Neutral Citation Number: [2021] CA (Bda) 21 Civ

Case No: Civ/2022/11

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL/COMMERCIAL JURISDICTION
THE HON. MR. JUSTICE MUSSENDEN
CASE NUMBER 2021: No. 338

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 18/11/2022

Before:

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

- -

IN THE MATTER OF NEWOCEAN ENERGY HOLDINGS LIMITED
AND IN THE MATTEROF THE COMPANIES ACT 1981

Between:

THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED
Appellant

- and -

NEWOCEAN ENERGY HOLDINGS LIMITED
Respondent

Keith Robinson, Carey Olsen Bermuda Limited, for the Respondent

Kevin Taylor, Walkers (Bermuda) Limited for the Appellant

Hearing date(s): 14 November 2022

- -

APPROVED REASONS

CLARKE P:

1. On **Tuesday 26 July 2022** we allowed the appeal of the Hong Kong and Shanghai Banking Corporation ("HSBC" or "the Petitioner") from the decision of Mussenden J, dated 31 May 2022 (leave to appeal having been granted by the judge on 1 June 2022), and ordered that the Respondent, NewOcean Energy Holdings Ltd ("NewOcean" or "the Company"), a Bermuda company, should be wound up and that the joint provisional liquidators should continue as provisional liquidators with the powers granted pursuant to section 175 of the *Companies Act 1981*, which powers were not to be limited by section 170 (3) of the *Companies Act*, such that the Amended Light Touch Order was no longer to be in effect. The winding up order was made in relation to a petition filed by HSBC on 22 October 2021.

2. On **30 September 2022** we gave detailed reasons for the decision ("the Reasons") that we had made at the end of July.

3. The Company, acting through Mr Shum, its executive director, now seeks leave to appeal to the Judicial Committee of the Privy Council from our decision and a stay of the order which we made, pending the final determination by the Privy Council of the appeal.

Leave to appeal

4. The Company contends that it is entitled to appeal as of right. As to that, section 2 of the *Appeals Act 1911* provides that an appeal shall lie:

> "(*a) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of $12,000 or upwards or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $12,000 or upward*;"

If an appeal lies as of right it would only be proper to refuse leave if the putative appeal was devoid of merit and bound to fail, or if the appeal was an abuse of process. That is not the case here.

5. I do not accept that the Company's putative appeal is from a decision of this Court where either "*the matter in dispute on the appeal amounts to or is of the value of $12,000 or upwards*" or where the appeal "*involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of $12,000 or upward*".

6. The application of this section was considered by this Court in *Sturgeon Asia Central Balanced Fund Ltd v Capital Partner Securities Co Ltd* Civil Appeal No 14 of 2017, in which this Court determined that the participating shareholders in a fund were entitled to vote to terminate the fund and have a Company wound up on the just and equitable grounds. The Court, which had been provided with a bundle of some 50 authorities on the question, held that there was in that case no appeal as of right under section 2 (a). In the lead judgement Baker P observed, echoing the words of Lord Hodge in the Privy Council case of *A v R* (5 March 2018) that the provision for a right of appeal if the amount in dispute amounted to or was of the value of $12,000 was "*anachronistic*" and should be "*restrictively rather than liberally applied"*. He also observed, *inter alia*, that:

(a) the money realised in the liquidation of the Company was not "*the amount of the matter in dispute*" nor was it "*the amount of a claim or question relating to property"*
(b) the economic consequences of the Court's winding up order were indirect and/or too remote

7. The value of the debts owed by the Company to its bank creditors, of whom the Petitioner is one, amounts to some $ 770.6 million. And the Petition debt is over US $ 70 million and HK $ 5.4 million. But those debts were not the matter in dispute on the appeal. The Petition debt was not disputed and nothing decided by this Court or the Privy Council will determine whether or not it exists or in what amount. The appeal did not determine a claim to property or a question respecting property. Nor did it determine the existence or otherwise of some civil right. What was in dispute on the appeal was to whether the Supreme Court had erred in the exercise of its discretion in further adjourning the winding up proceedings, and continuing the Amended Light Touch Order, and not ordering the immediate winding up of the Company.

8. Mr Keith Robinson for the Company submits that the appeal involves directly or, at the lowest, indirectly some claim or question to or respecting property amounting to or of the value of more than $12,000, the question being whether or not the Court was right to grant a winding up order in relation to the Petition debt. I do not accept that this submission is well founded. The section is to be narrowly construed and it must, in my view, be held to apply if, but not unless, there is a claim in respect of some property to which the would-be appellant is, or claims to be entitled, or some question in respect of that property. No such question arises. The Petitioner's entitlement to the only relevant property – its chose in action against the Company – is not in question. A contrary conclusion would not constitute the application of a strict construction; would not, as it seems to me, be consistent with *Sturgeon*; and, if correct, would appear to mean that, in relation to all windings-up where the Petition debt exceeded $12,000, there was an appeal as of right.

9. The 1911 Act also provides that an appeal to the Privy Council may lie:

> "(c) *at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision*."

10. It is apparent from the authorities – such as *Imran Siddiqui v Athene* [2019] BN 2020 CA 2 - that it is necessary for a would-be appellant who relies on the "*great general or public importance"* provision to show that there is a dispute as to the applicable principle[s] of law rather than a dispute as the applicability of settled principles of law to the facts of the case.

11. In *Imran Siddiqui* Smellie JA cited, inter alia, the judgment of the British Virgin Islands Court of Appeal in *Renaissance Ventures Ltd v Comodo Holdings* [2018] ECSC J 1008-3:

> "*Where there is no dispute on the applicable principles of law underlying the question which the appellant wishes to pursue on his or her appeal, a question of great general public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there*

> *are some genuine uncertainties surrounding the principle itself, or if it is considered to be far-reaching in its effect, or given to harsh consequences or for some other good reason would benefit from consideration at the final appellate level, this court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance*."

12. Mr Robinson further submits that, according to his research, there have been 25 reported Bermuda Supreme Court cases in the last 10 years that have concerned Hong Kong provisional liquidations (which I take to mean, provisional liquidations in relation to companies carrying on business in Hong Kong). None of them have been successfully appealed to the Court of Appeal for Bermuda or to the Privy Council. There is a lack of judicial guidance on provisional liquidations in Bermuda from the highest court which has left uncertainty as to, *inter alia*, the appellate Court's ability to use its discretion in the context of a provisional liquidation to order a winding up. This, he submits, has given rise to conflicting views, genuine uncertainty and likely harsh consequences that will affect the interests of the Company's creditors. Further the increasing regularity with which Hong Kong provisional liquidations are appearing in front of the Bermuda courts reinforces the point that it is of general public importance that Bermuda's highest appellate court should opine on this subject and bring clarity to this important area of law.

13. This is said to be of particular importance to the Company which is a public listed Company with around 48% of its stock held by the general public. The Group has over US$ 1 billion worth of assets and was operating one of the major LPG and oil terminals in the Southern China region. There were continuing negotiations in respect of asset sales in terms of hundreds of millions of US$s. The Company's 30 bank lenders were major local and international banks. The Group has over 950 employees in Hong Kong and China whose livelihood depends on the continuing survival of the Group. The question whether the Company should face an immediate winding up order is, it is submitted, clearly a matter of public importance and not a private matter.

14. Mr Kevin Taylor for HSBC submits that there is, in truth, no issue of great general or public importance. The question of whether this Court was correct to overrule the judge and order the immediate winding- up of the Company fell within the ambit of judicial discretion. The case concerned the application of settled legal principles in the area of Bermuda insolvency law and their application to the facts of the case. There is no novel issue of law.

15. He also referred us to what was said by Lord Bingham in the context of an application for leave to appeal to the House of Lords in v *Secretary of State for Trade and Industry ex parte Eastway* [2000] 1 WLR 2222, at 2228:

> "*In its role as a Supreme Court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of certain law, even where such are shown to exist."*

16. Thus, Mr Taylor submits, even if the Court was persuaded that there was an error in its application of the relevant principles, this would be an insufficient basis for the grant of leave to appeal. Further, if, contrary to that submission, the Company was able to demonstrate that there was some ground of general importance, the Court still retains a discretion and should be slow to grant leave. In the English Supreme Court decision of *Uprichard v Scottish Minister* [2013] UKSC 21, Lord Reed said at [59] that:

> "*Appeals against any order or judgement of the Court of Appeal in England and Wales or in Northern Ireland can be brought only with the permission of the Court of Appeal or of this court.* ***In practice, the Court of Appeal normally refuses permission so as to enable an appeal panel of this court to select, from the applications before it for permission to appeal, the cases raising the most important issues"****.* [Emphasis added].

17. Further in *Sturgeon* Baker P, when considering the "*or otherwise*" provision observed:

> "*Whilst there is authority to indicate that the words or otherwise are not to be read with the previous provision in the subsection, it is also clear not only from the wording of the section, but also from a number of Commonwealth cases that the threshold is a high one, and that there must be truly exceptional circumstances to justify this court in granting leave. In the circumstances therefore, for my part, I would refuse leave. I would do so having said that there were a number of very troubling issues in this case that this Court decided and were resolved in the judgement of my Lord Justice of Appeal Clarke. But, none of those issues seem to me to cross the threshold of carrying a sufficient interest, beyond the interests of the parties, to justify this court in granting leave to appeal. It seems to me that the Privy Council, like the Supreme Court, much prefer to decide which cases they will they wish to take on appeal, and in my judgment that matter is better left to them to decide."*

18. The Company has in its submissions and in a number of affirmations set out, at some length, the respects in which it contends that the Court was in serious error. No useful purpose would be gained by going through those points at length, let alone responding to them. In essence they are that the Court:

(i) wrongly substituted its discretion for that of the judge;
(ii) failed to take into account how close the Company was to disposing of its assets at a price which meant that all or most of its debts would be paid;
(iii) ignored or paid little heed to (a) the time inevitably required to secure a disposition of so substantial a body of assets; (b) the need for the proposed sales to be close to completion before a restructuring proposal could be properly considered; and (c) to the prospect of the value of its assets being reduced to a fraction if the liquidation proceeded; and
(iv) paid too much attention to the need for 75% of the creditors to agree with the proposals (and the fact that some 66% supported the winding up) in circumstances where the creditors were either ignorant of the nature and extent of the progress which had been made (or of Mr Selvia's affidavit) or had been misled by the JPLs, and had not been made aware of the Company's explanations for what it was said to have done wrong
(v) gave insufficient weight to the efforts of the Company to cooperate with the JPLs and to provide information; see [41] of Mr Shum's second affirmation.

19. I would accept that these contentions are arguable. But it does not seem to me that an appeal to the Board would raise any question of great general or public importance, as opposed to a question of great importance to the Company and its shareholders and creditors. The judgment considered a substantial number of well-known authorities and sought to apply them. Mr Robinson submits that those authorities were not cases decided in the context of the availability of a "light touch" provisional liquidation, and that the Privy Council should have the opportunity to consider whether they are applicable without qualification where there is in place a light touch order with a view to restructuring and, in particular, whether or not the creditors, in that context, do have an entitlement as between them and the Company, to a winding up order *ex debito justitiae*, and whether or not the views of a substantial majority should be afforded the significance which this Court attached to them.

20 I am not persuaded that this submission takes the case out of the category of one where what is, in essence, in issue is whether the judgment of the Supreme Court was a valid exercise of a statutory discretion. Further, in my view, the question of whether or not an appeal should be entertained by the Board on the basis suggested by Mr Robinson or otherwise is very much something that, in a case such as this, the Board should decide.

21. Accordingly, I would decline to grant leave on this basis, also.

Stay

22. Since I would refuse leave, it follows that the only basis upon which the case could be taken to the Board would be if the Board were minded, itself to give leave. In the nature of things, and having regard to the size of the material that has been provided to us, an application for leave is not likely to be capable of swift determination by the Board, unless the Board were persuaded that it should accelerate its procedure.

24. The present case is not one where a plaintiff has obtained, or has been denied, a judgment for a debt. What was sought, and has been granted, is the collective remedy afforded by a winding up order. In relation to such cases HSBC relies on the dicta of Plowman J in *Re A and BC Chewing Gum* Ltd [1975] 1 WLR 59 where he said:

> "*It [i.e. the relevant section of the Companies Act 1948] says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then there is the question of practice, and as a matter of practice a stay is never granted…But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding up order has been made the Official Receiver has to ascertain first of all the assets as at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of section 227 of the Act of 1948 ; and thirdly the liabilities of the Company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.*
>
> *Supposing there is an appeal and the winding up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered; it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But if the business is being carried on at a profit, as I understand this business now is, no*

additional harm is done by refusing a stay … Of course if the business can only be carried on at a loss- it should not be carried on at all."

25. Whilst the considerations to which Plowman J referred are potentially relevant, I do not accept that in a liquidation case a stay should never be granted; nor, indeed, that that remains the position in England. If that were so, the discretion given to the Court would, in reality, be non-existent.

26. In *Aabar Block SARL v Maud* [2016] EWHC 1319 (Ch) Snowden J (as he then was) set out the law on stays of judgments and orders in the following terms:

22. The principles applicable on an application for a stay pending appeal were helpfully summarised by Mr Justice Eder in Otkritie International Investment Management Limited & Ors v Urumov (aka George Urumov) & Ors [2014] EWHC 755 (Comm) at paragraph 22. Mr Justice Eder stated:

"As summarised by the claimants, the applicable principles are as follows:

1. First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR 52.7 .

2. Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: Winchester Cigarette Machinery Ltd v Payne And Another unreported 10 December 1993 per Ralph Gibson LJ.

3. Third, as stated in DEFRA v Georgina Downs [2009] EWCA Civ 257 at paragraphs 8 to 9, per Sullivan LJ (emphasis supplied):

'A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay and, if such grounds are established, then the court will undertake a balancing exercise , weighing the risks of injustice to each side if a stay is or is not granted.

It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture or because a threatened strike will occur or because some other form of damage which will be done which is irremediable …'

4. Fourth, the sorts of questions to be asked when undertaking the "balancing exercise" are set out in Hammond Suddard Solicitors v Agrichem International Holdings Ltd. [2001] EWCA Civ 2065 at paragraph 22 per Clarke LJ (emphasis supplied):

'By CPR rule 52.7 , unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion

> *whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent? '*
>
> *5. Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: Leicester Circuits Ltd v Coates Brothers [2002] EWCA Civ 474 at paragraph 13, per Potter LJ."*

27 In the course of his judgment he observed, in the context of an application to stay a bankruptcy order pending the determination of an application for permission to appeal, that, in that case, there was no urgent need to get in or secure the assets of the estate or to identify creditors or to obtain information from Mr Maud. There was only one asset of Mr Maud which was capable of being realised which was his shareholding in a Company called Ramblers. He then said:

> "[34] *It is, however, the risk of irreparable harm to Mr Maud's interests in those shares if a bankruptcy order is made, that in my judgement provides solid grounds for Mr Maud seeking a stay pending appeal. It is not disputed that if a bankruptcy order is made without a stay, the provisions of article 12 (i) (b) of Ramblas' articles will be irreversibly triggered. Those articles provide that in the event that a shareholder loses the right to dispose of his property in any manner whatsoever (which would be the case if a bankruptcy order was made and not stayed), his shares must be offered to the other shareholders. That compulsory process under the articles cannot be halted once initiated."*

27. In the result Snowden J was satisfied that, if he did not order a stay until the appeal could be heard, Mr Maud would suffer the irremediable prejudice of being forced to offer his shares in Ramblers for sale which would, of itself, deprive him of his property, and would be something that could not be undone if the appeal were to succeed. He also found that the petitioners would suffer no counterbalancing prejudice if the order was stayed for a short period. He therefore granted a stay until after the determination of the application for permission to appeal and, if permission was granted, the determination of the appeal.

28. In *Aabar* Snowden J also referred to the dictum of Potter LJ in *Leicester Circuits Ltd v Coates Brothers* [2002] EWCA Civ 474 at [13]:

> "*The proper approach is to make the order which best accords with the interests of justice. Where there is a risk upon one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal."*

29. A stay of a winding up petition was also granted in *Re Dollar Land (Feltham) Ltd* [1995] BCC 40; and in *Fullsun International Holdings Group Company Ltd* [2022] SC (Bda) O 43 Com. In the latter case the petitioner had failed to establish that it would derive any benefit from the winding up; the adjournment had the support of 72% by value of the unsecured creditors and it was likely that another 23% were of the same view. The judge (Mussenden J) also derived assistance from *McPherson and Keay on the Law of Company Liquidation* (Sweet & Maxwell, 5th Ed) where it stated that 'a '*good reason'* to adjourn is '*that winding up will deprive creditors of the benefit of a proposed compromise, or will endanger a scheme for reconstruction*."

30. In the light of those authorities it is apparent that we should consider the potential consequences if, on the one hand:

    (a) a stay is granted but any appeal is unsuccessful either because the Privy Council failed to give leave or because, after leave was given the appeal failed; and, on the other hand:

    (b) a stay is refused and an appeal is successful.

32. As to the former, HSBC submits that it is important and desirable for the liquidation of the Company to proceed because, having regard to the uncertainty of the Company's financial status and the conduct of the Company's displaced board, there is no basis to suggest that the interests of the creditors can be adequately safeguarded if a stay is granted and management of the Company is returned to the control of its directors.

33 The Court should, it is submitted, take into account a number of factors which are detailed in the reasons including the following:

    (a) the Company owes to HSBC an undisputed debt (as it does to the other bank creditors);
    (b) the Company's executive directors (other than Mr Shum) have resigned as have the auditors;
    (c) the Company's major bank creditors did not support the prior restructuring efforts in 2020 and 2021;
    (d) the Company's auditors disclaimed their opinion on the 2021 accounts
    (e) on 27 October 2021 the Company announced that it had relocated its headquarters from Hong Kong to mainland China, which included relocating its books and records. As a result, the JPLs, even as at the date of their Third Report to the Supreme Court on 5 July 2022, do not appear to have had access to all the book and records of the Company;
    (f) the Company deliberately breached the Light Touch Order by failing to inform the JPLs, HSBC and the Supreme Court that a winding up petition had been filed in Hong Kong on 12 April 2022 by Kuwait Petroleum Corporation, a trade creditor, in circumstances where the Company had refused to disclose the identity of its trade creditors to the JPLs. The Company appeared to be seeking to obscure the extent of the debts owed to its creditors;
    (g) the Company dissipated its assets by way of the two share pledges referred to at [38] – 45] of the Reasons without reference to the JPLs;
    (h) the Company failed to publish its 2021 Annual Results by the requisite deadline as a result of which trading in its share on the HKSE was suspended on 1 April 2022 and remains suspended; those results have still not been published.

(i) the Company failed to provide the JPLs with the necessary financial information to consider the viability of any restructuring proposal and whether it was in the best interests of the creditors.

34. HSBC submits that, in the light of the above, a stay would be potentially damaging to the interests of the creditors, including itself, and that this damage could not be offset by a reversion to the Light Touch Order in circumstances where the former management had (a) withheld and obscured key information and developments from the JPLs; and (b) was in a position to procure the dissipation of assets with the JPLs[1] being powerless to prevent that.

35. HSBC further submits that the contention that in the absence of a stay application the appeal will be rendered nugatory and that the execution of the winding up order will bring terrible adverse economic consequences for the Company should be rejected.

36. The matters relied on by HSBC in the preceding paragraphs have been supplemented by a very recent report to this Court from the JPLs, received by the Court in the last week of October 2022. The Report is a very substantial work, 45 pages in length with over 900 pages of annexures. The Executive Summary includes the following statements:

(i) The main challenge to the winding up of the Company is that the Company is merely a holding entity: its value lies within the assets and businesses held through indirect holdings. The Group structure is complex, as it operates through various layers of entities across several jurisdictions. The JPLs have found that jurisdictions such as the PRC where a significant portion of the Group's assets and businesses are located do not recognise foreign orders automatically and hence, it is critical to seek recognition in multiple foreign jurisdictions in order to assert effective control. Section 5 of the Report reveals that the JPLs had not been granted voluntary access to the underlying businesses and assets. They have successfully assumed control of the Company's wholly owned subsidiary, Super Deal, a Seychellois company, by replacing its board of directors with persons nominated by the JPLs and are progressing the change of directors of various BVI entities directly held by Super Deal. Section 8 of the Report reveals that the Company currently holds over 110 known (indirect) subsidiaries across 9 jurisdictions.

(ii) Since the appointment of the JPLs, the directors and officers of the Company have failed to cooperate with the JPLs and denied the JPLs access to critical books and records of the Company and relevant personnel in the Group. The JPLs attempted to visit the Company's office in the PRC and were denied access. There has been no material information provided to the JPLs since the last batch of information that was provided to the JPLs during the Company's restructuring. Information about the Group's current financial status and substantive details of its asset holdings remain outstanding. Mr Shum, as the only current executive director of the Company, completed a statement of affairs. However, the JPLs consider Mr Shum's statements to be incomplete and lacking substantiation. No value was attached to the assets listed on Mr Shum's statements and no details were provided to support the makeup of the liabilities of the Company. Further detail is contained in sections 5 (Progress of the Liquidation), 6 (Outstanding Information to Date), and 7 (Statement of Affairs) of the Report.

[1] Although the JPLs have become Liquidators I propose, for the sake of convenience, to continue to use the JPL description.

(iii) The JPLs have pursued their own investigations and during the limited time available the Group has been undergoing an undisclosed and unsanctioned reorganisation process. The JPLs found transfers of shareholdings within the Group, pledging of assets and transfers of rights attached to assets which have never been publicly disclosed. These transactions ("the Transactions") have a significant impact on the economic value of the Company and thereby the potential recovery for the benefit of unsecured creditors of the Company. The chain of these transactions commenced prior to and during the Company's attempts to restructure its debts; even while the appointment of the JPLs was ongoing. The latest Transaction the JPLs have uncovered occurred in August 2022. Details are set out in section 8 and Annexure G.

Included in section 8 is reference to the fact that on 8 June 2022 NewOcean Energy (Zhuhai) Company Limited had (as appeared from a notice of that date published by the Zhuhai Natural Resources Bureau (ZNRB)) applied to transfer the coastal rights of the LPG Deep Sea Terminal to a company – Zhuhai Shangyang Enterprises Limited, which appears to be outside the Group. Further the JPLs had understood from an officer of the ZNRB that coastal LPG facilities must have valid coastal rights before they can operate and that the Terminal together will all relevant rights attached to it were currently subject to transfer outside the Group which was expected to complete in November 2022: section 8.1.

We were told that the outgoing board of the Company has no knowledge of this supposed transfer of the LPG Asset. Mr Robinson also told us that the coastal rights transfer was to take place in accordance with the lease referred to at [43] pf the Reasons. But the nature of the link between the transfer and the rental agreement is wholly unclear and there is no evidence before us which addresses what is contained in section 8.1 of the Report.

The section refers to other apparent transfers of substantial assets outside the Group: e.g. the Transactions referred to at sections 8.2; 8.5; 8.6; 8.10; and 8.11. There appear also to have been, after the making of the winding up order, increases in the share capital of three subsidiaries the effect of which may have been to dilute the Company's ultimate ownership of the relevant company.

(iv) It would appear from the Transactions that have already taken place that the Company has no desire to restructure its debts with creditors of the Company and are potentially placing its core businesses and assets (including the LPG Deep-Sea Terminal, the Oil Products Storage Terminal, the Zhuhai Commercial Property Complex and various vessels) out of the reach of the JPLs. These actions harm the prospects of recovery for the creditors in the winding up. In Section 10 of the Report the JPLs record that:

> "*Both before and after the Bermuda Winding Up order, the Group has been brazenly divesting itself of assets, over which the Company is the ultimate beneficial owner. The value of the company as observed from the Transactions (detailed in section 8 of this Report) may have severely diminished and it is particularly concerning the company chose to not publicly disclose any of these Transactions whilst it appeared to attempt to restructure the debts of the company in a Court-supervised restructuring. The actions already undertaken by the Company and within the Group would appear to cause detriment to the position of creditors of the Company. We*

consider that many of these Transactions as a matter of Bermudian law, may be voidable."

(v) it is apparent the JPLs will not receive any assistance or cooperation from the Company's officers whilst the appeals process is ongoing. However, it is the duty of the JPs to fulfil their obligations while they remain in office. The JPLs consider that they will have to resort to other means within their powers to determine their steps going forward in dealing with the Transactions that they have already identified. Two of the JPLs are now also appointed liquidators of the Company in Hong Kong which is beneficial given the assets and the offices of the Company are located in the PRC and Hong Kong. The JPLs continue to enjoy the support of creditors who on 12 October 22 2022 voted unanimously for the JPLs to remain in office as permanent liquidators. The minutes of the meeting of creditors record that 20 creditors with US $ 715,21.849.18 in value of claims on the Company voted in favour of an application being made to the Supreme Court for the appointment of three individuals as permanent liquidators. This was 100% in number and 100% in value of all creditors present personally or by proxy and voting on the resolution.

37. In section 5 of the Report the Liquidators state that they have not been provided with any access to the current financial data of the Company and its operating subsidiaries and state that there has been no cooperation or any direct communication with any officer of the Company or management personnel within the Group. The JPLs have made clear that they adopt a neutral position as to whether permission to appeal should be given but expressed the opinion that:

"*a stay of execution will delay the JPLs' urgent action to attempt to preserve assets on behalf of the creditors. The JPLs consider that the Group has now unequivocally demonstrated its intent to frustrate the Bermuda Winding Up Order to the detriment of the Company's creditors."*

38 In his second affirmation in these proceedings Mr Shum, who had only had about 12 hours to consider the Report, made clear that he found the Report extremely biased and unsatisfactory, and, in particular, the criticisms of himself personally which had never been put to him for a response, of which he gave examples. The allegations that the Group had been undergoing an undisclosed reorganisation process and had put assets beyond the reach of the JPLs was firmly rejected. The vast majority of the alleged transactions were said to have already been addressed and considered by the lower court in Shum 4 and Shum 6 and in no way concealed from the JPLs or the Bermuda Court and the others had never been put to the Outgoing Board for a response/ it was also, he said, completely untrue to say that the JPLs would not receive any assistance or cooperation from the Company's officers whilst the appeal process was ongoing. Whilst he addressed a number of specific items he did not deal with the apparent intended disposal of the LPG Asset to an entity outside the Group.

The contentions of the Company

39. As to the position if a stay is refused, the Company (through Mr Shum, contends that a stay should be granted because the likely effect of a stay not being granted will be to cause irreparable damage to the Company as a result of a significant loss of the potential value at which the Company will be able to sell its assets, such that any appeal will be rendered nugatory. Granting a stay will be less likely to cause injustice because it preserves the opportunity to make a significant recovery for the Company's creditors as the Company will

not lose the significant value that the PRC licences represent and prospective buyers will not be deterred from making a purchase. The Company is not seeking to secure the dismissal of the winding-up petition so that it can resume trading in a normal manner. What it seeks is a further short adjournment of the petition in order to pursue a sale process that would maximise the recovery value of certain assets to the benefit of its creditors in circumstances where, it contends, many of its creditors and the court have been materially misled so as to mask the late stages in negotiations for onward sales that the Company has reached.

40. We have before us for this application a number of documents which were in existence when we heard the application in July but which were not then placed before us by either side or by the JPLs. These are:

(i) the 3rd Report of the JPLs to the Supreme Court;
(ii) the 1st affirmation of David Selvia of 6 July 2022 before the Supreme Court;
(iii) the 9th Affirmation of Mr Shum Siu Hung of 8 July 2022 before the Supreme Court;
(iv) the draft restructuring proposal which Mussenden J had required the Company to provide to the JPLs within 14 days of the 8 July hearing and which were provided to them on 22 July 2022.

We have also been provided with two very substantial affirmations from Mr Shum of 4 August and 25 October 2022. It is not easy to summarise the material set out in these documents. In essence what is said or submitted is as follows.

41. First, execution of the winding up order will lead to substantial irreversible and irreparable harm to the creditors of the Company with significant adverse consequences for potential investors in the assets of the Group. This is for four reasons:

(i) the execution of the order will wipe out the enterprise value of the Company upon the PRC operational licences being revoked and the value of the Group's assets once depleted could not be recovered;
(ii) the Company's efforts in negotiating with potential investors to sell its core assets, which are currently at an advanced stage, will be wasted if the execution of the order is not stayed. Cathay Capital one of the potential investors of the LPG assets has made it clear that it would not invest in those assets if the company were wound-dup. Thus the prospect of realising up to US $ 736 million in the next quarter (which translates to recovery of 71% - 94% of what is owed to the bank creditors) will be irretrievably lost and the sales opportunities are unlikely to be repeated. The $ 736 million is the product of $ 450 million for the LPG Assets and $ 286 million for the Zhuhai Complex.
(iii) the liquidation of the Company will affect the Group's ability to perform the statutory safety and disaster prevention functions at the LPG and Oil Terminal, hence posing safety and disaster prevention risks due to flammable goods that are handled and stored there;
(iv) the Company will be unable to receive substantial monies due and payable to the Group, thus causing an unnecessary loss to the general unsecured creditors

The occurrence of these risks would, it is said, render the appeal nugatory.

42. As to (i) above, first, the listing status of the company on the HKSE will be revoked upon a winding up and once revoked cannot be reinstated. As to that it appears that trading has been suspended. But the listing status has not been revoked. Second, the value of the Group's Oil Terminal would be wiped out because the operational licences of the terminal will likely be revoked upon the winding up of the company.

43. As to that the Company has very substantial "LPG Assets" in Zhuhai, consisting of a very large LPG storage terminal, 9 LPG bottling plants and 3 three auto-gas filling stations and their supplementary infrastructures. Their estimated market value is said to be around US $450 million. The Company also has a 79.2% interest in a deep-sea Oil Storage Terminal which is estimated to be worth no less than US $80 million. The value of these assets is highly dependent on their normal operation which is subject to the Group maintaining all necessary licences including but not limited to (1) Port Operation Licence; (2) Port Dangerous Goods Operation Attached Certificate; (3) Gas Cylinder Filling Permit; (4) Gas Operation Licence; and (5) Dangerous Chemical Business Licences.

44. According to a PRC legal opinion these licences will face a material risk of cancellation by the competent government authorities. If the necessary operational licences are revoked the value of the LPG assets and the Oil Storage Terminal will be wiped out because once the licences are revoked it is impossible for the Group to reinstate them. Accordingly, it is said, the Group will suffer irreparable and irreversible damage of US 530 million as a result of the execution of the winding up order. If the order is stayed the company will retain ownership of the various licences and will be permitted to continue operations for its LPG business units and retain the professional technical and safety management personnel critical to managing these assets, thereby allowing the Company to continue meeting the conditions required for the issuance and retention of its various licences.

45. As to (ii) the relevant sale negotiations had by 4 August 2022 progressed to advanced stages with potential completion in Q3 and Q4 of 2022. The Company was looking to receive binding offers from potential investors in Q3/4 of 2022, complete the sale in Q4 of 2022, and receive proceeds of the sale of up to US $ 736 million in December 2022 and February 2023.

46. Mr Shum's first affirmation recorded that the Company continued to work closely with Cathay Capital in relation to the sale of the LPG assets for approximately US $450 million and referred to the affirmation of 8 July 2022 of Mr David Selvia, managing director of Cathay Capital, which informed the Supreme Court that Cathay Capital was on track towards completion of the sale in Q4 2022, and had conducted initial due diligence. Mr Shum recorded that Cathay Capital would no longer purchase the LPG assets if the Company was wound up as the valuable government approvals and licences required to operate those assets would be revoked automatically by the winding up order. (This contention goes well beyond the "material risk" position identified in the PRC legal opinion which the Company obtained). But, if the Court granted a stay of execution which allowed sufficient time for Cathay to proceed it was willing to continue with the sale negotiations with the Company, the JPLs and the interested creditors. This is recorded in a powerful letter from Cathay Capital dated 2 August 2022 in which Mr Selvia made plain, in terms, that Cathay Capital was not interested in acquiring the LPG business under any liquidation scenario, saying;

> "*The underlying principle is simple: in this highly supervised sector life is too short to heap regulatory headaches on top of an already complex situation" …*

> *"To expect that a fire sale in a liquidation context will realise value is both naïve and foolish and betrays a profound misunderstanding of the asset. Calamity will ensue, the universe of buyers will further shrink and the value realisable by creditors will further reduce"*

Mr Selvia had confirmed that in his affirmation, saying that a full liquidation would render Cathay's interest "moot", saying:

> "*I have no interest in dealing with any situation where the relevant supervisory authorities might seek [to] review, revoke or otherwise modify any licences affiliated with NOE's LPG business units - given the geostrategic nature of NOE's Zhuhai terminal, a smooth transition is critical."*

47. In relation to the Zhuhai Commercial Complex, it had been valued for the Company by Savills Real Estate Valuating Ltd in November 2021 at RMB 1.8 billion, i.e. approximately US $ 286 million. Mr Shum referred to the Letter of Intent of 21 December 2021 between the Company and Beijing Tianxi, and the agreement of 16 February 2022, referred to at [41] of the Reasons, and said that Beijing Tianxi was expected to complete the due diligence process by the end of August 2022, enter into binding term sheets for the sale of the Complex by November 2022 with a target completion date of February 2023. The execution of the winding -up order would terminate those negotiations, which were at an advanced stage, thereby wasting the Outgoing Board's efforts. Further, Mr Shum observed, once the due diligence stalls or investors lose interest it is difficult to impossible to resume or restart negotiations even if the Company succeeds on appeal. The costs and time expended by potential investors in deliberating the business and conducting due diligence will also be wasted.

48 In relation to the Complex Mr Shum's 9th Affirmation reported that the due diligence process conducted by Beijing Tianxi was expected to be completed by the end of August 2022 and an agreed term sheet was expected in October 2022, subject to the JPLs' review and final approval.

49 Accordingly, the Company was working towards confirming binding term sheets (a) in relation to the sale of the LPG Assets by the end of Q3 2022, with sales to be completed in Q4 2022 and (b) in relation to the Complex by October 2022. The completion of the sale of those two assets was projected to generate liquidity to pay off 95% of the Company's bank creditors. The affirmation also reported on progress in relation to other potential investors –including CITC AMC in relation to the LPG Assets and HF Group and Infinity Group in relation to the Group's assets.

50 The affirmation expressed the view that, with the information provided to them, the JPLs were in a position to assess the sale negotiations and expressed the belief that they should come to the same conclusion as the Company that the proposed sale of the LPG Assets and the Complex would generate up to $ 726 million, which would be paid to the Company's creditors. The affirmation recorded that the Company was conducting a review of the RFA with a view to further discussions with the creditors and the JPLs and narrowing the differences which prevented agreement on the original scheme in 2020. The affirmation set out details of the proposed mechanism for the sale proceeds to flow to the Company, the proposed Conditions Precedent to a Restructuring Effective Date and a proposed post-restructuring monitoring procedure.

51. The effects of a winding up, it was submitted, would be that the Company would lose out on the opportunity to receive proceeds of US $ 736 million which equals 95% of the outstanding bank debts. The completion of the sales would be hugely beneficial to the creditors because, based on a liquidation analysis of the Company conducted on 2 December 2020 by Duff Phelps the conclusion was that the potential recovery for creditors in a liquidation scenario was between 17% and 31% (not taking into account the potential licence revocation consequence in the PRC) and, in case of a liquidators' fire sale the expected recovery and the timeline of recovery would be much prolonged.

52. The Draft Restructuring Proposal was a substantial document setting out the progress of the negotiations in respect of the sale of the LPG assets and the Complex and their contemplated disposal for up to US $ 736 million and the manner in which the proceeds of sale were to be distributed to creditors.

53 This account is to be compared with the altogether more downbeat executive summary of the 3rd JPL Report to the Supreme Court of 5 July 2022 which included the following:

> "*The JPLs, having now met with the Company's financial advisers and potential investors, have been left underwhelmed by the progress and preliminary nature of the discussions in respect of the asset disposal and/or restructuring initiatives. There are no binding offers, term sheets issued or due diligence conducted by the parties that the JPLs have spoken to. The JPLs have also attempted to arrange with K & K direct meetings with key management personnel of the Company but as the time of this report no such meeting has taken place.*
>
> *The JPLs therefore remain of the view that relevant and critical information concerning the affairs of the Group, which would enable the JPLs to fulfil their duties under the Appointment Order remains outstanding. It appears to the JPLs that the Company does not have a "live" restructuring proposal at the time of the report and the JPLs do not have sufficient information to assist with the review or formulation of a restructuring proposal. The Company has not yet notified the JPLs of any intended timeline within which they propose to settle the creditors' claims, the percentage of these claims that they intend to settle and the extent to which the creditors' rights may need to be varied in order to implement a potential debt restructuring. Accordingly, it is the JPLs view that there remain only limited prospects of a restructuring being successfully implemented for the company, if the status quo is maintained*."

In the light of the information in Mr Shum's affirmations before this Court, that Report, or some of it, appears to have been overtaken by events.

54. As to (iii), the Group employs over 950 full-time staff, most of whom are in the PRC. The company also maintains a team of around 115 employees in the PRC for safety and technical support of the Group's operations. The cessation of operations would impair the Group's ability to meet its statutory obligations under PRC industrial safety and disaster prevention laws. The Group had been reminded to comply with statutory regulations by the Emergency Management Bureau of Zhuhai City which highlighted the importance of its role in ensuring production safety by maintaining staff management stability and implementing various security measures despite the crisis faced by the Group. If the order was not stayed the Company would no longer be able to maintain around 115 members of staff critical to the statutory safety and disaster

prevention functions of the sea terminal, dangerous chemical depot and the production and logistic infrastructure located in Gaolan Harbour, Zhuhai. This will significantly increase the risk of an industrial accident, violation of relevant laws and regulations, significant financial penalties imposed by government authorities and claims by third party users of the Oil Storage Terminal and LPG stations.

55. As to (iv) it is said that the revocation of business licences and the cessation of business operations would be detrimental to the Company's overall cash position. The Company has substantial monies due and payable from its customers for daily operations which it would likely be unable to recover without a stay of execution.

56. Mr Shum also produced details as to how the Company had provided the JPLs with cash flow projections for the year ended 31 December 2022 which showed a positive closing bank balance. In order to boost cash flow while the Company formulated its restructuring plan the Company had leased out its Zhuhai Terminal and refined products storage facility. The LPG bottling plants and auto- gas stations also continue to be operated and brought in positive cash flow.

57. Mr Shum submitted that there can be no prejudice to the Petitioner in making an order for a stay of execution pending appeal because, so he claimed, the Company is and was all material times balance sheet solvent (in this respect he relied on figures for the period ending 30 June 2021) ,and because the assets of the company were preserved under the terms of the Light Touch Order, under which all payments or dispositions of the Company's property or its subsidiaries outside the ordinary course of business could not be made without the direct or indirect approval of the JPLs.

58. I have set out the rival submissions at length because it is apparent that each side says that they will be severely prejudiced if the order that they seek is not made and the other side scarcely prejudiced at all.

Analysis

59. There are in my view a number of critical considerations. The first is that it is apparent that the relationship between the liquidators and Mr Shum is dysfunctional. There are, of course, factual issues as to what has or has not happened which it is not possible for us finally to resolve on an interlocutory basis, but the repeated complaint by the liquidators that they are not being assisted (indeed the reverse), with specific examples, seems to me to be of considerable force. The Report attached a substantial document – Annexure D - which records the information which is wholly or partially missing. Mr Shun has given no details of the value of the assets of the Company for the purpose of the Statement of Affairs (see section 7 of the Report). It is not apparent to me that he is really prepared to work with the liquidators. This want of cooperation, or worse, is reflected in what I said at [29] – [30] of the Reasons, in the matters contained therein summarised at paragraph 33 above, and in the contents of the First Report to the Supreme Court summarised at [47] of the Reasons. Although there was some improvement in the relationship by 8 July, since then, matters appear to have reverted to the situation of functional deadlock which the JPLs foresaw in the First Report. Mr Robinson submitted that a functioning relationship could be restored, under the guidance, where necessary, of the judge, and on the restoration of the Light Touch Order the Board would be able to lead the negotiations for the disposal of the critical assets. In my judgment, the history of events, and the matters set out in the JPLs' report to this Court do not inspire confidence that that is so,

60 Second, it is apparent that any value of the Company depends on the value it derives (or can derive) from a very large number of direct and, more importantly, indirect subsidiaries. This is apparent from a perusal of the "simplified" asset structure which appears at page 31 of the Report. Thus, to take but one example, the company which owns the LPG terminal is owned by a BVI company, which is owned by a Samoan company, which is owned by a BVI company (Sound HK), which is owned by a Seychellois company (Super Deal). The latter company appears to have been introduced into the chain on 26 August 2021, for an unknown purpose, and without the liquidators (or the Court) being informed of it until June 2022.

61. In order to realise the assets of the Company and derive value from the subsidiaries in the Group the liquidators are going to have to conduct an exercise, upon which they have already embarked, which involves, *inter alia*, changing the composition of the boards of the relevant companies and securing recognition of the status of the liquidators in the PRC and elsewhere. This is a process which may well take some time and should not be held up by a stay, especially because of the risk that subsidiaries in the Group or interests in them may be disposed of before the liquidators can gain control. This appears already to be happening in relation to, *inter alia* the company owning the LPG Asset. If allowed to take place this could have the result that nothing was obtained for the Company from the realisation of the asset in question. Mr Robinson told us that the transfer of the coastal rights was part of some other (unidentified) transaction but we have no explanation from Mr Shum as to what is going on. Staying the liquidation and restoring the Light Touch Order, the maintenance of which requires, as I said in the Reasons [130], "*complete transparency and cooperation from the Company"*, neither of which is apparent, does not seem to me likely to provide the protection needed.

62 Next it remains relevant to consider the fact that the existing "current proposal", which has, in one shape of form, been around for over two years, without coming to fruition, is one that requires the consent of 75% of the bank creditors. It is apparent that they remain, in large measure, in favour of the liquidation. By March 2022 64.8% of the bank creditors supported it. At the First Creditors Meeting bank creditors representing US $ 744.9 million out of some $ 786 million voted to have the liquidators confirmed by the Bermuda Court and a committee of inspection appointed. Although liquidation had been ordered by this Court by then, the fact that so many voted in favour of confirmation, shows an almost universal view that there should be a liquidation.

63 These considerations, and in particular the strong recommendation of the independent liquidators who are officers of the court, causes me to conclude that we should refuse a stay. I also take into account that, whilst it is obviously a matter for the Board, it seems to me somewhat unlikely that they will be minded to grant leave.

64 I have not ignored the powerful points made by the Company in support of the contention that a liquidation will produce irreversible value destruction and that the long term managers of the PRC subsidiaries would be treated more favourably than the JPLs or those taking control of the subsidiaries on their behalf. As to that, I entertain some scepticism as to whether these catastrophising forecasts are entirely well founded. There is no doubt a material risk of cancellation of the relevant licences in relation to the LPG Assets, although the tenor of the legal opinion provided to the Company appears to be that the risk is that there will be uncertainty in the operation and management of the relevant companies or that important personnel may resign, which may lead to a revocation of the licenses. But it is not apparent that our order has led to that being threatened or intimated, or that things have happened which

make that likely, or that any of the staff of the subsidiaries have left it; and it does not seem to me impossible for the liquidators to negotiate with the Chinese authorities to the extent necessary and to take steps with a view to ensuring the continuance of the business of the subsidiaries of the Company pending a disposition of those companies.

65 As to negotiations for asset disposal, I accept that there is a difference between negotiating with a company which is under the direction of accomplished executives with expertise and with a company which is under the control of liquidators. But, again, I find it difficult to accept that the liquidators will be unable to procure the sale of the relevant subsidiary companies at a respectable price. Further, I bear in mind that those who are clamouring for liquidation, and who will be the entities most likely to suffer from value destruction (and possible the only ones likely to suffer) are sophisticated bank creditors who can form their own judgment as to benefit and risk, and who are concerned, as are the Liquidators, that assets may disappear from the Liquidators grasp and that assets disposals should be under the Liquidators' control.

66 For these reasons I would decline to grant a stay.

Kay JA:

67 I agree.

Bell JA:

68 I agree.