instance or on appeal.

59. As it happens, the High Court in the BVI has now – *Lai Wing Lun (As Liquidator of Docile Bright Investments Ltd) v Marine Bright Limited*, unreported - ruled in favour of Docile Bright, setting aside the transaction by which the preference shares were purportedly transferred from Docile Bright to Marine Bright, thereby confirming that only Docile Bright has an interest in the Petition. That seems to me an additional reason why no order should be made as to their costs in relation to the winding up petition in respect of which they had no true standing.

The JPLs fees and expenses

60. The winding-up order provided for the appointment of three JPLS who, notwithstanding the appeal, continued to undertake their statutory duties and have incurred fees and expenses. They have now been discharged; but it is necessary to address the question of their fees and costs. I reject the suggestion that we should decline to do so on the grounds that the JPLs, not being parties to the appeal or the Petition, have no standing to make representations to us, as they have done. I am wholly satisfied that, in our discretion, we should consider them.

61. If a winding up goes ahead the default position is that the liquidator's remuneration and expenses are paid from the assets of the company. Rule 140 of the *Companies (Winding –Up) Rules 1982* provides:

> "***Costs payable out of the assets***
>
> *The assets of a company in a winding-up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realizing or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs and expenses as the Court may allow to a liquidator appointed in such voluntary winding-up shall, subject to any order of the Court, be liable to the following payments, which shall be made in the following order of priority, namely: ……*

62. Rule 23(3) of the same Rules provides:

> "(3) Subject *to any order of the Court, if no order for the winding-up of the company is made upon the petition, or if an order for the winding-up of the company is made upon the petition. or if an order for the winding-up of the company on the petition is rescinded, or if all proceedings on the petition are stayed, the provisional liquidator shall be entitled to be paid, out of the property of the company, all the costs, charges, and expenses properly incurred by him as provisional liquidator, including such sum as is or would be payable under the scale of fees for the time being in force where the Official Receiver is appointed provisional liquidator, and may retain out of such property the amounts of such costs, charges, and expenses*."

The position under these Rules is similar to that which applied in *Graham v John Tullis & Son (Plastics) Ltd* [1991] BCC 398 where the applicable rule was that, if a winding up order was not made, the remuneration and expenses were to be met out of the property of the company but it was open to the court to make an order as to expenses to the effect that those charges in whole or in part were to be paid by some other person to the company as part of the expenses of the cause.

63. In the present case the order for the winding-up of the Company has been rescinded and the proceedings on the Petition have been stayed. In those circumstances the provisional liquidators are entitled to be paid their fees and costs out of the property of the Company subject to any order of the Court. The relevant question is whether the Court should:

(i) order that those fees and costs be paid by the Company, without any right of recovery from Sino Charm; or

(ii) order that they should be paid by the Company on the basis that the Company may recover the amount thereof from Sino Charm; or

(iii) order that they should be paid by Sino Charm;

(iv) make no order now and postpone consideration of the question as to who should pay the costs until after the determination of the Hong Kong proceedings.

Sino Charm submits that an order should be made on the first basis, as do the JPLs. The JPLs submit that, in the alternative, an order should be made on the second basis. An order on the second basis was made by the Court of Appeal of the Virgin Islands in *Westford Special Situations Fund v Barfield Nominees Ltd* [2011] ESCS JO328-5. An order on the third basis was made by the Court of Appeal of the Eastern Caribbean in *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2012] ECSC JO5i4-3 in similar circumstances.

64. In my view the Court should make an order on the third basis for the following reasons. The JPLs were appointed by an order of the Supreme Court, made in circumstances where there had been

no prior application to restrain the advertisement or advancement of the Petition. They have continued to act in accordance with their duties until the decision on the appeal, the handing down of which was delayed for reasons which were in no way the fault of the JPLs. They are entitled to be paid the remuneration due to them, and the costs and expenses incurred by them as officers of the Court; and to be paid within a reasonable time.

65. But, as it has turned out, they should never have been appointed in the first place, given that the alleged debt was *bona fide* disputed. In those circumstances it seems to me that the remuneration and costs and expenses of the JPLs should be borne by the party that has wrongfully procured their engagement, to no apparent benefit to the Company, which has led to the fees, costs and expenses with which we are now concerned.

66. I do not accept that the fact that, if Sino Charm did not pay, the former JPLs would have to claim against a company registered in the BVI (either by suing there or by suing in Bermuda and seeking to enforce any judgment in the BVI) is a reason for making a different order. This is no great burden. The former JPLs are located in Bermuda and Hong Kong and have offices in the BVI. Judgments and orders of the Bermuda courts are readily recognized in the BVI which has a highly competent and fully functioning judicial system.

67. There must, of course, be some oversight as to the reasonableness of the amount claimed. We were told that the former JPLs' clam as at 30 August 2022 was in the region of US $ 681,462, which seems to us, *prima facie*, a remarkably high sum.

68. I would therefore order that the remuneration of, and all costs charges and expenses properly incurred by the JPLs, shall be paid by Sino Charm, the amount thereof to be taxed by the Supreme Court, if not agreed, and paid as agreed or as the Supreme Court shall direct.

69. We were asked to stay any order arising from our judgment pending the determination by the Privy Council of an application by Sino Charm for permission to appeal to it. We do not think it appropriate to do so. The effect of such a stay would, in effect, be to continue the winding up. Sino Charm will have the protection of section 166 (1) of the Companies Act 1982. If it was apparent that a disposition which potentially contravened the Act was about to be made Sino Charm could seek injunctive relief.

70. Accordingly, the order that I would make is as follows:

(a) the appeal is allowed;

(b) the order for the winding up of the Appellant made on 11 August 2021 is set aside *ab initio*;

(c) Man Chun So, Yat Kit Jong and Joseph Gordon (together, the "JPLs") are hereby released and discharged;

(d) the Petition is stayed *sine die*, pending the outcome of the proceedings between the Appellant and the Respondent in Hong Kong. Each party shall have liberty to apply to the Supreme Court to restore the petition upon 14 days' notice to the other parties.;

(e) the sums held by Conyers Bermuda Limited as security for the costs of the appeal shall be released by them to the Appellant forthwith;

(f) the Respondent shall pay the Appellant's costs of the appeal on the indemnity basis, such costs to be taxed if not agreed. The Appellant shall be entitled to the costs of two counsel;

(g) As regards the costs below: -

(i) The costs of the presentation of the petition shall be reserved; and

(ii) The Respondent shall pay the Appellant's costs incurred from 27 October 2019 (the date of the First Zhang Affidavit when it became apparent that the petition was disputed on substantial and *bona fide* grounds) on the indemnity basis.

(iii) The Appellant shall be entitled to the costs of two counsel;

(iv) The Respondent shall pay the remuneration of, and all costs, charges and expenses incurred by, the JPLs, to be assessed by the Supreme Court if not agreed.

BELL JA:

71. I agree.

SMELLIE JA:

72. I also agree.