IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO: 153 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF GUOAN INTERNATIONAL LIMITED

IN OPEN COURT

Appearances:	**Mr Tom Lowe QC instructed by Mr Christopher Young and Ms Fleur O'Driscoll of Forbes Hare for the Petitioners**
	Mr Jonathon Milne and Mr Spencer Vickers of Conyers Dill & Pearman LLP for the Company
Before:	**The Hon. Justice Kawaley**
Heard:	**15 October 2021**
Date of decision:	**15 October 2021**
Draft Reasons Circulated:	**26 October2021**
Reasons Delivered:	**29 October 2021**

HEADNOTE

Creditor's winding-up petition-adjournment-statutory demand based on final foreign judgment-whether pending appeal results in petition debt being disputed-common law recognition of foreign judgment-whether petition should be adjourned to permit company to seek stay of judgment pending appeal-comity-costs of the adjourned hearing-Companies Act (2021 Revision) sections 93(a), 95(1)(b)-Grand Court Rules Order 62 rule 4(2), (11)

REASONS FOR DECISION

Introduction

1. On March 1, 2021, the Petitioners, Chong Ching and Yao Sze Ling obtained summary judgment against the Company from the Hong Kong High Court (Anthony Chan J) in HCCL 9 of 2020 (respectively the "HK Judgment", "HK Court" and the "HK Proceedings"*)* in the amount of:

   (a) HK$100 million;

   (b) pre-judgment interest in the amount of HK$1,545,205; and

   (c) post-judgment interest at the rate of 8% per annum from March 2, 2021, which on April 19, 2021 stood at HK$1,073,973.

2. On this basis, the Petition alleged, the judgment debt due to them from the Company as at April 19, 2021 totalled HK$102,619,178 (the "Petition Debt"). A Statutory Demand pursuant to section 93(a) of the Companies Act (2021 Revision) was served on the Company at its registered office on April 23, 2021. The Petition Debt was not paid and the Petition herein dated June 4, 2021 was formally filed on June 8, 2021. On July 2, 2021 the Petitioners filed an application to appoint joint provisional liquidators ("JPLs Summons"), but they applied and obtained an Order adjourning this application on July 12, 2021. The Petition was first heard on July 15, 2021 and adjourned to October 15, 2021 on the Petitioners' application.

3. The Petitioners applied to adjourn the Petition in order to respond to the First Affirmation of Liu Deng, the Company's Chairman, served on July 6, 2021. Most significantly, the Company's evidence indicated that it was pursuing an appeal against the HK Judgment and was conducting an independent investigation into alleged misconduct by the Petitioners in relation to the "Yicko Acquisition". The Petitioners had obtained the HK Judgment on the basis of debt instruments issued to them in connection with the Yicko Acquisition. The Exhibit to this Affirmation apparently ran to thousands of pages. On July 15, 2021, I made an Order in the following terms:

   "1. *The Petitioners do file any evidence in reply to the affirmation of Liu Deng by 4 pm on 12 August 2021;*

2. *No further evidence be filed without the leave of the Court;*

3. *The Petition herein be adjourned for hearing on 15 October 2021;*

4. *The parties have liberty to apply;*

5. *Costs be reserved.*"

4. The July 15, 2021 adjournment Order clearly contemplated that unless further directions were given, by necessary implication in advance of the adjourned hearing on October 15, 2021, the Petition would be heard on the basis of the evidence filed by August12, 2021. On October 8, 2021, a week before the adjourned hearing, the Company served draft additional evidence again apparently running to thousands of pages, and on October 11, 2021 issued a Summons seeking leave to rely on that evidence at the October 15, 2021 hearing. At first blush this looked like a case of "*déjà vu all over again*".

5. The Company sought leave to rely upon, *inter alia*, the additional fact that (a) proceedings had been instituted in Hong Kong which if successful would result in rescission of the Yicko Acquisition, and (b) that an application to adduce fresh evidence on appeal had been filed with the HK Court on November 7, 2021. They substantively sought to dismiss or stay the Petition on October 15, 2021, or on such later date as might be required to afford the Petitioners an opportunity to respond to the additional evidence.

6. The Petitioners' primary argument was that as a matter of law, since the HK Judgment had not been stayed by the HK Court, the mere fact of an appeal could not support the Company's argument that the debt was disputed *bona fide* on substantial grounds. This issue was fully canvassed in the respective skeleton arguments and, after affording the Company an opportunity to dislodge my provisional view that the debt was not disputed, I ruled that the Petitioners were entitled in principle to seek a winding-up order based on their Statutory Demand, which was in turn based on the HK Judgment.

7. I then heard argument on the question of whether the Petition should be adjourned, as the Petitioners were somewhat reluctantly willing to accept as an alternative to an immediate winding-up order or stayed as the Company contended in light of my summary rejection of their application for the Petition to be dismissed. In this context, I considered the Company's application to admit further evidence and ruled that paragraphs 232-234 of the Second Deng Affirmation, and that part of the

Exhibit thereto which attached the *Ladd-v-Marshall* application due to be heard at some point before the Hong Kong Court of Appeal, were relevant to the questions of (a) whether and (b) if so on what terms, the Petition should be adjourned for the specific purpose of enabling the Company to apply to stay the HK Judgment pending the appeal.

8. I determined that the pivotal consideration in favour of adjourning the Petition was that the Hong Kong Court was the most appropriate forum to determine whether or not to stay execution of the HK Judgment based on an informed assessment of the merits of a Hong Kong appeal. Having regard to considerations of comity, and the importance of judicial cooperation in commercial matters in the winding-up sphere in particular, I considered that this Court should not make an immediate winding-up order in circumstances where the Hong Kong Courts might, possibly in relatively short order, suspend and ultimately set aside the judgment upon which the Petitioners relied.

9. I accordingly granted an adjournment and heard argument as to costs, making an Order in the following relevant terms:

> "1. *The Company be granted leave to adduce the evidence regarding the Ladd v Marshall application made in the context of the Hong Kong Civil Appeal No. 136 of 2021 (on Appeal from HCCL: 9/2020) contained at paragraphs 232 to 234 of the Second Affirmation of Liu Deng affirmed on 8 October 2021 and the exhibits referred to therein at pages 838 to 1949 of Exhibit LD-2, in relation to the fact that the Ladd v Marshall application has been made.*
>
> *2. The Petition herein be adjourned for hearing to a date to be fixed with the Court in the month of November 2021, unless otherwise agreed between the parties, upon the conditions subsequent that:*
>
> *a. an application be made by the Company to stay the judgment dated 1 March 2021 in the High Court of Hong Kong Special Administrative Region, cause no. HCCL: 9/2020 ("Application for Stay"); and*
>
> *b. Evidence be filed with the Court and served on the Petitioners on or before 29 October 2021, such evidence to include:*
>
> *i. The fact that the Application for Stay has been made and details regarding when the Application for Stay is likely to be heard and determined in Hong Kong; and*

ii. *an explanation of the position regarding the appointment of auditors to the Company, Yicko Securities Limited and Yicko Nominees Limited.*

3. *The decision as to Costs be reserved and brief reasons for the grant of the adjournment will be given by the Court.*"

10. I set out below the reasons for the October 15, 2021 Order, somewhat more fully than I initially contemplated, and my decision on the costs of the adjourned hearing pursuant to paragraph 3 of the said Order.

Legal effect of a pending appeal against a final judgment on the right of a creditor to rely upon the judgment debt as the basis for seeking a winding-up order

11. The threshold question of the legal effect of a pending appeal against a final judgment on the right of a creditor to rely upon the judgment debt as the basis for seeking a winding-up order does not appear to have been directly considered before in any Cayman Islands considered judgment.

12. In the Petitioners' Skeleton Argument, Mr Lowe QC made the following key submissions in support of the Petitioners' contention that the Petition Debt was not disputed so that in light of the Company's failure to pay the sums claimed in the Statutory Demand, the Petitioners were entitled to a winding-up order *ex debito justitiae*:

(a) the HK Judgment was entitled to recognition: '*Dicey, Morris & Collins on The Conflict of Laws*', 15th Rule 48. The judgment was final notwithstanding the appeal in Hong Kong: *Dicey*, paragraph 14-023, *Gol Linhas Aereas-v-Matlin Patterson*; Cayman Islands Court of Appeal, Civil Appeal 12 of 2019, Judgment dated August 11, 2020 (Sir Bernard Rix JA) (unreported); *Nouvion-v-Freeman* (1889) App Cas 1;

(b) a foreign judgment could be recognised as the basis for a winding-up petition without first being formally enforced by the Court: *Re China Hospitals* [2018] 2 CILR 335 (Kawaley J);

(c) the mere existence of an appeal as of right does not make the debt a disputed one: *Re Amalgamated Properties of Rhodesia (1913) Limited* [1917] 2 Ch 115; '*McPherson & Keys Law of Company Liquidations*', 5th edition paragraph 3-089.

13. The principles relied upon in support of this point appeared coherent and to be supported by recent and longstanding persuasive authority. The Company's counsel's diligent research identified perhaps the only common law authority which casted doubt on the principles upon which the Petitioners relied. In the Company's Skeleton, Mr Milne argued:

> "*44. As Sir James Astwood, former Chief Justice of Bermuda, observed in Holborn Oil Company Limited v Tesora Petroleum Corporation*[1]*, a case which also involved a statutory demand based on a foreign judgment:*
>
> > *'It is basic law that a foreign judgment is not enforceable in Bermuda per se and I have no evidence that the Defendant has taken any steps in Bermuda to have the foreign judgment legally enforced here. In my opinion there is no debt in Bermuda which, would give the Defendant a right ex debito justitiae to an order to wind up the company. If this were so it would make a mockery of our Law and our institutions in that our sovereignty would be violated.'*
>
> *45. It is submitted that the same policy rationale applies in the Cayman Islands.*"

14. At first blush this authority, when placed in the scales with the Petitioners' authorities on this point, is found wanting. Not only was Bermudian winding-up law in 1990 in its infancy, Sir James Astwood did not appear to have been referred to any relevant authority on the topic of the recognition of and reliance upon foreign judgments at common law, as opposed to enforcement of foreign judgments in the strict (or narrower) sense. It seemed doubtful that the *Holborn* case reflected the modern Bermudian law position on this issue.

15. '*Dicey, Morris & Collins on the Conflict of Laws*' 15th ed. essentially explains that recognition of foreign judgments in relation to parties bound by them is driven by the public policy considerations of finality which underpin the *res judicata* principle, principles which have not been doubted since 1870: paragraphs 14-119-14-120. It suffices to set out Rule 48:

[1] [1990] SC (Bda) Civ 273 (20 August 1990).

> *"A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 49 to 52 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either:*
>
> *(1) of fact; or*
>
> (2) *of law.*"

16. *Gol Linhas Aereas-v-Matlin Patterson*; Cayman Islands Court of Appeal, Civil Appeal 12 of 2019, Judgment dated August 11, 2020 was a complicated case which directly concerned the enforcement of an arbitration award. However, the Court of Appeal also considered the issue estoppel principle in relation to foreign judgments, the only dispute being how one determined the finality question, not whether the doctrine applied. Most pertinently to the present case, Sir Bernard Rix JA (delivering the Court's leading judgment) cited the following authority with approval:

> "117. *The last and most recent authority to which I should refer under this issue is Midtown Acquisitions LP v. Essar Global Fund Ltd [2017] EWHC 519 (Comm), [2017] 1 WLR 3083 (Teare J). There, the claimant had obtained in New York a so-called 'confession judgment' and then sued on it in England. The respondent opposed the claim, but summary judgment was granted, albeit subject to a stay, since there was currently an application in New York to vacate the judgment. The issue was whether the New York judgment was "final and conclusive" or was like the 'remate' judgment in Nouvion v. Freeman. Teare J held that it was unlike the 'remate' judgment since it could only be challenged on appeal or on grounds such as error, fraud, misrepresentation or other misconduct. As Teare J said (at para [32]):*
>
> > *The judgment can be challenged on appeal (which challenge, it is common ground, is irrelevant to the question whether the judgment is final and binding) or on such grounds as error…*"
> > [Emphasis added]

17. In my judgment it is clearly the general Cayman Islands legal position that (a) a final and conclusive judgment of a foreign court cannot be challenged locally by parties bound by it and (b) the mere pendency of an appeal does not deprive a foreign judgment of its final and conclusive character. The quoted passage is highly persuasive if not strictly binding on this Court in relation to this general point. As *Dicey, Morris & Collins* put it at paragraph 14-026:

> "*At common law, a foreign judgment may be final and conclusive in the foreign country where it was given…*"

18. It remains to consider the more context-specific question of how these broad judgment recognition and issue estoppel principles apply in the winding-up context. It seemed counterintuitive to consider that such fundamental principles of general application should not apply in the winding-up context, absent express statutory provision to contrary effect. Firstly, may reliance be placed on a foreign judgment which has not been domesticated to found a petition debt? The Petitioners found only indirect local support for this proposition in a case where the relevant petition debt was based on a foreign arbitration award which had not been locally enforced. In *Re China Hospitals* [2018] 2 CILR 335, I did not directly consider the question of reliance on foreign judgments to found a petition debt at all. I did (at paragraphs 70-71) expressly consider by analogy the impact of a pending appeal on the both (a) the right to obtain a winding-up order, and (b) the discretion to make or not make a winding-up order:

> "*70 In re Amalgamated Properties of Rhodesia (1913) Ltd. (1) serves as a useful illustration of the circumstances in which the discretion to decline to make a winding-up order in light of a pending appeal against the judgment debt will be exercised where the petitioner has established a prima facie right to a winding-up order. In that case a winding-up order was made, with directions given for the petition to be dismissed if the respondent gave security for the petition debt. If security was not given, the winding-up order would become operative.*
>
> *71 That was a case where an appeal lay as of right on the merits of a judgment obtained following an ordinary civil trial…*"

19. But since *In re Amalgamated* did not concern a foreign judgment at all, the most that I can be viewed as having done was to assume (without deciding) in *Re China Hospitals* was that a pending appeal could not be relied upon as the basis for a disputed debt argument in relation to a foreign judgment as well as a domestic judgment. Because I treated that case as relevant to the effect of a pending appeal in relation to a foreign award.

20. However Mr Lowe QC was entitled to rely on the analogy between a foreign award which has not been converted into a local judgment through formal enforcement, the position in *China Hospitals*, and a foreign judgment. I did expressly decide in that case that the foreign award could without more be relied upon in a winding-up petition as the basis for the petition debt.

21. In short, I was satisfied at the hearing of the present petition that the general principles according to which a final foreign judgment on the merits cannot be challenged by a party bound by it applied

in the winding-up context and found no need to look for direct authority to this effect. Indeed, the Company's counsel did not have the temerity to advance any contrary submission. Having already indirectly approved the *ratio* of *Re Amalgamated Properties of Rhodesia (1913) Limited* [1917] 2 Ch 115 in *Re China Hospitals*, the additional authority to which Mr Lowe QC referred in oral argument, '*McPherson & Keays Law of Company Liquidation*', 5th edition (at paragraph 3-089), merely reinforced my provisional view.

22. This analysis is supported by the decision of Sergeant J in *Re Amalgamated Properties of Rhodesia (1913) Limited* at pages 123-124, which was tacitly approved by the Court of Appeal. By agreement before the Court of Appeal (in the winding-up proceedings), the company in that case give security for the petition debt as a condition for the petition being dismissed. Sergeant J at first instance however crucially opined (at page 123):

> "*In my judgment, therefore, the petitioners are entitled as a matter of right to a winding up order, and, if I were not to make it, I should practically be doing what Eve J. or the Court of Appeal ought to have been asked to do, if the respondents so desired-namely to stay execution on the judgment pending the appeal. Sir John Simon has, however, suggested that the respondents may at an early stage be in a position to provide security…for this debt, and I think I should give them the opportunity to do so.*"

23. In light of the weight of the above authorities, I had little difficulty in declining to follow *Holborn Oil Company Limited v Tesora Petroleum Corporation* [1990] SC (Bda) Civ 273 where the petition was dismissed on the grounds that the foreign judgment had to be locally enforced before reliance could be placed upon it. That decision was unsupported by any other authority; and the Company's counsel in the present case were unable to garnish their bare reliance on that summary decision with more meaty authority supportive of the Bermuda Supreme Court's decision.

24. For these reasons I accepted the Petitioners' submission that they were entitled to a winding-up order as of right having served a Statutory Demand under section 93(a) of the Companies Act (2021 Revision). I rejected the Company's submission that the Petition should be dismissed because the Petition Debt was a disputed one.

25. I then heard argument on what to my mind was the only controversial issue, whether a winding-up order should be made or the petition adjourned. Although the Company's fall-back position was that Petition should be stayed if not dismissed, this approach seemed to me to assume that the Court

had determined that the Petition Debt was disputed and that the Petition was being stayed while the dispute was resolved in separate proceedings.

Declining to wind-up and deciding to adjourn the Petition

26. What principles govern the exercise of the broad discretion conferred on this Court by section 95(1) of the Companies Act when hearing a petition? The statute provides:

> "*Upon hearing the winding up petition the Court may —*
>
> *(a) dismiss the petition;*
>
> *(b) adjourn the hearing conditionally or unconditionally;*
>
> *(c) make a provisional order; or*
>
> *(d) any other order that it thinks fit,*
>
> *but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.*" [Emphasis added]

27. Section 95 itself gives no guidance as to how the broad discretions it confers should be exercised. Guidance must be sought from case law and leading texts. It seemed obvious that the Court should not grant a winding-up order without forming some view as to the Company's prospects of success in its pending appeal. Both sides were agreed, for somewhat different reasons that this Court should not carry out that merits assessment exercise.

28. The Petitioners submitted that the Company was "*being asked by the Company to hear what is virtually an appeal which will likely never be admitted by the Hong Kong Court of Appeal*" (Skeleton Argument, paragraph 29). It was accordingly argued that not only should the final judgment already granted by Chan J be recognised, this Court ought not to second-guess what view the Hong Kong Court of Appeal would form of the *Ladd-v-Marshall* application.

29. The Company argued in its Skeleton more directly that Hong Kong was the forum where the merits of the dispute it contended still existed should be tried:

> "*17.9 in the alternative, without prejudice to the Company's primary submission that the Petition should be dismissed, in circumstances where the Court is not minded to dismiss the Petition at this stage, it is submitted that it is appropriate to stay the Petition pending the outcome of ongoing litigation in Hong Kong to permit the parties to resolve their disputes, which revolve around matters governed by Hong Kong law, by the dispute resolution mechanism to which the Company (and/or Exquisite) and the Petitioners contractually agreed.*"

30. It was possible to infer from the fact that the Company had not already applied for a stay of the Honk Kong Judgment that its prospects were not demonstrably strong. The test for a stay of execution pending appeal was clearly a high one. Moreover, the Company was clearly trying to enhance its prospects of appellate success through its application to adduce further evidence in support of its appeal to the Hong Kong Court of Appeal. I granted the Company's application to adduce further evidence to a very limited extent, permitting the Respondent to rely upon three paragraphs of the 54 page long Second Deng Affirmation and roughly 40% of the Exhibit thereto. This was evidence which was relevant to the question of how the Court should dispose of the Petition have determined that the Petitioners were *prima facie* entitled to a winding-up order. I did not consider it necessary to assess the merits of the Hong Kong application, but rather took into account the fact it was being made.

31. Mr Lowe QC forcefully argued that the proper course for the Company to pursue if it wished to prevent the Petitioners from relying upon the HK Judgment was to seek a stay of that judgment pending appeal. This was supported by indirect general authority and direct text authority. In *Nouvion-v-Freeman* (1889) 15 App Cas. 1 at 13, Lord Watson stated:

> "*In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of an appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable, the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal…*"

32. The learned authors of *Dicey Collins & Morris*, after quoting this passage (at paragraph 14-26), add:

> "*So in a proper case a stay of execution would no doubt be ordered pending a possible appeal.*"

33. The general position is therefore that a foreign judgment will not be enforced without having some regard to the outcome of a pending appeal. In the foreign arbitration award enforcement context, the Cayman Islands Court of Appeal stayed the local judgment granting enforcement pending the outcome of a Brazilian appeal: *Gol Linhas Aereas-v-Matlin Patterson*; Cayman Islands Court of Appeal, Civil Appeal 12 of 2019, Judgment dated August 11, 2020 (at paragraph 197). But this was only because it was too late to do what the relevant statutory scheme contemplated, namely to "*allow the court before which enforcement is sought to adjourn the enforcement proceedings pending the outcome of set aside proceedings in the court of the seat.*" Against the background of these authorities in the judgment enforcement context, the position contended for by the Petitioners in relation to reliance upon a foreign judgment as the basis for a petition debt in winding-up proceedings seemed uncontroversial. On the other hand, the Company's contention that the pending appeal should be taken into account also seemed sound.

34. The learned authors of '*McPherson & Keays Law of Company Liquidation*', 5th edition (at paragraph 3-089) notably state in a passage upon which Mr Lowe QC aptly relied:

> "*Where the petition is founded on an unpaid judgment debt or costs, the petitioner is not deprived of the right to a winding-up order simply because the company has lodged an appeal against the judgment. The proper course is for the company to apply for a stay of execution of the judgment pending determination of the appeal and to seek an adjournment of the winding-up petition...*"[2] [Emphasis added]

35. This was a very clear steer towards recognising and allowing a petitioner to rely upon a judgment despite an appeal unless the judgment could be stayed. Hong Kong authority upon which the Petitioners' counsel also relied also suggests that a stay of execution should be sought if the company wishes to prevent a winding-up order being made before a pending appeal is heard and decided. However, this authority also contemplates that the winding-up court could stay the winding-up proceedings, applying the high threshold test applicable to granting stays of execution pending appeal. In *Re Shiamas International Ltd.*[2014] HKCFI 1601(where a winding-up order was actually ultimately made), Jonathan Harris J opined as follows:

> "*Mr Dobby who appeared for the supporting creditor submitted that it is quite clear that in the absence of a stay of a judgment it is only in very limited circumstances that the Court will decline to make a winding up order until after*

[2] The sole authority cited for this principle is *Re Anglo-Bavarian Steel Ball Co* [1899] W.N. 80, which was not placed before the Court.

an appeal of the judgment has been determined. In order to justify the stay of a winding up petition, there must be shown very strong prospects of an appeal succeeding: Kwan J explained the principles in Re Rotegear Corporation Limited HCCW 538/2009 (16 Nov 2009) ([2009] HKEC 1874) at para 4:

> *'The principles upon which the court acts in an application to stay a winding-up petition pending the hearing of an appeal from a judgment upon which the petition is founded were considered by Barma J in Re Sky Talent Properties Ltd, HCCW No. 892 of 2003, unreported, 9 December 2003, paras. 7 to 12. The fact that an appeal is pending does not amount to a ground for declining to make a winding-up order, where no stay of execution has been obtained. As stated by Barma J, the alternate basis on which a stay of execution pending appeal may be granted, namely that there are arguable grounds of appeal and the appeal would be rendered nugatory if there should be no stay, would not generally provide a ground for the court to stay the winding-up petition, as the making of a winding-up order would not prevent the appeal from going ahead, it being open to the liquidator to prosecute the appeal if he feels it in the interest of the company to do so and contributories or creditors are willing to provide funding for the exercise. The requisite degree of strength of merits of the appeal, to justify an exercise of discretion for a stay of the winding-up petition, is not just arguable but very strong prospects of the appeal succeeding.'*

Similarly in Re Sky Talent Properties Limited, HCCW No. 892 of 2003 (9 Dec 2003) ([2004] HKEC 472) at para 11, Barma J says this:

> *'…. it seems to me that if, on the material presented at the hearing of the winding up petition, the court is able to see, without going into the merits of the appeal in more than a preliminary way, that there are very strong prospects of the appeal succeeding, it may well be appropriate for the court to consider at least staying the winding up proceedings pending the outcome of the appeal. In the context of an application for a stay of execution, the level of strength required has been described as so strong as to suggest that "something has gone grievously wrong with the process of law in the court below"[3] (see e.g. World Trade Centre Group Limited v Resourceful River Limited (unreported, CA, Litton JA, 12 May 1993), applied in Wenden Engineering Service Company Limited v Lee Shing Yue Construction Company Limited (unreported, CFI, Ma J, 17 July 2002)). I see no reason why the level of strength required in order to resist the making of a winding up order, where no stay of execution has been applied for, should be any lower."'* [Emphasis added]

36. In *Shiamas* an immediate winding-up order was granted because there was no evidence that the company was likely to be able to obtain a stay of the French judgment or pursue an appeal. The

[3] This passage revealed the high hurdle the Company will likely be required to meet to obtain a stay of the HK Judgment pending appeal. It also confirmed my view that staying the present Petition to permit the Company to pursue its appeal was inappropriate in circumstances where I could form no preliminary view of the merits of that appeal.

Company in this case is listed in Hong Kong and is apparently actively pursuing an appeal before the Hong Kong courts.

37. It is moreover important in the interests of comity, as I observed in the course of argument, that the Cayman Islands courts are astute to avoid accidentally undermining the integrity of parallel or related proceedings before the Hong Kong courts. This factor may have somewhat diminished significance when the Hong Kong Court has already delivered judgment on the merits of a petition debt, but it has some relevance all the same. As Parker J observed in *Altair Asia Investments Limited*, FSD 200 of 2019 (RPJ), Judgment dated March 16, 2020 (unreported)[4]:

> "*67…Comity and cooperation is particularly important in the field of cross-border insolvency and it my view it would not be appropriate for this Court to proceed to a judgment on the disputed debt by determining the Petition before Mr Justice Harris has handed down judgment.*
>
> *68. I have decided that the right course is to accede to the company's submission to adjourn because there is a risk of conflicting judgments if this Court were to proceed to determine the Petition in advance of the Hong Kong Court.*"

38. My own researches have also revealed another, somewhat different, case which supports the views I expressed in the course of the hearing about the importance of showing due deference to the Hong Kong Courts in the context of overlapping proceedings. In *Re China Agrotech Holdings Limited* [2019] 2 CILR 332, (in which Mr Lowe QC coincidentally also appeared), Segal J observed (at paragraph 19):

> "*(d) It also seems to me to be right, for the reasons given by Mr. Lowe, that there are strong grounds for believing that the risk of inconsistent judgments is low. I am anxious, however, to avoid any discourtesy to or conflict with the Hong Kong court and would, had the Hong Kong court expressed the wish to do so, have been prepared to defer giving judgment pending further discussions between the parties and the courts…*"

39. I took the view that although the March 1, 2021 judgment of Chan J meant that the Petition Debt was no longer disputed, the fact that an appeal appeared to be vigorously being pursued by the Company meant that there was a risk of inconsistency between this Court granting an immediate winding-up order based on a debt which the Hong Kong Court of Appeal might in the foreseeable

[4] This case was not addressed in argument.

future determine was not undisputed at all. This anxiety was fortified by the fact that it was impossible for me to form a summary view of the merits of a complicated appeal relating to a transaction between the Company and related parties whose debt it was said would be shown to be invalid on the basis of recently obtained evidence of impropriety.

40. All these considerations arising in the context of a broad discretionary statutory adjournment power irresistibly suggested that the Petition should be adjourned on terms. Although this issue was not addressed at the hearing, the fact that the Petitioners were related parties and it was unclear to what extent their interests were truly aligned with the general body of unsecured creditors was another subliminal consideration.

Terms of the adjournment

41. The terms of the adjournment flowed logically from my acceptance of Mr Lowe QC's submissions that:

(a) the proper procedure for the respondent to a winding-up petition to follow if it wishes to obtain the indulgence of an adjournment in light of a pending appeal is to obtain a stay of execution pending appeal in respect of the judgment upon which a petition debt is based;

(b) a relevant consideration as to whether or not to make a winding-up order before the appeal was determined was when the stay application would likely be heard and no evidence on this point had been placed before the Court by the Company.

42. I therefore determined that adjourning the Petition on the condition subsequent that the Company files evidence that it had applied for a stay of execution in Hong Kong no later than October 29, 2021, and that the Company should in that evidence also address when the proposed stay application would likely be heard. Somewhat marginally, I was persuaded to require the Company to evidentially address the issue of when a new auditor was likely to be appointed by the Company, a matter which was potentially relevant to the future need to appoint provisional liquidators.

Costs

43. The Petitioners' counsel sought costs on the indemnity basis to be taxed and payable forthwith. Mr Milne submitted that costs should be reserved. I reserved costs in order to review the way in which the Company had approached its application to adduce fresh evidence in further detail. My provisional view was that the Petitioners had comprehensively won the dispute about their standing to seek a winding-up order and should be awarded their costs. Whether those costs should be payable on the indemnity basis was far less clear, although it seemed doubtful that grounds for ordering taxation and payment forthwith would be found to exist. GCR Order 62 rule 4 provides:

> "*(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

44. The critical question was whether or not the Company had engineered a situation whereby it filed evidence, or an application to adduce further evidence, so late that the Petitioners would be forced to seek an adjournment in order to reply to the evidence contrary to the July 15, 2021 Order. The terms of this Order were specifically designed to prevent such an occurrence. The timeline of relevant events based on the evidence and the record herein may be summarised as follows:

- **July 15, 2021**: the Petitioners are granted leave to file responsive evidence to the Company's evidence by August 12, 2021 and the Court directs that no further evidence should be filed without leave of the Court;

- **August 10, 2021**: Petitioners seek Company's agreement to extension of time for filing evidence until August 26, 2021. The Company agrees the following day;

- **August 26, 2021**: Fourth Affirmation of Chow Ho Hon Eric affirmed on behalf of the Petitioners;

- **September 2, 2021**: Howse Williams, whose Preliminary Reports forwarded to regulatory and enforcement agencies in Hong Kong were

described in Mr Deng's First Affirmation, produced Supplemental Reports;

- **September 14, 2021**: in the HCA 260 Action, Exquisite Honor Holdings Limited, served a Statement of Claim in support of its case that the agreements, which resulted a dividend declared to the Petitioners one day before the closing of the Yicko Acquisition, are null and void;

- **September 24, 2021**: the Company's attorneys seek the Petitioners' attorneys agreement to file further evidence, "*as soon as possible and, in any event, before 4pm on 8 October 2021*";

- **September 29, 2021**: Howse Williams submitted an Interim Report to the authorities in relation to an "Independent Internal Inquiry" into the Yicko Acquisition;

- **September 30, 2021**: the Petitioners' attorneys reserve their rights until seeing the evidence pointing out that hearing bundles and skeletons are due by October 12, 2021 and suggesting that the proposal to serve further evidence by October 8, 2021 "*does look like a cynical decision on the part of your client to seek to take a tactical advantage*";

- **October 7, 2021**: the Company makes a *Ladd-v-Marshall* application to adduce further evidence in support of its appeal. The supporting Affirmation avers that the fresh evidence was first reviewed in late August, 2021 after Howse Williams had completed imaging email boxes of various Company officers, which emails could not have been reasonably accessed until March, 2021;

- **October 8, 2021**: the Company receives a letter of support for the current Board from a shareholder. The Company forwards draft evidence to the Petitioners and, somewhat cheekily, to the Court as well with a query as to whether a formal application to rely on the new material was required;

- **October 10, 2021**: the Petitioners advise the Company that the proposed evidence "*is impossibly late and wholly irrelevant*" and accordingly the Company's application would be refused.

- **October 11, 2021**: the Second Deng Affirmation is affirmed;

- **October 15, 2021**: The Petitioners establish that the Petition debt is not disputed and the Company's application to dismiss or stay the Petition on the grounds that it is based on a disputed debt is refused. The majority of the additional evidence the Company seeks to adduce is ruled inadmissible on grounds of irrelevance. Evidence relating to the *Ladd-v-Marshall* application dated October 7, 2021 is admitted. The Petition is heard and adjourned on terms.

45. In my judgment the Company was entitled to seek leave to place before the Court evidence showing it was fortifying (or seeking to fortify) its appeal prospects in Hong Kong through making the *Ladd-v-Marshall* application which was made on October 7, 2021. However, it ought to have been obvious that a formal application for leave was required. But, more pertinently, based on the material before me, it is not clear that the application could have been made much sooner. The general evidential picture suggests that the Company was doing its best to prepare an application for the Hong Kong Court of Appeal and the adjourned hearing of the Petition rather than slyly deploying time-wasting tactics. I am unable to find that the further evidence application was deliberately delayed, especially since notice of the intention to rely on further evidence was given on September 24, 2021. That was respecting rather than undermining the letter and spirit of the July 15, 2021 Order.

46. I did admittedly find on October 15, 2021 that the Company's attempt to argue that the Petition Debt was disputed based on the existing of a pending appeal and most of the proposed further evidence was misconceived. I also found that the proper course for the Company to take was to apply for a stay of execution pending appeal in Hong Kong. Was this litigating in an improper or unreasonable way, as the Petitioners' counsel complained? Failing to follow the correct procedure is clearly within indemnity costs territory. However the pivotal rules of law and practice about (a) the impact of pending appeals on the right of a petitioner to rely on the judgment debt and (b) the

need to obtain a stay (or secure payment of the judgment debt) to avoid a winding-up order, have never (seemingly) been directly considered before by this Court. In my judgment the Company has come close to entering, but has not actually entered, indemnity costs territory in the way it conducted itself in relation to the October 15, 2021 hearing.

47. On the other hand it is clear that the Petitioners achieved substantial success and, having regard to the overriding objective set out in GCR Order 62 rule 4(2)[5], are entitled to their costs of and relating to the October 15, 2021 hearing which I award them in any event to be taxed if not agreed on the standard basis.

Conclusion

48. These are the reasons for the conditional adjournment of the Petition on October 15, 2021 and my decision as to the costs of and in relation to that hearing.

THE HON. MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

[5] The sub-rule provides: "*The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"