

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 22 OF 2019
(ON APPEAL FROM HCCW NO 313 OF 2017)**

IN THE MATTER of Sun Fung Timber
Company Limited

and

IN THE MATTER of section 178(1)(a)
of the Companies (Winding Up and
Miscellaneous Provisions) Ordinance
(Cap 32)

Before : Hon Kwan VP, Yuen JA and Barma JA in Court
Date of Hearing : 7 July 2020
Date of Judgment : 8 November 2021

J U D G M E N T

Hon Barma JA (giving the Judgment of the Court):

1. This is an appeal by the petitioner, 广东顺德展炜商贸有限公司, against the judgment of Chung J (“the judge”) dated 19 December 2018 by which the judge dismissed a winding-up petition issued by the petitioner against Sun Fung Timber Company Limited (“the Company”).

2. The petition was based on a debt allegedly owed by the Company to the petitioner under an arbitral award issued by the Zhanjiang Arbitration Commission dated 19 May 2017 (“the Award”). The petition was opposed by New Intertrades Foods Co, Limited (“the opposing contributory”), a 50% shareholder of the Company.

Factual background

3. The Company was incorporated in Hong Kong in October 1989.¹ Mr Simon Tsang and the opposing contributory each held 50% of the Company’s shares.² Mr Tsang and Mr Dany Lee were the two directors of the Company.³ Mr Lee and his wife were the two directors of the opposing contributory⁴ holding 60% and 40% of its shares respectively.⁵

4. According to the Company’s audited financial statements for the years 2011-2015, its principal activity is “retail of timber products and property investment”,⁶ and its annual revenue was in the range of HK\$4.3 million to HK\$5.7 million.⁷ It is common ground that Mr Tsang was responsible for the business and daily operation of the Company.⁸

5. The petitioner was set up by Stanley Wu (“Mr Wu”) on the Mainland as a wholly-owned foreign enterprise in January 2017.⁹

¹ [C/2/149].

² [C/2/146].

³ [C/2/142, 147].

⁴ [D/25/331, 336]

⁵ [D/25/335].

⁶ [E/36/449, 455, 484, 503].

⁷ [E/36/452, 468, 488, 501].

⁸ Lee 1st Affirmation, §12 [B/4/49].

⁹ [C/1/136-137].

6. On 14 April 2017, the petitioner and the Company entered into an agreement by which the Company agreed to supply and the petitioner agreed to purchase a quantity of marble stones at a price of RMB 220 million (“the Supply Agreement”).¹⁰ Pursuant to the Supply Agreement:

- (1) The Company was obliged to supply a total of 13,750 marble stones at a unit price of RMB 16,000 (Clause 1).
- (2) The date of delivery was 20 April 2017 (Clause 4(3)).
- (3) The Company agreed to the payment of a deposit by the petitioner by a cheque drawn in the sum of RMB 22 million, and that the petitioner’s obligation to pay such deposit should be deemed fulfilled once the Company had received the deposit cheque from the petitioner (Clauses 7(2) and 7(3)).
- (4) In the event that the Company failed to deliver the marble stones, the Company should pay the petitioner a daily penalty of 1% of the contract price commencing from the stipulated date of delivery. If the Company failed to deliver the marble stones 7 days after the stipulated date of delivery, the petitioner would be entitled to rescind the Supply Agreement and to demand payment of a penalty for breach of contract of 50% of the contract price (Clause 8(6)).
- (5) All disputes arising from or relating to the Supply Agreement should be submitted to the jurisdiction of the Zhanjiang Arbitration Commission (Clause 10).

7. The petitioner’s case on the circumstances leading to the signing of the Supply Agreement and the breach by the Company was set out in [13] to [19] of the judgment below.¹¹ In summary:

¹⁰ [C/10/218-225].

¹¹ [A/2/8-9].

- (1) Mr Wu carried on a business in the construction materials trade in the Mainland through a sole proprietorship. The business did not have a permit for carrying on import/export trade.
- (2) Mr Wu began his business dealings with the Company from about the mid-1990s, such dealings being for the supply of various construction materials. Mr Tsang had always been Mr Wu's business contact in the Company.
- (3) In September 2016, Mr Wu was approached by a customer for an order of a large quantity of marble stones to be delivered from the Mainland to Macau. Mr Wu approached Mr Tsang for samples of marble stones and showed them to his customer. The customer was satisfied with the samples and wanted to place an order with Mr Wu. The transaction between Mr Wu and his customer was concluded in September 2016.
- (4) As Mr Wu's business at the time could not carry on export trade, he set up the petitioner for the implementation of the transaction.
- (5) After the signing of the Supply Agreement, Mr Wu and his customer inspected the first batch of marble stones delivered by the Company and discovered that there were cracks in them, leading the customer to reject them.
- (6) Despite repeated demands, the Company failed to deliver the marble stones by the stipulated date for delivery.

The Award and the petition

8. On 15 May 2017, the petitioner commenced arbitral proceedings for breach of the Supply Agreement against the Company with the Zhanjiang Arbitration ("the Arbitral Proceedings").

9. On 19 May 2017, just 4 days after the proceedings were commenced, the Zhanjiang Arbitral Commission issued the Award. According to the Award, a hearing was conducted on 17 May 2017,¹² at which the Company (represented by Mr Tsang) did not contest the petitioner's claims but merely asked for a reduction of the penalty.¹³ The Award recorded a settlement agreement reached between the petitioner and the Company by which the Company was ordered to pay the petitioner RMB 59 million within 30 days as penalty for the breach of the Supply Agreement.¹⁴

10. On 19 October 2017, the petitioner commenced the present winding-up proceedings against the Company based on the Award. Section B of the petition, setting out the details of the Company's non-payment of the debt owed under the Award,¹⁵ shows that the petitioner relied on the insolvency of the Company as the ground for seeking a winding-up order.

11. The opposing contributory opposed the petition on the ground that the Supply Agreement was a sham agreement and involved collusion between the petitioner and Mr Tsang with a view to depriving the Company of its valuable assets.¹⁶ It was the opposing contributory's case that there was a deadlock in the Company¹⁷ and that Mr Tsang had no authority to

¹² [C/4/188].

¹³ [C/4/190].

¹⁴ [C/4/192-194].

¹⁵ [A/1/2-3].

¹⁶ Lee's 1st Affirmation, §§29-42 [B/4/56-59].

¹⁷ Lee's 1st Affirmation, §§16-20 [B/4/50-53] and Lee's 2nd Affirmation, §56 [B/8/112].

enter into the Supply Agreement or to conduct the Arbitral Proceedings on behalf of the Company.¹⁸

12. When the petition came before Harris J on 23 April 2018, he expressed some concerns as to the commerciality of the Supply Agreement.¹⁹ Harris J directed the parties to file evidence in order to explain, amongst other things, the circumstances leading to the signing of the Supply Agreement and the conduct of the Arbitral Proceedings.²⁰ The petition was adjourned for substantive argument.

The judgment below

13. The judge dismissed the petition on the basis that there exists a *bona fide* dispute on substantial grounds as to the debt relied on by the petitioner.²¹

14. At [25] of his judgment,²² the judge said that “this is a case where the documents presented to support this petition appear to be in good order at first glance, but display some rather unusual (perhaps even disturbing) features when they are looked at closer (and/or when they are looked at in the surrounding circumstances)”. The unusual features highlighted by the judge at [26] of his judgment were as follows:²³

“26. First, the subject agreement has dubious features. It is unusual for Wu, who claims to have about 20 years’ business dealings with Sun Fung Timber, to place an order for marble stones which:

¹⁸ Lee’s 2nd Affirmation, §§35-36, 49-51 [B/8/104-105, 110-111].

¹⁹ Transcript of hearing before Harris J on 23 April 2018, pp.2Q-U, 4O-Q, 5S-U, 6B-D.

²⁰ Wu’s 6th Affirmation, §4 [B/7/78].

²¹ Judgment, §§22, 39-40 [A/2/10, 15-16].

²² [A/2/11].

²³ [A/2/11].

- (a) was very large in quantity (a total of 13,750 slabs (measuring 2.2M x 2.8M each)), relative to the size of Sun Fung Timber (para 8 and 9 above) and the frequency and size of their earlier marble stone transactions (para 27 below);
- (b) (related to sub-para (a) above) has a very large contract sum (of RMB220 million);
- (c) required delivery within a very short period (of several days). It is also noted that Sun Fung Timber was only paid several days before delivery. Judging from its size, it is unlikely Sun Fung Timber would have the financial resources to confirm a corresponding order (or orders) from its supplier(s) before it was paid by Wu;
- (d) the subject agreement stipulated a delay penalty of 1% per day (and a maximum delay penalty of 50% of the contract sum).”

15. In relation to the evidence adduced by the petitioner in support of its previous marble stones transactions with the Company,²⁴ the judge observed that the size of the two earlier transactions (the value of each of which was around RMB 1 million) was quite different from that of the Supply Agreement. The judge also noted that, unlike the Supply Agreement, no date of delivery or penalty provision could be found in the handwritten documents evidencing the earlier transactions.²⁵

16. As to the petitioner’s point that the Supply Agreement was signed in the presence of a PRC lawyer because of “the substantial value of the contract and such large sums of monies changing hands”, the judge’s impression was that this suggested it was expected that the Supply Agreement may in future be challenged in some way and/or that Mr Wu was

²⁴ [D/14/260-263].

²⁵ Judgment, §28 [A/2/12].

not confident that the Company would be able to perform the Supply Agreement.²⁶

17. The judge also noted that the petitioner failed to provide information on a number of matters, such as the identity of the Macau customer, the particulars and the supporting documents relating to the contract between the petitioner and the Macau customer, and the steps taken by the petitioner to remedy its own breach of its agreement with the Macau customer. The judge considered that these were also matters which raised doubts about the Supply Agreement.²⁷

18. The judge considered that the Arbitral Proceedings were not straightforward either.²⁸ He noted that there was no explanation as to why the petitioner was willing to accept a lesser sum than it would otherwise be entitled to according to the penalty provisions in the Supply Agreement in the settlement with the Company when it appeared to have an overwhelming case on non-delivery.²⁹

19. The petitioner requested that the petition should be stood over until the opposing contributory had successfully established its claim that the Supply Agreement was a sham. However, having concluded that there was a *bona fide* dispute on substantial grounds in respect of the petition debt, and having taken into account the unusual features of the Supply Agreement

²⁶ Judgment, §29(a) [A/2/12-13].

²⁷ Judgment, §30 [A/2/13].

²⁸ Judgment, §31 [A/2/13].

²⁹ Judgment, §§37-38 [A/2/15].

and the Award, the judge did not accede to the petitioner's request and held that the appropriate course was to dismiss the petition.³⁰

Grounds of appeal

20. The petitioner advanced the following grounds of appeal:

- (1) The judge erred in applying the test of “*bona fide* dispute on substantial grounds” and ought instead to have applied the “real prospect of success” test. (“Ground 1”)
- (2) The judge failed to consider the appropriate threshold for dealing with allegations of fraud. (“Ground 2”)
- (3) The judge took into account irrelevant considerations and failed to take into account relevant considerations. (“Ground 3”)
- (4) The judge erred in dismissing the petition and refusing to stand it over pending a successful application by or on behalf of the Company for the Award to be set aside. (“Ground 4”)

Ground 1 - The proper test

21. Ms Eu SC³¹ for the petitioner submitted that the proper test in determining a winding-up petition which is based on a debt under an arbitral award is that there must be a “real prospect of success” in setting aside the arbitral award. She relied on the Court of Final Appeal decision in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2009) 12 HKCFAR 84³² and the pro-arbitration approach adopted in Hong Kong, in particular the “mechanistic” approach to enforcement of arbitral awards, as set out in, for example, *Re PetroChina International (Hong Kong)*

³⁰ Judgment, §§40-43 [A/2/15].

³¹ Leading Mr Anson Wong Yu Yat.

³² [P#8].

Corp Ltd [2011] 4 HKLRD 604.³³ Ms Eu SC submitted that the high threshold of “real prospect of success” in setting aside arbitral awards should be applied when a party opposes a winding-up petition based on an arbitral award. She contended that the judge erred in applying the threshold of “*bona fide* dispute on substantial grounds” in the Judgment.

22. We note that the proper test was not in issue before the judge. It would appear that in the court below, the petitioner was prepared to meet the opposition to the petition on the basis that the test was the existence of a *bona fide* dispute and by contending that the opposing contributory could not establish the existence of such a dispute in respect of the petition debt.³⁴ We also have some doubt as to whether the application of a different test would make any practical difference.

23. Nevertheless, having considered the submissions by the parties, we are of the view that the judge was right to apply the “*bona fide* dispute on substantial grounds” test, which is a long-standing test applied by the courts in bankruptcy and winding-up proceedings when the petition debts are disputed. The test is well established in Hong Kong, where it has often been stated that petitions are not meant to be used for the purpose of debt collection and the winding-up or bankruptcy jurisdiction of the court will be exercised only in very clear cases.

24. The premise of Ms Eu SC’s contention in advocating the “real prospect of success” test is that the petition in this case “is not a petition based on a mere debt” and that the petitioner is “seeking to enforce”³⁵ the

³³ [P#4].

³⁴ Wu’s 5th Affirmation, §10 [B/6/74].

³⁵ Petitioner’s Skeleton, §17.

A Award. Given that it would be “two sides of the same coin” whether a
B party presents a winding-up petition based on a debt under an arbitral award
C or seeks leave to enforce the arbitral award under the Arbitration Ordinance,
D Ms Eu SC submitted that the threshold test “ought to be the same”.³⁶

E 25. With respect, we are unable to accept this submission. It is
F well-established that “the presentation of a petition to wind up a company
G on the grounds of insolvency is the exercise of a class right and does not
H constitute enforcement of either a judgment or ... an arbitration award”: *Re*
I *Lucky Resources (HK) Ltd* [2016] 4 HKLRD 301 at §3.³⁷

J 26. In view of this, we are not persuaded that, as a matter of
K principle, the threshold test for determining an opposition to a winding-up
petition based on a debt under an arbitral award should necessarily be the
same as the test for setting aside an arbitral award.

L 27. The petitioner relied heavily on the Court of Final Appeal
M decision in *Karaha Bodas* in support of the “real prospect of success” test,
N which was mentioned in §§50, 54 and 76 of the judgment. However, it is
O important to note that *Karaha Bodas* was not a winding-up case at all. The
P case concerned an application to resist enforcement of a New York
Q Convention arbitral award on the ground of public policy under s.44(3) of
R the now repealed Arbitration Ordinance (Cap 341) (see §48). The Court
S of Final Appeal was not concerned with the test to be applied by the court
in determining a winding-up petition based on a debt under an arbitral award.
Nor did it address the conceptual difference between the presentation of a
winding-up petition and the enforcement of an arbitral award.

T ³⁶ Transcript, p.21H-J.

U ³⁷ [R#2].
V

Accordingly, *Karaha Bodas* does not assist the petitioner. Indeed, Ms Eu SC accepted at the hearing that there is no direct authority in support of the proposition that the threshold test for winding-up proceedings and applications to set aside an arbitral award should be the same.³⁸

28. For the above reasons, we do not consider that the judge erred in determining the petition by reference to the “*bona fide* dispute on substantial grounds” test.

Ground 2 - The threshold for allegations of fraud

29. Ms Eu SC complained that the judge erred in referring to the “dubious features” of the Supply Agreement. Citing *Nina Kung v Wong Din Shin* (2005) 8 HKCFAR 387,³⁹ Ms Eu SC submitted that the judge failed to consider the high threshold required for alleging fraud and wrongly reversed the position by putting the petitioner, who was the holder of the Award, “on trial to answer every question”.⁴⁰

30. In our view, there is no substance in this complaint. We agree with Mr Wong SC⁴¹ for the opposing contributory that for the purposes of resisting the petition on the basis that there is a *bona fide* dispute, it was not necessary for the opposing contributory to prove that the petitioner had committed fraud. In particular, it is important to consider the context in which the allegations of fraud or collusion in the present case arose.

³⁸ Transcript pp. 21K-M.

³⁹ [P#9].

⁴⁰ Petitioner’s Skeleton, §§20-22.

⁴¹ Leading Mr Martin Kok.

31. The jurisdiction of the court to “go behind” a judgment upon which a petition debt is based was explained by Yuen JA in *Re Tam Mei Kam* (unreported, CACV 87/2012, 8 May 2013)⁴² at [22.1] and [22.2] as follows:

“22.1 The bankruptcy court will treat a judgment for a sum of money as *prima facie* evidence that the judgment debtor is indebted to the judgment creditor for that sum.

22.2 As *prima facie* evidence of indebtedness, it may be rebutted and that is what is meant by “going behind” the judgment. It is important to understand the rationale for this approach. First, bankruptcy affects an individual’s legal status. Secondly and importantly in this context, the bankruptcy court’s exercise of the power and/or duty to inquire into a judgment is necessary to *protect a debtor’s real creditors* from collusive judgments entered into by the debtor in order to initiate a bankruptcy and thereby reduce the funds available for his real creditors.”

32. In *Re Phoon Lee Piling Co Ltd* [2003] 2 HKLRD 396⁴³ at [25], Kwan J (as she then was) held that “the bankruptcy court will not, as a matter of course, inquire into the validity of a judgment debt, but only where there is evidence that the judgment has been obtained by fraud, mistake, collusion, or that there has been some miscarriage of justice”. In this context, “miscarriage of justice” refers to “something from which [the court] can conclude that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due to the claimant”: *Re Tam Mei Kam* (supra) at [26.2].

33. There is no dispute that these principles that are applied in bankruptcy cases are equally applicable to winding-up cases.⁴⁴

⁴² [R#1].

⁴³ [P#12].

⁴⁴ Petitioner’s Skeleton, §33; Opposing Contributory’s Skeleton, §10.

34. It is clear from these authorities that the relevance of fraud or collusion in this context is to rebut the *prima facie* evidence of indebtedness based on the judgment. In deciding whether to “go behind” a judgment upon which a petition debt is based, the court in bankruptcy or winding-up proceedings is not tasked with making findings of fact in relation to fraud or collusion. Instead, the court is asked to form a view on the available evidence before it as to whether there is a *bona fide* dispute on the judgment debt.

35. As shown in [24] of the Judgment,⁴⁵ the judge was well aware that mere allegations of wrongdoing are “not enough”. He considered that the opposing contributory had to show that there was a *bona fide* case that the Supply Agreement was a “sham transaction” in that the petitioner had “taken part in a conspiracy” or has at least “knowingly assisted” Mr Tsang to harm the Company. In [26] to [30] of the Judgment,⁴⁶ the judge went on to examine the various features of the Supply Agreement by reference to the underlying evidence, including the unprecedented size of the order when compared with past dealings, the short period for delivery of the marble stones under the Supply Agreement and the lack of crucial information regarding the contract between the petitioner and its Macau customer.

36. Apart from the matters specifically addressed by the judge, we consider that there are other aspects of the evidence which also cast significant doubt over the genuineness of the Supply Agreement.

- (1) Clause 7.2 of the Supply Agreement⁴⁷ provides for the payment of a deposit in the amount of RMB 22 million by the

⁴⁵ [A/2/10-11]

⁴⁶ [A/2/11-13].

⁴⁷ [C/10/223].

petitioner to the Company. Curiously, Clause 7.3 provides that the payment obligation would be “deemed fulfilled” once the Company received the deposit cheque from the petitioner. In other words, the petitioner’s payment obligation was to be regarded as discharged even though there was no actual deposit and payment of the cheque. In fact, it was not disputed that the cheque in question, on which the payee name was left blank,⁴⁸ was never deposited by the Company.⁴⁹ The petitioner’s only explanation was that there was an understanding that the cheque would only be deposited by the Company if the petitioner was satisfied with the quality of the first batch of the marble stones.⁵⁰ In our view, it is surprising, to say the least, that the Company would simply accept a piece of paper, which was not supposed to be banked in, as the equivalent of the payment of a deposit, given that the Supply Agreement is on any view a substantial contract involving a large amount of money. It is also difficult to see why the understanding given by the petitioner in relation to the deposit cheque did not find its way into the provisions of the Supply Agreement when the parties had taken the trouble of drafting it and formally signing it in the presence of a PRC lawyer.

- (2) In the course of oral argument,⁵¹ Mr Wong SC drew our attention to a letter dated 16 January 2018 issued by the solicitors for Mr Tsang⁵² setting out Mr Tsang’s case on the Company’s inability to perform its obligations under the Supply Agreement. Notwithstanding that Mr Tsang is one of

⁴⁸ [C/10/234-235].

⁴⁹ Lee’s 1st Affirmation, §38 [B/4/58]; Lee’s 2nd Affirmation, §34 [B/8/103-104]; Wu’s 6th Affirmation, §26 [B/7/82].

⁵⁰ Wu’s 6th Affirmation, §26 [B/7/82].

⁵¹ Transcript, pp.43T-44P.

⁵² [E/37/518-520].

the founding shareholders and directors of the Company,⁵³ the letter stated that Mr Tsang took the view that the petitioner is “entitled” to present the petition and that it is “unmeritorious” for the Company to defend the petition.⁵⁴ This lends further support to the judge’s view that there is a *bona fide* dispute as to whether there was collusion between the petitioner and Mr Tsang, who has not taken part in this these proceedings, in the making of the Supply Agreement and the obtaining of the Award.

37. It appears to us clear from the foregoing that the judge was aware of the serious nature of the allegations advanced by the opposing contributory and that there is a sufficient evidential basis to go behind the Award, which was obtained by consent and not after a full trial on the merits. We therefore reject the petitioner’s ground of appeal based on the threshold for making and establishing allegations of fraud.

Ground 3 – Relevant/irrelevant considerations

38. Ms Eu SC submitted that the judge failed to take into account relevant matters, such as the indoor management rule and the long course of dealings between the petitioner and the Company where Mr Tsang had always been held out as the only person with authority to act for the Company.⁵⁵

39. We do not agree with Ms Eu SC’s submissions in this respect. In [5] of his judgment,⁵⁶ the judge referred to the fact that the business of

⁵³ Lee’s 1st Affirmation, §§4-5 [B/4/46]; [D/26/347, 353, 355, 358].

⁵⁴ [E/37/519].

⁵⁵ Petitioner’s Skeleton, §24.

⁵⁶ [A/2/7].

A the Company was operated by Mr Tsang, while Mr Lee (through the
B opposing contributory) was a non-participating shareholder. Further, in
C [26] of his judgment,⁵⁷ the judge regarded it as unusual for Mr Wu, who
D claims to have had about 20 years' business dealings with the Company, to
E place an order for marble stones which contains the dubious features
F highlighted. Thus, the judge was plainly aware of the past dealings
G between the petitioner and the Company and would have had that in mind
H when assessing the evidence.

G 40. We also agree with Mr Wong SC that the indoor management
H rule is not relevant in light of the judge's conclusion that there is a *bona fide*
I dispute as to genuineness of the Supply Agreement and the question of
J collusion between the petitioner and Mr Tsang. This conclusion was based
K on the evidence before the judge, and is not negated by the operation of the
L indoor management rule.

L 41. As to irrelevant considerations, Ms Eu SC referred to Mr Lee's
M allegations against Mr Tsang in respect of the latter's wrongdoing in
N managing the Company and submitted that the petitioner was not party to
O such wrongdoing.⁵⁸

O 42. In our judgment, the judge did not take account of irrelevant
P considerations by referring to the allegations regarding Tsang's wrongdoing
Q in managing the Company. On a fair reading of [23] and [24] of the
R judgment below,⁵⁹ it is clear that the judge was aware that allegations
S relating to Mr Tsang's wrongdoing in managing the Company were "not

T ⁵⁷ [A/2/11].

U ⁵⁸ Petitioner's Skeleton, §26.

V ⁵⁹ [A/2/10-11].

enough” and that it would be necessary for the opposing contributory to establish a *bona fide* case in respect of the petitioner’s involvement in the sham transaction.

Ground 4 - Standing over the petition

43. Ms Eu SC submitted that the judge erred in refusing the petitioner’s request to stand over the petition until the opposing contributory has successfully applied to set aside the Award. Ms Eu SC referred to *McPherson & Keay’s Law of Company Liquidation (4th ed)* at §3-090⁶⁰ and *Re Quatrovision Pty Ltd (in liq)* [1982] 1 NSWLR 95⁶¹ (cited in *McPherson & Keay*) in support of the argument that the judge erred in “requiring the petitioner to go into further evidence to support its claim” rather than requiring the opposing contributory to “take steps to set aside the Award”.⁶²

44. In her oral submissions, Ms Eu SC further contended that the petitioner would be left in limbo if the court dismisses the petition.⁶³ She submitted that the petitioner would be stuck with a paper award as long as the opposing contributory claims that there is a deadlock in the Company preventing it from setting aside the Award.⁶⁴ Ms Eu SC stressed that it is important for the court to impose a time limit for the opposing contributory or the Company to act.⁶⁵

45. In response, Mr Wong SC submitted that the Company could not have issued proceedings to set aside the Award in the PRC in view of

⁶⁰ [P#6].

⁶¹ [P#7].

⁶² Petitioner’s Skeleton, §19.

⁶³ Transcript, pp.3J-K and 56K-M.

⁶⁴ Transcript, p.8R-T.

⁶⁵ Transcript, p.6A-C.

the deadlock in the Company⁶⁶ and hence it would not be practicable to order that the petition be stood over.⁶⁷ Mr Wong also cited *Re Gasbourne Pty Ltd* (1984) 2 ACLC 103⁶⁸ in which the approach adopted in *Re Quatrovision* was not followed.

46. We do not agree with Ms Eu SC's submission that the petitioner would be left in limbo. The reality is that even if the petition is dismissed, it would always be open to the petitioner to enforce the Award in the usual way. In fact, we were informed by Ms Eu SC that the petitioner had in fact taken steps to enforce the Award in a separate set of proceedings in Hong Kong (HCCT 25/2019) ("the Enforcement Proceedings") after the petition was dismissed.⁶⁹ We understand that the opposing contributory has been given leave to intervene in the Enforcement Proceedings and has applied to set aside the enforcement order of the Award *ex parte* ("the Setting Aside Application") and that the Setting Aside Application will be heard in due course.⁷⁰ In light of these developments in the Enforcement Proceedings, we do not accept that the petitioner is simply stuck with a paper award or that there is a need for the court to impose a time limit for the opposing contributory or the Company to act.

47. We also do not regard the authorities relied on by the petitioner as imposing a hard-and-fast rule that the court should invariably stand over a winding-up petition based on a debt under a judgment or an arbitral award

⁶⁶ Opposing Contributory's Skeleton, §9.

⁶⁷ Opposing Contributory's Skeleton, §43.4.

⁶⁸ [R#10].

⁶⁹ Transcript, pp.5N-6F. See also §§13 to 18 of the second affidavit of Lam Lai Kiu Kelvin filed on 11 May 2020 (not in the appeal bundle) in support of the opposing contributory's application for leave to file a Respondent's Notice out of time.

⁷⁰ Transcript, pp. 7J-L, R-T. See also §§11 to 20 of the Reasons for Decision handed down by Mimmie Chan J in HCCT 25/2019 on 18 August 2021 ([2021] HKCFI 2407) regarding the petitioner's application for security. It was stated in §24 that the Setting Aside Application was fixed to be heard on 30 August 2021.

until that judgment or arbitral award has been successfully set aside. We agree with the observations in *Re Gasbourne* at 135 that the court is guided by the course which is the “most convenient”, taking into account the individual circumstances of each case. As explained in *Re Gasbourne* after a review of the relevant authorities, there may be situations where the company sought to be wound up is “willing and able to take steps” to set aside the judgment or arbitral award upon which the petition is based. There may be other cases in which all the relevant materials relating to the petitioner’s claims are before the court and the court is in a position to rule on whether the party opposing a petition has shown a *bona fide* dispute that the judgment or the arbitral award is liable to be set aside.

48. We think that the present case falls into the latter category. Apart from the fact that the Company was deadlocked and does not appear to be in a position to set aside the Award in the PRC, the parties in this case were directed by Harris J to file evidence specifically to address the question of whether the Supply Agreement was a genuine commercial transaction. The petitioner has been given the opportunity to file a number of substantive affirmations together with documentary evidence, even though, as we observed at the hearing,⁷¹ it is generally rare for rounds of affirmations to be filed in a winding-up petition. The petitioner cannot realistically complain that it has no chance to put forward its case by way of evidence for the purposes of showing that there is no *bona fide* dispute. In the circumstances, we agree with the judge’s view (as set out [43] of the judgement)⁷² that the most appropriate course to adopt in this case is to dismiss the petition.

⁷¹ Transcript, p. 23O-Q.

⁷² [A/2/16].

49. We also agree with Mr Wong SC that the petitioner's request is inconsistent with the "choice of remedies" principle, as approved by the Court of Final Appeal in *Astro Nusantara International BV v PT Ayunda Prima Mitra* (2018) 21 HKCFAR 118,⁷³ which enables a party to resist enforcement of arbitral awards in Hong Kong without having challenged the awards in the supervisory court (at §78). In our view, to impose an obligation on the opposing contributory or the Company to set aside the Award in the Mainland as a condition for standing over the petition is to effectively compel the opposing contributory or the Company to choose an active remedy over a passive remedy (see [79] of *Astro Nusantara*).

50. Accordingly, we do not consider that the judge erred in refusing to stand over the petition upon being satisfied that there is a *bona fide* dispute on substantial grounds.

The respondent's notice

51. In light of our agreement with the judge's reasons for dismissing the petition, it is not necessary for us to address the other arguments raised in the respondent's notice seeking to uphold the judgment on additional grounds, including the argument that Mr Tsang had no actual or ostensible authority to represent the Company in signing the Supply Agreement and conducting the Arbitral Proceedings. We are conscious that these grounds may be more fully ventilated in the hearing of the Setting Aside Application before the Court of First Instance. In the circumstances, we are not minded to express any views on those matters at this stage.

⁷³ [R#4].

Conclusion and costs

52. For the above reasons, the petitioner's appeal is dismissed.

53. So far as the costs of the appeal are concerned, both counsel accepted at the end of the hearing that these should follow the event. Accordingly, we would make an order that the costs of this appeal be paid by the petitioner to the opposing contributory, to be taxed on the party and party basis if not agreed, with a certificate for two counsel.

(Susan Kwan)
Vice-President

(Maria Yuen)
Justice of Appeal

(Aarif Barma)
Justice of Appeal

Ms Audrey Eu SC and Mr Anson Wong Yu Yat, instructed by Chan & Chan,
for the petitioner

Mr Anson Wong SC and Mr Martin Kok, instructed by Yu & Associates,
for the opposing contributory

The Company, unrepresented, absent

The Official Receiver, attendance excused