EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2023/0062

BETWEEN:

THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED

Applicant

and

NEWOCEAN (SHENZHEN) ENERGY INVESTMENT LIMITED

Respondent

And

CLAIM NO. BVIHCM2023/0063

BETWEEN:

THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED

Applicant

and

SOUND HONG KONG LIMITED

Respondent

Appearances:

Mr. Matthew Hardwick, KC, with him Ms. Rosalind Nicholson for the Applicants

Mr. David Mohyuddin, KC, with him Mr. Jerry Samuel for the Respondents

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2024: January 30, 31;
July 29.

JUDGMENT

Introduction

[1] **Wallbank J.:** On 6th April 2023, The Hong Kong and Shanghai Banking Corporation Limited ('HSBC'), as creditor and agent for other creditors, filed an Originating Application in this Court against each of NewOcean (Shenzhen) Energy Investment Limited ('NewOcean SZ') and Sound Hong Kong Limited ('Sound HK'), seeking the appointment of Mr. Aaron Gardner, Mr. Kenneth Fung and Mr. Roderick Sutton as liquidators over these companies ('the Applications'). Both NewOcean SZ and Sound HK are incorporated in the Territory of the Virgin Islands ('BVI'). Messrs. Gardner, Fung and Sutton are insolvency professionals employed by or working for the insolvency firm FTI in its BVI office (Mr. Gardner) and Hong Kong office (Messrs. Fung and Sutton).

[2] After a protracted procedural phase, these Applications came on for their substantive hearing on 30th and 31st January 2024. Following a contested hearing, the Court reserved its decision, which it delivered on 29th July 2024. These are the Court's written reasons.

Background

[3] In 1998, a company called New Ocean Energy Holdings Limited was incorporated in Bermuda. As its name indicates, it is a holding company, and the business of what would become its group (the 'Group') involved trading in energy related goods, services and facilities, in various countries, including maritime transport. By the time of the events with which we are presently concerned, the Group comprised a large and complex corporate structure, through which assets worth, allegedly, hundreds of millions of United Stated Dollars, were owned and operated.

[4] The next year, in 1999, Sound HK was incorporated. New Ocean Energy Holdings Limited owned 100% of the issued share capital of Sound HK.

[5] About four years later, in 2003, NewOcean SZ was incorporated. Sound HK owned 99.9% of NewOcean SZ's issued share capital.

[6] We are presently concerned with events occurring on and after 28th May 2018.

[7] At that time New Ocean Energy Holdings Limited, and the Group, was controlled by its executive director Mr. Shum Siu Hung ('Mr. Shum').

[8] On 28th May 2018, New Ocean Energy Holdings Limited, as borrower ('the Borrower'), entered into a Facility Agreement ('the Facility Agreement'), pursuant to which a consortium of lenders ('the Lenders') (of which HSBC was the Mandated Lead Arranger, Original Lender and Agent) made available to the Borrower a United States Dollar term loan facility of up to US$145,000,000 and a Hong Kong Dollar term loan facility of HK$195,000,000, in various tranches respectively.

[9] The Borrower's direct and indirect subsidiaries, Sound HK and NewOcean SZ, were two of four guarantors who provided a Guarantee and Indemnity to the Lenders in respect of the Facility Agreement. For convenience, these two guarantors that we are presently concerned with, will be referred to as 'the Guarantors'. They are the Respondents to the present Applications.

[10] Two days after the Facility Agreement had been entered into, on 30th May 2018, the Borrower drew down US$35,400,000 under Tranche A and HK$51,480,000 under Tranche B of the Facility Agreement ('First Utilisation Date')

[11] Then, a month and a half later, on 16th July 2018, the Borrower drew down a further US$109,600,000 under Tranche A and HK$143,520,000 under Tranche B of the Facility Agreement.

[12] The Borrower was under a contractual obligation to make repayments of the first instalments of US$14.5m under Tranche A and HK$19.5m under Tranche B, each being 10% of the aggregate amounts outstanding under Tranche A and B, due no later than 30 months after the First Utilisation Date. Thus, the Borrower was required to make these repayments by about 30th November 2020. But the Borrower did not do so. It repaid nothing.

[13] Instead, the Borrower proposed two schemes of arrangement in an effort to compromise the debt ('the Debt'). The Bermuda and Hong Kong courts became involved, but the net result was that the majority of the creditors did not agree to restructure the Debt and, as the creditors were perfectly entitled to do, they maintained their contractual rights under the Facility Agreement.

[14] On 12th May 2021, HSBC (in its capacity as Agent and acting on the instructions of the Majority Lenders) wrote a demand letter (the 'Demand Letter') to (*inter alios*) the Borrower (1) identifying six Events of Default; (2) in accordance with Clause 22.15 (Acceleration) of the Facility Agreement, declaring that all of the sums due under Tranche A and B were immediately due and payable; (3) demanding repayment of the Debt.

[15] On 17th May 2021, HSBC, in the same capacity, wrote to (*inter alios*) the Guarantors pursuant to Clause 17 of the Facility Agreement demanding that each guarantor make immediate payment of the Debt ('the Guarantor Demand').

[16] Clause 17 provided:

> "Each Guarantor irrevocably and unconditionally jointly and severally:
>
> (a) as principal obligor and not merely as surety, guarantees to each Finance Party the prompt performance by the Borrower of all the Borrower's obligations under the Finance Documents;
>
> (b) undertakes with each Finance Party that whenever the Borrower does not pay any amount when due under or in connection with any Finance Document, that Guarantor shall forthwith on demand by the Agent pay that amount as if it was the principal obligor;
>
> (c) agrees with each Finance Party that if any amount which would otherwise be claimed by any Finance Party under the above paragraph (a) and/or (b) is for any reason not recoverable thereunder on the basis of a guarantee, it shall, as an independent and primary obligation, indemnify that Finance Party immediately on demand against any cost, loss or liability that Finance Party may incur or suffer as a result of the Borrower not paying any amount when (if such amount were recoverable from the Borrower) it would have been due under or in connection with any Finance Document. The amount payable by a Guarantor under this indemnity will not exceed the amount it would have had to pay under this Clause 17 if the amount claimed had been recoverable on the basis of a guarantee."

[17] The Guarantors failed to make payment of the Debt or any part of it – and (until filing the evidence in these Applications) have never sought to challenge the fact or nature or amount of the Debt in any way.

[18] Many things happened between 17th May 2021 (the date of the Guarantor Demand) and 6th April 2023 (the date HSBC filed the Applications in this Court), although payment of the debt, even in part, either on the part of the Borrower or of the Guarantors, was not one of them.

[19] Amongst these events, in August 2021, a Seychelles company, called Super Deal, was interposed between the Borrower and Sound HK – so as to become the 100% shareholder of Sound HK (the 'Super Deal Interposition'). The effect of this was to sever from the Borrower control of its thitherto 100% subsidiary, Sound HK and through it, the Group and all its assets. This interposition resulted in the transfer of the shares in Sound HK to transferees unknown to HSBC. HSBC informs the Court that '[n]either Mr. Shum nor the Borrower has ever provided any explanation in respect of the Super Deal Interposition'.

[20] But that was not the only pertinent interposition. It is to be recalled that Sound HK owned 99.9% of the shares in NewOcean SZ. Some time between December 2020 and August 2022, a Samoan company, called Chance Right, was interposed between Sound HK and NewOcean SZ, acquiring the entire issued share capital of NewOcean SZ in place of Sound HK.

[21] A yet further interposition was effected around the same time. On 1st August 2021, another Samoan company, called Dynamic Frontier, was interposed between Sound HK and another intermediate holding company, New Energy.

[22] Amongst other transactions (which included disposals of group assets such that they would no longer be in the Group), a transaction was entered into which the parties have referred to as the Victory Mountain Loan (the 'Victory Mountain Loan'). On 16th November 2021, a shell company within the Group without any significant assets called New Ocean Petroleum entered into a loan agreement with a company outside the group called Victory Mountain to borrow, or ostensibly to borrow, HK$85m (increased to HK$120m pursuant to an Addendum executed on the same day). This loan was guaranteed by the Borrower (i.e. New Ocean Energy Holdings Limited), which also agreed to execute a deed pledging all the shares in Sound HK in favour of Victory Mountain. The Borrower (i.e. New Ocean Energy Holdings Limited) pledged to Victory Mountain all the shares held by Sound HK in NewOcean SZ. NewOcean SZ indirectly held an LPG Deep-Sea Terminal; and the 35% interest in an oil products storage terminal.

[23] The net effect of these transactions appears to have been to insulate assets remaining within the Group from HSBC's and the other Lenders/creditors' rights of recourse under the Facility Agreement against the Borrower and against the Guarantors, NewOcean SZ and Sound HK.

[24] In the meantime, in September 2021 the Borrower circulated a draft Facility Agreement by way of a fresh proposal to its banking creditors, in broadly similar terms to the schemes previously rejected by the creditors. This proposal was also comprehensively rejected by a majority of the creditors.

[25] Then, on 30th September 2021, HSBC served a statutory demand in accordance with Bermudan law on the Borrower, followed, on 22nd October 2021, with a winding up petition against the Borrower in Bermuda ('the Bermuda Petition') seeking the appointment of joint provisional liquidators.

[26] The Borrower also filed an application in the Bermuda Supreme Court, on 17th November 2021. The Borrower thereby sought an order appointing its own nominated 'light touch' provisional liquidators to effect a restructuring of its debts (and filed evidence that it owed US$770.2m to its bank creditors).

[27] The Bermuda Supreme Court, by Mussenden J., determined on 14th December 2021 not to make a winding up order on that occasion, despite twelve banks, between them holding 63.6% of the Debt, supporting the making of an immediate winding up order. Instead, the Bermuda Supreme Court acceded to the Borrower's application for the appointment of 'light touch' provisional liquidators, appointing Messrs. Fung and Sutton of FTI, together with one other insolvency practitioner from a different firm (together the 'Bermuda JPLs' and 'the Light Touch Order').

[28] HSBC observes that between 14th December 2021 and 8th April 2022 the Borrower breached the Light Touch Order in a number of ways and failed to provide the Bermuda JPLs with critical information to enable a restructuring to be attempted.

[29] On 16th March 2022, the Borrower filed a summons in Bermuda seeking an order to limit the scope of the JPLs' powers under the Light Touch Order. The Bermuda Supreme Court granted that application on 9th May 2022. In the meantime, HSBC's winding up petition was adjourned some five times.

[30] On 3rd June 2022, HSBC filed an appeal against the 9th May 2022 decision of the Bermuda Supreme Court to the Bermuda Court of Appeal.

[31] On 25th July 2022 the Court of Appeal of Bermuda (by Justices of Appeal Sir Christopher Clarke, Sir Maurice Kay, and Mr. Geoffrey Bell JA) allowed HSBC's appeal and ordered that the Borrower be wound up with immediate effect. The Bermuda JPLs were appointed as the Joint Liquidators ('the Bermuda JLs').

[32] A few days later, on 4th August 2022, the Bermuda JLs were informed that the shareholder of Sound HK was neither Super Deal nor the Borrower, such that the ownership of the shares in Sound HK 'is therefore currently unknown'.

[33] A few days later still, on 8th August 2022, the Hong Kong Court made a winding up order against the Borrower pursuant to a winding up petition filed by a trade creditor of the Borrower, Kuwait Petroleum Corporation ('the Hong Kong Order').

[34] By 19th August 2022, a further four share capital transactions were effected within the Group structure, and a further share transaction occurred on 9th December 2022.

[35] HSBC observes and contends that:

> "the series of transactions (asset disposals, share transfers, pledges and mortgages) relating to these assets and the Group companies which owned them … have wholly frustrated the efforts of liquidators appointed 18 months ago in Bermuda (on 25 July 2022 in respect of the Borrower) to recover the sums owed to HSBC by the Borrower."

[36] We have seen that HSBC says that it served the Guarantor Demand on the Guarantors on 17th May 2021. It was some two years later, on 6th April 2023, that HSBC came to this Court. On that date HSBC filed applications to appoint liquidators over the Guarantors, as well as applications for the appointment of provisional liquidators.

[37] In relation to the applications to appoint liquidators over the Guarantors (as opposed to provisional liquidators, i.e. to wind up these companies), HSBC relied upon these companies' failure to comply with the Guarantor Demand. On that basis, HSBC contended that:

> "15. In the premises, the Company having failed to pay its debts as they fell due, is insolvent within the meaning given in section 8(1)(c)(ii) of the Act.
>
> 16. Further or alternatively, it is just and equitable that the Company be wound up under section 162 (1)(b) of the Act."

[38] The Act in question is the Insolvency Act, 2003, as amended.[1]

[39] To maintain a clear distinction between the application to appoint **provisional liquidators** and an application to appoint **liquidators**, I shall refer to the latter as an application to wind up a company.

[40] On 1st May 2023, I granted the provisional liquidation applications on an *ex parte* basis, appointing Messrs. Gardner, Fung and Sutton as Joint Provisional Liquidators ('the Provisional Liquidators') in order to maintain the value of assets owned or managed by these companies.

[1] Acts 5 of 2003, 11 of 2004, 16 of 2004, 19 of 2006, 1 of 2008 and 16 of 2022.

[41] In light of the history which I have related in brief above, I was satisfied that, as HSBC contended, there was a 'real risk that, following service of the Liquidation Application on [the Guarantors] steps will be taken to remove the control of assets under the direct or indirect ownership of [the Guarantors] to a place beyond the control of the ultimate liquidators'.

[42] As mentioned earlier, a protracted phase ensued before the Applications filed on 6th April 2023 came on for their substantive hearing.

[43] On 5th June 2023, both the Guarantors filed Notices of Opposition to the Applications to wind them up. These were in materially identical terms:

> "For the reasons more fully set out in the Affirmation of Cheung Kwong Sang (with Exhibits thereto) dated 5 June 2023, the Company intends to oppose the making of an order to appoint joint liquidators, including the following grounds:
>
> 1) Contrary to the Applicant's assertions, the Victory Mountain Loan is not a sham, but a genuine transaction supported by evidence. Accordingly, Victory Mountain is entitled to take enforcement actions, including but not limited to taking over the shares of the Company;
>
> 2) The Applicant is not entitled to make the Application against the Company because the Company no longer owes the alleged guaranteed liability towards Applicant;
>
> 3) Further, to the extent that there is any dispute over the existence of such liability between the Applicant and the Company, that dispute should be resolved in Hong Kong in accordance with the exclusive jurisdiction clause in the Facility Agreement. This is supported by a legal opinion on Hong Kong law; and
>
> 4) FTI Consulting (BVI) Limited lacks independence to continue acting as joint provisional liquidators by virtue of their appointment over NewOcean Energy Holdings Limited ("Listco") as more fully set out in evidence. Paul Lewis Pretlove and Chun Yin Law of Interpath (BVI) Limited are independent and eligible and should be appointed instead. The Company reserves all of its rights related to the Application, including its right to add further grounds of opposition thereto and to file further evidence in response to the same."

Objection 1 – 'Victory Mountain Loan not a sham'

[44] It can immediately be stated that the first stated ground of opposition – that the Victory Mountain Loan was not a sham – had not been stated as a ground for winding up the Guarantors. As I have related, the primary ground relied upon was their noncompliance with the Guarantor Demand. The *bona fides*, or lack thereof, of the Victory Mountain Loan was not advanced as a ground for the winding up on the basis of insolvency. That issue does, though, concern the secondary, further or

alternative, ground, for the just and equitable winding up of the Guarantors. That is because HSBC contends that just as it had begun to take formal steps to recover the Debt against the Borrower and the Guarantor, the Victory Mountain Loan constituted a deliberate attempt, by a sham transaction, to put the key valuable assets beyond HSBC's reach.

[45] It can also immediately be seen from these four articulated grounds of opposition to the winding up of the Guarantors that:

(1) these arguments do not in any way address the fact that the Debt remains outstanding from the Borrower to HSBC; and

(2) only the second ground disputes the Debt. It does so on the basis that each of Guarantors 'no longer owes' HSBC the Debt that these companies had guaranteed (necessarily and logically implying that the Guarantors did owe HSBC the Debt at an earlier point, begging the question what circumstance(s) entailed that they no longer did). The other three grounds do not dispute the Guarantors' liability to HSBC.

[46] We thus have, as at 5th June 2023 (i.e. about two months after the winding up applications were filed), the Guarantors advancing four articulated objections to the winding up petitions, and reserving their rights to add further objections.

[47] The Guarantors filed evidence in opposition to the Applications, by way of an Affirmation filed on 5th June 2023 on behalf of each of these companies by Mr. Cheung Kwong Sang ('Mr. Cheung'), who describes himself as the sole shareholder and sole director of Victory Mountain Limited, which he says was then the 100% shareholder of Sound HK.

Objection 2 – debt disputed

[48] In relation to the second ground of opposition, Mr. Cheung developed the argument articulated in the Notice of Opposition. Mr. Cheung affirmed that:

(1) the 'HK counsel team' 'has considered the matters set out in the 'Discharge of Liability' section hereinbelow and concluded that the Company holds an arguable defence in regards to its liabilities as a guarantor which may eventually discharge its liabilities:' Mr. Cheung (SZ) at paragraph 26;

(2) a draft Writ of Summons 'has been prepared to be filed in High Court in Hong Kong' and which 'sets out the relevant grounds in discharging the Company's liability as corporate guarantor'. The 'Indorsement of Claim' in the draft Writ of Summons alleges that HSBC 'has acted in an injurious manner towards' the Guarantors and seeks a declaration, on that basis, that HSBC 'has no right to commence the BVI proceedings': Mr. Cheung (SZ) at paragraph 27;

(3) At Mr. Cheung (SZ) paragraphs 30-32, Mr. Cheung stated:

> " 30… I understand that soft touch provision liquidators were appointed to [the Borrower] on or around 14 December 2021 for the purpose of carrying out a restructuring with a view to avoiding an immediate winding up order made against [the Borrower]. However, upon the restructuring efforts by [the Borrower] with the provisional liquidators preferred by HSBC appointed, steps (or rather lack thereof) were taken by the Lenders (through the liquidator or otherwise).
>
> 31. The debt which the Company had signed up for being a guarantor under the Facility Agreement was an unsecured debt, with [the Borrower] as the principal debtor. However, such non-actions could well be injurious the Company as a guarantor in causing depreciation of the Companies' assets.
>
> 32. In that respect, the nature of the debt which the Company had signed up for being a guarantor has been materially varied. It would not be fair, just and equitable for the Company to continue to be liable for the debt.
>
> 33. In the circumstances, the Company disputes that it has any liability under the Facility Agreement and HSBC is no longer entitled to pursue the Company under the Facility Agreement. Further, the fact that HSBC waited until April 2023 to file the Liquidation Application against the Company suggests that it knew that its entitlement to take out the Liquidation Application is questionable (or at the very least, the Company disputes that it is still liable to the debt)."

[49] HSBC contended that these arguments in support of an 'arguable' defence of 'Discharge of Liability' in respect of the Debt, which stood at some US$171m ('the Discharge Claim'), withstand no sensible scrutiny. HSBC made the following points in response to those taken by Mr. Cheung:

(1) Mr. Cheung materially misstates the extent to which the Guarantors' 'HK counsel team' has 'confirmed' that the Guarantor 'holds arguable defence'. HSBC pointed out that the Guarantors' Counsel opinion 'confirmed' no such thing. The HK Counsel opinion was expressed in far more tentative, and indeed speculative, language, with the Guarantors'

Counsel explicitly stating that they 'express no view' on the matter. HSBC observed that the opinion stated, at paragraphs 49 and 50:

> "49. **We have not been provided with the details of the Restructuring**. **However, we can see an argument** that there may be complaints in relation to how the Restructuring has been carried to gainfully utilise the Borrower's assets and the Borrower would have been procured to repay its debts under the [Facility Agreement]
>
> 50. Importantly, the liquidator appointed to conduct the Restructuring was the Lenders' choice, and that the liquidator **may** have been practically influenced by the Lenders' as to the direction of the Restructuring. **We can see an argument to** the effect that steps taken by the Lenders' (through the liquidator or otherwise) **may** be considered to be injurious to the surety in causing depreciation of the Borrower's assets. **We have not been provided with details instructions in respect of the Restructuring**, and **we express no view on whether that is the case on the facts.** Instead, the merits of the Restructuring, and the cause of its failure, may well be something that has to be explored at trial." (Emphasis added.)

(2) HSBC further observed that Mr. Cheung's evidence was 'extraordinarily vague' and failed to identify any acts or omissions by HSBC or on the part of the Lenders that the Guarantors claim to have been 'injurious to the surety in causing depreciation of the Borrower's assets.'

(3) The Guarantors' 'HK counsel team' appear to be suggesting a potential argument, whilst expressly conceding that it had no detailed instructions on which to found such an argument. Normally, one would expect Counsel to start with facts and then opine that there is a potential arguable case – not the other way round.

(4) Mr. Cheung also alleged that the Lenders had engaged in 'non-actions' (i.e. failed to act) and had vetoed the appointment in Bermuda of 'soft-touch' liquidators, thereby sabotaging the Borrower's debt restructuring efforts. HSBC countered this with evidence to show that this was not the case, in the form of a counter opinion from HSBC's own Hong Kong Counsel, which stated:

> "…**in light of the damning findings made in the Bermuda CA Reasons** [i.e. the reasoned judgment of the Bermuda Court of Appeal when it ordered the winding up of the Borrower] - **that it was the Borrower and its management's conduct**

> **in failing to cooperate with the JPLs and provide information to the JPLs over a substantial period of time (in breach of the "light touch" order)** and **their dissipation of the Borrowers' assets** that led to the substantial majority of creditors taking the view that the Borrower should be wound up - **it is difficult to see how there can begin to be a case that the Restructuring failed and the Borrower was wound up by reason of the JPLs' alleged injurious conduct**." (Emphasis added.)

(5) HSBC observed that the Joint Provisional Liquidators appointed in Bermuda were not HSBC's agents as a straightforward matter of law, and there is no basis to impute any failings of the Joint Provisional Liquidators onto HSBC or the Lenders.

[50] Mr. Cheung (who does not appear to be a lawyer, and thus appears to be relaying, uncritically, ideas for opposition to the Applications suggested by legal advisors) also argued that the Guarantors 'received no consideration and/or corporate benefit by entering into the Facility Agreement' 'as the borrower of the loan is [The Borrower] instead of [New Ocean Investment]'. He advanced this argument on the back of a contention that the Facility Agreement, which contained the guarantee clause at Clause 17, did not expressly indicate that the Facility Agreement is to be signed as a deed such that 'the Facility Agreement was signed as an agreement instead of a deed'. Mr. Cheung argued that although Clause 17.10 stated the intention that 'the Parties intend this Agreement to bind each Guarantor as a deed and it shall take effect as a deed, even though the other parties execute this agreement underhand' this was 'not sufficient' in circumstances where, he contended, the 'Facility Agreement was not in fact signed in the form of a deed.'

[51] HSBC argued that these contentions were plainly wrong on several levels:

(1) It is trite English/BVI law that whilst consideration must move from the promisee (here HSBC) consideration does not need to move to the promisor (the Guarantor) and can comprise the conferring of a benefit on a third party (the Borrower). As the authors of **Chitty on Contracts** (35th edn., Sweet & Maxwell 2023) ('**Chitty**') explain in altogether familiar terms:

> "6-041 While consideration must move from the promisee, it need not move to the promisor. It follows that the requirement of consideration may be satisfied where the promisee does something at the promisor's request, but confers no corresponding benefit on the promisor.

6-042 It also follows that the promisee may provide consideration by conferring a benefit on a third party at the promisor's request: e.g. by entering into a contract with the third party."

(2) In the specific creditor/debtor/surety context the **Law of Guarantees** (7th edn., Sweet & Maxwell 2015) ('**Law of Guarantees**'), confirms at 2-009 that:

> "2-009 The consideration must move from the creditor rather than from the debtor… The consideration need not directly benefit the surety, though it may often do so…In most cases, however, the consideration will consist entirely of some advantage given to or conferred on the principal by the creditor at the request of the surety, such as forbearance from suing him or the compromise of existing legal proceedings against him, loaning him money, supplying him with goods on credit, or, in the case of a fidelity guarantee, taking him into the creditor's service or employment…"

HSBC observed that its own Hong Kong law opinion confirms that the same applies as a matter of Hong Kong Law.

(3) HSBC pointed out that its factual evidence in any event is that the monies loaned by HSBC to the Borrower were of benefit to the overall corporate Group to which the Guarantors belonged and notes that Clause 3.1 of the Facility Agreement expressly provided:

> "3.1 Purpose The Borrower shall apply all amounts borrowed by it under the Facility towards refinancing of any existing indebtedness of the Borrower under the Existing Facility and financing the general working capital requirements of the Group." [where the 'Group' (as defined) included the Borrower's subsidiaries.]

(4) In the premises, the Guarantors' obligations were supported by valuable consideration (a conclusion obvious as a matter of English/BVI law – and further supported as a matter of Hong Kong law).

(5) HSBC contended that the Facility Agreement plainly was effective as a deed. As a matter of BVI law: (1) Section 103(4)(a) of the Business Companies Act 2004 provides that an instrument is validly executed by a company as a deed if it is (i) 'sealed with the common seal of the company'; and (ii) 'witnessed by a director of the company or such other person who is authorised'; (2) the common seal of each of the Borrower and the Guarantors was affixed to the Signature Page of the Facility Agreement and in the presence of two directors; and (3) the statement of intention in Clause 17.10 reinforces the conclusion that

the Facility Agreement was effective as a deed in providing that 'the Parties intend this Agreement to bind each Guarantor as a deed and it shall take effect as a deed, even though the other parties execute this agreement underhand'. HSBC observed that its HK Counsel opinion confirms that the analysis is very similar under Hong Kong law, where (1) a deed is a contract under seal (**Halsbury's Laws of Hong Kong**,[2] 115.017); (2) a deed is deemed to have been duly executed by the corporation 'if the deed purports to bear the seal of the corporation affixed in the presence of and attested by…2 members of [the] board or body' (Conveyancing and Property Ordinance (Cap. 219) ('CPO'), section 2036); and (3) Clause 17.10 is relevant because 'if the document makes it clear on its face that it is intended by the person or persons making it to be a deed, then it will have that effect' (**Law of Guarantees**, 2- 021).

[52] Mr. Cheung moreover argued that HSBC has not supplied any evidence that it served the Guarantor Demand on the Guarantors by fax and courier on 17th May 2021. He points to the fact that the alleged demand 'does not bear the Company's [i.e. NewOcean SZ's and/or Sound HK's] chop' (always affixed, he says, by the receptionist Ms. Chu Man Fong) such that 'it is therefore doubtful whether the alleged notice was indeed served on the Company on 17 May 2021 as alleged.'

[53] Mr. Cheung went on to say that 'I verily believe that HSBC has never served the alleged demand notice on the Company on 17 May 2011'.

[54] Mr. Cheung further claimed that the lack of statutory demand 'appears to be an attempt on the part of HSBC to bypass the exclusive jurisdiction clause which points in favour of the Hong Kong Court'.

[55] HSBC countered these arguments with the following.

[56] HSBC's witness of fact, Mr. Tse, confirmed that the Guarantor Demand had been served upon NewOcean SZ and Sound HK.

[57] HSBC relied upon lawyers' affidavits sworn on 26th January 2024 to show the precise manner in which the Guarantor Demand was served upon NewOcean SZ and Sound HK. This evidence was to the effect that the Guarantor Demand, as permitted by Clause 30.3(a)(i) of the Facility

[2] 2nd edn., Lexis-Nexis Butterworths 2022.

Agreement, was sent by fax to the specified fax number for communication for each of NewOcean SZ and Sound HK (in accordance with Clause 30.2) at 18.04 hours on 17th May 2021; and, as permitted by Clause 30.3(a)(ii), was sent by couriered letter to the specified address for communication for each of NewOcean SZ and Sound HK (in accordance with Clause 30.2) at 14.38 hours on 18th May 2021; and, as permitted by Clause 30.3(a)(iii) and 30.4 of the Facility Agreement, it was sent by email at 5.34pm by Ms. Peggy Chiang of HSBC to the email addresses angelinewong@newoceanhk.com; and mankin@newoceanhk.com.

[58] Moreover, observed HSBC, contrary to the Guarantors' case **now**, the Guarantors had themselves in fact pleaded HSBC's service of the Guarantor Demand upon them in their own Writ of Summons issued on **5th January 2024** in Action No. 27 of 2024 in the High Court of the Hong Kong Special Administrative Region, stating unambiguously:

> "On or about 17 May 2021, the Defendant (in its capacity as Agent of the Facility Agreement) served on the Plaintiffs (as Guarantors) a demand letter with respect to the Demanded Sums".

Accordingly, submits HSBC, the Guarantors' denial of service of the Guarantor Demand is further clear evidence of the absence of substance (and the lack of good faith) in their opposition to these Applications.

[59] Mr. Cheung further argued that HSBC had failed to adduce any documents evidencing that it has obtained the authority from the Lenders to bring these Applications, with reference to Clauses 26.7(a) and (f) of Facility Agreement. These provide:

> "26.7 Majority Lenders' instructions
>
> (a) Unless a contrary indication appears in a Finance Document, the Agent shall
>
> (i) exercise any right, power, authority or discretion vested in it as Agent in accordance with any instructions given to it by the Majority Lenders…
>
> **(f) The Agent is not authorised to act on behalf of a Lender (without first obtaining that Lender's consent) in any legal or arbitration proceedings relating to any Finance Document**)." (Emphasis added.)

[60] HSBC countered this by exhibiting the Lenders' consents to its lawyers' affidavits filed in January 2024.

[61] Mr. Cheung pointed the Court to what he said was an 'important development'. He gave evidence that there was 'on-going negotiation between the Listco's [i.e. the Borrower's] creditors and the

Listco's liquidators for the restructuring of the debts owed by the Listco and its subsidiaries (i.e. the Group) to its creditors (which include Victory Mountain)'; and in particular 'a serious investor who is prepared to reach a solution with, among others, the Lenders' had come forward, with an email dated 2nd June 2023, which Mr. Cheung contended this indicated 'the real possibility that the debt due to the Lenders from the [Borrower] and its subsidiaries would be settled in due course'.

Objection 3 - 'No jurisdiction'

[62] Ground 3 of the Guarantors' Notice of Oppo was in terms that 'to the extent that there is any dispute over the existence of such liability between the Applicant and the Company, that dispute should be resolved in Hong Kong in accordance with the exclusive jurisdiction clause in the Facility Agreement'.

[63] The Guarantors' argument in this regard was that the BVI courts do not have jurisdiction to determine whether or not there is a *bona fide* substantial dispute to the alleged debt, because, they said, the Facility Agreement contained an exclusive jurisdiction clause in favour of Hong Kong.

[64] The Guarantors relied upon their Hong Kong Counsel's opinion to support this argument. Mr. Cheung, giving evidence for the Guarantors, stated that their Hong Kong Counsel 'conclude' (as claimed at Cheung(SZ) paragraph 25) 'that HSBC ought not to have presented the Liquidation Application against the Company in the BVI as HSBC had not been able to justify the reason it commenced the claim in the BVI rather than in Hong Kong'.

[65] HSBC was put to considerable time and trouble addressing these contentions. This effort included showing:

(1) with reference to the wording used in the Facility Agreement at Clause 37.1, that claims raised by the Borrower were subject to the exclusive jurisdiction of the Hong Kong courts, whilst the Lenders and their agent, HSBC, were at liberty to refer their claims to the Hong Kong courts or the courts of any other jurisdiction, i.e., the jurisdiction clause was an asymmetric jurisdiction clause;

(2) that whilst there is Hong Kong case law authority for the proposition argued for by the Guarantors, that is not the position under English law, nor, by extension, BVI law; and

(3) Mr. Cheung had (again) overstated the position in relation to the alleged 'conclusion' reached by the Guarantors' Hong Kong Counsel: the furthest that they were prepared to

> go in the HK Opinion was to state, in carefully qualified terms, that 'there is at least an argument that HSBC would be under a duty to justify suing in a court other than Hong Kong' / 'at least as a matter of Hong Kong law, it is arguable that the Finance Parties ought not to have presented the Petitions.'

[66] The analysis on this topic became quite involved. However, very shortly prior to the hearing, the Guarantors dropped this objection.

Objection 4 – 'FTI lack of independence'

[67] Finally, it is claimed at the fourth ground in the Notices of Opposition that FTI 'lacks independence' to continue acting as the Joint Provisional Liquidators. The point is developed at Cheung(SZ) paragraph 54 and Cheung(HK) paragraph 54, which claim that given FTI's existing role as the Bermuda JLs of the Borrower it would 'not be appropriate' they should remain as Joint Provisional Liquidators of the Guarantors. Cheung paragraph 54 continues that 'Without making criticisms towards FTI, there is a legitimate concern for serious conflicts of these two roles'. Cheung(SZ) paragraph 57 proposes Mr. Paul Pretlove and Mr. Law Chun Yin of Interpath BVI Limited in place of FTI.

Legal principles

[68] The essential legal principles were not in dispute. Learned Counsel for HSBC explained them as follows.

[69] There is, as described in **McPherson & Keay: Law of Company Liquidation** (5th edn., Sweet & Maxwell 2021) ('**McPherson**') at 3-067 and 3-068:

> "...a broad general principle that a winding-up order will not, as a matter of discretion, be made on a debt which is subject to a dispute, provided that the dispute is based on some substantial ground; the petition should be struck out...[T]he principal reason is that a winding-up petition is not to be used for the improper purpose of compelling a solvent company to pay a disputed debt which would certainly be discharged as soon as the company's liability was clearly shown to exist, and irreparable damage could be caused to the company…"

[70] In similar vein the authors of **French on Applications to Wind Up Companies** (4th edn., Oxford University Press 2021) ('**French**') state (at 7.423):

> "…a dispute about the existence of a debt, or the identity of the creditor, cannot be expected to be decided in proceedings on a winding-up petition, because those proceedings are particularly unsuited to determining such a question. The usual practice of the court is to dismiss (or, sometimes, adjourn) a creditor's winding up petition if there is a dispute on substantial grounds about the existence of the petitioner's debt, leaving the petitioner to establish standing in other more appropriate proceedings…"

[71] The authors of **French** explain (at 7.577) that:

> "A dispute about the existence of a debt will not justify dismissal of, or preventing presentation or continuation of, a winding-up petition based on non-payment of the debt, unless the court is satisfied that 'the debt is disputed on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore, ignore)'…"

[72] The focus of the test is upon a dispute on substantial grounds. Many statements of the test also use the word '*bona fide*' (see **French**, at 7.599-7.610). For example:

(1) in **Re a Company (No. 003079 of 1990)**[3] Ferris J described the test as: '…whether there is a *bona fide* dispute on substantial grounds concerning the indebtedness relied upon [by the petitioner]…';

(2) in **Commissioners of Customs & Excise v Jack Baars Wholesale**[4] Lindsay J stated (at paragraph [22]) that in his experience this was the most frequently applied test; and

(3) in **Abbey National plc v JSF Finance and Currency Exchange Co Ltd**,[5] Morritt C spoke, at paragraph [36], of there being '…a substantial ground on which [the company] *bona fide* disputes its liability…' and, at paragraph [46], of '…substantial grounds for disputing the claim…[which] are advanced honestly…'.

[73] The authors of **McPherson** explain at 3-080 that:

(1) the '*bona fide*' element requires that that the company demonstrate that the dispute '…must be honestly believed to exist by those who allege it…'; whilst

(2) the element of substantiality requires that that '...belief must be based on reasonable and substantial grounds…'. In **Re Arena Corp Ltd**,[6] Morritt V-C explained, at [53], that '…bona

[3] [1991] BCLC 235.
[4] [2004] BPIR 543.
[5] [2006] EWCA Civ 328.
[6] [2004] B.P.I.R. 415.

fide disputed on substantial grounds…' is for all practical purposes synonymous with '…real as opposed to frivolous…'.

[74] The same test is applied in this Court. As stated in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**,[7] ('**Sparkasse**') at [3] per Byron C.J. (in what remains an exemplary summary of the law, and which can, for convenience, be referred to as the **Sparkasse** test):

> "…the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be tried…Invoking the process of the Court in relation to a debt which was known to be dispute on genuine and substantial grounds was an abuse of the process of the court…".

[75] Learned Counsel for HSBC urged that the Court should beware of a 'cloud of objections on affidavit'. He reminded the Court of the following.

[76] The authors of **French** observe (at 7.592) that:

> "…the court is entitled to refuse to take at face value a company's assertion that there is a dispute and is entitled to enquire into the basis for the alleged dispute…".

[77] Although (see **Tallington Lakes Ltd v Ancasta International Boat Sales Ltd**.[8]) the court should not conduct a long and elaborate hearing, examining in minute detail the case made on each side, equally 'the evidence is not to be approached with a wholly uncritical eye' (**French**, 7.593).

[78] In particular (and as observed by Oliver LJ in In **Re Claybridge Shipping Co. SA**[9]**)** the Court must be alive to the situation where the company seeks to raise a 'cloud of objections on affidavits' in order to claim that a debt is disputed. In **Safe Solutions Accounting Limited (In Liquidation) and Asciom Solutions Limited (In liq.) v French Connections Limited**[10] ('**Safe Solutions**') Hariprashad-Charles J observed (with reference to the words of Oliver LJ in **Claybridge**):

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[7] BVI Civil Appeal No. 10 of 2002 (unreported, delivered 18th June 2003).
[8] [2012] EWCA Civ 1712.
[9] [1997] 1 BCLC 572 at 579 c-d.
[10] BVIHCV 2006/0127B (unreported, delivered 11th September 2006).

> "…[I]t is too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that because a dispute of fact cannot be determined without cross examination, the petition should go to another division of the court to establish the debt…"

[79] Likewise Neuberger J. in **Re Richbell Strategic Holdings Ltd**[11] explained (as cited at **French**, 7.594):

> "A judge, whether sitting in the Companies Court or elsewhere, should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity [are] not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law."

[80] Small Davis, J. recently cited and applied this passage in her judgment (at [37]) in **Rich Region v Industrial and Commercial Bank of China (Macau) Limited**[12] ('**Rich Region**') when dismissing allegations of a substantial dispute raised by the debtor in voluminous evidence.

[81] The Court's function is to inquire but not to resolve. The key distinction, as identified by Foster J in **China Alarm Holdings** at [44] (by reference to **Sparkasse**) is between an inquiry by the court as to the substance and *bona fides* of the dispute (which is both permitted and required) and the resolution of the dispute (which is neither permitted nor required):

> "I likewise find that it is this court's function to inquire whether there is a substantial dispute in this case, in line with the authorities I have referred to above. It is not the court's function at this stage to resolve the issue..."

[82] Again, this was the approach endorsed by Small-Davis J. in **Rich Region** at [38].

[83] HSBC also advanced a secondary basis for appointment of liquidators over the Guarantors, namely the so-called just and equitable ground. Learned Counsel for HSBC reminded the Court that this ground confers a discretion that is broad but which, like all discretionary powers of courts, must be exercised judicially and 'founded on reasoning which can be examined and justified' (**McPherson**, 4-025). **Ebrahimi v Westbourne Galleries Ltd**[13] ('**Ebrahimi**') (as considered in **McPherson**, 4-026) remains the leading case in which Lord Cross in the House of Lords explained

[11] [1997] 2 BCLC 429 at 435.
[12] BVIHC (COM) 2022/0134 (unreported, delivered 31st July 2023).
[13] [1973] A.C. 360.

that the ground was an equitable supplement to the common law principles that apply to company law.

[84] Learned Counsel for HSBC, Mr. Hardwick, KC, submitted that an analysis of the authorities confirms that there are a number of broad situations in which the courts may wind up on this ground including where control or management of the company's affairs is characterised by fraud, misconduct or oppression (**McPherson**, 4-036 to 4-044). The jurisdiction was examined in this Court by Hariprashad-Charles J in **Safe Solutions** (as referred to above) who (at [55] [56] and [69]) noted the agreement of all parties that the **Ebrahimi** decision remained the '*locus classicus'*.

The Hearing

[85] At the hearing, learned Counsel for the Guarantors, Mr. Mohyuddin, KC, urged that the **Sparkasse** test is a 'modest hurdle' or 'low threshold', as remarked by Jack J in **Tall Trade Ltd v Capital WW Investment Limited**[14] at paragraph [27].

[86] Mr. Mohyuddin urged that even a shadowy defence would suffice for the purpose of surmounting the modest hurdle or low threshold, following **GBM Minerals Engineering Consultants Ltd v Michael Wilson & Partners Ltd**[15] per HHJ McCahill QC at [50].

[87] Mr. Mohyuddin contended that in this case it is clear that there is a *bona fide*, substantial dispute between the Guarantors on the one hand and HSBC on the other which satisfies the requirements set out above for the applications to be dismissed.

[88] Mr. Mohyuddin urged though that in the English Court of Appeal decision in **Re Bayoil S.A.**,[16] and in the judgment of Lord Justice Ward, the court there warned that there is a need to proceed cautiously where there is any doubt about the claim or the cross-claim because a winding up order is a draconian order; if wrongly made, the Company has little commercial prospects of reviving itself and recovering its former position.

[89] Mr. Hardwick accepted that the **Sparkasse** test indeed represents a 'modest hurdle' or 'low threshold', but urged that the notion of 'a shadowy defence' sufficing should be treated with caution

[14] BVIHC (COM) 2020/0025, 2020/0043, 2020/0095 and 2020/0157 (unreported, delivered 3rd December 2020).
[15] [2018] EWHC 3401 (Ch).
[16] [1999] 1 WLR 147.

as it is 'barnacled with lots of old Order 14 English law' and is 'a dangerous path to go down'. He urged that the safer, clearer, test to apply is the **Sparkasse** test itself.

The Grounds of opposition abandoned and pursued

[90] At the hearing, Mr. Mohyuddin made no mention of the first ground of opposition to the application to appoint liquidators over the Guarantors, i.e. that the Victory Mountain Loan was not a sham. This ground was *de facto* abandoned by the Guarantors.

[91] The point would, anyway, not have taken the Guarantors anywhere in terms of raising a dispute in respect of the Debt on which the applications were based, because the Victory Mountain Loan did not directly concern the Debt. It is difficult to understand why it was included in the Notice of Opposition at all; moreover, why it was given primary prominence.

[92] The third ground of opposition was also abandoned. This ground urged that to the extent that there is any dispute over the existence of such liability between the Applicant and the Company, that dispute should be resolved in Hong Kong in accordance with the exclusive jurisdiction clause in the Facility Agreement. Mr. Mohyuddin confirmed that he was not pressing the contention that the BVI Court had no jurisdiction to determine whether there is a dispute that suffices to dismiss the applications.

[93] That concession was clearly correct, both on the plain language of the jurisdiction clause in the Facility Agreement and as a matter of BVI law. It is difficult to see how this ground of opposition could sensibly have been advanced at all.

[94] This ground of opposition engendered one of two clear cases where the Guarantors' evidence of Mr. Cheung had overstated and thereby misrepresented the import and effect of the Hong Kong Counsel opinion the Guarantors had obtained.

[95] The fourth ground of objection, that employees of FTI lack independence, was also abandoned. The argument was changed shortly before the hearing, however, with the Guarantors adducing evidence from a number of purported creditors who, between them, ostensibly have a greater cumulative debt owing to them than the Lenders/HSBC, and who all say that two other insolvency practitioners from another firm should be appointed instead of the FTI employees if the Guarantors are to be wound up.

[96] With three of the four stated grounds of opposition abandoned, only the second main ground remained. This was that HSBC is not entitled to make the Applications against the Guarantors because the Guarantors no longer owe the alleged guaranteed liability towards the Applicant. The Guarantors pursued this ground.

[97] In doing so, however, Mr. Mohyuddin intimated at the hearing that the Guarantors were also abandoning their following sub-arguments:

(1) That the Guarantors 'received no consideration and/or corporate benefit by entering into the Facility Agreement';
(2) That the Facility Agreement was not executed as a deed;
(3) Concerning restructuring of the Borrower's debts.

[98] Mr. Mohyuddin explained that he had three overarching 'dispute points'. The first concerned service of the Guarantor Demand.

Service of the Guarantor Demand

[99] Mr. Mohyuddin explained that establishing service of the Guarantor Demand is fundamental to the applications proceeding. He explained:

> "It's the only thing upon which the insolvency ground is founded, because, as you observed in an exchange with my learned friend, there is no statutory demand in this case."

[100] Mr. Mohyuddin adverted to Clause 30 of the Facility Agreement. He observed that pursuant to Clause 30.1, a demand 'shall be made in writing and, unless otherwise stated, may be made by fax or letter or pursuant to Clause 30.4 by email'.

[101] He pointed the Court to Clause 30.3 of the Facility Agreement, which materially provides:

> "Any communication or document made or delivered by one person to another under or in connection with the Finance Documents will only be effective:
>
> (i) if by way of fax, only when received in legible form."

[102] He submitted that this is a restrictive clause which concerns the effectiveness of a communication or document, such as the Guarantor Demands. Mr. Mohyuddin submitted that it is not enough for HSBC to have said simply that they had sent the demands. Rather, it is for HSBC to demonstrate that the delivery had been effective.

[103] Mr. Mohyuddin explained that the Guarantors' position was that the Guarantor Demands had not been received at all.

[104] He submitted further that if sent by fax, HSBC 'have to say it was received in legible form because if they can't say that they cannot say they have served an effective demand.' He urged further that the Facility Agreement was 'a document no doubt prepared by HSBC or its lawyers. That is what they have chosen to include.'

[105] Mr. Mohyuddin contended that 'the short point is there is no evidence before you that it was received in legible form.'

Fax delivery

[106] Concerning delivery by fax, HSBC's case was that the Guarantee Demands had been sent by fax on 17th May 2021 to the fax number for the Guarantors (and the Borrower – it being the same) as shown on the signature page of the Facility Agreement, as stipulated in clause 30.2 of the Facility Agreement.

[107] Mr. Hardwick also pointed to Clause 30.3(e) of the Facility Agreement:

> "Any communication or document made or delivered to the Borrower in accordance with this Clause will be deemed to have been made or delivered to each of the Obligors."

[108] Mr. Hardwick contended that if the document comes to the attention of the Borrower, it is deemed to have been made to each of the Obligors, being the Guarantors, as well.

[109] Mr. Hardwick contended that no case is being advanced by the Guarantors that the Borrower did not receive the Guarantor Demands.

[110] Mr. Hardwick took the Court to the Guarantor Demand, showing this was:

(1) a letter dated 17th May 2021;

(2) addressed to the Guarantors, with copy to the Borrower, all at the same address;

(3) with the fax number specified in the Facility Agreement;

(4) addressed for the attention of a person by name of Cheung Man Kin;

(5) comprising 9 pages.

[111] Mr. Hardwick then took the Court to a document exhibited to a legal practitioner's affidavit. This was an electronic record of a fax delivery, provided, he said, some three years after the event. In the bottom quarter of the page, it showed 'sent 2021-05-17'. It stated further that delivery of a ten-page document had occurred on 17th of May 2021 at 18:00 hours to the same fax number as stated in the Guarantor Demand, with a subject line 'New Ocean 2018 – Demand Letter'.

[112] Mr. Hardwick submitted that this tallied with a fax consisting of 9 substantive pages and a cover page.

[113] He found support for this with reference to the designation of the attachments: 'NewOcean Energy Demand Notice on Guarantors dated 17 May 2021.pdf'.

[114] Mr. Hardwick urged that this delivery confirmation is primary evidence of the fact that as stated on the face of the Guarantor Demand, it was faxed to the authorised fax number for the Guarantors on 17th May 2021 at 18:00 hours.

[115] Mr. Mohyuddin contested this. He pointed out that the Guarantee Demand had been 9 pages, whereas this fax confirmation said 10 pages. He dismissed as speculation Mr. Hardwick's suggestion that the tenth page would have been a cover sheet. Mr. Mohyuddin did not however take issue with the fact that the attachments had been labelled 'NewOcean Energy Demand Notice on Guarantors dated 17 May 2021.pdf'. Nor did he point to any evidence that any other communication of ten pages had been sent by fax, to the same fax number, on that date or time or otherwise, to explain that this transmission report was not in respect of the Guarantor Demand.

[116] He alluded to the fact that the Guarantors had adduced evidence from Mr. Cheung that he had made inquiries with the receptionist at the offices shared by the Borrower and the Guarantors, Ms. Chu Man Fong, but that the receptionist could not show that the Guarantor Demands had been received, in particular, by reason of the fact that the copy of the Guarantor Demands relied on by HSBC did not bear the Guarantors' chop. Mr. Cheung's evidence was that it was therefore doubtful that the Guarantor Demands had been delivered, such that he 'verily believed' that they had not been. It is uncontroversial that Mr. Cheung himself had no firsthand knowledge of the events surrounding delivery of the Guarantor Demands, because his involvement only began on 16th November 2021, whereas delivery of the Guarantor Demands is contended for by HSBC on 17th and/or 18th May 2021 (by letter of that date, by fax, courier and email).

[117] Mr. Cheung gave no evidence that he had inquired with any of the contractual authorized contacts, such as the named addressee of the Guarantor Demand, Cheung Man Kin, whether they had received the Guarantor Demand. His inquiry appears to have been limited to Ms. Chu Man Fong, who was not named as an authorized contact.

[118] Mr. Hardwick submitted also that under the **Sparkasse** test, it is logical that the burden is on the company who disputes a debt to show that there is 'so much doubt and question about the liability to pay the debt that the court sees that there is a question to be tried'. Mr. Hardwick made this submission in the context of Mr. Mohyuddin's submission that the burden was on HSBC to show that a fax had been received in legible form. Such a proposition itself need only to be stated to show that it cannot be correct, because a fax sender typically will not know if a fax has been received illegibly unless the recipient says so. It is divorced from reality to contend that a party has the burden to prove something he does not and cannot know.

[119] A similar perplexing line of argument appears in relation to Mr. Cheung's professed belief that the Guarantor Demand had not been received because the version exhibited by HSBC did not contain the Guarantors' or Borrowers' chop. Where HSBC's case is that the Guarantor Demand had been sent by fax, courier and email, there is no reason for HSBC to have a Guarantor chopped version at all. The furthest Mr. Cheung could sensibly take this argument is to say that because he could

not, upon his inquiries with the receptionist, find a chopped version in the Guarantors'/Borrowers' records, in circumstances where all incoming documents are chopped by the receptionist Ms. Chu Man Fong, then that would suggest that they never received the Guarantor Demand.

Courier delivery

[120] Concerning delivery of the Guarantor Demands by courier, HSBC adduced documentary evidence obtained from the courier company DHL in September 2023. Mr. Hardwick explained that the delay of some two and a half years was explained by the fact that Mr. Shum, on behalf of the Borrower and/or the Guarantors, had put HSBC to the task of proving the courier delivery. The documents comprised a letter from DHL dated 7th September 2023 stating:

> "Dear Customer
> This is a proof of delivery/statement of final status for the shipment with waybill number 2569611424.
> Thank you for choosing DHL Express."

[121] The DHL letter then stated that

> "Your shipment 2569611424 was delivered on 18 May 2021 at 14.38."

Additional details included were that the package had been picked up at 11:59 on 18th May 2021, and that it weighed 0.19lbs. The shipper was stated to be HSBC.

[122] Then HSBC also exhibited a DHL detail receipt, showing that this parcel had been addressed to NewOcean Energy Holdings Limited at 23/F, The Sun Group Center, Gloucester Road, Wanchai, being the authorized address to which letters could be sent under the Facility Agreement to the Borrower and to the Guarantors, and marked for the attention of the authorized contact, Cheung Man Kin. This document carried the same shipment number.

[123] Mr. Mohyuddin contested this evidence, by submitting that this documentary evidence does not demonstrate what document was being served.

[124] Mr. Hardwick pointed out that this is not surprising, since one would not expect a courier waybill or receipt to specify the subject of its contents, particularly since the Guarantor Demand was commercially confidential.

[125] Mr. Hardwick also pointed out that the courier delivery is further supported by a contemporaneous email dated 17th May 2021, at 5:34 p.m. This was from a Ms. Peggy Chiang of HSBC to a Ms. Angeline Wong and Cheung Man Kin of the Borrower/Guarantors. Ms. Angeline Wong signed herself off on correspondence as 'Deputy General Manager & Head of Investor Relations, NewOcean Energy Holdings Limited (342:HK)'.

[126] The subject line read:

> "Subject: Important NewOcean Energy Holdings Facility Agreement - Demand Notice on Guarantors dated 17th of May."

[127] The attachment was described as 'NewOcean Energy Demand Notice on Guarantors'.

[128] The email stated:

> "Dear Angeline and Man Kin
>
> Enclosed is the demand notice on Guarantors we sent to you by fax and e-mail as instructed by the Majority Lenders.
>
> The original copy has been couriered today to the address below."

[129] Mr. Hardwick submitted that this communication ties in with the DHL courier documentation exhibited by HSBC, showing the package was picked up the next morning on 18th May 2021 and delivered in the afternoon of that day, and with the fax transmission report showing the demand notice was transmitted a few minutes later on the same evening of 17th May 2021.

Email delivery

[130] Concerning delivery by email, Mr. Hardwick pointed out that delivery of the Guarantor Demands was also effected by the email dated 17th May 2021, at 5:34 p.m.

[131] Mr. Mohyuddin took objection to the delivery by email. He submitted that HSBC adduced no evidence showing that email was an agreed method for delivery of a Guarantor Demand.

[132] He referred to Clause 30.4 of the Facility Agreement. The material parts provided as follows:

> "Any communication to be made between any two Parties under or in connection with the Finance Documents may be made by electronic mail or other electronic means to the extent that those two Parties agree..."

[133] Mr. Mohyuddin urged that a document in the suite of documents pertaining to the Facility Agreement, entitled 'Authorised Contacts', which listed various persons, including Cheung Man Kin, and their email addresses, including in relation to the Borrower and the Guarantors, should not thereby be construed as an agreement which enabled HSBC to serve an effective demand by email on these Guarantors, because:

> "you need to look at the extent to which there is agreement on that document to use email."

[134] He contended that that document fell short of an agreement that Guarantor Demands could be sent by email. He read out that this document stated:

> "We authorise you to contact the "Authorised Contacts" listed below for the purpose of performing call back and other general communication.
> …
> "Call back: to confirm and validate utilisation request, payment instruction, change of contact, et cetera.
>
> General: to facilitate the day-to-day communication with respect to selection notice, payment invoice, rate fixing advice, financial undertaking documents, et cetera."

[135] Mr. Mohyuddin argued that sending a Guarantee Demand fell outside the scope of agreed email communications, because the service of a demand letter is not part of day-to-day communication. He admitted, though, that he had no support for this proposition.

[136 Mr. Mohyuddin additionally adverted to clause 30.4(c) of the Facility Agreement:

> "Any electronic communication made between those two Parties will be effective only when actually received in readable form..."

[137] He urged that it is HSBC's obligation to prove the Guarantors received the Guarantee Demands in readable form, in a similar vein to his submission that HSBC had the burden of showing that the Guarantors had received communications by fax in legible form.

[138] Mr. Hardwick countered these submissions by arguing that these points were an invention on the part of Mr. Mohyuddin. Mr. Hardwick urged that these submissions were wrong, because they lost sight of the fact that Cheung Man Kin is the authorized person for receipt of an important document such as the Guarantor Demand; the very person to whom it must be sent. Moreover, observed Mr. Hardwick, the authorised contact form permits documents to be sent to specified email addresses. Thus, said Mr. Hardwick, there is no problem with the sending of a Guarantor Demand to an authorized person, at an authorized email address.

[139] Mr. Hardwick made a further, overarching point. The Guarantors had adduced evidence that they had commenced legal proceedings in the High Court of Hong Kong, in Action No. 27 of 2024 against HSBC on 5th January 2024. The legal practitioners' affidavit pursuant to which the Guarantors had adduced this evidence, explained:

> "The HK litigation relates to a dispute as to the existence of the debt upon which HSBC has sought to base its Liquidation Application. It is therefore essential that the Court's attention be brought to, not only the existence of the HK Litigation, but also the contents of the HK Statement of Claim in advance of the hearing of the Liquidation Application."

[140] It was with piquant relish that Mr. Hardwick showed the Court the 'HK Statement of Claim'. He mentioned that HSBC had had the benefit of seeing it in draft form some 6 months earlier. The version filed on 5th January 2024 was materially identical to that earlier draft. It had been filed by the same three Hong Kong Counsel on whose legal opinion the Guarantors have relied in these proceedings. The HK Statement of Claim was also certified by Statements of Truth. A director of Sound HK, one Chann CHUOB, stated on behalf of Sound HK that 'I … believe the facts stated in the Statement of Claim dated 5 January 2024 are true.' Similarly, on behalf of NewOcean SZ, a director by name of Xinfu SU, made the same Statement of Truth.

[141] The HK Statement of Claim had been filed in Hong Kong some nine months after the present Applications were filed on 6th April 2023, and only some three weeks before their present hearing on 30th and 31st January 2024.

[142] The HK Statement of Claim relayed the fact of the Debt owed by the Borrower at paragraphs 17 to 19, defining them as the 'Demanded Sums', and then at paragraph 20, the Guarantors pleaded:

> **"On or about 17th May 2021, the Defendant (in its capacity as Agent of the Facility Agreement) served on the Plaintiffs (as Guarantors) a demand letter with respect to the Demanded Sums."** (Emphasis added.)

[143] Mr. Hardwick submitted that this pleaded averment was conclusive of the issue of service of the Guarantor Demand – the Guarantors had themselves stated they had been served, under a Statement of Truth, from two separate individuals who were directors of each of the Guarantors.

[144] One could go further, and advert to the specificity as to capacities of HSBC and of the Guarantors that the latter had included here in this pleading, indicating that they must have seen this from the Guarantor Demand itself or its surrounding communications. The Guarantor Demand itself specified HSBC's capacity as Agent of the Majority Lenders in its third and fifth paragraph on its first page, the seventh paragraph on its second page and in the signature block on the third page. The Guarantor Demand expressly referred to NewOcean SZ and Sound HK as 'Guarantors'.

[145] Mr. Hardwick also argued that since the Hong Kong claim was ostensibly brought to dispute the existence of the debt HSBC says in these proceedings is owed by the Guarantors, then the Guarantors would surely have disputed service of the Guarantor Demand if they had genuinely not received it. But no service point was taken in the original HK Statement of Claim. Rather, all the purported claims contained in it were predicated upon the Guarantor Demand having been served.

[146] The day before the start of the present hearing, on 29th January 2024, the Guarantors filed a further affidavit from their BVI legal practitioners, exhibiting an Amended Statement of Claim dated 26th January 2024 they had filed earlier on 29th January 2024 in Hong Kong. This Amended Statement of Claim contained a single substantive amendment – to plead that the Guarantors had not been served with the Guarantor Demands. Paragraph 20 now read:

> "The Defendant alleged that it ~~On or about 17 May 2021, the Defendant~~ (in its capacity as Agent of the Facility Agreement) served the Plaintiffs (as Guarantors) with a demand letter, with respect to the Demanded Sums on or about 17th of May 2021. However, the Plaintiffs

(as Guarantors) were not served with a demand letter and have not received any such demand from the Defendant."

[147] This was the complete opposite of what the Guarantors had pleaded only some three weeks earlier, through the same Hong Kong Counsel, having prepared that earlier pleading some six months previously. The BVI legal practitioner's affidavit exhibiting the Amended Statement of Claim gave no explanation as to the circumstances or reason for the amendment. Mr. Mohyuddin proffered, though, upon instructions only (not under any form of oath or affirmation) that the earlier pleading had been a 'mistake'.

[148] The Amended Statement of Claim was not verified by any Statement of Truth. Mr. Mohyuddin asserted that there was as yet no requirement under Hong Kong procedural law to provide one.

[149] Mr. Hardwick submitted that this 180 degree *volte face* was a cynical maneuver, and observed that the Guarantors had adduced no evidence of any materials or documents underlying any part of their HK Statement of Claim. Mr. Hardwick urged that the Court should see the original pleading as the true position, which, moreover, shows that the Guarantors cannot have had an honest or *bona fide* belief in their argument in these proceedings that they had never been served with the Guarantor Demand.

The Court's Judgment on service of the Guarantor Demand

[150] It warrants preliminary observation that I keep the **Sparkasse** test firmly in mind.

[151] This is that:

> "…the dispute [in respect of a debt] **must be genuine in both a subjective and objective sense**. That means that the reason for not paying the debt must be **honestly believed to exist** and **must be based on substantial or reasonable grounds**. Substantial means having substance and not frivolous, which disputes the Court should ignore. **There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be tried**…Invoking the process of the Court in relation to a debt which was known to be dispute on genuine and substantial grounds was an abuse of the process of the court…". (Emphasis added.)

[152] Whilst both sides accept (and it is indeed well settled) that a respondent to a winding up petition has a low threshold or modest hurdle to surmount in order to persuade the Court that it has a genuine dispute in respect of a debt, the burden is on the respondent company to raise 'so much doubt and question about the liability to pay the debt that the court sees that there is a question to be tried'. It should be clearly understood that **much** is not required to show that there is a question to be tried. At the same time, the respondent company has to bring forward **enough** to satisfy this requirement. As **Sparkasse** makes plain, it is not **any** argument that brings the respondent company home on this. It would be erroneous to see a low threshold as no threshold at all.

[153] In this regard, I do not consider it helpful to say that even a 'shadowy' defence suffices. Quite what 'shadowy' means is open to debate. This is a word which, whilst at home in purple prose, lives uneasily in a legal lexicon. Moreover, shadows are by their nature elusive. It is more juridically rigorous to speak, as Byron C.J. did in **Sparkasse**, in terms of a need for the respondent company to show a dispute that is 'genuine in both a subjective and objective sense', such that 'the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds'. Those are the tried and tested criteria applicable in this jurisdiction and I do not think it necessary, nor prudent, to contemplate any gloss upon it.

[154] Byron C.J.'s reference to 'genuine in both a subjective and objective sense' is important. It is all too easy for a respondent to exercise wishful thinking in respect of a hopeless argument, particularly when such argument(s) have been come up with by imaginative lawyers, and to want the Court to go along with it. It is also all too easy for a respondent's witness to profess that he 'verily believes' something which, though he desperately wants it to be the case, objectively does not bear a moment's scrutiny. The Court should not affirm self-delusion by indulging it. Whilst the Court should note a party's subjective mental state, professed or actual, the Court must always remain firmly anchored in objective reality and not flinch from firmly rejecting – politely of course – nonsense when the Court encounters it. To do otherwise is to empower pernicious abuse.

[155] I also accept that the Court's task is simply to inquire whether enough of a dispute to the debt has been shown by the respondent to see that there is a question to be tried; conversely, that, **if there is such a genuine dispute**, the Court should not try to resolve it.

[156] In the present case, I am not persuaded that there is any genuine dispute, subjectively or objectively, that the Guarantors were served with the Guarantor Demand.

[157] It is utterly incredible for the Guarantors to suggest that they were not served on 17th May 2021, when their own original Statement of Claim in Hong Kong not only expressly averred, under Statements of Truth from two separate directors, that they had been served with that document, but they were also able to plead in what capacity HSBC had served it and in what capacity the Guarantors had received it. They could not have done that without referring to the very document(s) which explained the Guarantor Demand.

[158] I also note that the Amended Statement of Claim in Hong Kong, which introduced a complete *volte face* in this regard, was unsupported by any Statement of Truth (irrespective of whether a Statement of Truth was required under Hong Kong law at that point), and unsupported by any documents, and entirely unexplained other than by way of the vaguest, unsworn, word that the earlier position had been a 'mistake'. A mistake, by whom, why, what, how, when, where, one could well ask.

[159] The simple, direct, averment, under directors' Statements of Truth, that the Guarantors had been served on 17th May 2021 with the Guarantor Demand has the ring of untutored genuineness about it. The amendment inserted into the Amended Statement of Claim does not.

[160] I also note that the Guarantors' arguments as to alleged non-service, which was their leading point at the hearing, found no mention in their Notices of Opposition. If it was so strong as to warrant being advanced as the Guarantors' primary point of dispute, one would have expected it to feature in the Notices of Opposition.

[161] Similarly, when a respondent company genuinely disputes a debt, usually there is one good, readily identifiable reason why a debt is disputed. Where a debt is disputed on genuine and substantial grounds, what the Court does not generally see is a host of reasons advanced in piecemeal fashion and dropped along the way, and then various other arguments raised. Where

that happens, this is an indicator (without putting it any higher) of an opportunistic snatching at straws, and of brain-storming afterthoughts, in an effort to thwart a winding up order – in other words, the advancing of objectively ungenuine, insubstantial disputes.

[162] That is what the Court is presented with here. The documentary evidence that the Guarantors received the Guarantor Demand by fax, courier and email is overwhelming and is not sensibly contradicted with contrary evidence. Mr. Mohyuddin submitted that HSBC had not adduced sufficient evidence to discharge its burden of proving service; that HSBC's evidence did not meet the '51% requirement of tipping the balance of probabilities in favour of HSBC'. I respectfully disagree. The documentary evidence concerning service of the Guarantor Demand far exceeds any such 51% requirement.

[163] Mr. Cheung's evidence of his inquiries with the Guarantors'/Borrower's receptionist is manifestly insufficient. The receptionist was not an authorized contact person for communications between the parties. Mr. Cheung gives no evidence of any inquiries of Ms. Angeline Wong or of the authorized contact Cheung Man Kin, nor of having interrogated the companies' email or other data and communications storage systems.

[164] In light of the documented service methods, it is incredible that the Guarantors were not served with the Guarantor Demands. I do not see how service can sensibly be disputed. Even if Mr. Mohyuddin is correct that email was not an agreed service method (I do not think he is, in light of clause 30.4(a) of the Facility Agreement brought to the Court's attention by Mr. Hardwick at the hearing on 31st January 2024, and the fact that Mr. Shum, very shortly after the Facility Agreement was signed, notified HSBC in writing of the electronic email address for the authorized contact officer for communications pursuant to the Facility Agreement, but it is beyond this Court's present remit to determine this and I will not do so), we are still left with the proofs of transmission by fax and by courier. The Guarantors bring forward no evidence that those proofs concerned some other document(s) and not the Guarantor Demand. I accept Mr. Hardwick's submission that those proofs tally with the service of the Guarantor Demand as described by HSBC in contemporaneous email correspondence with the Guarantors/Borrower. Like Mr. Hardwick, and for the reasons given by him, I see nothing in the apparent discrepancy of one page (10 pages as opposed to 9 pages) in

the fax transmission report and the fact that the DHL documentation did not mention that it concerned the Guarantor Demand.

[165] The matter is, to my mind, settled by the Guarantors' own averment, under Statements of Truth, in their original Statement of Claim in Hong Kong. They could not have pleaded what they did plead if they had not received the Guarantor Demand.

[166] The Court is of the firm view that the Guarantors advance no subjectively or objectively genuine dispute as to service of the Guarantor Demand. The Court is of the firm view that the Guarantors do not honestly believe such a dispute exists. The Guarantors have not brought to the Court any substantial or reasonable grounds for the existence of such a dispute. This line of argument of the Guarantors fails.

Consent of lenders

[167] The second line of argument presented by Mr. Mohyuddin on behalf of the Guarantors concerned the consent of the Lenders to authorize HSBC to make a Guarantor Demand on behalf of the Lenders.

[168] Mr. Mohyuddin pointed out that Clause 26.7(f) of the Facility Agreement provided that:

> "The Agent is not authorized to act on behalf of a Lender (**without first obtaining that lender's consent**) in any legal or arbitration proceedings relating to any Financial Document." (Emphasis added.)

[169] He argued that HSBC's evidence shows that HSBC had not obtained the Lenders' consent prior to making (or purporting to make) the Guarantor Demand on Sound HK. HSBC had obtained their consent to do so after the event. Mr. Mohyuddin argued that that meant HSBC had not been authorized to make the Guarantor Demand on Sound HK.

[170] Mr. Mohyuddin further pointed out that Clause 30.4(b) of the Facility Agreement provided that:

> "Unless and until notified by the Agent to the contrary, electronic mail shall not be used for any of the following communications to be made by a Finance Party to the Agent in connection with the Finance Documents:

(i) a notification by a lender of its consent or approval, its decision to withhold its consent or approval, its decision to withhold its consent or approval or otherwise communicating its position or instruction to the Agent in any matter which requires the Agent to act on the instructions of all the Lenders or the Majority lenders (as the case may be)."

[171] Mr. Mohyuddin contended that taking Clauses 26.7 and 30.4(b) together, there is to be discerned a requirement that prior authority must be given by the Lenders and it cannot be given by email unless and until notified by the Agent to the contrary. He argued that HSBC had adduced no evidence either of these requirements had been satisfied. He accepted that HSBC had obtained prior consent from the Lenders in respect of the Guarantor Demand on NewOcean SZ, but argued that this had been invalid because HSBC had adduced no evidence that HSBC had notified the Lenders that electronic mail could be used for giving their consent.

[172] Mr. Hardwick countered these arguments by making two observations:

(1) HSBC was also a Lender. Irrespective of whether HSBC had obtained effective prior consent from the other Lenders, HSBC was clearly entitled to make the Guarantor Demand on its own behalf, without showing that it had provided itself with consent to do so, whether by email or otherwise. Mr. Mohyuddin accepted that he was 'constrained to accept the point that HSBC is a lender'. Thus, said Mr. Hardwick, the lack of prior consent from the other Lenders to make the Guarantor Demand on Sound HK was irrelevant.

(2) HSBC's documentary evidence shows that HSBC had asked the other lenders' consent by way of email. They responded by email, as was only natural, and HSBC accepted those communications. It was obvious, contended Mr. Hardwick, that it was to be implied that the Lenders were entitled to provide their consent by email.

The Court's Judgment on lender consent

[173] HSBC's response that it was also a Lender, and thus entitled on its own behalf to make a Guarantor Demand without showing that it had provided itself with consent to do so, whether by email or otherwise, means that Mr. Mohyuddin's arguments concerning lender consent are unsustainable.

[174] These arguments are hopeless. They are typical snatching at picayune technical points, which, when ever so slightly scratched below the surface, are revealed to be hollow. They are symptomatic of the proverbial cloud of objections which the Court should disregard.

[175] It can usefully be added that the Court is not required to suspend common sense when reviewing evidence upon its inquiries into the *bona fides* and substance of a dispute to a debt. It would be extraordinary if HSBC should not be entitled to rely upon lender consent if such consent was provided by email, in circumstances where HSBC had sought that consent by email and where HSBC had not required the consent to be provided in another form. The form of consent was specified to be at **HSBC**'s, not the Lenders or the Guarantors', discretion. That suggests that the agreed form of consent appears to have been aimed primarily at providing **HSBC itself** with protection from eventual arguments from Lenders that they had not in fact provided their consent. But the Court does not need to go this far, nor to make any findings on this, and it does not do so. The Guarantors' arguments concerning lender consent evaporate when it is recalled that HSBC was also a Lender and entitled to make the Guarantor Demand on its own behalf.

'Discharge of Guarantors' liability'

[176] Mr. Mohyuddin contended that there was a further genuine and substantial dispute against the Debt being due from the Guarantors. His argument had two parts. In brief summary, it was this:

(1) The Guarantors' liability had been in the nature of a guarantee, not a free-standing, independent liability by way of an indemnity;

(2) That liability by way of guarantee had been discharged by the Lenders, represented and led by HSBC, doing injurious acts through the Joint Provisional Liquidators with the result that restructuring of the Debt failed, thereby causing loss to the Borrower. This factual matrix (or alleged factual matrix) was pleaded in the Hong Kong Amended Statement of Claim.

[177] Mr. Mohyuddin pointed out that both sides had obtained an opinion from Hong Kong Counsel as to the nature of the Guarantors' obligations. The Guarantors' Hong Kong Counsel opined (he said) that their liability had been in the nature of a guarantee. He observed:

> "In our view, it is reasonably arguable that the Facility Agreement only imposed liability on the Companies by way of a guarantee and not an indemnity."

[178] HSBC's Hong Kong Counsel (he pointed out) opined that their liability had been – ultimately – as a primary independent obligation as an indemnity, not as a guarantee.

[179] Mr. Mohyuddin submitted that the fact both sides' Hong Kong counsel disagreed on this fundamental aspect (which is a matter of mixed law and fact) is enough to establish a genuine and substantial dispute warranting refusal of the winding up petition.

[180] Mr. Mohyuddin furthermore urged the Court to have careful regard to the entirety of the matters pleaded in the Hong Kong Amended Statement of Claim as showing a sufficient case that the guarantee only liability was discharged. The culmination of this pleading was as follows:

> "As pleaded in Sections B to D hereinbelow, the conduct of the Original Lenders (led by the Defendant), through the JPLs (who were of the Original Lenders' choice) or otherwise, as well as the Group's creditors, are injurious to the plaintiffs in causing a depreciation in the value of the Borrower's assets and hence a deprivation of the Plaintiffs' recourse (as guarantors) against the Borrower."

[181] The essence of the pleading, in so far as it concerned HSBC itself, had been that:

(1) HSBC had been in a position to influence the JPLs, since HSBC was part of a Steering Committee and was thus able to provide comments to the JPLs efforts to effect restructuring of the Borrower;

(2) HSBC met or spoke with the JPLs at least seven times between 15th December 2021 and 11th April 2022 (although the Guarantors offer no evidence as to the content of such conversions); and

(3) HSBC and the JPLs both instructed the same law firm (Messrs. Allen & Overy).

[182] For the rest, the pleading enumerates various alleged acts, omissions and unconstructive attitudes on the part of the Joint Provisional Liquidators.

[183] Mr. Hardwick, for HSBC, submitted that irrespective of the merits, or otherwise, of the disagreement between Hong Kong Counsel as to the nature of the Guarantors' liability, the Guarantors' position faces the fundamental problem that the Bermuda Court of Appeal had made crucial findings of fact against the Borrower. Thus, for example (where the Borrower is referred to as 'the Company' and without footnotes):

> "29. Between 14 December 2021 and 8 April 2022 the Company breached the Light Touch Order in a number of ways. The Company refused to meet with the JPLs on a regular basis and insisted that all communications with the Company should be routed through the Company's local HK counsel – Kobre & Kim ("K & K"). At the only meeting with the Company's management on 22 December 2021, the meeting was heated and two of the Company's representatives took photos of the JPLs' team at the meeting. In their second Report, see [77] below the JPLs noted that they had asked for a meeting with the Company's management and the Company had agreed to such a meeting but that no indication had been given as to when the meeting would take place.
>
> 30. In breach of paragraph 4 of the Light Touch Order the Company failed to provide the JPLs with critical information to enable them (i) to opine on whether the "Current Proposal" was in the interests of the creditors and (ii) to discharge their duties and functions. The information not provided included financial information up to 31 December 2021 and current details about the Company's creditors.
>
> …
>
> 32. On 28 January 2022 the JPLs held an informal (virtual) meeting of creditors of the Company via Zoom. In attendance were the JPLs, individuals from Allen & Overy, the JPLs' legal advisers, and FTI Consulting, the JPLs' financial advisers, and representatives of K & K and of the Company's financial advisor – Oriental Patron. None of the Company's directors attended. There were 61 attendees representing 23 Bank creditors with a total combined debt of US $ 741.2 million.
>
> …
>
> 48. Although the Company did not receive a copy of the Report until it was unsealed, much of what is in it was included in the letter from Mr Fung to the Company dated 14 March 2022. The Company did receive Appendix I of the Report which set out in considerable detail a summary of the JPLs' powers and how they had sought to exercise them. It indicated that in many cases they had been unable to act for want of information or access to the Board.
>
> …

> 83. The JPLs had not been provided with any current information in respect of the financial position of the Company and the Group, as a result of which the JPLs were unable to make any informed assessment as to the feasibility of any restructuring proposal being put forward.
>
> …
>
> 113. In my judgment the learned judge failed, in the light of the material before him, to take into account (sufficiently or in several cases at all) a number of relevant considerations namely: (a) the size of the majority needed in order for the restructuring to take place; taken with (b) the size of the majority of bank creditors who seek a winding-up and oppose an adjournment; (c) the absence of any opposing majority of creditors; (d) the requirements of exceptionality; (e) the fact that what had been proposed was in substance an adjournment in order to permit a sale by the Company of its assets in order to pay creditors; (f) the history of the case and, in particular the fact that the application for provisional liquidators followed a previous unsuccessful attempt to implement a similar (albeit not identical) Scheme; (g) the absence of any clear agreement to purchase assets of the Company's subsidiaries which would be likely to pay off the outstanding debt within a reasonable time; (h) the absence of any up to date financial accounts; (i) the behavior of the Company's management."

[184] Thus, urged Mr. Hardwick, the Bermuda Court of Appeal judgment held that it was the Borrower itself that contributed significantly to the restructuring failure, and that Court's findings present a formidable obstacle to the success of the Hong Kong claim, which itself is entirely unsupported by any documentary material.

The Court's Judgment on discharge of Guarantors' liability

[185] It should first be noted that the **Sparkasse** test is concerned with genuine and substantial disputes **to the debt** upon which a winding up petition is based. That test is not satisfied if there is simply a dispute, in the abstract, between the parties. Mr. Mohyuddin submitted it was enough for him to show that both sides' Hong Kong Counsel disagreed about the nature of the Guarantors' liability (i.e., guarantee vs indemnity). That is clearly part of the reason why he wanted to approach this aspect in two parts, with this being the first part – he saw in that disagreement a sufficient dispute to dismiss the Applications. In my respectful judgment, that is not sufficient. The dispute the **Sparkasse** test is concerned with is to the Debt itself. The dispute Mr. Mohyuddin wished the Court to see was not against the Debt, but in respect of, at best, an intermediate legal issue.

[186] Now, the dispute Mr. Mohyuddin wanted the Court to focus on **could** have concerned the Debt, but only if taken together with the second part, i.e., that the Guarantors' liability as guarantors (if that was what it ultimately was) was discharged on account of more than frivolous allegations of

injurious acts on the part of HSBC. But it is also clear to me that Mr. Mohyuddin wanted the Court to concentrate on, and be satisfied as to the existence of a sufficient dispute under, the first part, because the Guarantors' case as expressed in the Hong Kong Amended Statement of Claim is manifestly extremely thin.

[187] In that regard, first, there are the inherent problems that joint provisional liquidators are not, in law, the Lenders, nor HSBC's agents. Moreover, the Guarantors bring forward no factual allegations of the Lenders or HSBC actually communicating anything to the JPLs that could be interpreted as influencing them. Mere discussions, including several discussions, between creditors' representatives and provisional liquidators are entirely normal and to be expected. Of themselves they are not indicative of anything improper. Indeed, the Guarantors abandoned, before this Court, their previous objections that the JPLs lacked impartiality. To go on with, all the acts and omissions alleged by the Guarantors concerned alleged acts and/or omissions of the JPLs, not the Lenders or HSBC. The Guarantors do not show how any such acts or omissions are to be imputed to HSBC.

[188] Yet moreover, the Hong Kong Amended Statement of Claim is a decidedly one-sided affair. That is doubtlessly to be expected. But it ignores all the findings against the Borrower and its management (the same natural persons running the Guarantors) made by the Bermuda Court of Appeal. The effect of those findings is to render it well nigh impossible for the Borrower, and, by extension (since the same natural persons are concerned) the Guarantors, to establish causation against the JPLs, and (upon the Guarantors' barely comprehensible case) by imputation against HSBC. Bluntly put, the Guarantors' problem is that the Bermuda Court of Appeal found as a fact that it was the Borrower's own breaches of the Bermudan 'light touch' provisional liquidation order that was causative of the restructuring failure. It is extremely difficult to see, with no documentary support proffered by the Guarantors to back up their Hong Kong Amended Statement of Claim, how the Guarantors could surmount those findings.

[189] This Court need not wait for the Hong Kong proceedings to be determined. This Court has its own criteria – the **Sparkasse** test – to guide it.

[190] Even if there is a *bona fide*, substantial dispute between the parties on the legal nature of the Guarantors' liability (which, frankly, I am not persuaded that there is, but for present purposes I do not need to descend into the detail of that legal labyrinth, and indeed must not go so far as in effect to resolve that 'dispute'), such a dispute is irrelevant, because the Guarantors fail to bring forward a

substantial case that HSBC injured the Borrower. The allegation that HSBC caused injury to the Borrower is so thin, so legally and factually unsupported, and so contrary to the clear and unambiguous findings of the Bermudan' Court of Appeal that it was the Borrower and its management (the same natural persons who ran the Guarantors) which frustrated the restructuring, that this ground of 'dispute' is frivolous. That is this Court's considered view, which it is entitled to reach on the material before it.

[191] What is more, it is entirely pellucid to this Court that the Guarantors' arguments that their liability was discharged is a desperate and ill-thought-out lawyers' construct in which no objective observer, informed of the facts, including those found by the Bermudan Court of Appeal, could have any genuine belief.

[192] Moreover, the mere fact that someone has filed a claim in a court does not create, nor demonstrate, a *bona fide* dispute. When that case is unsupported, and is contradicted by clear findings of another senior court, indeed a Court of Appeal, then this Court need not ascribe much weight to the mere fact that a claim has been brought – and in particular one which, in amended, and thus presumptively operative form, is not supported with a Statement of Truth.

[193] For those reasons, this Court has no hesitation whatsoever in rejecting this basis for opposing the Applications.

Equitable winding up

[194] HSBC relied upon the principles of equitable winding up as a fallback position. Mr. Hardwick submitted that HSBC's case on insolvency was its primary case, and that it was overwhelmingly strong, such that HSBC had no need to develop its case on equitable winding up. I agree. Since the Guarantors failed to raise any genuine, substantial dispute to the Debt, the Guarantors have failed to show to the **Sparkasse** test standard that the Debt is not due from them. The Applications succeed on that ground. The Court need not, therefore, determine the equitable winding up ground.

Other considerations

[195] It is unclear whether Mr. Mohyuddin was maintaining the Guarantors' position that the Applications should be dismissed (or adjourned) on account of a prospect of the Debt being settled by a

potential investor. It suffices to say that the Guarantors advanced no evidence that there was any reasonable prospect of the Debt being settled within a reasonable time. The Guarantors' suggestion that such a settlement was in the offing was far too vague and far too tentative to warrant putting off a decision on the winding up Applications.

Form of the Order

[196] Although the Guarantors abandoned their case that the FTI employed office holders lack impartiality, the Guarantors reintroduced their contention that their alternative insolvency practitioners should nonetheless be appointed. The Guarantors did this by placing before the Court a number of letters from putative trade creditors, who, together, ostensibly are owed a greater amount than the Lenders. These letters curiously all put forward the same alternative insolvency practitioners that the Guarantors had put forward, in materially identical terms. As Mr. Hardwick observed, very little is known about these other creditors and their claims. None of these creditors appeared in the Applications, as was, of course, their right. Mr. Mohyuddin submitted that the majority creditors are entitled to have their preferred candidates appointed. Mr. Hardwick disagreed. He urged that the FTI office holders have already gained the benefit of over 5000 hours of time as part of the work they have so far done, and there is no good reason to appoint others.

[197] I agree with Mr. Hardwick in this regard. I find it particularly significant that none of these other putative creditors thought it important enough to attend and make representations at the hearing. Absent grounds for considering the FTI employees to be lacking partiality, or to be labouring under a conflict, or probable imminent conflict, I see no reason to appoint other professionals than those proposed by the Applicants.

[198] For the reasons stated, the Applications succeed with immediate effect.

[199] The Court will hear further submissions, as may be necessary, on consequential matters.

[200] I take this opportunity to thank the parties' legal practitioners for their assistance in relation to this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar