IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

NEUTRAL CITATION NUMBER: [2025] CIGC (FSD) 17

CAUSE NO. FSD 359 OF 2024 (DDJ)

B E T W E E N:

ICM SPC

Plaintiff

AND

(1) RYAN PAUL JARVIS AND

(2) JOHN JOHNSTON

(IN THEIR CAPACITY AS JOINT LIQUIDATORS OF PHOENIX COMMODITIES PVT LTD (IN LIQUIDATION))

Defendants

Before:	The Hon. Justice David Doyle
Appearances:	David Alexander KC and Corey Byrne of Ogier (Cayman) LLP for the Plaintiff
	David Chivers KC, Ben Hobden and Luke Fraser of Harney Westwood & Riegels (Cayman) LLP for the Defendants
Heard:	26 February 2025
***Ex Tempore* Judgment delivered:**	26 February 2025

Draft transcript of *Ex tempore*
Judgment circulated: 27 February 2025

Transcript of *Ex tempore*
Judgment delivered: 4 March 2025

Dismissal of an application for an injunction to restrain the presentation of a winding up petition on the ground that the alleged debt was bona fide disputed on substantial grounds and it would be an abuse of the process of the court for a winding up petition to be presented in such circumstances – consideration of the relevant law and practice

JUDGMENT

Introduction

1. I now deliver my judgment in respect of the Originating Summons dated 5 December 2024 (the "Originating Summons") presented by ICM SPC which is a segregated portfolio company incorporated in the Cayman Islands ("ICM" or the "Company"). ICM has two segregated portfolios one of which is Ancile Opportunity and Recovery Fund Segregated Portfolio ("ASOR").

2. ICM seek an order restraining the Defendants from presenting or causing Phoenix Commodities Pvt Ltd ("Phoenix BVI") to present a winding up petition against ICM in relation to a statutory demand served by the Defendants on ICM on 12 November 2024. The Defendants are the joint liquidators of Phoenix BVI, a company which is presently in voluntary liquidation in the British Virgin Islands ("BVI").

3. On 16 December 2021 one of the liquidators signed a "Settlement of List of Members" pursuant to section 193 (1) of the Insolvency Act 2005 of the BVI (the "IA") (the "List of Members") of Phoenix BVI and on that List of Members appeared ASOR and the following details:

Nominal value per share	US$1.00
Issue price per share	US$90.72
Total number of shares issued	440,935
Total number of shares called up	Nil
Total number of shares paid up	Nil

4. On 24 January 2022 Ogier, the Company's attorneys, wrote to the joint liquidators and objected to the inclusion of ASOR in the List of Members. Ogier stated that the reasons for the objection were:

   (1) ASOR was never a shareholder of Phoenix BVI; alternatively and without prejudice to the foregoing

   (2) if ASOR had been a shareholder for any period of time, it no longer is.

   Reference was also made to what Ogier defines as the Debt Conversion and they say it was never effected.

5. On 24 February 2022 the Company filed an Originating Application (the "Originating Application") with the High Court of the BVI seeking an order pursuant to section 193(3) of the IA that ASOR be removed from the List of Members. The Company's primary position was that ASOR was never a valid shareholder of Phoenix BVI because neither ASOR nor any authorised agent of ASOR agreed to become a shareholder in writing. Reliance was placed on section 49 of the Business Companies Act 2004 of the BVI.

6. After a six day trial in September 2023, on 30 May 2024 a 90 page judgment of Mangatal J was handed down (the "BVI Judgment"). Mangatal J concluded that ASOR (acting by Mr Abdul-Massih) agreed in writing to becoming and in due course became a shareholder ([252]). The Company's other objections were also dismissed. The Originating Application was dismissed with costs awarded against the Company. Mangatal J was critical of the Company and Mr Abdul-Massih. For example: at [188] "This case, ASOR's case is quite convoluted, and has contorted through many twists and turns." At [192] "I have to say that I found Mr. Abdul-Massih to be a very unsatisfactory witness. The various stories he advanced to the Court … are quite incredible, often inconsistent and I find them to be incapable of belief." At [219] "untrue". At [223] "a complete fabrication". At [224] "a completely different story."

7. On 5 June 2024 the joint liquidators called on ASOR pursuant to section 204(1) of the IA to pay US$90.72 per share. The amount due was stated to be US$40,001,623.20 (the "Call").

8. On 9 July 2024 an order (with effect from 30 May 2024) formally dismissing the Originating Application and awarding costs against the Company was entered in the BVI.

9. On 11 July 2024 the Company filed a notice of appeal and on 25 July 2024 the joint liquidators filed a counter notice. The appeal in the BVI has not yet been heard or determined.

10. A statutory demand stated to be under section 93 of the Companies Act (2023 Revision) of the Cayman Islands dated 12 November 2024 was served and it claimed that the Company owed Phoenix BVI the sum of US$40,001,623.20 and indicated on page 1 of the demand that if payment was not made within 21 days a winding up petition may be presented against the Company. On page 2 there is reference to the BVI Judgment and at paragraph 5 it is stated "It is therefore established that ASOR is a shareholder in Phoenix BVI and properly recorded on the settled list of members." At paragraph 7 it is stated that the "Debt became due and payable on 5 June 2024, when the Call was made, and the Company is liable to make payment of the same." At page 3 under the heading "Particulars of the Debt" at paragraph 9 it is indicated that if the Company does not respond or provide an unsatisfactory response within 21 days the joint liquidators "will seek to appoint liquidators to the Company on the basis that one of the segregated portfolios, ASOR cannot meet its liabilities as they fall due."

11. By letter dated 13 November 2024 attorneys acting for the Company stated:

> "As the Joint Liquidators are fully aware from previous correspondence on this matter, the basis upon which the underlying debt is claimed is disputed both in terms of the quantum claimed and the manner in which any such quantum may be (or may already have been) paid."

It is interesting to note the reference to quantum in that paragraph.

12. The joint liquidators on 2 December 2024 sensibly agreed to undertake not to present a winding up petition in furtherance of the statutory demand pending determination of the Originating Summons and the Company undertook to file the Originating Summons by 6 December 2024.

13. The Originating Summons was filed on 5 December 2024.

The position of the Company

14. On behalf of the Company it is submitted that there is a *bona fide* dispute on substantial grounds for three main reasons:

    (1) the debt is not a debt nor a debt which is due (there being no equivalent statutory provision in the IA to section 80 of the Insolvency Act 1986 of England and Wales);

    (2) the Company has disputed the Call and the only proper and legitimate course of action which, as a matter of BVI law, was open to the joint liquidators was for them to have made an application to enforce the Call under section 205 of the IA; and

    (3) there are significant factual disputes which exist between the parties as to what terms it is said that ASOR agreed in writing to become a shareholder of Phoenix BVI.

15. I should record that during the hearing the Company conceded that if the Defendants obtained a balance order under section 205 of the IA and there was no successful appeal against it, if the Defendants then issued a statutory demand and then presented a winding up petition, the Company would not oppose the making of a winding up order in such circumstances.

The position of the joint liquidators of Phoenix BVI

16. The position of the joint liquidators of Phoenix BVI is that:

    (1) there is a debt;

    (2) there is no genuine dispute on substantial grounds;

    (3) there is no need to proceed by way of section 205 of the IA; and

    (4) there is no genuine dispute that the shares were to be paid up to US$40 million.

17. The joint liquidators say that they are not required to apply for an order under section 205(1) of the IA. The joint liquidators say that the section merely gives a liquidator a 'shortcut' (described as a

'summary remedy') for obtaining a court order under section 205(2) known as a 'balance order' (paragraph 57 of their skeleton argument). They say that:

> "The non-mandatory language of the section 205 is a case where "may" means just that. If a liquidator is entitled to "enforce" the liabilities called under s.204 then that enforcement can take a variety of means. The liquidator might enforce against some security, or by bringing an action for debt, or counterclaiming in an extant action, or by petitioning for insolvency, and do any of these things in the BVI or abroad." (paragraph 62 of their skeleton argument).

18. The joint liquidators helpfully refer to paragraph 10-029 of *McPherson & Keay's Law of Company Liquidation* (5th ed.):

> "Because it greatly reduces expense in cases where there are large numbers of contributories, obtaining a balance order is the customary way of enforcing calls. But the liquidator is not bound to make use of this procedure and since calls in winding up constitutes a debt in the nature of a specialty the liability of a contributory may be enforced by action at law."

19. Mr Chivers referred me to the informative and interesting judgment of Kekewich J in *Westmoreland Green and Blue Slate Company v Feilden* [1891] 3 Ch 15 where at page 21 it was stated "That calls constitute a debt cannot be doubted. They probably would be a debt independent of statute, and they are expressly made a specialty by the Companies Act 1862, s75."

20. The joint liquidators say that the debt, the subject of the statutory demand, is not based upon the BVI Judgment. They add that the findings in that judgment amount to *res judicata* and the appeal does not impact the finality or enforceability of the judgment. They say that it would be a *Henderson v Henderson* abuse for the Company to seek to rely on matters which it could and should have raised in the BVI proceedings in respect of the List of Members, which in effect speaks for itself.

21. The joint liquidators maintain that the debt is due and owing and submit that once through the dust of irrelevant detail, the dispute raised by the Company does not pass even cursory scrutiny. They say it is raised in a further attempt to avoid clear liability.

The relevant law

22. There is a lot of English and Commonwealth authority in the area of the law concerning disputed debts and restraining the presentation of winding up petitions. Locally, I can do no better than refer to the helpful judgment of Ramsay-Hale J (as the Chief Justice then was) in *KrisEnergy (Gulf of Thailand) v Rubicon Vantage International Pte Ltd* (FSD unreported judgment 12 June 2020) where at [58] reference was made to the well established principle that winding up proceedings should not be commenced where the petition debt is genuinely disputed on substantial grounds and that it is an abuse of process to seek to use the winding up court as a debt collection agency.

23. At [56] Ramsay-Hale J stated that the test for determining whether a court will accede to an application to restrain the presentation of a winding up petition was set out in *Coulson Sanderson & Ward Ltd v Ward* [1985] 1 WLUK 105:

> "[T]he court should not on an interlocutory motion restrain what would otherwise be the legitimate presentation of a winding-up petition by someone qualified to present it, unless the company establishes on the evidence a *prima facie* case for holding that the petition would constitute an abuse of process."

24. *KrisEnergy* is also consistent with *Parmalat Capital Finance Ltd v Food Holdings Ltd* 2008 CILR 202. Lord Hoffmann at [9] referred to debts which were "*bona fide* disputed on substantial grounds" and the rule of practice rather than law in that respect. This approach was followed in *Camulos Partners Offshore Ltd v Kathrein and Co* 2010 (1) CILR 303 Chadwick P at [61] and by Parker J in *Re Primus Investments Fund* (FSD unreported judgment 16 June 2020) and Ramsay-Hale CJ in *Re Global-IP Cayman* (FSD unreported judgment 7 February 2024) at [16]-[21].

25. Charles Quin J in *Huawei Technologies v HiTs Africa Ltd* (FSD unreported judgment 29 January 2014), in the context of a hearing of a winding up petition, at [55] referred to a leading textbook and the quote "A dispute about the existence of a debt will not justify restraining the presentation of a winding up petition for 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)" and added:

> "It is common ground that the Court in reviewing a disputed debt petition has a duty to determine whether there is a dispute on substantial grounds." ([57])
>
> "The Court should be astute to ensure that, no matter how substantial the evidence in support of the dispute, it does actually disclose the dispute as having substantial ground." ([58])

26. At [60] Quin J quoted from Neuberger J (as he then was):

> "a judge … 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."

And Quin J added:

> "The onus is on the Company to prove, on a balance of probabilities, that the debt is disputed on substantial grounds and not just on …. some ground which is frivolous or without substance and which the Court should therefore ignore." ([61])

27. In that case in respect of an alleged cross claim that had not been prosecuted for over two and a half years Quin J concluded:

> "this dispute is not a genuine dispute founded on substantial grounds. To put it another way: the purported cross claim by the Company does not satisfy the test of substantiality and there is no evidence to conclude that it is genuine, serious and of substance." ([79])
>
> "To adopt Oliver LJ's words in *Claybridge Shipping*, Mr. Das' company is the unwilling debtor raising a cloud of objections which I find can properly be ignored as being frivolous and of no substance. On the evidence before me I find that the Company has failed to discharge the burden that the debt is disputed on any substantial ground and therefore the arbitration clause in the PLFA is irrelevant." ([89])

The evidence

28. I have considered all the evidence placed before the court.

29. I have regard to the List of Members and the BVI Judgment.

30. I also note the correspondence in respect of, prior to and subsequent to the statutory demand and, of course, the terms of the statutory demand itself.

31. Harneys, the attorneys acting for the joint liquidators, by letter dated 27 June 2024 to Ogier, the attorneys acting for the Company, pointed out that the Company in the BVI proceedings did not apply for any modification to be made to the List of Members in respect of the price per share and added that "it is irrefutable that the Company and ASOR agreed to consideration of USD 90.72 per share, totalling USD 40,001,623.20 (commonly rounded to USD 40 million)". The joint liquidators suggest that it is disingenuous and unsustainable to maintain otherwise in circumstances where:

(1) On 20 November 2019 various individuals at Inoks (including Mr Abdul-Massih) received a copy of Phoenix BVI's register of members which stated that the consideration per share in respect of ASOR's shareholding was USD 90.72 and Inoks confirmed receipt of the email the same day;

(2) The MOU refers to USD$40,000,000. Mr Abdul-Massih in his witness statement dated 31 January 2023 at paragraph 30 in support of the BVI Application stated that "The price was set at US$90.72 per share, with the subscription involving an investment of US$40,000,000 …";

(3) In his witness statement dated 31 January 2023 Mr Abdul-Massih confirmed that Mr Navandher also sent him a document listing ASOR as holding 440,935 shares at 90.72 per share and a total value of US$40,000,000, and Mr Abdul-Massih replied to confirm his agreement with the proposed shareholders and to correct the name from Inoks to ASOR;

(4) Mr Abdul-Massih has signed a certificate to BNP which on his own description (paragraph 36 of his first affidavit in the BVI proceedings sworn on 24 February 2022) "essentially confirmed that Phoenix BVI had issued 440,935 fully paid-up shares to ASOR against a

capital contribution of US$40,000,000". I note that Mangatal J in the BVI Judgment at paragraph 186 stated: "… on DAY 2 – pages 125-126, Mr. Abdul-Massih, after much prevarication and in my regrettable view, attempts at obfuscation, stated that BNP could rely on the certificate for the purpose of the BNP Condition Precedent";

(5) At paragraph 36 of his witness statement dated 31 January 2023 Mr Abdul-Massih refers to US$40,000,000 "being the value of the pre-allocated shares."; and

(6) ASOR's skeleton for the BVI Application at paragraph 91 stated that "if ASOR agreed to take the shares at all, the issuance of those shares imposed a new liability on ASOR (i.e. to procure the reduction of the debt owed by Phoenix Dubai/Phoenix BVI to Ancile Investment by USD 40 million)". At paragraph 119 it is stated: "It is correct that the debt conversion never actually took place."

32. I have noted the response of Ogier for the Company by way of letter dated 4 July 2024. It is stated that the BVI Judgment is subject to appeal and that there is a dispute as to "the liability that your clients consider should be attached to the shares". Ogier indicate that "any further debate about the appropriate quantum of any liability (and accordingly any proceedings) should be stayed pending the determination of our client's appeal". Ogier added "Absent agreement, our client intends to apply for a stay of the judgment to that effect." No stay has been granted in respect of the BVI Judgment. I note under the relevant BVI rules that except in so far as the court below or a single judge of the court otherwise directs (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and (b) any intermediate act or proceeding is not invalidated by an appeal.

33. It is interesting to note that in Ogier's detailed 4 page letter there is only one short paragraph dealing with the evidential matters raised by Harneys. Ogier says:

(a) Points (1), (3) and (4) post-date the time ASOR was entered into the register of members;

(b) Points (2), (5) and (6) refer back to the consideration agreed in the MOU which the BVI Judgment found not to be binding.

34. In fairness I also note the 8 page letter of Ogier dated 27 November 2024 and all the points and arguments raised by the Company in that letter and elsewhere.

35. Nowhere in his first affidavit sworn in these proceedings on 5 December 2024 does Mr Abdul-Massih engage with the evidence referred to in the letter of 27 June 2024 nor the criticisms made of him in the BVI Judgment. He simply says that ASOR is appealing the BVI Judgment and he says "that there was never a concluded agreement for ICM or ASOR to purchase shares in Phoenix BVI for a cash payment" (paragraph 5). He then in very generalised terms refers to the potential loss to ICM if a winding up petition was presented (paragraphs 6-10).

Determination

36. It is a serious step to restrain a legal entity from exercising a statutory right and applying for a statutory remedy. The court's jurisdiction to grant an injunction restraining the presentation of a winding up petition should be exercised with great circumspection and only in clear cases. I note the relevant legal tests referred to in the law section of this judgment and apply them to the facts and circumstances of this case.

37. I am not persuaded that it would be an abuse of process to present a winding up petition in the circumstances of this case. I am not satisfied that there is a genuine dispute founded on substantial grounds as to the debt.

38. I note the existence of an appeal in the BVI but as at today's date the BVI Judgment still stands. If it is overturned on appeal and the Company's name is removed from the List of Members then that would be a very different matter but as at today's date that is not the position.

39. The Company has not persuaded me that the debt is *bona fide* disputed on substantial grounds.

40. There are no clear and persuasive grounds for the order sought.

41. I deal with the main 3 points raised by Mr Alexander on behalf of the Company as follows:

42. Firstly, on the evidence presently before the court the debt is due. There is nothing in the Company's arguments based on the lack of a BVI equivalent of section 80 of the Insolvency Act 1986 of England and Wales. The Company has a liability to pay for the shares (section 195 of the IA). The debt became due and payable when the Call was made (section 204 of the IA).

43. Secondly, section 205 of the IA is permissive. It does not require the joint liquidators to present an application to enforce the Call. As at today's date the entry of ASOR as a member and the nominal value per share, the issue price per share and the total number of shares issued remains good. There is no need for the joint liquidators to obtain an order under section 205 of the IA or to commence an action at law. The present evidence before the court is that ASOR is a member and the sum of US$40,001,623.20 is due and owing.

44. Thirdly, I have considered the evidence and the issues raised by the Company. The Company says that if contrary to its primary argument there was no agreement at all and an agreement did exist at worst from ASOR's perspective, that agreement was that ASOR would cause a debt for equity swap to be carried out in consideration of ASOR becoming a shareholder in Phoenix BVI. Mr Chivers on behalf of the joint liquidators took me to a trilogy of English cases (*Black & Co's case* [1872] LR Ch App 254, *Cordova Union Gold Company* [1891] 2 Ch 580 and *Law Car and General Insurance Company* [1912] 1 Ch 405) and powerfully submitted in effect that any such agreement does not survive liquidation and the contributory must pay any unpaid amounts due on the shares in cash. I was unpersuaded by Mr Alexander's valiant attempts to distinguish those cases and to counter Mr Chivers' arguments. They were insufficient to lead me to conclude that the presentation of a winding up petition in the circumstances of this case would amount to an abuse of process.

45. Mr Alexander also submitted that if Mr Chivers was right that section 193 of the IA and the following sections provide a clear and simple scheme for the enforcement of calls then sections 205 and 206 are redundant. Mr Alexander stressed that section 193 (3) is about the list and section 205 is about the call. He added that his client must have an opportunity to challenge the call. Mr Chivers stressed that section 205 was plainly permissive and whereas it may assist liquidators looking at enforcing calls locally in the BVI it was not of assistance to liquidators enforcing calls outside the BVI and cited *McPherson* at paragraph 10-028 where it is stated that a balance order does not have the effect of a judgment and cannot be made the subject of a bankruptcy notice. Mr Chivers added that the joint liquidators had made the Call and it remains unpaid and in such circumstances they are entitled to serve a statutory demand and proceed to present a winding up petition if the debt is not paid.

46. I have taken into account the cautionary words of Quin J in *Huawei* especially at [58] to [61] and I have analysed all the evidence and arguments presented. I find the evidence and the arguments

presented by the Company unpersuasive. Although I keep a mind that is open to persuasion I have to say that the approach of the Company bears all the hallmarks of an entity seeking to avoid or delay the payment of a clear liability.

47. As other judges have made clear, it is all too easy for an unwilling debtor to attempt to raise a cloud of objections and then to claim that there is a real dispute on the facts and the matter should be left to be determined in some other proceedings. The evidence presently before the court does not lead me to conclude that there is a *bona fide* dispute as to the existence of an unpaid debt. I have tried to see through the clouds or as Mr Chivers puts it the "dust of irrelevant detail" and have concluded that the Company, despite the best efforts of Mr Alexander, have failed to persuade me that I should grant the injunction sought. Based on what is presently before the court, I am not persuaded that the debt is actually disputed *bona fide* on substantial grounds. There is no *prima facie* case for holding that the presentation of a winding up petition would be an abuse of process. In such circumstances it would be wrong for this court to grant an injunction restraining the presentation of a winding up petition and I do not do so.

48. There are simply no sufficient grounds to enable this court to take the serious step of restraining the presentation of a winding up petition. I do not of course say that the relief sought in such petition would follow as night follows day but there is presently insufficient evidence before the court to justify the granting of an injunction to prevent the Defendants from applying to the court to seek a statutory remedy.

49. I dismiss the Originating Summons and am minded to do so with costs against the Company such costs to be taxed on the standard basis in default of agreement.

50. Could the local attorneys please let me have before 3pm tomorrow, by way of an email to my PA, a draft order agreed as to form and content reflecting the determinations I have just arrived at. Thank you.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT