In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2021: No. 75

IN THE MATTER OF FDG KINETIC LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN

SINOPOLY STRATEGIC INVESTMENT LIMITED

Applicant

and

FDG KINETIC LIMITED

Respondent

RULING

Companies Act 1981 Section 76, Notice of Motion for joinder, Applications for stay of an order in respect of holding an annual general meeting, Leave to appeal, Stay pending appeal

Date of Hearing: **29 April 2021**
Date of Ruling: **21 July 2021**

Appearances: **Keith Robinson, Carey Olsen Bermuda Limited, for Sinopoly Strategic Investment Limited**

Lilla Zuill for Mr. Jaime Che and Mr. Tang Chung Wah

RULING of Mussenden J

Introduction

1. At the conclusion of the hearings on 29 April 2021 I adjourned a Notice of Motion to a later date to be set for a full hearing, I declined an application for leave to appeal to the Court of Appeal and I declined an application for a stay of an order pending appeal brought by Mr. Jaime Che ("**Mr. Che**") and Mr. Tang Chung Wah ("**Mr. Tang**") (together the "**Joinder Applicants**"). This Ruling sets out the Court's reasons for those decisions.

2. This matter came before me on 29 April 2021 in respect of FDG Kinetic Limited (the "**Company**"). The Petition in this matter had been adjourned from time to time to 29 April 2021.

3. On 28 April 2021 Zuill & Co filed a Notice of Motion returnable on 29 April 2021, firstly on behalf of Mr. Che who was a director of the Company and secondly on behalf of Mr. Tang who was one of the joint and several receivers of the Company in respect of all of the undertaking, property and assets of the Company pursuant to a Debenture dated 5 September 2019 (the "**Related Party Receiver**"). The applications were for the following: (a) the Joinder Applicants be joined as Respondents; (b) the *Ex Parte* Order dated 1 April 2021 be set aside; and (c) in the alternative to the Order being set aside, that the Order be stayed pending appeal (the "**Che/Tang Applications**"). It was supported by the Second Affirmation of Jaime Che affirmed on 28 April 2021 ("**Che 2**") together with its Exhibit "**JC-2**".

4. Also on 28 April 2021 Sinopoly filed a Summons returnable for the same time as the Petition on 29 April 2021 for various orders in respect of the conduct of an upcoming

adjourned annual general meeting of the Company to be held on 30 April 2021 in Hong Kong (the "**Adjourned AGM**")[1].

Background

5. In order to deal with the Che/Tang Applications it is necessary to set out in some considerable detail the background to this matter.

6. The Che/Tang Applications came as a result of and in the midst of other proceedings in respect of the Company. On 12 March 2021 Sinopoly Strategic Investment Limited ("**Sinopoly**") had presented a Petition seeking relief pursuant to section 76 of the Companies Act 1981 (the "**Act**"). The Petition was listed to be heard before the Court on 9 April 2021.

7. Also, on 12 March 2021 Sinopoly with the support of Union Grace Holdings Limited (together the "**Majority Shareholders**") filed an emergency *ex parte* on notice application ("**Sinopoly's Application**") pursuant to Section 76(1) of the Act to remedy the failure of the board of directors of the Company to:
    a. hold an annual general meeting ("**AGM**") of the Company within the time prescribed by section 71 of the Act and Bye-Law 56;
    b. call an AGM of the Company for the purpose of electing directors of the Company in accordance with *inter alia* Section 71 of the Act Bye-Law and Bye-Law 61;
    c. adhere to and comply with *inter alia* Bye-Laws 61, 87 and 88 and Section 71 of the act by:
        i. Refusing to allow an election in respect of the seats of two of the three members of the board of the Company that have retired or will retire by rotation at the AGM in accordance with Bye-Law 87; and

[1] Prior to the presentation of the Petition, an AGM had been scheduled for 17 March 2021. At the hearing of the Petition on 29 April 2021, the Court ordered that the AGM set for 30 April 2021 be the "Adjourned AGM".

ii. Refusing to allow Sinopoly to nominate candidates (the "**Sinopoly Candidates**") for election to the Three Available Seats (as defined below) at the AGM of the Company in accordance with Bye-Law 88.

Hearing of 15 March 2021

8. At the *ex parte* hearing on notice on 15 March 2021 Mr. Robinson and Mr. Masters appeared for Sinopoly. Ms. Tovey and Mr. Dyer of Walkers appeared for the Company. Ms. Tovey explained that the Company had received late notice of Sinopoly's Application and were present on a watching brief.

9. Sinopoly's Application was heard in advance of the AGM to be held in 2 days' time on 17 March 2021 in Hong Kong. The application was supported by the First Affidavit of Edward Middleton sworn on 12 March 2021 ("**Middleton 1**") along with its Exhibit "**ESM-1**".

10. Middleton 1 states that the Company was incorporated on 1 October 1992 under the laws of Bermuda and is listed on the Main Board of The Stock Exchange of Hong Kong Limited (the "**HkEx**"). Mr. Che was the Chief Executive Officer and Executive Director. Mr. Cao, an Executive Director was purportedly suspended. Mr. Hung and Mr. Toh were the other independent non-executive directors. Additionally, pursuant to an announcement of the Company dated 22 October 2020, Professor Sit Fung Shuen Victor ("**Professor Sit**") resigned as an independent non-executive director and chairman of the Company with effect from 24 October 2020. Accordingly, the Company was under the day to day control of the sole extant executive director Mr. Che.

11. Pursuant to a circular of the Company dated 29 October 2020, Mr. Toh and Mr. Cao were to retire from office by rotation at the AGM although Mr. Toh had offered himself for re-election but Mr. Cao did not offer himself for re-election. The Company's position is that there is only one seat available for election at the next AGM. However, Mr. Middleton was advised and believed that by operation of Bye-Law 87, the number of seats available for

election at the AGM was three, being those of Mr. Toh, Mr. Cao and Professor Sit (the "**Three Available Seats**").

12. The last AGM of the Company was held on 3 September 2019 and Section 71 of the Act required an AGM to be convened at least once in every calendar year, that is 3 September 2020 and Bye-Law 56 of the Company requires an AGM to be held within 15 months of the preceding one, that is 3 December 2020.

13. Issues had arisen about holding an AGM, its conduct, the number of seats available for election and the election process.

14. Mr. Robinson made submissions and references to the evidence in Middleton 1 including the Bye-Laws of the Company. The thrust of his submissions were as follows:

    a. The fundamental purpose of an AGM is to elect the directors;
    b. The shareholders of a company control the company, not the directors;
    c. The Majority Shareholders had a 74.56% beneficial interest in the Company per the 2020 Annual Report but as of the date of the hearing, they had approximately a 69.80% beneficial interest;
    d. Both the 3 September 2020 and 3 December 2020 dates for holding an AGM had passed;
    e. The formal procedures to be followed in respect of calling AGMs and the nomination and vetting of potential directors were not being followed;
    f. There was correspondence between the Majority Shareholders and the Company addressing issues in the procedures but the Company was still refusing to abide by the proper procedures; and
    g. There was a need for the intervention of the Court in respect of the AGM and the applicable procedures.

15. Mr. Robinson then submitted that on 23 February 2021 Sinopoly proposed candidates for election to the Three Available Seats pursuant to Bye-Law 88. However:

i. In breach of Bye-Laws 86, 87 and 88 and Bye-Law 61 read together with Section 71 of the Act, the Company was refusing to conduct an election in respect of the Three Available Seats;
ii. In breach of Bye-Law 88 the Company was refusing to allow the shareholders to elect the duly proposed Sinopoly Candidates to the Three Available Seats; and
iii. The Company was proposing to hold a meeting which would not qualify as an annual general meeting pursuant to Section 72 of the Act read together with Bye-Law 61 and therefore was also in breach of Bye-Law 56 and Section 71 of the Act.

16. Mr. Robinson submitted that section 76 of the Act provided the Court with the jurisdiction to regulate the conduct of AGMs of Bermuda companies. The Court has the indisputable authority under 76 of the Act to order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit and to give such ancillary or consequential directions as it thinks expedient. He provided case authorities where section 76 of the Act was analysed in detail in the context of Bermuda companies including *Ng Pui Lung v CY Foundation Group Limited and Luck Continent Limited* [2011] Bda LR 12 and *Lee Gai Poo v Asia Pacific Wire & Cable Corp* [2006] Bda LR 73.

17. Section 76 provides as follows:

> *"Power of Court to order meeting*
>
> *76 (1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the bye-laws or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient.*

(2) Any meeting called, held and conducted in accordance with an order under subsection (1) shall for all purposes be deemed to be a meeting of the company duly called, held and conducted."

18. Mr. Robinson submitted that in *Luck Continent*, the Court found by reference to *Asia Pacific Wire & Cable* that:

"34. As far as the existence of jurisdiction to invoke section 76 of the Act is concerned, decided cases are of limited import because "[w]hether or not it is so impracticable is a question which has to be answered by examining the circumstances of the particular case: Lee Gai Poo-v-Asia Pacific Wire & Cable Corp [2006] Bda L.R. 73, at page 3"

19. Mr. Robinson submitted that the Court in *Luck Continent* specifically held that the failures to hold a meeting in the time required by Section 71 of the Act was sufficient grounds to invoke jurisdiction under section 76:

"34. […] Impracticability may relate to calling a meeting in a permissible manner and conducting a meeting in the requisite manner. In my judgment no cases were cited which explicitly supported a construction of section 76 which would limit the application of the section to cases where impracticability relates solely to the administrative and logistical mechanisms of calling and conducting the meeting, although those cases cited where orders were made fell into such a category. Impracticability must also embrace circumstances where, as in the present case, mandatory statutory requirements relating to the time within which an annual general meeting must be held have not been complied with so that a valid meeting cannot be convened.

35. If the Court can order the convening of the AGM under section 72(3) as an alternative to winding-up a company in breach of section 71(1) (on the petition of a creditor or shareholder), it is difficult to see why the Company or a shareholder should

not be able seek similar relief from this Court more directly through a less draconian application than a winding-up petition under section 76(1)."

20. Mr. Robinson submitted that as the Company had failed to hold an AGM for over 18 months, there was jurisdiction for the Court to make an order under section 76.

21. Mr. Robinson submitted that the Court also had the power to make an order which furthers objects of section 76 of the Act in its wider statutory context. According to *Luck Continent* the relevant wider statutory context which reveals the objects of Section 76 of the Act, includes Section 72 of the Act read together with Bye-Law 61[2]. Specifically, the Court found in relation to Section 72 that:

"25. Section 72(3) makes it clear that the dominant purpose of the AGM is to elect the directors; failure to do so gives rise to the same legal consequences as failure to convene the annual general meeting altogether. As Mr. Lyon pointed out, the fact that a company which fails to convene an annual general meeting in accordance with section 71 may be wound-up, assuming the Registrar does not cure the defect under subsection (2), signifies the seriousness of the statutory obligation to permit shareholders to elect directors."

22. Mr. Robinson submitted that in relation to Bye-Law 61, the Court found that:

"30. Bye-law 61 provides that the following business conducted at an annual general meeting shall not be deemed special. In other words, the following matters must be dealt with at the AGM:

"...considering and adopting of the accounts and balance sheet and the reports of the Directors and Auditors and other documents required to be annexed to the balance sheet, the election of Directors and appointment of Auditors and other

[2] Mr. Robinson submitted that Bye-Law 61 of the Company in *Luck Continent* is materially identical to Bye-Law 61 of the Company

officers in the place of those retiring, and the fixing of the remuneration of the Auditors, and the voting of remuneration or extra remuneration to the Directors.

31. Bye-law 61 appears to prescribe that this should happen at each AGM, which section 71(1) of the Act mandates must be at least each calendar year."

23. Mr. Robinson submitted that in this wider statutory context, the Court found that the Court is not only empowered, but is required to make an order which both ensures that (1) the annual general meeting proceeds as soon as practicable and (2) gives effect to the fundamental statutory right of shareholders to elect directors to the seats of retiring directors:

"40. … the only appropriate way in which the Court's discretion can be exercised is to give directions for the convening of the AGM "as soon as practicable" with a view to giving effect to the directors' duties under section 72(1). This is because of the importance the statutory scheme attaches to enabling the shareholders to elect directors at the AGM, albeit that the Company's internal constitution means that not all the directors' seats are "up for grabs"."

24. Mr. Robinson submitted that in a subsequent *Luck Continent* decision the Court referred to this paragraph and again expressly reiterated it is a legitimate and proper use of the power of section 76 of the Act to grant an order which is designed to allow a shareholder to change the composition of the Board of the Company.[3]

"22. … A fundamental basis of the Final Order granted on Luck Continent's cross-application was that the meeting ought to be held as soon as possible to enable it to vote with a view to changing the composition of the Board."

25. Mr. Robinson submitted that the Court could either (a) make orders prayed for in the *Ex Parte* Summons directing the immediate publication of an announcement about the

[3] [2011] Bda LR 24 at 22

Sinopoly Candidates to fill the Three Available Seats and the conduct of the AGM on 17 March 2021 or (b) adjourn the meeting for a period of time for an *inter partes* hearing.

26. Ms. Tovey submitted that whilst she had no instructions, there could be no serious objection to adjourning the meeting for a period of time or until the date of the hearing of the Petition, 9 April 2021.

27. At the end of the hearing, in light of the above submissions, I ordered that the AGM of the Company scheduled for 17 March 2021 be adjourned until further order of the Court pursuant to section 76 of the Act and I ordered that the *Ex Parte* Summons be adjourned for an *inter partes* hearing, which was then set for 30 March 2021.

Order of 23 March 2021 removing Walkers from the Court Record

28. On 23 March 2021 I ordered that Walkers, on their own application, be removed from the Court Record as acting for the Company.

Hearing of 30 March 2021 (the "30 March 2021 Hearing")

29. On 30 March 2021 the *inter partes* hearing took place before me. The Company was not represented by counsel. Instead, it had sent submissions by email to the Court and to Sinopoly. Sinopoly's Application was now further supported by the Second Affidavit of Edward Middleton sworn on 29 March 2021 ("**Middleton 2**") along with its Exhibit "**ESM-2**". Mr. Middleton stated that the purpose of the affidavit was to update the Court as to matters which had occurred since the hearing of 15 March 2021 and to respond to the matters raised by the Company in its letter of 22 March 2021 ("**Company Response Letter**") to Sinopoly.

30. In the Company Response Letter, the Company stated that due to financial difficulties faced by the Company and costs concerns, it intended to proceed without engagement of counsel. It requested that Sinopoly produce a copy of the letter to the Court for

consideration. As a result of that request, Mr. Middleton's Exhibit "ESM-2" contained the following at:

a. pages 12 – 70 – the Company Response Letter dated 22 March 2021;
b. pages 71 – 81 – letters dated 22, 23, 24 March 2021 from the Related Party Receivers to Sinopoly opposing the relief sought by Sinopoly (the "**Related Party Receivers Response Letters**")
c. pages 82 – 86 – letter dated 24 March 2021 from Carey Olsen on behalf of Sinopoly to the Related Party Receivers with a proposed draft Order.
d. pages 87 – 175 - a letter from the Company dated 26 March 2021 to Carey Olsen attaching the First Affirmation of Mr. Che ("**Che 1**") and the Company's written submissions.
e. pages 176 – 256 - a corrected copy of Che 1 as there had been some missing pages in the original version.

31. In the Company Response Letter, the Company referred to the fact that the Notice of AGM provides only for "re-election of directors" and stated they would:
    i. Limit the election of directors to seats of those who are retiring at the meeting and offered to be re-elected (i.e. one person);
    ii. Refuse to inform the shareholders of the Sinopoly Candidates; and
    iii. Refuse to allow the shareholders to elect the Sinopoly Candidates in accordance with Bye-Law 86, 87 and 88.

32. In the written submissions of the Company dated 26 March 2021, it relied upon the evidence in Che 1 and submitted as follows:
    a. That the proceedings were a legal ambush as both the Petition and the *Ex Parte* Summons were filed at the same time, served on the Company on a Saturday, a non-business day in Hong Kong, for a hearing on the following Monday in Bermuda with over 700 pages of documents. Despite that, their counsel was successful in obtaining a hearing on an *inter partes* basis.
    b. That Sinopoly has failed to make full and fair disclosure to the Court about shareholdings. In particular, all the shareholding in the Company held by Sinopoly

have been subject to security rights in favour of China Orient Asset Management Co Limited ("**COAMC**"). Therefore, a question arises as to how Sinopoly can be dealing with the shares including purportedly exercising shareholders' rights without reference to consent from COAMC. Further Mr. Middleton had made numerous unsupported statements of purported 'facts' if not outright incorrect statements.

c. That there is no reference in the Middleton Affidavits as to whether the purported appointment of Mr. Middleton as a director of Sinopoly has been duly approved by COAMC. Further, there is no evidence of approval by COAMC to exercise any shareholder rights, in particular to have them voted at a general meeting. Such failure to positively prove Mr. Middleton's capacity and authority would render the proceedings null, void and of no effect.

d. That Mr. Middleton has failed to bring to the attention of the Court that Company is under receivership and all the business operations and assets of the Company are under the control of the Related Party Receivers.

e. That there is no apparent commercial benefit to Sinopoly or to anyone, for these proceedings to continue, as additional director may not be in a position to exercise their powers as directors. Thus, the application is futile and vexatious and any order will likely be on no practical use or effect to Sinopoly.

f. In the event that additional directors are appointed by the Majority Shareholders by order of this Court, it is very likely that there will be unnecessary friction, disputes and arguments created between the "old" and "new" directors.

g. Therefore, the status quo of the Board of the Company should be maintained. So as to enable the Related Party Receivers to work with the Board to explore and work out urgent alternative rescue proposals for the Company prior to the imminent threat of being wound up by the Hong Kong Court on 11 June 2021. It was not in the Bermuda's Court's interests to grant an order that would transform a harmonious and consensus functioning Board of directors to a stale one with possible constant conflict and argument amongst themselves, leading to ensuing litigation.

h. Mr. Middleton is acting on behalf of and for the JPLs of FDG Electric Vehicles ("**FDGEV**") as part of their efforts to "secure" assets of FDGEV. The JPLs are determined to remove Mr. Che at all costs on unfounded allegations of Mr. Che's personal "relationship" with various "related parties". The JPLs have a poor track record and have not been able to put forward any rescue/restructuring proposal for the Company or FDGEV. They have no chance to "rescue" the Company before 11 June 2021.

i. It is common ground that the Company faces imminent prospects of being wound up on 11 June 2021 by the High Court of Hong Kong. SHK Finance Limited ("**SHK Finance**") and the Related Party Receivers have been working out alternative rescue proposals for the Company and should be able to present such for consideration by all creditors and shareholders shortly. Therefore, the status quo of the Board of the Company should remain in place, at least in the short term.

j. Only two directors of the Company are required to retire and be re-elected at the AGM pursuant to Bye-Law 87. The Company has received legal advice that there is no mechanism to force the Board to consider a nomination under Bye-Law 88 or to convene a special general meeting to appoint the nominees.

k. The JPLs are officers of the Bermuda Court and should act professionally and with an open mind, taking into account of the interests of all creditors as a whole, rather than take an antagonistic approach from the outset to try only to snatch control of the Company Board for its own sake. The Company and the Related Party Receivers are more than willing to work with the JPLs and Mr. Middleton to put forward a joint practical rescue proposal for the Company on an amicable basis.

l. In light of these reasons, the Petition, *Ex Parte* Summons and Sinopoly Application should be dismissed in their entirety, with costs to the Company on an indemnity basis failing which they should be adjourned *sine die* with costs to the Company on an indemnity basis. If the Court grants the Order, then no fixed timetable should be set, allowing the Company to sufficient administrative flexibility to address necessary arrangements and Sinopoly should be made to pay in advance for all costs of the Company in complying with the relevant Court orders.

33. In the Related Party Receivers Response Letters Mr. Hou Chang Man wrote on behalf of Mr. Alan C. W. Tang and Mr. Kan Lap Kee who he said were all appointed as Joint and Several Receivers and Managers on 29 April 2020 in respect of all the undertaking, property and assets of FDK Kinetic pursuant to a Debenture dated 5 September 2019 entered into by FDK Kinetic in favour of SHK Finance. The Related Party Receivers submitted similar arguments as the Company on the following issues:
    a. The shareholding and COAMC;
    b. Efforts to remove Mr. Che at all costs and avoiding pending winding up proceedings;
    c. The lack of rescue proposals by the JPLs of FDGEV;
    d. Any new directors lacking any power or authority to manage the affairs of the Company;
    e. Mr. Che and his alleged personal relations, potential disputes between the "old" and "new" directors and the poor track record of the JPLs to rescue the Company; and
    f. The alleged failure of Mr. Middleton to make full and frank disclosure to the Court.

34. Mr. Robinson drew the Court's attention to the submissions of the Company and he made reply submissions as follows:
    a. The Company's position was that only two seats were available for election although the Majority Shareholders' position was that there were three seats available for election. It was the Majority Shareholder's right to have its own nominees on the slate pursuant to Section 76(1) of the Act.
    b. The Company was challenging the standing of the Majority Shareholders in the proceedings. Mr. Robinson submitted that Middleton 1[4] pointed out that according to the Company's 2019/2020 Annual Report, the Majority Shareholders together held 74.56 % beneficial interest in the Company which recently had been reduced such that they currently held 69.80% beneficial interest in the shares of the Company which would give them a majority vote at a general meeting. Therefore,

[4] Middleton 1 paras 16 - 18

they had standing in the proceedings. The election of directors at the AGM is an ordinary vote, that is 50%, and the Majority Shareholders can vote in the majority.

c. The Company had challenged the right of Mr. Middleton to represent the Majority Shareholders and to file affidavit evidence. However, in Middleton 1[5], Mr. Middleton explained: (a) that the Majority Shareholders are wholly owned subsidiaries of FDG Electric Vehicles Limited (the "**Parent Company**"); (b) on 20 July 2020 the Bermuda Court made an order granting full powers to joint provisional liquidators of the Parent Company ("**Parent Company JPLs**") such order operating to suspend the powers of the board of directors including Mr. Che; (c) on 19 August 2020 the Parent Company JPLs terminated the services of Mr. Che and other members of the board of the parent company; the Parent Company JPLs were making efforts to secure control of the assets of the Parent Company, including the Company in order to facilitate a restructuring; (d) on 19 August 2020, he and Mr. Li Weijing were appointed as directors of Sinopoly by the Parent Company JPLs; (e) on 25 August 2020, he and Mr. Weijing were appointed as directors of Union Grace; and (f) he and Mr. Weijing are able to exercise powers as directors on behalf of the Majority Shareholders including voting their shares at general meetings of the Company.

d. The Company's actions are to try to deny the Majority Shareholders their rights to nominate candidates for the board. He referred to the Middleton 1 Exhibit "ESM-1" where: (i) a document set out the Company's "Procedure for shareholders to propose a candidate for election as a Director[6]"; (ii) the "Letter from the Board to the Shareholders[7]" dated 29 December 2020 signed by Mr. Che announced that Mr. Toh has offered himself for re-election; (iii) Sinopoly's letter dated 23 February 2021 proposed 4 candidates and provided their biographies[8] (the "**Nomination**"); (iv) Sinopoly's reminder letter to the Company dated 4 March 2021 to publish the Nomination; (v) the Company's refusal letter dated 8 March 2021 giving 3 reasons

[5] Middleton 1 paras 20 - 24
[6] ESM-1 page 331
[7] ESM-1 page 83
[8] ESM-1 pages 256 - 330

why the election and appointment of Sinopoly's Candidates should not be included as an agenda item in the AGM[9]; (vi) that the rule 13.70 note of the Hong Kong Exchange Consolidated Main Board Listing Rules (the "**Listing Rules**") states that "*The Issuer must assess whether or not it is necessary to adjourn the meeting of the election to give shareholders at least 10 business days to consider the relevant information disclosed in the announcement or supplementary circular.*" However, the Company was wrong to say that "*Rule 13.70 of the Listing Rules requires our company to give shareholders at least 10 business days to consider the relevant information disclosed …before the date of the AGM.*". Mr. Robinson submitted that the Company could still comply with its obligations before a proposed AGM of 16 April 2021.

e. The Company in its letter to Sinopoly dated 22 March 2021 makes no reference to Professor Sit's seat which Sinopoly says is for election at an AGM.

f. The Company in the same letter alleged that there was no mechanism to force the Board to consider the Majority Shareholders' Nomination under Bye-Law 88 and relied on the Listing Rules. They pointed out to Sinopoly that "… *the Company should follow the Listing Rules to exercise due care in considering the nominated director(s) so as to protect the minority interest …*" However, Sinopoly counters that Bye-Law 88 gives the right to shareholders to nominate directors and there was no duty on the Company to prefer minority shareholders over majority shareholders.

35. Mr. Robinson submitted that in the circumstances it was the clear intention of the directors to breach *inter alia* Bye-Laws 56, 86, 87 and 88 and Section 71 of the Act. The effect would be to prevent the Majority Shareholders from wrestling control of the Company from Mr. Che, who had already been displaced by the Court as a director of a related group company. Further, he submitted that it was necessary for the Court to make an order in the terms sought to ensure the rights of the shareholders of the Company would not be further abrogated and the Company has some prospect of recovering from its current financial difficulty. There was an urgency to the matter as (a) a winding up petition against the

[9] ESM-1 page 337

Company in Hong Kong was due to be heard on 11 June 20201 and there was a significant risk that the Company would be wound up by the Hong Kong Court; (b) unless an AGM is properly convened, the Majority Shareholders will not have an opportunity to reconstitute the Board of the Company and take control of the Company in order for there to be a prospect of raising the necessary capital to avoid winding up; and (c) the best interests of the Company's creditors and shareholders would be served by the election of new directors at the AGM but this would not be achievable if the Company continues to impede the Majority Shareholders attempts to exercise their rights to elect new members to the Board of Directors at the AGM.

36. Mr. Robinson also drew the Court's attention to the submissions of the Related Party Receivers and he made reply submissions as follows:
    a. The Related Party Receivers were appointed as Joint and Several Receivers and Managers over specific assets of the Company but the Board still run the Company.
    b. The Related Party Receivers wrote several letters to counsel for Sinopoly. In the letter to Carey Olsen dated 23 March 2021, they stated that if the application to the Court was successful and there were conflicts between existing Board members and directors appointed by the Majority Shareholders, then the Related Party Receivers "*may be forced to suspend the powers of any or all of these directors*". However, Mr. Robinson submitted that the Related Party Receivers have no rights to suspend directors. Further, how the Board get along is not a concern of the Court.
    c. In the same letter, the Related Party Receivers make threats that the proceedings are an oppressive legal ambush if not also an abuse of legal process. They insist on the Petition and Sinopoly's Application being withdrawn immediately. However, Mr. Robinson submitted that the exercise of shareholders rights is not the business of the Related Party Receivers.

37. Mr. Robinson addressed the Court on the position of the Related Party Receiver in respect of the management of the Company. He submitted that it was well established that appointment of receivers over all assets and undertaking of a company does not terminate or suspend director's powers to the extent that such functions do not impinge prejudicially on the position of the receiver's appointer, by threatening or jeopardizing the assets that

are subject to the charge. He cited the case of *Newhart Development Ltd v Co-Operative Commercial Bank Ltd* [1978] QB 814 where the English Court of Appeal held that:

> *"15. ... The powers of the company and its directors to deal with the property comprised in the appointment (both property subject to a floating charge and property subject to a fixed charge), except subject to the charge, are paralysed; for though "under debentures or a trust deed in the usual form the Receiver is agent for the company, the company's powers are delegated to the Receiver so far as regards carrying on the business or collecting the assets; and frequently so as to enable the Receiver as attorney to convey a legal estate on sale".*
>
> *16. If that means that nobody else can take any step in regard to the assets of the company which does not amount to dealing with, or disposing of, the assets, it would appear to me to be too wide and not supported by any authority which has been cited to us. What, of course, the directors cannot do, aid to this extent their powers are inhibited, is to dispose of the assets without the assent or concurrence of the Receiver, for it is his function to deal with the assets in the first place so as to provide the means of paying off the debenture holders' claims. But where there is a right of action, and what is desired is to pursue that right of action, it does not seem to me that that comes within the concept of dealing with the assets. If and when the judgment comes to fruition and there is a sum of money recovered under a judgment obtained by the plaintiff company, then of course the disposition of those monies becomes a matter of interest to the Receiver, but until then, if he does not desire to pursue the action, it seems to me that there is nothing is the general law, or in any case cited to us - and I do not myself propose to refer to them because they do not really touch this point - which precludes the directors of a company, as a duly constituted board (and it is not suggested here that they were not a duly constituted board and they took the step of instituting this action) from seeking to enforce the claim, however ill-founded it may be, provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interests of the debenture holders."*

38. Mr. Robinson submitted that the English approach was adopted in *Hong Kong as in Li Lai Fun & Others v Centro-Sound Limited* [1986] HKCFI 30, where the Hong Kong First Instance Court discussed the nature of receivers' powers and concluded that receivers were managers of the assets in respect of which they were appointed and not managers of the company.

39. Mr. Robinson made various submissions, again citing the case of *Luck Continent,* in detail on the statutory regime applicable to annual general meetings, the Bye-Laws, the case law and the summary as follows:

> *"The statutory regime applicable to annual general meetings*
> *22. The primary purpose of an annual general meeting is to elect directors. Section 70 provides in salient part as follows:*
>
> > *"(1) As soon as convenient after any of the share capital of a company has been subscribed, the provisional directors shall convene the statutory meeting which shall be a general meeting of the members of the company for the purpose of electing the first board of directors... (6) A meeting called under subsection (1) shall be deemed to be the annual general meeting for the year in which it is convened."*
>
> *23. The first statutory meeting at which the provisional directors are elected is deemed to be an annual general meeting for the year in question. Section 71 provides so far is relevant as follows:*
> > *"71 (1) A meeting of members of a company shall be convened at least once in every calendar year; this meeting shall be referred to as the annual general meeting."*
>
> *24. The key statutory function of the annual general meeting becomes apparent when the above provisions are read together with the following provisions of section 72:*

"Failure to hold annual general meeting or to elect directors

72 (1) If default is made in calling or holding a general meeting in accordance with section 71(1) the directors shall use their best endeavours to call or hold the meeting at the earliest practicable date.

(2) If an annual general meeting is not held within three months of the date it should have been held or the required number of directors required to be elected, if any have not been elected at such a meeting the company may apply to the Registrar to sanction the holding of a general meeting to put the affairs of the company in order. Upon receipt of such an application the Registrar may in his discretion make an order allowing the application under such conditions as he thinks fit to impose including ordering the date by which the affairs of the company shall be put in order.

(3) Subject to subsection (2) if default is made in calling an annual general meeting in accordance with section 71 or to elect the required number of directors at such meeting the Registrar, any creditors or member of the company may apply to the Court for the winding up of the company and the Court on such application may order the company to be wound up or make any order that the Registrar might have made under subsection (2)..." [emphasis added[10]]

26. I accept the submissions of Mr. Smith and Mr. Hill to the effect that the jurisdiction conferred by section 76 is engaged by the continuing inability of the Company to convene the AGM in accordance with the Act and/or the Bye-laws, the deadline being October 31, 2010 under the Bye-laws and December 31, 2010 under the Act. In my judgment, however, the Court's discretionary powers under section 76 can only be exercised in relation to an annual general meeting in a manner which is designed to ensure that the meeting takes place as soon as possible, as required by section 72(1). The suggestion that the Court can use its section 76 facilitative powers in an open-ended fashion, designed to ensure the fairest conduct of business which is not in statutory terms required to be dealt with at the AGM is misconceived. Section 84 of the

[10] In Luck Continent judgment

Act expressly deals with how the business of accounts is to be dealt with at a general meeting: …

28. On a straightforward reading of section 76, it appears clear that the Court in the present case has the jurisdiction to make an order. This is because it is unarguably impracticable in a legal sense (absent a curative order from the Court- or the Registrar under section 72) for the Company to validly convene the AGM, as the time for so doing under both the Act and the Bye-laws has expired. It does not follow that the Court has an unfettered discretion to make an order it deems fit; an order made must be designed to further the objects of section 76 in its wider statutory context.

<u>Case law</u>

36. It was common ground between Mr. Lyon and Mr. Smith that the following passage from the Judgment of Wynn-Parry J in Re El Sombrero [1958] 1 Ch 900 at 906-907 was a pertinent guide to the construction and application of section 76(1) of the Companies Act 1981, as far as the exercise of the discretion is concerned:

> *"I therefore arrive at the stage where I hold that I have jurisdiction in this case, and there is nothing to prevent me exercising the discretion which is given under the section if I choose to exercise it. It is true that I am sitting as an appellate court, but I am entitled to consider the question of discretion, because, in my view, as I have held, the registrar has misdirected himself on a question of law. In my judgment, this is eminently a case in which the court ought to exercise its discretion; first, because if the court were to refuse the application it would be depriving the applicant of a statutory right, which, through the company, he is entitled to exercise under section 184 (1), to remove the respondents as directors; secondly (and I think this is a proper matter to take into account as part of the reasons for deciding to exercise my discretion), the evidence disclosed that the respondents are failing to perform their statutory duty to call an annual general meeting. The period within which they should have held an annual general meeting expired at some date in*

October, 1957. Their excuse in the evidence is that there would be no use in convening and holding an annual general meeting, because the accounts for the first period of the company's history are not yet available. I have read the evidence with care, and I do not accept it as bona fide evidence. There is a clear statutory duty on the directors to call the meeting whether nor not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not. It cannot possibly serve as an excuse for failing to perform that statutory duty. It is quite obvious that the only reason why the respondents refuse to call an annual general meeting is because the inevitable result of convening and holding that meeting would be that they would find that they had ceased to be directors."

37. There is nothing in the latter case or other cases referred to in argument to suggest that the discretion to convene a meeting which cannot otherwise be convened without a curative order can only be exercised where an excuse for not convening the meeting is advanced by the directors in bad faith. On remarkably similar facts, Wynn-Parry J in Re El Sombrero crucially held that there was " a clear statutory duty on the directors to call the meeting whether or not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not". Having regard to this analysis of the English statutory provisions, which hold good for the Bermudian statutory regime, it matters not whether the decision to delay the meeting was reached in good or bad faith.

Summary

40. The Court has jurisdiction under section 76(1) to give directions for the convening of the AGM because it is impracticable to convene the meeting within the time specified by section 71(1) of the Act and the Bye-laws. ... "

40. Finally, Mr. Robinson submitted that the Majority Shareholders were being denied the right for the Sinopoly Candidates to be elected and appointed. He presented a draft Order to the Court which he submitted was necessary in light of the circumstances. He submitted that

Section 76 was engaged and that the application was a compelling case with no answer from the Company for the Sinopoly Candidates to be placed on the ballot.

41. I adjourned my Ruling until 1 April 2021 so that I could fully consider the matter.

Order of 1 April 2021

42. On 1 April 2021, having read and considered more fully the Company's submissions, the Related Party Receivers Response Letters, the Affirmations of Mr. Che and the accompanying exhibits and the submissions of Sinopoly, I granted Sinopoly's Application for several reasons as follows:

    a. There had not been an AGM for over 18 months;
    b. I had accepted that there were Three Available Seats vacant for election;
    c. There should be an AGM as soon as practicable so that the Three Available Seats could be filled;
    d. I had accepted that Sinopoly had submitted to the Company, a Nomination comprising various names, to be eligible to be voted for the Three Available Seats;
    e. I had accepted that the Company had not published the Nomination to the shareholders and were not intending to hold an election for the Three Available Seats or the Sinopoly Candidates.
    f. I was of the view that Section 76 of the Act was engaged in the circumstances and I had the jurisdiction to make an order under Section 76 in respect of convening an AGM; and
    g. I was also of the view that that there was a need to regulate various procedures in order to ensure that the AGM was prepared for and conducted in a proper manner. In my view, applying *Luck Continent*, it was appropriate also to make specific orders to give effect to the Order to convene an AGM.

43. In light of the above reasons, I granted an Order (the "**1 April 2021 Order**") that included that (a) the Company would publish an announcement that the AGM will be reconvened on a date no later than 30 April 2021; (b) the business of such AGM would include the

nomination, appointment and vote on eligible candidates to fill the Three Available Seats pursuant to Bye-Laws 87 and 88 of the Company's Bye-Laws; (c) Mr. Che would be the chairman of the Adjourned AGM or failing him Mr. Toh would be chairman or failing him the members would elect a chairman; and (d) there was a range of other Orders to ensure the AGM would be conducted pursuant to the Bye-Laws.

44. Thereafter, the Petition was adjourned several times from 9 April 2021 to 29 April 2021.

Applications filed on 28 April 2021

45. As stated, on 28 April 2021 Zuill & Co filed the Che/Tang Applications returnable on 29 April 2021. The application was for the following: (a) the Joinder Applicants be joined as Respondents; (b) the *Ex Parte* Order dated 1 April 2021 be set aside; and (c) in the alternative to the Order being set aside, that the Order be stayed pending appeal, time for service of this application be abridged.

46. Also on 28 April 2021 Sinopoly filed a Summons returnable for the same time as the Petition on 29 April 2021 for various Orders in respect of the conduct of the Adjourned AGM.

Hearings of 29 April 2021

Joint Applicants Notion of Motion

47. In the morning of 29 April 2021 the Court started to hear submissions from Ms. Zuill and Mr. Robinson in respect of the Notice of Motion to set aside the Order and/or stay the Order pending appeal. The Court adjourned the hearing twice to later times in the day due to other court commitments including the Petition in this matter.

48. Ms. Zuill clarified that she had been just instructed in the matter by the Joinder Applicants Mr. Che in his personal capacity as a director and Mr. Tang, a Related Party Receiver. She

confirmed that she was not acting for the Company although she had been instructed on the steps taken by the Company towards having an Adjourned AGM.

49. Mr. Robinson briefly submitted that the Notice of Motion was wrong to refer to the "*Ex Parte* Order of 1 April 2021" because, on the contrary, the 1 April 2021 Order was in respect of the *inter partes* hearing held 30 March 2021, noting that Mr. Che had filed affidavit evidence, Mr. Tang had submitted the Related Party Receivers Response Letters and the Company had filed submissions all which were heard and considered by the Court. He stressed that the Adjourned AGM was scheduled for the next day in Hong Kong, that the Joinder Applicants had had a month to challenge the Orders since 1 April 2021, that the Joinder Applicants had been served with the 1 April 2021 Order since 2 April 2021 and the Che/Tang Applications were a stunt on the eve of the Adjourned AGM to derail it.

50. Mr. Robinson submitted that it appeared by the Notice of Motion that the Joinder Applicants challenge only (a) paragraph 4 in respect of who the chair would be for the Adjourned AGM; (b) paragraph 7 in respect of the duties of the chair; and (c) paragraph 10 in respect of ensuring that the Board and Related Party Receiver would allow any new directors to perform their duty. Further, Sinopoly had paid for the Adjourned AGM venue at the request of the Company as the Company had no money to fund the Adjourned AGM venue and the Company itself has not challenged the Order, thus taking steps to hold the Adjourned AGM. On that basis the Court should not hear the Che/Tang Applications at such short notice, but should adjourn the matter for hearing after the Adjourned AGM when the Joinder Applicants can challenge the outcome of the Adjourned AGM if they so wished. In any event, he had not had time to consider the submission and case authorities which were filed very late in the day.

51. The Court queried Ms. Zuill that the matter had been underway for some time, that the 1 April 2021 Order was a result of the *inter partes* hearing, that it is now late in the day for the Che/Tang Applications and it understood that considerable effort and resources have been expended to have the Adjourned AGM the next day. In reply, Ms. Zuill accepted that at the *inter partes* hearing there was evidence and submissions of the Joinder Applicants before the Court but that several issues had now arisen as follows:

a. The 1 April 2021 Order included terms that were not foreshadowed in the Petition and *Ex Parte* Summons that sought to bind the Joinder Applicants personally who did not have the opportunity to address them before the Court;
b. The Company and Mr. Che had indeed made efforts towards having the Adjourned AGM;
c. There are terms of the 1 April 2021 Order that seek to amend the Bye-Laws; and
d. The standing of Mr. Middleton is challenged.

52. Due to the shortness of time available to the Court to deal with the Che/Tang Applications in full before the Adjourned AGM due to commence within 24 hours in a different time zone in Hong Kong, and in order to determine the way forward, the Court queried Ms. Zuill about identifying what the issues were in respect of the 1 April 2021 Order that would warrant further submissions on a hearing of the Notice of Motion. Ms. Zuill submitted that the identified issues were as follows:
    a. Paragraph 4 – as to who should be chair of the Adjourned AGM;
    b. Paragraph 5 – as to the ability to not adjourn the Adjourned AGM which in effect was amending the Constitution and Bye–Laws of the Company;
    c. Paragraph 6 – as to the standing of Mr. Middleton including consideration of proceedings begun the very same morning in the British Virgin Islands for certain declarations about the Majority Shareholders and Mr. Middleton ("**the BVI proceedings**");
    d. Paragraph 7 – as to the fettering effect on the discretion of the chair of the Adjourned AGM and whether or not the Court has jurisdiction to make an Order that effectively amends the Bye-Laws on this point;
    e. Paragraph 8 – as to the quorum for the AGM and whether or not the Court has jurisdiction to make an Order that effectively amends the Bye-Laws on this point; and
    f. Paragraph 10 – as to the ensuring that the current Board and Related Party Receiver would allow any new directors to perform or not perform their duties effectively binding the directors.

53. Ms. Zuill submitted that it was necessary to consider the effect of these orders which was akin to an injunction. She referred to her skeleton argument filed the same morning in respect of the duties of the Petitioner relying on *American Cynamid v Ethicon* [1975] AC 396.

54. Mr. Robinson's replied generally that the efforts of the Joinder Applicants were to wreck the process of the Adjourned AGM and that they had no standing to challenge the terms of the Order as they were matters for the Company to address if it wanted to do so. In respect of paragraph 4, Mr. Che didn't have to be the chair if he did not want to and in respect of paragraph 10 the Court was entitled to make such an Order as ventilated in the *inter partes* hearings. Further, Mr. Robinson submitted that the Court should dismiss or strike out the Che/Tang Applications or adjourn them with directions for a further hearing.

55. I considered the submissions of the parties. In my view, considerable cost and effort had been made in the Court over several hearings, by various parties to follow the proper procedure in respect of the nomination and election of directors and to arrange the Adjourned AGM at cost, which was due to take place in Hong Kong within 24 hours, with the added factor of time zone differences. Additionally the Joinder Applicants, who had between them, been involved with the proceedings from the start and had filed evidence, submissions, and a comprehensive letter for the *inter partes* hearing had come late in the day at the twelfth hour to join the proceedings and seek a stay of the 1 April 2021 Order when the Company was not making any applications. Further, there was the urgency to the matter due to the winding up petition against the Company in Hong Kong that was due to be heard on 11 June 20201 with the significant risk that the Company would be wound up by the Hong Kong Court. Therefore, the Che/Tang Applications appeared to me to be on the face of it, an unwarranted and veiled attempt to derail the Adjourned AGM and the Court process that regulated it. Therefore, I was not persuaded that the Adjourned AGM should be adjourned further at the behest of the Joinder Applicants, whose standing was questionable in any event, in light of all the circumstances before the Court from all the hearings. However, I was minded that there could still be a full hearing for the Notice of Motion to address the issues raised albeit such hearing would be after the Adjourned AGM.

56. In light of the above, I ruled that "*The application is late in the day after several hearings some time ago to establish an AGM and to regulate it. I will not stay or amend my [1 April 2021] order. However, I will adjourn this Notice of Motion to another day for full hearing.*" I then settled directions for a full hearing of the Notice of Motion and the terms of the Order (the "**29 April 2021 Order**").

Application for Leave to Appeal – Part 1

57. On the same day Ms. Zuill immediately applied for leave to appeal the 1 April 2021 Order on the basis that the Order was an interim order. Additionally, Ms. Zuill submitted that she was likely to appeal any final order of the Petition, such Petition due to be heard later in the morning.

58. Mr. Robinson opposed the application for leave to appeal, submitting that the Court should refuse leave to appeal the 1 April 2021 Order as it was a final order on the *Ex Parte* Summons. Further, the application for leave to appeal is not an application by the Company, but was an application by the Joinder Applicants who have no standing to seek leave to appeal.

59. At that point, the Court had to adjourn for a short time to deal with an unrelated matter and the return date of the Petition in this matter which had been adjourned from time to time.

Hearing of the Petition and the Sinopoly Summons of 28 April 2021

60. On the same day the Court resumed just after the noon hour when the Petition was scheduled to be heard as well as the Sinopoly Summons that was filed the previous day. Mr. Robinson was present for the hearing. Ms. Zuill attended on a watching brief.

61. Mr. Robinson made submissions based on all his previous submissions leading to setting an AGM and its conduct. They were supported by the Third Affidavit of Edward Middleton

sworn 28 April 2021 ("**Middleton 3**") which purpose was to update the Court concerning events and correspondence since the 1 April 2021 Order. I made Orders including that: (a) the AGM scheduled to be held on 30 April 2021 in Hong Kong shall be the "Adjourned AGM"; (b) the Company through its directors and officers together with the chairman of the Adjourned AGM recognize various documents as valid and binding on the Company and to allow persons named therein to exercise all rights attaching to particular shares at the Adjourned AGM. Mr. Robinson indicated to the Court that he was not pressing ahead with the penal notice that was in the draft order.

62. The Petition was adjourned to 6 May 2021 for further mention.

Application for Leave to Appeal 29 April 2021 – Part 2

63. On the same day, the Court then resumed the hearing for leave to appeal.

64. Ms. Zuill clarified that in the circumstances of the Court's Order earlier in the day, she was also in effect applying for leave to appeal the 29 April 2021 Order made earlier in the day, in particular paragraph 1, that is, not to stay or amend the 1 April 2021 Order. She submitted that if leave to appeal was granted then she was seeking to have that paragraph 1 stayed also pending appeal.

65. Ms. Zuill took the Court through the Draft Notice of Motion for Leave to Appeal containing 10 grounds, which was attached to the Notice of Motion. For these reasons she submitted that leave to appeal and a stay should be granted. The grounds, in brief form, were as follows:

    a. The learned judge incorrectly intervened within the corporate governance of the Company.
    b. The learned judged erred in law by failing to consider sections 13 and 16 of the Act setting out a number of particulars.

c. Had the learned judged considered sections 13 and 16 of the Companies Act he should have asked himself whether the Order varies or restricts the Company's Bye-Laws, in particular Bye-Laws 61, 64 and 77; and/or

d. The learned judge [incorrectly] ordered relief that was not sought by the Respondent in either the Petition dated 12 March 2021 (the Petition) and the ex-parte Summons; and/or

e. In making the orders in relation to the business of the Adjourned AGM the learned judge incorrectly made orders restraining the chairman of the Adjourned AGM (the Chairman) and/or the receivers of the Company (the Receivers) who control the board despite neither the Chairman or the Receivers being a party to the Petition.

f. Had the learned judge considered properly or at all Supreme Court Rule 15/6(2) he would have ordered the joinder of the Appellant to the Petition and not made the Order;

g. The learned judge erred in failing have regard to the following disputed facts: (a) The validity of Mr Middleton's appointment as a director of the Respondent; and (b) The registered and beneficial owner of the shares which the Respondent and Union Grace Holdings Limited (Union Grace) are intending to vote at the Adjourned AGM.

h. Had the learned judge properly considered these disputes, he would have determined that he could not have made the Orders in respect of the Adjourned AGM as these matters clearly involve issues which require determination by Courts in the British Virgin Islands and/or Hong Kong prior to orders being made in respect of the Adjourned AGM.

i. The learned judge erred in making an order in respect of the shares of Union Grace: Union Grace was and is not a party to the Petition and there is no evidence upon what basis the Respondent had authority to act on Union Grace's behalf.

66. Mr. Robinson replied on each ground and generally that (a) the grounds do not affect Mr. Che or the Related Party Receiver; (b) the grounds addressed matters that were for the Company, not for the Joinder Applicants; (c) the Bye-Laws do not allow for an AGM to not take place – something which the current Board had done; (d) Section 76 of the Act

allows the Court to cure misconduct and ensure that the shareholders can exercise their rights; (e) the Company had every opportunity to appear at the hearings, having instructed counsel for the first appearance but then proceeded without counsel; (f) the Company filed evidence of Mr. Che, detailed submissions and letters from the Related Party Receiver; (g) Mr. Middleton explained why he had standing; and (h) all these issues were dealt with in evidence but the Company chose not to attend.

67. Mr. Robinson submitted that the Court should not grant leave to appeal and should not grant a stay for several reasons. He referred to Order 2 r 3 of the Rules of the Court of Appeal for Bermuda 1965 ("**RCA**") and to the procedure and test for leave to appeal as set out in *WF and Sannapareddy et al v Commissioner of the Bermuda Police Service* [2019] Bda LR 17 where Subair Williams J stated as follows:

> "The Relevant Legal Procedure
>
> Requirement for Leave to Appeal against Interlocutory matters
>
> *82. Section 12(2) of the Court of Appeal Act 1964 provides as follows:*
>
> *"(2) No appeal shall lie to the Court of Appeal –*
>
> *(a) against a decision in respect of any interlocutory matter; or*
>
> *(b) against an order for costs,*
>
> *except with leave of the Supreme Court or the Court of Appeal."*
>
> *Application Procedure*
>
> *83. Order 2/3 of the Rules of the Court of Appeal outlines the application procedure in respect of leave to appeal:*
>
> *"3 (1) Where an appeal lies only by leave of the Court or of the Supreme Court, any application to either Court shall be made by notice of motion ex parte in the first instance and the following provisions shall apply:*
>
> *(a) where the application is made to the Supreme Court, the notice of motion shall be filed with the Registrar of that Court not late(r) than fourteen days after the date of the decision of the Supreme Court;*

(b) if the application is refused by the Supreme Court and the intending appellant desires to apply to the Court for leave to appeal, he shall file his notice of motion with the Registrar not later than seven days after such refusal;
(c) unless the application (whether to the Court or to the Supreme Court) is dismissed or it appears to the Court to which the application is made that undue hardship would be caused by an adjournment, that Court shall adjourn the application and give directions for the service of notice thereof upon the party or parties affected;
(d) if leave to appeal is granted by the Supreme Court, the appellant shall file a notice of appeal;
(e) where leave to appeal is granted by the Court, the time, prescribed by Rule 2 of this Order, within which notice of appeal must be filed shall run from the date when such leave is granted.

(2) Every notice of motion filed in pursuance of paragraph (1) of this Rule shall set out the grounds of the application and shall be accompanied by an affidavit in support thereof and by a statement of the grounds of the intended appeal formulated in accordance with Rule 2 of this Order."

Applicable test in determining Application for Leave

84. In Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd [2007] Bda LR 81, the learned Chief Justice Mr Ian Kawaley, as he then was, cited with approval the case of The Iran Nabuvat [1990] 1 WLR 1115, in which Lord Donaldson of Lymington stated the test for leave to appeal; "no one should be turned away from the Court of Appeal if he had an arguable case by way of appeal" (p. 1117 – emphasis added) and "That is really what leave to appeal is directed at, screening out appeals which will fail."

85. I agree that this is the test to be applied in determining the merits of an application for leave to appeal."

68. Mr. Robinson submitted that leave should be granted to appeal on an issue of fact only where the Court takes the view that it is arguable that the judge was plainly wrong and leave should not be granted if the finding of fact was one which was open to the judge. He cited the case of *McAlphine Humberoak v McDermott International Inc (No. 2)* [1993] 1 WLUK 597. Mr. Robinson submitted that the 1 April 2021 Order was unimpeachable so leave to appeal should be refused.

69. In respect of a stay of execution pending appeal, Mr. Robinson referred to Order 2 rule 37 of the RCA which provides as follows:

> *"2/37 Stay of execution*
> *Upon the application of an intending appellant, the Court or a Judge may stay the execution of any judgment of the Supreme Court until the determination or other disposal of the appeal:*
> *Provided that no application under this Rule shall be entertained until it is shown to the satisfaction of the Court or a Judge that application for a stay of execution has been made to the Supreme Court and has been refused."*

70. Mr. Robinson submitted that the relevant test for granting a stay of execution of an ordinary judgment is set out in *Lines Overseas Management Ltd. v Green* [2002] Bda LR 24 at page 146 as follows:

> *"One starts with the assumption that the successful Plaintiff is not to be prevented from enforcing the judgment even though an appeal is pending. The Winchester Cigarette case , mentioned above. In holding the 'balancing of advantage' full and proper weight is given to those starting principles that there must be good reason to deprive the successful Plaintiff of the right to enforce the money judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason. The Winchester Cigarette case . The discretion is unfettered and 'it must be exercised judicially and to provide guidance.' Hobhouse L.J. in the Winchester Cigarette case , mentioned above, at 6.*

There must be an arguable appeal, being one which 'has some prospect of success.' Arab Monetary Fund v Hashim and others (No.9) Ch. D. 29 July *1994. (Lexis transcript). In the instant case though the Defendant has a right of appeal the prospects of success of the grounds of appeal appear to me to be not impressive but it is not suggested that they are unarguable.*

'It is also relevant that the Defendant can say that without a stay he would be ruined regardless of the outcome of the appeal (see Linotype—Hell Finance) …. The appellant must show some special circumstances which take the case out of the ordinary so that the ordinary rule should not apply, and that a stay be granted.' Slough Estates plc v Welwyn Hatfield District Council [1996] 2 PLR 50 at 77*May J. (Lexis transcript).*

"I am to exercise a discretionary jurisdiction as a matter of 'common sense and balance of advantage,' to quote Balcombe L.J. I take the balance of advantage to be equivalent to balance of fairness between the parties." Slough Estates plc case at 77, *May J. (Lexis transcript).*

In determining the balance I must act 'judicially' and must have regard to 'all the circumstances of the case,' Winchester Cigarette case , mentioned above, and I must make a decision 'which best accords with the interest of justice.' Combi (Singapore) Pte Ltd v Sriram and another , Court of Appeal (Civil Division) 23 July 1997 (Lexis transcript), Phillips L.J. at 4. (Lexis transcript).

But 'where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.' Combi case , mentioned above, Phillips L.J. at 4."

71. Mr. Robinson submitted that in *In the Matter of an Application for Information about a Trust* [2013] SC (Bda) 45 App (20 May 2013) Hellman J (sitting as a single Justice of the Court of Appeal) stated as follows:

"The principles applicable to a stay were set out in my previous ruling. They were expressed succinctly by Sullivan J in Department for Environment v. Downs [2009] EWCA Civ 257 [paragraph 8 of the judgment]:

> *"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".*"

72. Mr. Robinson submitted that a successful shareholder should not be denied judgment, that is, the holding of the Adjourned AGM. Further, he submitted that the Notice of Motion was about technical points; the Joinder Applicants were not bringing the Che/Tang Applications as representatives of the Company; they did not have any standing and were not entitled to a stay of the Orders; there was a prejudice to the Company as there were winding-up proceedings set for June 2021; the Adjourned AGM was to allow directors to be elected by the major shareholders to get control of the company so that it could be restructured and the application by the Joinder Applicants was a last minute stunt to halt the Adjourned AGM.

73. I adjourned to consider the submissions and resumed later the same day when I ruled that I refused to grant leave to appeal and to stay the Orders.

Refusal of Leave to Appeal

74. I refused leave to appeal for several reasons. First, in my view, in the 29 April 2021 Order, I had declined to amend or stay the 1 April 2021 Order whilst giving directions for a full hearing of the Notice of Motion. The main effect of that Order was that the Notice of Motion was going to have a full hearing at a later date after further evidence and submission had been filed. However, along with my reasons already stated, the more concerning point was the lateness of the Che/Tang Applications. Of some note, the Adjourned AGM was due to take place within 24 hours in Hong Kong. In my view, it was imperative to the Court

to make clear to all parties that the 1 April 2021 Order was not going to be stayed or amended, thus allowing the Adjourned AGM to continue.

75. Second, I was persuaded by Mr. Robinson's submissions that the grounds in the draft Notice of Appeal were in effect matters for the Company to address rather than for the Joinder Applicants. In essence, the grounds did not affect Mr. Che or the Related Party Receivers. However, the Company had not brought an application to stay the Adjourned AGM. On the evidence, the Company had taken all the necessary steps to convene and conduct the Adjourned AGM.

76. Third, I was satisfied that the Court had the jurisdiction under Section 76 of the Act to ensure that the Company held an AGM and more significantly also had the authority to give effect to the conduct of an AGM. In my view, on the evidence, there was a need to ensure that the Adjourned AGM was going to be conducted in a proper manner. Therefore, specific orders were required.

77. Fourth, in my view, I was not persuaded that the specific orders in relation to the conduct of the meeting usurped the Bye-Laws of the Company. On the contrary, I was satisfied that the specific orders were required in all the circumstances.

78. Fifth, I was satisfied that the Company had ample opportunity to be heard. At the *Ex Parte* hearing on notice, the Company was represented by counsel on a watching brief, although they were removed from the record soon after. At the *inter partes* hearing, the Company was not represented by counsel, but all of the material in the form of Affirmations, written submission and the Related Party Receivers Response Letters were submitted to the Court and duly considered.

79. Sixth, in all the circumstances where the Joint Applicants had almost a month to challenge the 1 April 2021 Order, they had waited until the last possible moment to engage the Court when there were time zone issues to consider and the clock was ticking down. I described it earlier as an attempt to derail the Adjourned AGM. Additionally, this tactic appeared to me to be a last throw of the dice in the Last Chance Saloon.

80. In light of the above reasons, in following Lord Donaldson's test for leave to appeal, I was not satisfied that the Che/Tang Applications had an arguable case by way of appeal. Further, I was of the view that such an appeal was likely to fail.

Refusal to grant stay of Order pending appeal

81. I refused to grant a stay of the 29 April 2021 Order for several reasons. First, in following *Lines Overseas Management Ltd. v Green* I was persuaded by Mr. Robinson that the starting principle was that there was no good reason to deprive the shareholders of their right to have the Adjourned AGM and to elect the directors as they see fit. On that basis I exercised my discretion to not grant the stay pending appeal.

82. Second, I have already stated that I was not satisfied that the Joinder Applicants had an arguable case. It follows that I am not of the view that there is an arguable appeal which has some prospect of success.

83. Third, in considering the balance of fairness, I have considered all the circumstances in the case. I am persuaded by Mr. Robinson's submissions that the Joinder Applicants were not representatives of the Company; their standing is questionable in the circumstances; there was a prejudice to the Company as there were winding-up proceedings set for June 2021; the Adjourned AGM was to allow directors to be elected by the major shareholders to get control of the company so that it could be restructured and the application by the Joinder Applicants was a last minute stunt to halt the Adjourned AGM.

84. Fourth, in my view, in following Hellman J in *In the Matter of an Application for Information about a Trust,* the balance of fairness tips to the shareholders and their right to have the Adjourned AGM rather than to the Joinder Applicants and their own individual interests. Further, in considering and balancing any risk of harm to the parties, I am of the view that refusing to grant a stay pending appeal is less likely to produce injustice. On the one hand, the long overdue Adjourned AGM will take place, the shareholders will be able to exercise their right to vote, directors will be appointed and the Company can move on with its business. On the other hand, Mr. Che is able to perform his duties as chair in

accordance with the Bye-Laws and the terms of the Orders of the Court as necessary or he may choose to not be the chair. In respect of the Related Party Receivers, they will be able to perform their duties with the duly elected directors or take steps to address any issues if and when they arise.

85. In light of the above reasons, I was not persuaded that there were solid grounds put forward by the Joinder Applicants to grant a stay of the 29 April 2021 Order.

Conclusion

86. For the reasons above, my conclusions were as follows:
    a. In respect of the Che/Tang Applications by the Joinder Applicants:
        i. I declined to amend or stay the 1 April 2021 Order that day;
        ii. I gave directions for a full hearing of the Notice of Motion at a later date;
        iii. I declined to grant leave to appeal to the Court of Appeal; and
        iv. I declined to grant a stay pending appeal.
    b. In respect of Sinopoly's Summons, I granted the Order in the terms.

87. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs and/or damages, I direct that:
    a. In respect of the Notice of Motion which is adjourned for a full hearing at a later date that costs be reserved; and
    b. In respect of the application for leave to appeal and for the stay pending appeal, that costs shall follow the event in favour of Sinopoly against the Joinder Applicants on a standard basis, to be taxed by the Registrar if not agreed.

Dated 21 July 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT