IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 96/2013

IN THE MATTER OF THE COMPANIES LAW

AND IN THE MATTER OF HITS AFRICA LTD.

BETWEEN:

HUAWEI TECHNOLOGIES

PETITIONER

AND:

HITS AFRICA

THE COMPANY

Appearances: **Mr. David Butler and Ms. Jessica Williams of Harneys for the Petitioner**

Mr. Steven Barrie and Mr. Colm Flanagan of Nelson & Co. for the Company

Before: **The Hon. Mr. Justice Charles Quin**

Heard: **28th and 29th November 2013**

JUDGMENT

INTRODUCTION

1. On the 16th July 2012, Huawei Technologies Co. Ltd. (the "Petitioner") presented a Petition for the winding up of HiTs Africa Ltd. (the "Company") pursuant to the provisions of the Companies Law on the ground that the Company is insolvent and unable to pay its debts.

2. The Petition is grounded by a Statutory Demand dated the 8th March 2013 issued by the Petitioner and served on the Company pursuant to s.93 of the Companies Law (2012 Revision) ("The Law"). The Statutory Demand claims that the Company owes the sum of US$21,303,468.26 and interest of US$6,314,347.95 calculated up to including the date of the Statutory Demand, being a total indebtedness of US$27,617,816.21.

3. On the 23rd September 2013 the Company issued a Summons for leave to file and serve affidavits in opposition to the Petition upon the Petitioner out of time.

4. On the 27th September 2013 the Court granted the Company leave to file and serve the affirmation of Santosh Kumar Das[1] ("Mr. Das") and adjourned the hearing of the Petition for the winding up of the Company to the 28th and 29th November 2013.

5. On the 28th and 29th November 2013 the Court heard the winding up Petition presented by the Petitioner. The Petition was grounded by the affidavit of Mr. Yu Han, sworn on the 29th May 2013 and supported by the affidavit of Mr. Yang Ce ("Mr. Yang Ce"), sworn on the 4th November 2013.

6. In opposition to the Petition the Company filed the affirmation of Mr. Santos Kumar Das ("Mr. Das"), dated the 25th September 2013.

[1] The Chief Technical Officer of (see para 17)

BACKGROUND

7. The Company is a Cayman Islands exempted company incorporated on the 24th May 2007 under the laws of the Cayman Islands, with its registered office at the offices of Trident Trust Company (Cayman) Ltd. P.O. Box 847 GT 1 Capital Place, Shedden Road, Grand Cayman, Cayman Islands.

8. The Company is engaged in business operations in the sub-Saharan Telecoms market, predominantly in the United Republic of Tanzania, the Democratic Republic of the Congo and the Republic of Equatorial Guinea.

9. The Petition states that the Company is 92.82% owned by HITS Telecom Holding Company K.S.C. ("HITS Telecom") – a telecom holding company listed on the Kuwait Stock Exchange, with market capitalization of approximately KD 90 million as of September 2009.

10. The Petitioner is a multinational networking telecommunications, services and consumer electronics company based in Shenzhen, in the People's Republic of China ("PRC") and is one of the largest manufacturers of telecommunications equipment in the world.

11. Pursuant to a Purchase Long Form Agreement ("PLFA") dated the 28th April 2006 as amended by the First Amendment to the PLFA dated the 27th January 2009 (the "First Amendment") and the Second Amendment to the PLFA dated the 24th June 2009 (the "Second Amendment") and as supplemented by the Binding Letter of Intent dated the 29th April 2008 (the "Binding Letter") (together with the First

Amendment, the Second Amendment and the Binding Letter, the "Agreement")) entered into between the Company and Excellentcom Tanzania ("Excellentcom")[2], on the one part, and the Petitioner and Huawei Technologies (Tanzania) Co., Ltd. ("Huawei Tanzania")[3] on the other:

a) The Petitioner and Huawei Tanzania were to provide telecom equipment and services to Excellentcom; and

b) The Company was to be "*jointly and severally responsible with Excellentcom...in respect of all obligations including but not limited to payments, repayments and provision of security.*"

12. The Petitioner contends that pursuant to Clause 42.4 of the PLFA, the Company was to make payment in respect of offshore portions and onshore portions of the work done, under the PLFA, to the Petitioner and to Huawei Tanzania respectively. "Onshore" work represents work done within the United Republic of Tanzania, while "Offshore" work represents work done elsewhere, including in respect of the manufacturing and shipping of telecommunications equipment from China.

13. The Petition alleges that, in accordance with the PLFA, and as acknowledged by an Acknowledgment Letter dated the 25th June 2010 (the "Acknowledgment Letter"), Excellentcom has accepted receipt of equipment and services in the amount of US$34,001,148.88. Against this, the Petitioner set off the sum of US$12,697,680.62 (of which US$4,070,000.00 was deposited into the bank account of the Petitioner, and US$8,627,680.12, was deposited into the bank account of

[2] A related Company of HiTs Africa.
[3] A related Company of Huawei Technologies Co. Ltd.

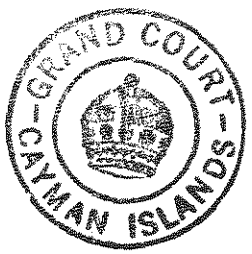
Huawei Tanzania) which had already been paid as a deposit in accordance with Clause 1.2 of the Second Amendment. Accordingly, the Petitioner contends that the resulting sum of US$21,303,468.26 (the "Outstanding Debt") remains due and owing despite several requests for payment from the Company.

14. The Petitioner also draws the Court's attention to Clause 4 of the Second Amendment which reads:

> *"The Company accepts and agrees to pay the penalty at the rate 0.03% of the outstanding amount calculated on a daily basis from the due date until full settlement of such outstanding amount."*

15. As a result, the Petitioner contends that from the date of the Acknowledgment Letter[4] to the 9th July 2013[5], interest has accrued in the sum of US$7,094,054.93, and continues to accrue at the rate of US$6,391.00 per day. The Petitioners claim the outstanding debt and the accrued interest is now US$28,397,523.19.

16. The Petitioner presents the Petition as a creditor of the Company and submits that it is entitled to do so pursuant to s.94(1)(b) of the Companies Law of the Cayman Islands. Further, the Petition is presented on the basis that the Company is unable to pay its debts within the meaning of s.93 of the Companies Law.



[4] 25th June 2010
[5] The date on which the Winding Up Petition was completed (prior to filing).

EVIDENCE ON BEHALF OF THE COMPANY

17. In his affirmation dated the 25th September 2013 Mr. Das states that he is the HiTs Africa Group Chief Technical Officer, providing technical services to the Company since June 2010. Mr. Das avers that he has been actively involved in the Company's business operations in the United Republic of Tanzania, the Democratic Republic of the Congo, the Republic of Equatorial Guinea and the Republic of Liberia. Mr. Das further avers that his knowledge of the Company's business operations in Tanzania is through Excellentcom – a joint venture partner in which the Company has a majority shareholding. Mr. Das confirms that he has been authorised to make his affirmation on behalf of the Company and in opposition to the Petition.

18. Mr. Das states that the PLFA dated the 28th April 2008 was entered into by the Company and the Petitioner to manufacture and install on a turnkey basis a full mobile telecommunications network in Tanzania, capable of serving at least two million subscribers. The PLFA also provided for the construction, in three phases, of 734 base transceiver stations at a total price of US$182,386,574.90.

19. Mr. Das alleges that the Petitioner failed to meet many of the timelines for the implementation of the project. Mr. Das says that as a result of this there were two amendments to the PLFA – first on the 8th January 2009 and then on the 24th June 2009. By the two Amendments the network was to be constructed in two phases, with an option to agree a third phase. As part of Phase 1 the Petitioner would manufacture and supply all of the plant machinery, computer hardware and software, apparatus material and articles for the network, and, construction of 204 base transceiver stations (BTS) in Dar es Salaam City, Tanzania, by 28th June 2010.

Phase 1 provided for the commissioning of the network core and the installation of telecommunications equipment and the 204 BTS. Mr. Das said that the agreed cost for Phase 1 was US$73,876,586.19. Mr. Das said that the Company paid the sum of US$12,697,680.62 as an advance payment towards the agreed price for Phase 1.

20. In his affirmation Mr. Das avers that the Petitioner failed to complete the works by the completion date. Mr. Das further complains that at the completion date the Petitioner had constructed only 40 of the 204 BTSs required in Phase 1, and had failed to construct the remaining 164 sites as required by the PLFA. Mr. Das also says that of the 40 sites constructed none were ready to radiate any telecommunications signals, and not a single acceptance test was carried out as required under the PLFA. Mr. Das says that none of the sites constructed by the Petitioners were ever integrated into the network.

21. As a result of the purported failures in breach of the PLFA by the Petitioner, Mr. Das states that the Petitioner is not entitled to any further payments. Mr. Das avers that the Company is unable to provide telecommunications services to its customers and thus the Company suffered significant loss of revenue and income and it "*damaged our brand and commercial reputation*".

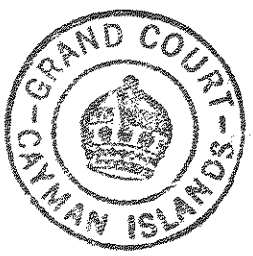
22. Mr. Das states in his affirmation that on the 16th May 2011, as a consequence of the Petitioner's failure to provide the network as agreed, the Company's attorneys wrote to the Petitioner and, by way of a demand notice, sought damages of US$991,427,224.00.

23. Mr. Das further states that on the 22nd June 2011 the Company's attorneys wrote to the Petitioner demanding that they remove their equipment which was left on approximately 141 sites.

24. Mr. Das says that the purported Acknowledgment Letter dated the 25th June 2010 in the amount of US$34,001,148.88 is not a valid Acknowledgment Letter because the author, Mr. John Paul ("Mr. Paul"), did not have any authority – ostensible or otherwise – to execute this document on behalf of the Company.

25. Furthermore Mr. Das said that execution of this alleged Acknowledgment Letter is completely at odds with the delivery notes which have been produced by the Petitioner for the same goods and services which bear dates subsequent to the 25th June 2010.

26. Accordingly, Mr. Das submits that by reason of the substantial issues of dispute between the Petitioner and the Company, and Excellentcom, and in accordance with the PLFA, the Company issued and delivered to the Petitioner a Notice of Arbitration dated the 8th February 2011 in accordance with Clause 74.2 of the PLFA, which expressly provided that issues of dispute were to be dealt with by Arbitration. Mr. Das stated at paragraph 11 of his affirmation: "*To date an arbitration of these issues has not taken place.*"



27. On the 6th February 2013 the Petitioner's attorneys wrote to the Company, submitting that it owed the Petitioner US$21,303,468.26, being an outstanding debt in respect of telecommunications equipment and services provided by the Petitioner to Excellentcom and also submitting that the Company is jointly and severally responsible, with Excellentcom *"..... in respect of all obligations including but not limited to, payments and repayments and provision of security."* This letter, before action, demanded payment on or before the 11th February 2013.

28. On the 7th February 2013 Mr. Pat Erickson ("Mr. Erickson"), the Chairman of the Company, wrote to the Petitioner's attorneys denying that the Company owed any debt and averring that no debt was due because of the Petitioner's default of non-completion of the turnkey project pursuant to the PLFA. Mr. Erickson added that the Company reserved its position.

29. On the 18th March 2013 the Petitioner's attorneys served a Statutory Demand on the Company pursuant to s.93 of the Companies Law – demanding payment of the outstanding sum of US$21,303,468.26 and interest of US$6,314,347.95 – being a total indebtedness of US$27,617,816.21. The Statutory Demand stated that should payment not be made within 21 days of the date upon which the Statutory Demand was served, the Company would be deemed to be insolvent, and the Petitioner would present the Winding Up Petition to the Court pursuant to s.92(d) of the Companies Law. The Statutory Demand attached the particulars of the debt pursuant to the PLFA as amended by the First and Second Amendments dated the 27th January 2009 and the 24th June 2009, and in accordance with the Acknowledgement Letter dated the 25th June 2010.

30. The Company acknowledges that it was served with the Statutory Demand, dated the 25th March 2013, which sought payment of the sum of US$27,617,816.21 and, consequently, the Company wrote a letter dated the 31st March 2013 disputing the debt and demanding that the Statutory Notice be withdrawn.

31. Mr. Das complains that they heard nothing further from the Petitioner's attorneys until the 17th July 2013 when the Company was served with the Petition to wind up the Company.

32. Mr. Das confirms that the Petitioner has served various demands for payment to the Company – including a Demand Notice on the 30th October 2010, for payment of the sum of US$63,070,389, and a Statutory Notice served by the Petitioner on Excellentcom, in respect of the same debt.

33. Mr. Das also refers to the Petition to wind up Excellentcom filed in the High Court of Tanzania, claiming the outstanding debt of US$77,062,608.28. It is Mr. Das' evidence that none of the various sums claimed are supported by valid purchase orders, invoices or goods received notices.

34. Mr. Das refers to the affidavit dated the 27th January 2011, filed by David Charles ("Mr. Charles") – CEO of Exellentcom – in opposition to the winding up Petition filed by the Petitioner in the High Court if Tanzania, to wind up Excellentcom.

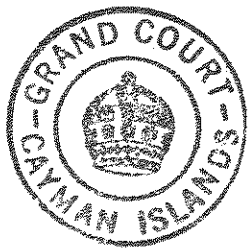
35. Mr. Das' evidence is that the Petition to wind up Excellentcom was dismissed by the High Court in Tanzania on the 4th February 2013, on the basis that there was a substantial and genuine dispute with regard to the debt being claimed, and, as result, the Petitioner has failed to prove that Excellentcom was insolvent or unable to pay its debts. The Court notes that there is no formal Order or Minute of Order from the Tanzanian High Court to confirm the outcome.

36. Mr. Das also confirms that the Petitioner brought proceedings in Kuwait against the parent company, Hits Telecom Holding Company (K.S.C.) on the grounds of a guarantee given by them in respect of the sums dues under Agreement. Mr. Das said the proceedings in Kuwait were dismissed on the 18th February 2013 by the Kuwaiti Court, on the basis that the Court did not have jurisdiction over the matter as the Agreement was governed by the laws of England and was subject to an arbitration clause in respect of any dispute arising out of the PLFA. Again, no order or Minute of Order from the Kuwaiti Court reflecting this Ruling has been produced.

37. In conclusion Mr. Das said the Company disputes that any sums are due to the Petitioner arising out of the Agreement. Mr. Das states that the sum of US$12,697,680.62 paid by the Company constitutes more than 20% of the original price of the Phase 1 works. Mr. Das avers that the Company has a substantive defence to the claims being brought against it and also that the Company cross-claims against the Petitioner. Mr. Das also states that if the Petitioner considers that it has a genuine claim then the Petitioner should bring arbitration proceedings against the Company in Switzerland under the rules of Conciliation and Arbitration of the International Chamber of Commerce in accordance with Clause 74.2 of the

PLFA. Mr. Das says if the Petitioner brought arbitration proceedings this would allow the Company to defend the claims made against it, and to counterclaim for the loss and damage suffered as a result of the Petitioner's breach of its contractual obligation under the PLFA.

38. Accordingly, Mr. Das invites the Court to dismiss the winding up Petition on the basis that here is a real and genuine dispute as to the debt due and submits that the Petitioner is unable to establish that the Company is insolvent and unable to pay debts as they fall due.



EVIDENCE ON BEHALF OF THE PETITIONER

39. In addition to the verifying affidavit of Mr. Yu Han, dated the 29th May 2013, the Petitioner filed the affidavit of Mr. Yang Ce, dated the 4th November 2013, setting out its position.

40. Mr. Yang Ce and Mr. Das agree that the total value of the PLFA was US$182,386,574.90 and that consideration was originally divided into three phases. Mr. Yang Ce disagrees with Mr. Das' averment that the Petitioner failed to meet many of the milestones and timelines for the implementation of the project, resulting in the First Amendment and the Second Amendment. Mr. Yang Ce states that this purported allegation is incorrect and avers that the key reason that the parties entered into the First and Second Amendments is that the Company failed in all its payment obligations to the Petitioner on several occasions. In fact, Mr. Yang Ce contends that the Company has failed to make any further payments to the Petitioner other than the initial deposit of US$12,697,680.62 which had been paid to the Petitioner. Mr. Yang Ce relies on the terms of the First and Second Amendments. Clause 3.1.(a) of the First Amendment dated the 27th January 2009, confirms that the contract value as per annex 3 is US$73,876,596.19 (inclusive of variation orders). Clause 3.1(b) states that 30% of the total contract value will be paid as down payment by the 15th February 2009 (less the US$12,600,000 – already paid by Hits Africa to Huawei) which left a balance of US$9 million. Clause 3.1(c) states that 20% of the total contract would be paid by the 15th June 2009 and Clause 3.1(d) said that 20% of the total contract would be paid by the 15th December 2009. In addition the Petitioner relies on the fact that it was clear that Clause 3.1(g) of the First Amendment states irrevocable and unconditional bank guarantee will be

issued by a first class international bank acceptable to Huawei by the 28th February 2009, covering 10% of the total Phase I plus the corresponding interest and Clause 3.1(h) states that a valid corporate guarantee will be issued by Hits Telecom by January 2009, which will cover 60% of the total Phase I value plus interest. Similar irrevocable and unconditional bank guarantees and corporate guarantees were promised in relation to Phase II.

41. Confirming that the Petitioner agreed to revise the payment terms at the request of the Company Mr. Yang Ce highlights the fact that Recital B to the Second Amendment states:

> *"The Company has requested and both parties have agreed to revise payment terms for the total balance of the contract value under Phase I, Phase II and Phase III."*

42. Further to the variations requested by the Company in the Second Amendment and to the re-defined payment schedules and bank and corporate guarantees, Mr. Yang Ce refers the Court to two letters from Huawei Tanzania to Excellentcom, copied to the Company, dated the 19th March 2009 and the 3rd April 2009. The First Letter dated the 19th March 2009 reads:

> *"As per agreed in the First Amendment signed on the 27th January 2009, the down payment of Phase 1 shall be fulfilled by 15th February 2009, however, the payment is delayed up to now."*

The Second Letter dated the 3rd April 2009:

"As per agreed in the First Amendment signed on the 27th January 2009, the down payment of Phase 1 shall be fulfilled by Hits on the 15th February 2009, however, the payment is delayed up to now. Meanwhile the new promise of payment on the 15th April 2009 is given in Barcelona by Hits Africa, hence we are looking forward to this payment. If Hits cannot fulfill this obligation on that day and Huawei have no choice but to switch off those equipments in MSC to reduce costs. Huawei highly appreciates that Hits can resolve this payment issue as soon as possible to help both of us conquer this current difficulty."

43. These letters were written between the execution by the parties of the First and Second Amendments and set out the substantial payment delays by the Company in relation to the sums due under the PLFA. These letters confirm that the Petitioner's representatives met with the Company's representatives in Barcelona, at which time the Company's representatives made promises for prompt payment of the monies due under the PLFA and the First Amendment. Mr. Yang Ce avers that the Petitioner entered into the First and Second Amendments as a result of the payment delays and the Company's promises.

44. In his affidavit Mr. Yang Ce further states that the Petitioner's obligations to complete its performance obligations were subject to the Company performing its payment obligations under the PLFA as set out in Clause 2(a) of the First Amendment. Under the First Amendment the Company was supposed to have paid US$22,162.975.86 less US$12,697,680.62 deposit, by the 15th February 2009. Mr. Yang Ce states that this payment milestone was not met by the Company.

45. Mr. Yang Ce refers to the Second Amendment which provided for the Company to pay four monthly payments of US$1.43 million – which sums were due on a monthly basis from May 2009. The Petitioner's position is that the remaining balance under Phase I – US$45,178,905.57 – due by 12 equal monthly installments from January to December 2010 remains unpaid.

46. After the signing of the Second Amendment the Petitioner commenced part of the work on Phase I. However, Mr. Yang Ce's evidence is that none of the payments agreed in the Second Amendment were paid by the Company, so that the Petitioner began to reduce its work, ultimately ceasing work in order to mitigate its loss. Mr. Yang Ce states in his affidavit that, as a result of the Company's failure to meet its payment installments, pursuant to the First and Second Amendments, the Petitioner was left with no alternative but to serve a Notice of Termination on the Company on the 4th January 2011.

47. Mr. Yang Ce relies on the Acknowledgment Letter signed by Mr. Paul, the Implementation Manager for the Company and Excellentcom, on the 25th June 2010, confirming that "*the equipment and services referred to in the attached schedules and invoices have been successfully delivered, installed and implemented by Huawei accordingly.*" This letter, dated the 25th June 2010 signed by Mr. Paul, was accepted on behalf of Huawei Tanzania. In addition, Mr. Yang Ce relies on the delivery notes signed by the Company and by the Petitioner, confirming that the equipment and services provided by the Petitioner had been delivered and acknowledged, pursuant to site visits in Dar es Salaam.

48. In relation to the arbitration, Mr. Yang Ce contends in his affidavit that the arbitration clause only remained in force, so long as any provision of this contract is still in force.

49. The Petitioner served a Notice of Termination on the 3rd January 2011 which was received by the Company on the 4th January 2011, and, accordingly, the Petitioner maintains that the agreement was terminated pursuant to Clause 72 of the Agreement which provides that:

> *"....the non-defaulting party may terminate the contract (the agreement)....by written ..... and such terminations shall be effective at the date when the termination notification had been delivered to the defaulting party."*

50. It is Mr. Yang Ce's contention that the amounts due, which form the subject of the Petition, are confirmed in the Acknowledgment Letter and are not part of any alleged broader dispute between the Company and the Petitioner.

51. Accordingly, Mr. Yang Ce contends in his affidavit that the outstanding debt is due and owing and that the Company does not have any credible argument to the contrary.

THE LAW ON DISPUTED DEBT

52. I am grateful to both counsel – Mr. Butler for the Petitioner and Mr. Barrie for the Company – for their helpful review of the relevant case law in relation to the questions of a disputed debt in a creditor's petition and exclusive jurisdiction clauses.

53. In ***Re General Exchange Bank*** [1866] E.R.A. 2964 the then Master of the Rolls, Romilly J. held that a winding up order will not be made on a creditor's petition where there is a bona fide dispute as to the petitioning creditor's debt and, accordingly, in that particular case the creditor's petition for winding up a Company was dismissed.

54. In ***Mann & Another v Goldstein & Another*** [1968] 1 W.L.R. 1091 Ungoed-Thomas J. examined the course the Court should take when a debt is disputed on substantial grounds, and stated at letter F on page 1096:

> "*When the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore, ignore) and the company is solvent, the court will restrain the prosecution of a petition to wind up the company.*"

55. In the Second Edition of ***Applications to Wind Up Companies*** 2007 by Derek French, the learned author examines the question of the "substantiality" of ground of dispute and states at paragraph 6.10.2.1 the test to be applied:

> "*A dispute about the existence of a debt will not justify the restraining presentation of a winding up petition for non-payment of the debt, or striking out, restraining, advertising of, or dismissing such a petition, 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.)*"

Referring first to ***Mann v. Goldstein*** and Ungoed-Thomas J's dicta, the learned author refers to a slightly different test applied in New Zealand in ***Delaine Pty Ltd. v. Quatro Publishing plc*** [1990] 3ACSR[6] 81 where Young J. said at page 82:

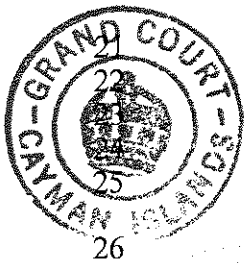
> *"The view appears to be gaining currency that, so long as a debtor can think of some dispute with its creditor, it can force the creditor to go to law and evade winding up for a considerable period of time. This view is a misconception. It is only if the debtor can prove that there are substantial grounds for disputing the debt that relief may be given."*

56. In the English Companies Court, Harman J. in ***Re a Company (No. 0010656 of 1990)*** [1991] BCLC 464 at page 466

> *"... It is clear that mere honest belief that payment is not due is not sufficient. There has to be a substantial ground for disputing liability to justify non-payment."*

57. 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. Mr. Butler on behalf of the Petitioner relies on the decision of Chadwick J. (as he then was) ***in Re A Company (No. 006685 of 1996)*** [1997] 1 BCLC 639 where he stated in the English Companies Court the principle:

> *"....the general rule under which this court refuses to entertain a petition founded on a disputed debt, applies only where the dispute is a genuine dispute founded on substantial grounds; and does not preclude this court from determining – or entitle this court to decline to determine – the question whether or not there are substantial grounds for dispute."*



[6] ACLR continued by ACSR – Australian Company Law Reports continued by Australian Corporations and Securities Reports.

58. The Court should be astute to ensure that, no matter how substantial the evidence filed in support of the dispute is, it does actually disclose the dispute as having substantial ground.

59. In ***Re Claybridge Shipping Company S.A.*** [1997] 1 BCLC 572 Oliver LJ (as he then was) stated at page 579:

> *"It is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because as dispute of fact cannot be decided without cross examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings."*

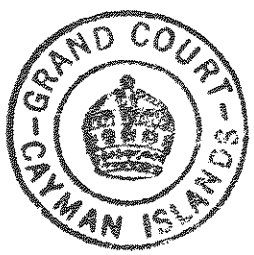
This dicta by Oliver LJ was adopted by Chadwick J. in ***Re a Company***[7].

60. Staying on the question of "substantiality" of ground of dispute Neuberger J. (as he then was) said at page 435 in ***Re Richbell Strategic Holding*** [1997] 2 BCLC 429:

> *"...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."*

61. The Grand Court has applied Chadwick J's test in ***Re a Company*** (*supra*) and also the principles as laid down by Ungoed-Thomas J. in ***Mann v Goldstein*** and Oliver LJ in ***Re Claybridge Shipping***.

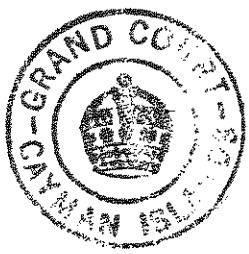
Mottley JA in our own Court of Appeal in ***Re Parmalat Capital Finance*** [2006] CILR 480 held at paragraph 46 that:



[7] ***Re a Company (No. 006685 of 1996)*** [1997] 1 BCLC 639

> *"The onus is on the Company, if it disputes the bona fides of the debt, to show that it does so on substantial grounds. A dispute which is based on insubstantial grounds could not suffice."*

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 the some ground which is frivolous or without substance and which the Court should therefore ignore.



THE LAW ON EXCLUSIVE JURISDICTION CLAUSES

62. For reasons that are obvious, the law on exclusive jurisdiction clauses is frequently inextricably linked with the law on bona fide disputes.

63. Mr. Barrie relies upon the decision of Foster J. ***In the matter of Times Property Holding Limited*** [2011] (1) CILR 223 where the Court held that it would not make a winding up order where the company disputed the existence of a debt and the parties had expressly agreed that any dispute arising out the agreement would be resolved by arbitration in Hong Kong. The Court stated it would not seek to determine whether the grounds on which the debt was disputed had any real substance since that would be to pre-judge an issue which the company as entitled to seek resolution in arbitration in Hong Kong. In refusing to make the winding up order Foster J. stated:

> *"Where, as here, parties have expressly agreed that any dispute between them arising out of the relevant contract is to be determined in a particular forum by a particular tribunal, it is not obvious to me why they should not be held to that agreement..."*

Mr. Barrie submits that the instant case is similar to ***Times Property*** and this Court should not seek to decide the dispute but, in accordance with the Agreement, should allow the parties to resolve this dispute in Arbitration proceedings in Switzerland.

64. In ***Re Duet Real Estate Partners 1 LP2*** (Unreported 7th June 2011), Jones J. dismissed the application for an injunction to prevent the presentation of a winding up petition where the applicants argued that the existence of the arbitration should prevent the winding up petition proceeding. Although Jones J. did not refer to the ***Times Property*** decision of Foster J., he stated in his judgment that the ***Duet*** Cayman case was thoroughly disingenuous and concluded:

> *"There is no evidence on which to infer that there is any genuine and substantial dispute about ESO's status as a creditor having the right to present the winding up petition."*

Accordingly, notwithstanding the existence of an arbitration clause, Jones J. dismissed the Duet Cayman application for an injunction leaving the creditor ESO free to present its winding up petition.

65. The Company also relies on the dicta of Bannister J. in ***Pioneer Freight Futures Company Limited v. Worldlink Shipping Ltd. Samoa,*** BVIHC (Unreported 1 July 2009) in which Bannister J. said it was not for the BVI Court to deprive Pioneer its contractual right to argue its case in the High Court in London.

66. However, in a more recent decision of Bannister J. in ***Alexander Jacobus De Wet v. Vascon Trading Limited*** BVIHC (Unreported, 6th December 2011) the learned Judge stated that his analysis in ***Pioneer Freight*** had been wrong and added:

> *"On the question of exclusive jurisdiction being argued in support of a disputed debt he held that the Court must first decide on the evidence before it whether there is a dispute at all. If the evidence (as in this case) discloses no ground at all for challenging the debt, then it is irrelevant that there may be an exclusive jurisdiction or arbitration provision."*

67. In ***De Wet v. Vascon*** Bannister J. followed the decision of the President of the BVI Court of Appeal, Sir Dennis Byron in ***Sparkasse Bregenz Bank AG v. Associated Capital Corporation*** (BVIC.A. Civ App. Number 10 of 2002, 18th June 2003, Unreported) and the English Court of Appeal decision of ***BST Properties Ltd. v. Reorg-Apport Penzugyi RT*** [2001] EWCA Civ 1997. In ***BST Properties*** the English Court of Appeal held that the exclusive jurisdiction clause is irrelevant to the question of whether the debt was bona fide disputed on substantial grounds. Only if a substantial dispute is identified will the exclusive jurisdiction clause fall to be taken into account.

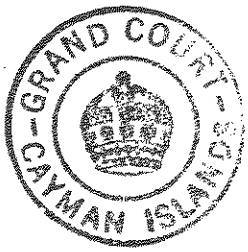
68. In ***SRT Capital SPC Ltd.***, Foster J. examined the BVI cases, the Cayman Islands Court of Appeal case and his own decision in ***Times Property*** in great detail and stated at paragraph 48:

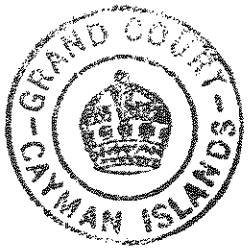
> *"The circumstances in the **Times Property** case, upon which reliance was placed were also different but it is clear anyway that in that case, in which there were clearly factual issues, I gave consideration to whether the company's grounds for disputing the alleged debt were substantial. In fact, as I have already mentioned, counsel for the Company, in response to a question from me, accepted that I had to be satisfied in the instant case that there were substantial issues in dispute. He did submit that the "substantial" test only applies when there are issues of fact or of fact and law to be resolved and not when the dispute is purely one of law, where there is a choice of law and exclusive jurisdiction clause. While I am not entirely convinced of that, as on the Company's own case there are significant factual issues to be resolved in the present case and I was urged on behalf of the Company to consider the whole background and surrounding circumstances giving rise to the Confirmation, it is not necessary in this case for me to analyse what the position is or should be when, in the context of choice of law and/or exclusive jurisdiction provisions, the dispute is purely one of law."*

Foster J. then concluded at paragraph 49:

> *"I have therefore concluded on this aspect that I should, in accordance with the agreed established practice determine whether the Company's dispute of the debt is genuine and on substantial grounds or whether it is frivolous and of no substance and so should be ignored. Of course if I do conclude that there is a substantial dispute about the alleged debt, that dispute must be resolved by the English Courts in accordance with the English Law."*

In ***SRT Capital***, Foster J. applied the correct test which I also apply in this case. Whether or not a dispute is substantial is a question of fact to be decided by the Judge on the facts of, and the circumstances surrounding, each case. In this case the Petition has been properly presented and served on the Company – claiming an outstanding debt of US$27,617,816.21. The Company has to discharge the burden of satisfying the Court that the Petition is subject to a genuine and substantial dispute.





THE DEBT

69. It is clear from reading the terms and conditions of the PLFA, the Binding Letter and the First and Second Amendments that the Company agreed to pay installment payments for goods delivered and services rendered. Indeed it is beyond doubt that after delayed payments by the Company it requested the Second Amendment, which set out clear defined payment plans. However, the evidence discloses that, other than the initial deposit of US$12,697,680.62 – paid to the Petitioner – the Company has not paid any amount under the PLFA or under the First and Second Amendments.

70. There is evidence that the Petitioner provided telecom equipment and services to Excellentcom and the Company. Both the First and Second Amendments provided for payment installments. The evidence before me is that the Company never complied with any of its payment obligations under either the First Amendment or the Second Amendment to the PLFA.

71. There is no dispute between the parties that the Statutory Demand was properly served and has expired. Furthermore there is no dispute that the Petition was properly served on the Company. In addition, Mr. Keiran Hutchison ("Mr. Hutchison") – a partner of Ernst & Young Limited – has sworn an affidavit dated the 19th June 2013 in accordance with O.3 r.4(1) of the Companies Winding Up Rules 2008 as amended and confirms that he is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5 of the Insolvency Practitioner Regulations. Mr. Hutchison confirms that he is a Chartered Accountant and has approximately 25 years' experience in Insolvency and Restructuring in the Cayman Islands and Australia.

LETTER OF ACKNOWLEDGMENT

72. I accept Mr. Yang Ce's evidence that, on the strength of the re-structured payment arrangement and strengthened guarantees the Petitioner continued to work on Phase 1 and that substantial quantities of equipment, goods and services were delivered to the Company and Excellentcom by the Petitioner and by Huawei Tanzania.

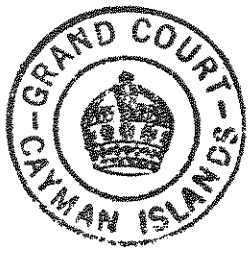
73. On the 25th June 2010 the Implementation Manager Mr. Paul employed by Excellentcom confirms that the value of US$28,484,194.50 in equipment and services were provided to Hits Africa under the contract from offshore, and US$5,517,044.33 of equipment and services were provided from onshore.

74. Although Mr. Das claims Mr. Paul had no authority to sign the letter, there is no evidence to support this bald assertion. It is noteworthy that this is not a denial by Mr. Das that Mr. Paul signed the letter, nor is it a denial that the goods and services were in fact delivered. In fact, all the evidence points to the contrary. It appears from the evidence – both from Mr. Yang Ce and from the Exhibits attached to Mr. Das' affidavit – that Mr. Paul was responsible for checking the equipment and insulation, provided by the Petitioner and to ensure that both were properly implemented to meet the Company's requirements. The exhibits demonstrate that Mr. Paul and a representative of the Petitioner attended a significant number of sites in Dar es Salaam confirming that goods and equipment had been delivered for the purposes of the installation of the telecom communications network.

75. Mr. Yang Ce states at paragraph 13 of his affidavit that Mr. Paul was responsible

> *"... for checking the equipment and installation and to ensure that it is properly implemented and meets the Company's requirements. He was in effect the Company's project manager for this matter on a day to day level and would therefore have been the obvious person to execute the document for the Company."*

76. In the two letters of demand from Mkono & Co, the Tanzanian attorneys acting for Excellentcom, dated the 17th May 2011 and the 22nd June 2011, the attorneys claim loss and damages, but at no point in either letter do they state that Excellentcom and the Company did not receive the goods and equipment as acknowledged by Mr. Paul in his Letter of Acknowledgement dated 25th June 2010.

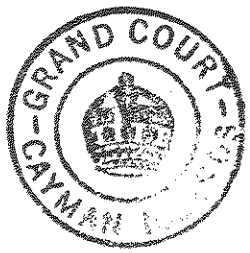


CROSS CLAIM

77. On the 17th May 2011 Mkono & Co. on behalf of Excellentcom, claimed for loss of revenue, opportunity loss, loss of value at Excellentcom, loss of value at Hits Holding and cash loss, leading to a total of US$991,427,244.00 and stated that "*if the aforesaid amount is not paid within seven (7) days, that the client's strict instructions to us are to commence legal proceedings to claim the same without further notice*." Neither Mkono & Co nor Mr. Das have provided any particulars as to how this figure of US$991,427,244.00 is made up.

78. On the 22nd June 2011 Mkono & Co. wrote again complaining that it was the Petitioner who terminated the PLFA by notice dated the 3rd January 2011, and asked the Petitioner to remove their equipment from the sites within 30 days, "*failing which, their client's strict instructions were to commence proceedings to claim a refund from the Petitioner for the rent which their client has been paying, as well as compensation.*"

79. The evidence is that neither the Company nor Excellentcom took any further steps to prosecute these claims, despite their clear representations that they intended to do so. Over two and a half years have elapsed since the above-referenced letters were written and this, inevitably, leads to the conclusion that 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.



ARBITRATION

80. On the 8th February 2011, Mr. Charles, the Chief Executive Officer of Excellentcom issued a Notice of Arbitration to the Petitioner and Huawei Tanzania on behalf of Excellentcom – demanding that all disputes arising out the PLFA dated the 28th April 2008, be referred to Arbitration pursuant to the provisions of Article 74 of the PLFA. In this Notice of Arbitration Mr. Charles states at paragraph 4: "*The quantum of ETL's [Excellentcom's] claims will be fully particularized in due course.*" At paragraph 5 Mr. Charles states: "*ETL [Excellentcom] will particularise the disputes, controversies and claims and quantum of its damages in a statement of claim to be served in accordance with the rules of conciliation and arbitration of the international chamber of commerce.*" And at paragraph 6: "*ETL [Excellentcom] proposes that the arbitrators be appointed and terms provided in Article 74 of the Agreement.*"

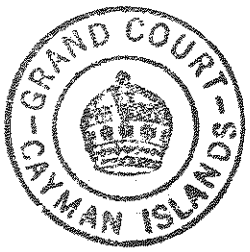
81. On the 7th March 2011 Huawei Tanzania wrote to Excellentcom acknowledging receipt of Excellentcom's Notice of Arbitration. Huawei Tanzania stated in its letter that the Arbitration Article 74 ceased on the 4th January 2011 when Huawei Tanzania's Notice of Termination was served on Excellentcom. Huawei stated that the Notice of Termination, by reason of Article 72.1.2, being effective when it was served on Excellentcom on the 4th January 2011, and thereby "ousted the Arbitration Clause", Huawei Tanzania added that, for these reasons, it will not recognize the Notice of Arbitration, will not appoint any Arbitrator and will vigorously contest any arbitral proceedings founded on the Notice of Arbitration.

82. There is no evidence that the Company and Excellentcom ever responded to the letter from Huawei Tanzania. There is no evidence that Excellentcom or the Company have ever particularized the quantum under their Notice of Arbitration. There is no evidence that Excellentcom or the Company ever particularized the "*disputes, controversies and claims and quantum of its damages in a statement of claim.*"

83. What is somewhat incredible is that Mr. Das actually recommends to the Petitioner that, if it considers that it has a genuine claim, it should "bring arbitration proceedings against us...." and "....this would allow us to fully defend the claims being made against us and to counter claim for loss and damage...."

84. In the same affirmation Mr. Das refers to the Notice of Arbitration issued by the Company and Excellentcom on the 8th February 2011 and then merely states in paragraph 11 that, "to date an arbitration of these issues have not taken place."

85. It is almost three years since Excellentcom issued its Notice of Arbitration. On the evidence before me neither the Company nor Excellentcom have taken any steps to prosecute the purported claim for damages or to proceed towards arbitration, again leading to the inescapable conclusion that the professed dispute is not a genuine dispute based on substantial grounds.



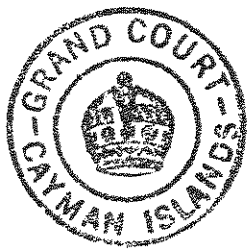
CONCLUSION

86. The Petition was presented to the Court on the 9th July 2013. I find that the Petitioner is a creditor of the Company and thus has standing to present the Petition under s.94(1)(b) of the Law.

87. I find that the Court is entitled to wind up the Company under s.92(d) of the Law as the Company is unable to pay its debts. The Petitioner has established that the Company is unable to pay its debts under s.93(a) of the Law. The Statutory Demand was served on the Company on the 18th March 2013 and the Company has, in the words of the statute, "*neglected to pay, such sum or to secure or compound for the same to the satisfaction of the Petitioner.*"

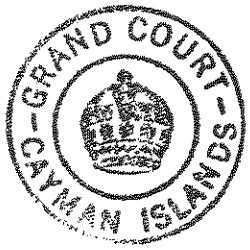
88. From my review of the evidence and of the written and oral submissions of counsel, I find that there is no genuine dispute founded on substantial grounds. I accept the submission from counsel for the Petitioner that for well over two years the Company has failed to pay what is due to the Petitioner.

89. 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.



90. For all the above reasons I order the winding up of the Company and appoint Mr. Hutchison as the Official Liquidator.

Dated this the 29th January 2014



Honourable Mr. Justice Charles Quin
Judge of the Grand Court