IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 54/2020

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF ADENIUM ENERGY CAPITAL, LTD

Appearances:	**Mr. Brett Basdeo, Mr. Barnaby Gowrie and Mrs. Annalisa Shibli of Walkers for the Petitioner, Bareeq Capital**
	Mr. Ian Huskisson of Travers Thorp Alberga for Adenium Energy Capital, Ltd.
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Heard:	**19th June 2020**
Draft Judgment:	**27th July 2020**

HEADNOTE

The Companies Law (2020 Revision) – Sections 92 and 93, Bona fide and substantial dispute as to debt, principles of res judicata, misnomer.

JUDGMENT

1. By Petition filed on the 8th April 2020, the Petitioner, Bareeq Capital seeks the winding up of Adenium Energy Capital Ltd ("the Company") pursuant to s.92 (d) of the ***Companies Law*** (2020 Revision), and the appointment of joint official liquidators. The Petitioner alleges that it is a creditor of the Company and that the Company is unable to pay its debts pursuant to s.93 of the Law.

2. The Company is registered in the Cayman Islands as an exempt company limited by shares. It opposes the Petition primarily on the basis that there is a *bona fide* dispute on substantial grounds as to the standing of Bareeq Capital as a creditor and that the principle of misnomer applies.

3. The Petitioner is incorporated in Egypt and is a developer and investor in infrastructure projects in that country. It seeks to establish a debt owed by claiming that it is the beneficiary of a Final Arbitral Award dated 8th March 2019, ("the Award"). This was issued by DIFC-LCIA Arbitration Centre in Dubai ("DIFC-LCIA") in case no DL 17091, ("the first arbitration").

4. The background to the claimed debt began in 2015 when on the 5th May the two parties entered into a memorandum of understanding, ("MOU"), pursuant to which, the Company agreed to purchase the rights of the Petitioner in a solar energy project established by the Government of Egypt. The total consideration under the agreement was US$2.5 million. The Company defaulted on the agreement paying only US$150,000.00 and a further US $100,000.00 sometime later. The terms of the MOU provided for Egyptian law as the governing law and the resolution of all disputes by arbitration at the DIFC-LCIA. The Petitioner submitted a request for arbitration in April of 2017. The Final Award which was issued, required that in 30 days from the 8th March 2019, the Company pay the Petitioner the following sums:

i) US$2,250.000.00 in respect of the amounts outstanding under the MOU.
ii) Simple interest on this sum at the rate of 5%per annum, to wit US$308.22 per day from the 22nd September 2018.
iii) Legal costs in the sum of US$341,258.27.
iv) Arbitration costs in the sum of US$118,917.80.

5. The Petitioner made written demands for payment on the 12th, 18th and 26th March 2019 and on the 8th and 23rd April 2019 before seeking to enforce the Award in Dubai and the Cayman

Islands. The enforcement proceedings in the Cayman Islands commenced with the filing of an *Ex Parte* Originating Summons dated 5th August 2019 in Cause No. FSD 148 of 2019.

6. Prior to the filing of the Ex Parte Originating Summons, the Company appealed the making of the Award in the first of a series of applications before the Dubai Courts.

7. On 9th April 2019 the Company filed an application for nullification of the Award before the Dubai Court of Appeal. On 29th January 2020, the Court of Appeal rejected the Company's case.

8. On 8th August 2019, the Company objected to the Petitioner's registration of an enforcement file. The Dubai Court of Appeal rejected the objection. Attachment orders have been issued against the office furniture of the Company and the shares and profits of its two wholly owned subsidiaries.

9. The Company appealed the ruling of the Dubai Court of Appeal to the Court of Cassation. On the 3rd June 2020, the Court ruled against the Company and found in the Petitioner's favour.

10. Following the ruling of the Court of Cassation, the Petitioner and the Company agreed to a Consent Order, made on the 9th June 2020, for enforcement of the Award in the Cayman Islands in proceedings FSD 148 of 2019. Those proceedings had been adjourned for reasons of international comity pending the ruling of the Court of Cassation.

11. Although not reflected in the Consent Order, Counsel on behalf of the Company advises that the consent of the Company was expressed to be "*without prejudice to [the Company's] position on the standing of Bareeq Capital as an entity under Egyptian Law*".

12. The Company has failed to pay the claimed debt through to the date of this hearing. The Petitioner relies on the fact of this failure as indicative that the Company is unable to pay its debts, is insolvent on a cash flow basis and is therefore liable to be wound up.

13. On the day of the hearing, a notice was received from a creditor of the Company, who claims that there is an outstanding debt in the sum of US$1.58 million in addition to a 5% interest applicable as of November 2019. The notice indicated an intention to appear on the hearing in order "*to oppose the making of a winding up order, and if the winding up order is made, support the appointment of Alexander Lawson and Christopher Kennedy of Alvarez & Marsal .... Cayman Islands as joint official liquidators of the Company.*"

14. The Application of the Petitioner is supported by the First and Second Affidavits of Mr. Omar El Kheshen, both dated the 25th March 2020. He is the managing director of the Petitioner. He has also provided a Third Affidavit dated 16th June 2020. In addition to these, the material before the Court on the hearing consisted of:

i) First Affidavit of Annalisa Shibil dated 20th May 2020 together with exhibits.
ii) Second Affidavit of Annalisa Shibili dated 26th May together with exhibits.
iii) First Affirmation of Mahmoud Moharram dated 5th June 2020 together with exhibits.
iv) First Affirmation of Paul Stothard dated 15th June 2020 together with exhibits.

THE LEGAL PROVISIONS

15. By s.94 of the Law an application for winding up may be made by a creditor of a company. This section provides:

(1) An application to the Court for the winding up of a company shall be by petition presented either by-

(a) the company;

(b) any creditor or creditors (including any contingent or prospective creditor or creditors);

(c) any contributory or contributories; or

(d) subject to subsection (4), the Authority pursuant to the regulatory laws.

(2) Where expressly provided for in the articles of association of a company the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting.

16. A company may be wound up if any one of a number of circumstances is satisfied. Section 92 of the Law provides:

"A company may be wound up by the Court if-

(a) the company has passed a special resolution requiring the company to be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;

(d) the company is unable to pay its debts; or

(e) the Court is of opinion that it is just and equitable that the company should be wound up.

17. In this case, the Petitioner asserts that the Company is unable to pay its debts and relies on the deeming provisions which are set out in s.93 of the Law.

"A company shall be deemed to be unable to pay its debts if-

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

(b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

18. Order 3 of ***The Companies Winding Up Rules 2018*** ("CWR") details the general procedural requirements with which a petitioner should comply prior to and on presentation of a petition.

THE ISSUES

19. The primary issue between the parties is as to the standing of the Petitioner. The facts which give rise to the issue are not in dispute but there is disagreement as to the effect of those facts. In summary, the name of the Petitioner, Bareeq Capital is said to be its English trading name. It was registered in the Egyptian Registry under an Arabic name, translated into English, *"Al Bareeq for Investments and Project Development"* with registration number 69748.

20. Despite unanimous resolutions in its General Assembly in August 2013 and again March 2017 to add the name "Bareeq Capital" as the official English name and consequential amendments to its Articles of Association, the Petitioner failed to add the said name as part of its commercial registration in Egypt. The Petitioner says that this was an unfortunate administrative oversight which was not rectified until the 18th May 2020.

21. Seven days earlier, on the 11th May 2020, the Company filed a request for a second arbitration hearing with DIFC-LCIA. The Company seeks to argue, *inter alia,* that at the time of the signing of the MOU, Bareeq Capital did not exist under Egyptian Law and has acted in bad faith, fraudulently and with gross negligence in signing the MOU. The request also states that subsequent to the first arbitration, the Company through new counsel has sought to establish and confirm the veracity and existence of the incorporation of Bareeq Capital without success.

22. Counsel for the Company seeks to rely on the 'administrative error' of the Petitioner as the basis for raising three issues before this court:

i) That there is a *bona fide* dispute on substantial grounds as to the debt.

ii) The MOU requires all disputes to be referred to arbitration and thus the Court ought not to entertain this Petition until the dispute is resolved.

iii) Misnomer.

EXPERT EVIDENCE

23. In support of its contentions, the Company seeks to rely on the First Affirmation of Mahmoud Moharram. He is a partner and head of the corporate practice of the law firm of the Company's Egyptian Attorneys. His Affirmation addresses matters of Egyptian Law and the effect of operation without registration.

24. The appropriateness of the inclusion of his evidence was raised as a preliminary issue by Counsel on behalf of the Petitioner. There was an exchange of correspondence between Counsel on the 11th June 2020 in which Counsel for the Petitioner questioned whether there had been compliance with s.B5 of the ***Financial Services Division (FSD) Users Guide.*** In particular the complaint was that leave had not been sought to call an expert witness and that by no means could Mr. Moharram be considered to have the necessary independence required of an expert witness.

25. Counsel for the Company responded then, as he did at the hearing, that the purpose of the evidence is to identify the dispute and not for the Court to make any findings on foreign law. Counsel referred to the case of ***In the Matter of Times Property Holdings Ltd.***[1] which

[1] 2011 (1) CILR 233

referenced the British Virgin Islands Court of Appeal case of ***Sparkasse Bregenz Bank AG v. Associated Capital Corp***[2] in which Byron CJ expressed the view that one can determine that a dispute exists without determining how it would be resolved. Counsel submitted that the evidence on which the Company seeks to rely is no more than a statement of its case and drew a distinction between expert evidence in regular party disputes and the lighter touch analysis which is required to determine whether there is in existence a bona fide and substantial dispute.

26. Subsequently the Petitioner filed the Affirmation of Paul Stothard, dated 15th June 2020. Mr. Stothard is a Solicitor qualified in England and Wales and a registered legal practitioner in Dubai, United Arab Emirates. He is a partner in the firm Norton Rose Fulbright and represented the Petitioner in the later stages of the First Arbitration and at the final hearing. Counsel for the Petitioner while still referring to the preliminary objection, asks that the Court consider this Affirmation in response, if the Court is minded to consider the Affidavit of Mr. Moharram.

27. In the cited case of ***In the Matter of Primus Investments Fund L.P***[3]**.,** the Learned Judge did not accept the submission that winding up proceedings are not the appropriate forum to assess expert evidence and expressed the view that such evidence could be reviewed in order to determine the strength of the arguments raised.

28. In resolving this preliminary issue, I accept the submissions made by Counsel on behalf of the Company. Some evidence is required in order for the Court to be able to decide whether or not there is a *bona fide* dispute on substantial grounds. I propose therefore to consider both Affidavits to the limited extent of assisting in the determination on this aspect.

[2] Civil Appeal 10 of 2002, judgment dated 18th June 2003
[3] FSD 76 and 77 of 2020, Judgment 16th June 2020

BONA FIDE DISPUTE ON SUBSTANTIAL GROUNDS

29. Counsel on behalf of the Company submits that no entity by the name of Bareeq Capital has ever been registered as an Egyptian joint stock company. Bareeq Capital is not a legal entity which is capable of contracting and bringing claims. He states further that this was not raised as an issue in the arbitration which lead to the Final Award. He criticizes the Petitioner for failing to provide full disclosure of its legal and trading names which he says has led to the issue not having been determined at an earlier time. He submits that arbitration is the agreed means of resolving disputes and that the Court should decline to enforce the Award and judgment obtained as a result of the Award until the dispute as to the identity and status of Bareeq Capital is determined in the course of a second arbitration. Counsel has drawn the Court's attention to the case of ***Tallington Lakes Ltd. v. South Kesteven DC***[4] in which the view was expressed that the threshold for establishing that a debt is disputed is not a high one. The Court stated:

> *"I have to emphasise, however, in this context that it is well established that the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one for restraining the presentation of the winding-up petition, and may be reached even if, on an application for summary judgment, the defence could be regarded "shadowy".*"[5]

30. Counsel for the Petitioner argues that there is no bona fide dispute on substantial grounds. He relies on the principles discussed in the cases of ***Re GFN Corporation Limited***[6] and ***In the Matter of Duet Real Estate Partners 1 LP***[7]. Counsel submits that as a creditor, the Petitioner is entitled to expect that the Court would exercise its discretion in its favour by making a

[4] [2012] EWCA Civ. 443
[5] Supra, paragraph 23
[6] 2009 CILR 650
[7] Cause No FSD 77/2011, Judgment dated 7th June 2011

winding up order and references the case of ***In re HSH Cayman 1 GP Limited and Others.***[8] In summary, Counsel submits that:-

i) The debt is undisputed and is the subject of the Consent Order made in June 2020.

ii) The transactions leading up to the making of the Consent Order are not accompanied by any unfairness or unreasonableness in the sense discussed in the case of ***Re Hawkins ex parte Troup***[9] in that:

(a) The MOU was the result of arm's length negotiations in which both parties had the benefit of legal counsel.

(b) The Final Award was made after a full arbitration process in which both parties had the benefit of legal counsel.

(c) Appeals against the making of the Award have not been successful

(d) The Company through its Attorneys agreed to the terms of the Consent Order.

iii) The DIFC –LCIA Rules do not provide for a review of a Final Award by a later tribunal, neither does the MOU and the only recourse of the Company is to apply to the DIFC Court to set aside the Award which it has not done and is now out of time to do so

31. The applicable legal principles on this issue are not in dispute between the parties. They are set out in a number of judgments to which both parties have referred the Court.

32. In the case of ***In the Matter of GFN Corporation Limited***[10], the appellant disputed the indebtedness claimed by the respondent petitioner and asserted that the debts were owed by another company within its group. The Cayman Islands Court of Appeal (CICA) held that where a petitioner's debt is disputed, a court should first determine on a balance of probabilities that the petitioner was in fact a creditor before a winding up order could be made. The Court

[8] 2010 1 CILR 157
[9] 1895 1 Q.B. 404
[10] [2009] CILR 650

stated that in the normal course, a petition based on a debt which is disputed on *bona fide* and substantial grounds would be dismissed or stayed. However, in appropriate cases, the court can determine the question of a disputed debt in the course of the hearing of the petition. The relevant principle as to those cases was summarised as follows:

> "(d) *Appropriate cases include those where the court doubts that the debt is actually disputed bona fide on substantial grounds, or where the creditor, if he established his debt, would otherwise lose his remedy altogether, or where other injustice might result."*
>
> (e) *Where the winding-up court decides to hear a petition based on a disputed debt, it will only make a winding-up order on the grounds that the company is unable to pay its debts or that it is just and equitable to wind up, having determined that the petitioner is, on a balance of probabilities, a creditor of the company.*[11]

33. In the case of ***In the Matter of Duet Real Estate Partners 1 LP***[12], the issue before the Grand Court was whether there was a genuine and substantial dispute as to any debt owing by Duet Real Estate Partners 1 LP (Duet Cayman) to Eso Capital Luxembourg Holdings II S.A.R. L. (ESO). Duet Cayman had received a loan from ESO towards a hotel project. It claimed that by reason of a subsequent oral agreement, ESO became a partner in equity in the project and it thus ceased to be a creditor of ESO. Duet Cayman sought an injunction to restrain ESO from presenting a winding up petition so as to allow for the resolution of the disputed debt to be resolved by arbitration before the London Court of International Arbitration. The Court considered the documentary evidence which was inconsistent with the claimed oral agreement and compellingly showed that subsequent to the date of the claimed agreement, Duet Cayman believed that a loan was due and owing to ESO. The Court concluded that the assertion as to equitable interest was no more than a *'disingenuous delaying tactic'* and that there was no evidence from which it could be inferred that there was any genuine and substantial dispute about ESO's status as a creditor. The Court therefore declined to grant the injunction sought.

[11] Supra, paragraph 94
[12] Supra

34. In the recent case of ***In the matter of Primus Investments Fund L.P, and Mayer Investments Fund LP.***[13], the Petitioner, on a winding up petition, asserted that the Respondents were debtors in the sum of $324 million, arising from loans made under a facility agreement. Under that agreement the petitioner was the Agent and Security Agent. The debtors were not borrowers or guarantors but had granted security in favour of the Petitioner to secure the obligations of the Borrower, Hoade Investments Inc. The obligations included those over shares held in the holding company of a coffee retailer in China. Following the announcement of the discovery of a fraud at the coffee retailer in April 2020, and the consequential negative impact on the value of that company's shares, the petitioner served various notices upon the debtors seeking additional security and accelerating the amounts outstanding under the agreement.

35. The debtors did not comply. They argued, *inter alia*, in response to the petition that there was a *bona fide* dispute as to whether the debts were due and payable. The Court reviewed a number of authorities on this issue and stated:

> *"Each case will turn on its specific facts. A bona fide dispute on substantial grounds means a real dispute on which the respondent company has a real prospect of success (as opposed to a fanciful or insubstantial prospect of success): see Re A Company (No. 001946 of 1991) [1991] ex parte Fin Soft BCLC 737 at [740]; and Argentum Lex Wealth Management Ltd v Giannotti [2011] EWCA Civ 1341 at [17]. In the latter case, the Court of Appeal commented that the concept of a bona fide dispute on substantial grounds is similar to the test for obtaining permission to appeal viz. that there should be a realistic prospect of success: per Longmore LJ at §17.*
>
> *Whilst the winding up procedure is not suitable to resolve questions of disputed fact, as there is no investigation akin to a trial with discovery of documents and cross examination, the Court should be alive to 'smokescreens' or contrived arguments presented late in the day.*
>
> *As this Court said in Altair:*
>
> > *"I also bear in mind that an unwilling debtor may raise factual matters which cannot be easily determined without cross examination in order to assert a defence and in such circumstances the court should be astute to assess whether the defence put*

[13] Cause 76 and 77 of 2020, Judgment dated 16th June 2020,

forward is genuine and of substance"- see Re A Company 6685 [1997] BCC 830 at § 832 and 835 per Chadwick J as he then was, at §44

Whether to order a winding up of a company is of course a discretionary remedy. In an appropriate case, notwithstanding that it is not sitting as a 'trial court' in the traditional sense, the Court can determine the issues raised especially in those cases where the Court doubts there are substantial grounds for the disputes raised, or where substantial injustice would result from denying the petitioner its remedy."

Issue Estoppel

36. The Petitioner argues that there is no *bona fide* dispute because the issue now being raised is one which could have and should have been raised previously. It was not raised at the time of the arbitration, nor at any stage during the appeal process or upon the making of the Consent Order.

37. Counsel for the Petitioner relies on the case of ***In the Matter of The T Trust***[14] in support of his submissions. In that case the Applicants challenged the appointment of the L Foundation as a charitable beneficiary under the Trust. This challenge was made subsequent in time to the adjudication by the Grand Court on an amendment limiting distributions to charity. This had then led to the making of an order on 9th March 1994 following a compromise being reached between the parties. The consent of the L Foundation had been required for the proposed amendments set out in the order and thus its standing as a beneficiary and the provenance of its establishment and appointment were all before the Court. The Respondents argued that the issue of its appointment should have been raised at that earlier time. The Applicants argued that the validity of the appointment had not then been in issue before the Court.

38. The Court held that:

[14] [2000] CILR 11

"The doctrine of res judicata applied not only to issues specifically decided by the court but also to matters which ought to have been raised in earlier litigation. The relevant parties now before the court were the same; they had been required to present their whole case, and to permit them to reopen the same subject-matter would be an abuse of process. The non-contentious nature of the proceedings for approval of the compromise did not preclude the application of this rule."

39. The Court reviewed the material which had been before the Court in 1994 on the making of the order and stated:

> *"The present challenge to the L Foundation's status as a beneficiary must be considered in that light and when so considered is, in my view, to be seen as an abuse of the process of the court. It also clearly seeks to reopen an issue for litigation which is already settled by the order of March 9th 1994 or which, at the very least, is to be so regarded because it was a matter which could and should have been raised at that time. Given the factual circumstances, these conclusions flow as a matter of settled law; this case being as clear an illustration as one could ask of the doctrine of estoppel per rem judicatum.*
> ...
> *The issue of the status of the L Foundation as a beneficiary was plainly before the court- albeit not in a contentious manner- when its status was recognized and accepted by the court in March 1994. The order then made was final and carried important consequences as to the future rights or expectations of all parties then before the court."*

40. As to the legal principle, the Court said this:

> *"A further refinement of the doctrine of issue estoppel as classically stated in the case of Henderson v. Henderson (2) (3) Hare at 115; 67 E.R. at 319, per Wigram V.- C) is even more to the point of the question raised here. That statement of principle is well known and often cited, nowhere more authoritatively that in the Privy Council judgment in Yat Tung Inv. Co. Ltd. v. Dao Heng Bank Ltd, in which Lord Kilbrandon recalled the dicta from the earlier case ([1975]) A.C. at 590*):
> *"..[W]here a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounced a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the same time."*

41. On the specific issue of the L Foundation's status as a beneficiary, the Court stated that this was an issue which had been fairly and squarely put before the court in March 1994. The Court explained:

> *"Although that issue was not decided or determined on its merits because no dispute in the nature of a lis arose, it was none the less determined in the acceptance of all the other parties and the court as a necessary prerequisite to the final order of the court and in respect of which all who could give consent, consented.*
>
> *... Moreover the contention that the earlier decision should be one specifically deciding upon its merits the issue to be now raised patently falls foul of the dicta of the Privy Council in the Yat Tung case that an issue will be estopped and precluded if it could and should have been raise in the earlier proceedings but was not."*

42. In ***Virgin Atlantic Airways Limited v. Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited (The Appellant)***[15], the Board reviewed five general res judicata principles. The fifth and a further general principle was identified as follows:

> *"Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."*[16]

43. The Court described the inter relationship between the res judicata and abuse of process in the following way:

> *"Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank plc [1991] 2 AC 93 , 110G, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process"*[17].

[15] 2013 UKSC 46
[16] Supra, paragraph 17
[17] Supra, paragraph 25

44. The res judicata principle applies to consent orders. In ***Golfco v. Green Thumb Nursery & Landscaping Ltd. and Dawkins,***[18] the Grand Court held that a consent order was as effective an estoppel as an order of the court determining a case on the merits and was not merely a contractual agreement.

45. In his oral submissions Counsel for the Company described the situation as an unusual one. He said that he would accept that the Company should have raised the issue earlier but did not. Nevertheless he says that parties to litigation have an obligation to properly identify themselves to the Court. He submitted that there is a distinction from the ordinary res judicata principles where the issue is standing. He submits that the addition of the words *"Bareeq Capital"* to the Egyptian name takes the matter no further. Bareeq Capital did not exist then and does not exist now. It is not a legal person.

46. Counsel further submitted that it is not the case that a court cannot look behind a judgment. A court may do so in appropriate circumstances including where the judgment has been unfairly or improperly obtained. He relied on the case of ***McCourt and Siequien v. Baron Meats Ltd and the Official Receiver***[19] as summarising the approach which is intended to achieve fairness to all concerned. In that case the Court concluded that a number of propositions had been established by the cases cited. These included that the grounds upon which a bankruptcy court may go behind a judgment are more extensive than those upon which an ordinary court of law or equity may set it aside. The Court stated:

> *"In particular, a bankruptcy court will go behind a judgment if satisfied that the judgment creditor manifestly had no claim against the judgment debtor on which the judgment could have been founded. Thus in Ex Parte Kibble the court went behind a judgment obtained by default which was founded on a bill of exchange drawn by the debtor in his infancy. Lastly in Re Fraser (above) the court went behind a judgment obtained by the holders of a bill of exchange against a former partner in the firm in whose name the bill had been accepted.*

[18] 1998 CILR N. 11
[19] [1997] BPIR 114

He was not liable on the bill, but his defence to an action on the bill had been so ineptly conducted that judgment had been obtained against him under Ord. 14 and that an application made on his behalf for the judgment to be set aside had failed."

47. Counsel drew a parallel with the instant case and submitted that there was inept conduct in the defence of the Company at the first arbitration by not raising the point but that this cannot be held against the Company. It was not so held in the cited case.

The Evidence

48. Against the background of the legal principles, what are the fact in this case?

49. The MOU is exhibited to the Second Affidavit of Mr. El Kheshen. The parties to the MOU are stated to be Adenium Energy Capital Ltd and Bareeq Capital and the Final Award was made to Bareeq Capital.

50. In his First Affirmation Mr. Moharram states that as a matter of Egyptian Law, Bareeq Capital has never been incorporated as a separate juristic entity. The Public Register indicates the registration of the company *AL-Bareeq for Investments and Projects Development* (BIPD) with Commercial Register No. 69748. He states further that in so far as the words Bareeq Capital have been included as part of the name of a third entity, this was only legally valid and binding on third parties from the date of its recording on the Egyptian Commercial Registry which was as of 18th May 2020. He asserts that as a result of this, Bareeq Capital was not a legal entity and did not have the legal capacity to enter into the MOU in 2015. Thus he says that the MOU and arbitration clause are legally invalid under Egyptian law and that a second arbitration hearing is being sought in order to establish that Bareeq Capital had no standing to enter into the MOU or to seek the first arbitration hearing.

51. The responsive evidence of the Petitioner on this issue is that the two names refer to the same entity which holds registration no. 69748 and that the Company has known that they are one and the same since 2015.

52. By his Third Affidavit, Mr. El Kheshen asserts that since 2015, the Company has known that both names, the English Trading name and the statutory Arabic name refer to the same corporate entity # 69748 and has never taken issue with this despite numerous opportunities to do so. He states:-

> *" It is a preposterous allegation (which is wholly denied) that the Petitioner lacks legal status because its English trading name "Bareeq Capital" is slightly different than its lengthier statutory name in Arabic which translates Bareeq for Investments & Projects Development". The reality is that both the English trading name and the Arabic statutory name refer to the same corporate entity with commercial registration number 69748. The Petitioner's articles of association were formally amended and registered with Egyptian authorities in 2013 and again in 2017 to reflect this. The English trading name has since been uploaded to the commercial registry (regularising an administrative oversight)".*

53. Mr. El Kheshen also states that the Company has suffered no prejudice as a result of the issue of the name and that it failed to raise this issue in both the Dubai and Cayman enforcement proceedings and is merely attempting to further delay these proceedings.

54. There are two pieces of evidence which in my view are of significance At paragraph 13 of his Third Affidavit in these proceedings, Mr. El Kheshen refers to his evidence in the enforcement proceedings in support of his assertion that the Company was well aware from 2015 of its correct name and that at all material times was aware with whom it was dealing.

55. Mr. El Kheshen's Third Affidavit in FSD 148 of 2019 attaches correspondence dated 18th November 2015. It is addressed to the Company's Chief Legal Officer with the subject 'Fit Solar Project: Bareeq Capital Docs', is from a Senior Associate of Bareeq Capital and states:

"Dear Youssef,

As requested, I am attaching to this email Bareeq Capital establishment documents (commercial registration, investment gazette & its latest amendment).

Please find below its major highlights:

i) Statutory Name: Bareeq for Investments and Projects Development

ii) Legal Structure: Egyptian Joint Stock Company

iii) Registered Office: 28 Wadilinil Street, Mohandissin, Giza Egypt

iv) Authorized Signatory: Omar El Kheshen, chairman & managing director.....

v) Shareholders Structure:....."

Best Regards,

...."

56. This was followed by a request on the 19th November 2015 from the Company for confirmation of the registration number of the company. On the said date the response was provided *"Commercial Registration number is 69748."*

57. Mr. Stothard's Affidavit attaches as an exhibit correspondence from his firm to the Company's Attorneys in relation to the second arbitration in which it is asserted that it is commonplace in Egypt for entities to have both an Arabic and an English name. Mr. Stothard also refers to a notice of award relative to the underlying project which uses both names interchangeably. This is dated 24th January 2015, is from the Egyptian Ministry of Electricity and Renewable Energy and refers to Bareeq Capital's/ Bareeq for Investment & Project Development's eligibility to participate in the Feed in Tariff Program First Regulatory Period 2015-2017 with 150 MW PV Project. This is the project to which the MOU refers. This notice is attached as Exhibit C-8 to the Company's recent request for arbitration. It is also worth noting that paragraph 1 of the MOU under the heading Terms and Conditions states in part:-

> *"b) The Seller has provided, to the satisfaction of the Buyer, proof of ownership regarding the Rights, (specifically the NREA letter showing the Seller's eligibility to participate in the Project)."*

58. A second ministry document, a non- objection letter issued by the Egyptian Electricity Transmission company dated 23rd June 2015 is said to have also used the names interchangeably and is said to have been provided to the Company on that same date.

59. While the confirmation of the statutory name post-dates the signing of the MOU, it pre-dates the first arbitration and there is material which suggests that the fact of the statutory name was known to the Company prior to the MOU. Even if this is not correct, the issue of the statutory name of Bareeq Capital does not appear to be a question of new information coming to the attention of the Company subsequent to the first arbitration. It is plain on the face of material which is uncontradicted, that the Company well knew before the first arbitration that the statutory name of the Petitioner was not Bareeq Capital, that it was its Arabic name and that both names referred to the company registered under company number 69748.

60. It is also clear that the Company was well aware prior to the first arbitration hearing that the statutory entity and Bareeq Capital were one and the same and knew with what entity it had contracted.

The Second Arbitration

61. Counsel on behalf of the Company argues that in any event, this Court cannot determine that there is no substantial dispute because the Parties have agreed that all such matters are to be resolved by arbitration and given the fact of the filing of a request for second arbitration, this Court should allow for this process to be played out.

62. Article 12 of the MOU states "*This MOU shall be governed by and construed in accordance with Egyptian law. Any dispute or claim arising out of, or in connection with this MOU, shall be resolved by arbitration conducted in English in accordance with the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which rules are deemed to be incorporated by reference into this MOU.*"

63. Is this an issue which given the agreement of the Parties must be left to be resolved by arbitration? Counsel relies on the cases of ***In the Matter of Times Property Holdings Limited***[20] and ***Rusant Limited v. Traxys Far Eastern Limited.***[21]

64. In the case of ***Times Property Holdings***, the Grand Court stayed the petition to await the completion of arbitration proceedings. The company disputed the existence of the debts claimed and submitted that there had been express agreement that disputes would be resolved by arbitration. Arbitration proceedings were ongoing to determine whether the grounds on which the company disputed its alleged indebtedness were successfully made out or not. The Court noted that the substantive hearing was due to take place in only six months' time. The Court held that there was no obvious reason why the parties should not be held to their agreement. Additionally the Court held that even if it were to consider the dispute as to the debt, it would not have concluded that there was not a bona fide dispute on substantial grounds. The Court therefore declined to make a winding up order at that time.

65. In the case of ***Rusant Limited v. Traxys Far Eastern Limited*** in issue between the parties was whether there had been an amendment to the repayment date of a loan to change the date to July 2013 or some other date. A statutory demand was issued dated June 2013 and immediate repayment of the loan was sought. The Applicant sought injunctive relief to prevent the

[20] 2011 1 CILR 223
[21] 2013 EWHC 4083 (Comm)

respondent from relying on the statutory demand. It was submitted on behalf of the Applicant that the reliance on the statutory demand was precluded by the arbitration provisions of the agreement between the parties taken together with the provisions of the Arbitration Act 1996. The Applicant argued that a petition is a claim and that as the agreement between the parties required that all disputes be determined by arbitration, the claim had to be referred to arbitration. The Court disagreed in part, stating that an arbitration cannot wind up a company but said that any dispute where there is an agreement for arbitration ought to be resolved by arbitration, this being the means chosen by the parties, before a petition can be proceed. The Court stated:

> *"In relation to the Companies Court practice, it is well established and there is no need for me to go to the cases, that the insolvency process is not to be used for debt recovery. Where there is a bona fide dispute about a debt, a petition based on that debt is an abuse of process and presentation will be enjoined or, if a petition is already presented, the petition will be struck out. It will be a matter of fact in each case whether there is a bona fide dispute, as that phrase is used in the company law cases. Certainly if the case is not one for summary judgment there does exist a bona fide dispute, but the Companies Court is not to carry out even a summary judgment assessment unless it can be done very quickly and straightforwardly. Further, it seems to be enough to establish even a shadowy defence (see paragraph 22 of the judgment of Etherton LJ in Tallington Lakes Ltd v South Kesteven DC [2012] EWCA civ 443). It is not always the case that the court will refuse to resolve any dispute. For instance, a short point of construction on a simple agreement may, when the matter comes before the Companies Court, be dealt with by the judge. Having resolved the issue there is then no longer a dispute and the petition can proceed. But that is a rule of practice and not a rule of law.*
>
> *How does the arbitration provision interlink with the Company Court approach? Usually the point raised by Mr. Temmink will not arise. If there exists a bona fide dispute the petition will not be allowed and the question of arbitration does not come into it other than that the dispute which then has to be resolved, has to be resolved that is to say apart from the petition, which means of course that it will have to go off to the arbitration. In context there may be cases of a bona fide dispute which the Companies Court may nonetheless decide on a petition, as I have mentioned, a short construction point. But in cases where there exists an arbitration agreement the point ought to go off to arbitration, and that is because that is where the parties have agreed it should be dealt with.*
>
> *It seems to me that for the Companies Court to embark on it, even if absent an arbitration agreement it might be prepared to decide the point, would be to embark on the court dealing with "a claim". This is because an issue on the petition which is essential to the foundation of the petition becomes, in my judgment, a claim and falls within section 9 . Or, if that is wrong, the Companies Court should exercise its discretion to reject the petition*

and leave the debt to be established in the forum which the parties have agreed is the appropriate place. The Companies Court is not the place to decide even summary judgment claims. A defence can be bona fide even though the court dealing with the claim sees fit to give summary judgment. It is only if there is no bona fide defence that the Companies Court will proceed.

So I return to the interaction where the Companies Court considers that the defence is not bona fide within the concept as established in the Companies Court where there is an arbitration agreement. As I have said, even in a clear case for summary judgment, the arbitration agreement bites in an ordinary action applying the Halki Shipping approach. The policy is clear that disputes between parties should be decided in the forum which they have chosen. For the Companies Court to decide that there is no bona fide defence requires it to adjudicate on the claim or the dispute. Certainly when this court makes a decision, for instance, on a short point of construction (by this court I mean the Companies Court), it does so in respect of the matter which under our agreement is to be referred to arbitration. In my judgment, resolving that sort of issue falls within section 9(1) and should go off to the arbitrator and the petition should not proceed.

If I am wrong about that, then whether a dispute which is not a bona fide dispute should be referred to an arbitrator will be a matter of discretion according to the ordinary Companies Court principles. Although disputes about debts may result in there being no petition, disputes about solvency manifestly are matters for the Companies Court. It is on the petition that issues of insolvency are to be resolved, although I dare say that if it is absolutely clear that a company is solvent both on a cash flow and balance sheet basis, the petition will be restrained. But even then a statutory demand might be relied on if it has not been complied with. I do not need to decide that because Mr Temmink only seeks an injunction today based on the statutory demand."

66. On the basis of these cases, Counsel on behalf of the Company submits that there is a dispute which arises out of the MOU and that this must first be resolved before this Petition can be heard.

67. In the later case of ***Salford Estates (No. 2) Ltd. v. Altomart Ltd.***[22], the Appellate Court expressed doubt as to the reasoning in ***Rusant*** that an issue on a winding up petition which is essential to the foundation of the petition becomes a claim and falls within s.9 of the ***Arbitration Act*** such as to amount to a mandatory requirement that the petition had to be stayed and the matter referred to arbitration. However the Court considered that the alternative analysis was a

[22] 2014 EWCA 1575 Civ.

sound one that in the exercise of its general discretion, the Companies court should exercise its discretion consistently with the policy underlying the ***Arbitration Act.*** To do otherwise would be to encourage parties to an arbitration agreement to bypass it and seek through the draconian threat of liquidation to apply pressure on the alleged debtor to pay up immediately. This issue was also discussed in the case of ***Eco Measure Market Exchange Ltd. v. Quantum Climate Services.***[23] The Court therein described the presence of an arbitration clause in an agreement as a heavy obstacle for a petitioner on a winding up claiming sums due under the said agreement. The Court stated:-

> *"What the Court of Appeal decided in clear terms in the Salford Estate case was that, where there is an arbitration clause, it is sufficient to show that the debt is "disputed" and for that it is sufficient to show that the debt is not admitted. In this case it is clear that the debt is disputed and indeed the dispute goes beyond a mere non-admission."*

68. It is noted that these two later cases consider the issue of arbitration in terms of the general discretion of the Court rather than as imposing a mandatory requirement that a petition should be stayed as in the case of ***Rusant***. In this jurisdiction in the cited case of ***Re Duet Real Estate*** which was referenced in ***Re Primus and Mayer***, the Grand Court has in exercising its discretion even where an arbitration clause has been agreed by the parties, considered the circumstances surrounding the dispute raised in order to determine its bona fides.

69. In responding to Mr. Moharram, Mr. Stothard produces the DIFC –LCIA Rules which by Article 12 of the MOU are incorporated by reference. These Rules are similar to the LCIA Arbitration Rules in relation to the finality of an award and do not provide an avenue for review by a second tribunal. The parties specifically waive rights of appeal and review and agree to the final and binding nature of an award.[24] The Rules do not provide for any means by which

[23] [2014] EWCQ 1575 Civ
[24] Article 26.8 of the Rules

an award issued by a previous DIFC -LCIA tribunal might be subject to appeal, review or recourse by a later tribunal appointed under the Rules. They do provide for an application to be made to a Court within three months for the Award to be set aside. The Company would now be out of time. Mr. Stothard also states that DIFC Law incorporates English legal principles with respect to Arbitration and the English rule in ***Henderson v. Henderson***. He also states that the Petitioner has not participated in the second arbitration because it is of the view that it is an abuse of process and that any award made in those proceedings would be invalid. He states:

> *"There are other reasons why the second arbitration constitutes a serious abuse of process and is doomed to failure…… Indeed not only did Adenium fail to raise these issues during the first arbitration, but its position in the first arbitration was that the MOU was valid and effective, which is irreconcilable with its argument in the second arbitration, that the MOU is void ab initio."*

70. According to Mr. Stothard, the anticipated time line should this second arbitration proceed is some 18 to 24 months from the date of the request to a final award.

71. In this case there has already been an arbitration process spanning some two years and multiple appeals. The fact of the debt was resolved by the Award and confirmed on appeals. The Company now seeks a second arbitration by raising an issue which its own Counsel candidly stated to this Court, should have been raised at the time of the first arbitration. Moreover given the *res judicata* principles, it is an issue which on even a cursory review of documentation appears to be a hopeless endeavor. From the material before the Court, the reasonable and inescapable inference is not that it was not raised at arbitration due to the ineptitude of Counsel but because the Company well knew that the names were used interchangeably and that the reference in the MOU prepared in English to Bareeq Capital was a reference to the company with the statutory name in Arabic of *Al Bareeq for Investments and Project Development*. Even if this is wrong, it was plainly an issue which ought to and should have been raised at that time.

72. Is this Court precluded in the exercise of its discretion by virtue of the fact of the arbitration clause, from rejecting what appears to be no more than a tactical maneuver on the part of the Company designed to delay making payment of the debt?

73. I do not think that paying due regard to the agreement of the parties means that the Court should lend itself to countenance what appears to be no more than a ruse by the Company. This is particularly so, given that in this case the arbitration process has already been undertaken to completion. The Petitioner in this case is not endeavoring to bypass the agreed arbitration procedure. The route of arbitration appears to have already been exhausted under the applicable Rules. The ability to engage a second arbitration process to completion appears on balance to be doubtful. Further, it appears that a tribunal and or court on any second arbitration would have to consider and apply res judicata principles. I consider that the foregoing constitutes good and exceptional reasons why the parties should not be held to their agreement in this case.

74. In my view, the raising of the issue of standing now by the Company as a basis for the grounding of an assertion that there is a bona fide dispute on substantial grounds as to the debt owed has all the hall marks of a contrivance. Having reviewed the evidential material provided and considered all the submissions made by both parties, being mindful of the low threshold on these matters, I would conclude on balance that there is no bona fide dispute on substantial grounds as to the debt owed. In so doing I respectfully adopt the words of the learned Judge in the cited case of ***Primus***. The raising of this issue now and the filing of a request for a second arbitration is no more than a smoke screen.

75. In weighing all the factors in the exercise of my discretion, I have also considered the possible effect on the Petitioner. The MOU was entered into some five years ago. The Petitioner submitted a request for arbitration to the DIFC-LCIA on 17th April 2017. Following almost a

two year period, the Final Award was made on the 8th March 2019. Thereafter there has been more than a year of appeals. My view is that it would be an unjust outcome were it to be the case that because of the filing of a request for a second arbitration by the Company, this Petition is stayed without scrutiny or due inquiry and the Petitioner who is waiting to be paid what already has been declared to be a valid Award by an appellate court may have to continue to wait for another extended period of time. The Petitioner would be disadvantaged by further delays of unknown duration.

MISNOMER

76. The issue of misnomer was raised by the Company. Counsel on behalf of the Company argues that the Company is not entitled to present a judgment debt or a winding up petition which has been made in the name of another. The Award and Judgment are in the name of Bareeq Captial. Thus it is argued that the judgment debt was obtained in the name of a 'person' other than the 'person' named in the winding up petition. He submitted that there is no application to amend the Order because this would lead to a dispute as to whether there had in fact been a contract with an entity of a different name.

77. The Petitioner's response is that Bareeq Capital is not an entity that does not exist and that this has been addressed in Mr. El Kheshen's Third Affidavit. There is no fraud or subterfuge. Bareeq Capital has gone by both this name and its slightly lengthier name. It is the same corporate entity with the same number. At no time can it be said that the Company did not know who it was dealing with. Additionally Counsel asked the Court to note that the position has now been regularised without any issue.

78. Counsel on behalf of the Company relies on the case of ***In Re Goldthorpe & Lacey Limited***[25]. This as the basis for the principle that no winding up order will be made in a case where the judgment creditor has been misnamed. It is submitted that the judgment obtained by Bareeq Capital, was based on an Award made to it where it did not then exist.

79. In the cited case, the company, Goldthorpe & Lacey Ltd. was ordered to be wound up following on from a petition presented by "Just Looking Jewellery Ltd." The petition stated that the company was indebted to it in a certain sum, the amount of a final judgment obtained against it together with costs. It alleged that the judgment remained unsatisfied and that the company was unable to pay its debts.

80. The winding up proceedings had been issued by a creditor in person. It was a ground of appeal that the purported creditor on behalf of which the petition was presented, Just Looking Jewellery Ltd. did not exist and that no order should have been made. The Company which was registered was "Just Look In Jewellery Ltd." Thus the winding up petition had been issued on behalf of a non-existent petitioner. The court said that the order obtained could not stand but that where an existing person had been misnamed, there can properly be an amendment. The Court stated:

> *"Though they must be very rare in practice, we accept that cases could arise where solicitors or other persons cause a winding up petition to be issued on behalf of an imaginary (and thus non-existent) petitioner, or where it is impossible to identify with sufficient certainty any existing person as petitioner. There is, however, all the difference between a case where a petition is issued on behalf of a non-existent person and a case where it is issued on behalf of an existing person who is merely misnamed. In the latter case, an application to amend the petition will no doubt be necessary as soon as the misnomer is discovered; however, at least if the misnomer has caused no prejudice to the respondent company and other interested parties, the application will usually be granted as a matter of course."*

[25] 1987 BCC 595

81. Counsel for the Company submitted that the Court can look behind a judgment which has been obtained by fraud, or which has been unfairly and improperly obtained. He relied on the case of ***In Re Hawkins, ex parte Troup***[26] in which the Court stated:

> *"In my judgment, both an ordinary judgment and one obtained by compromise may be inquired into directly, but not before, it is made out that either the one or the other has been improperly or unfairly obtained. I do not go the length of saying that it must have been fraudulently obtained; it is sufficient, in my opinion, if it is made out that the judgment was improperly or unfairly obtained."*

82. Counsel submitted that it is 'outrageous for a party to mislead a tribunal into thinking that it was a company and to say that a court is not allowed to look at the real position and prevent massive prejudice to the business of the company and the company itself'.

83. In considering this aspect of the matter, I accept that this may be the stronger of the points raised on behalf of the Company and am of the view that the criticism of the Petitioner is in part well founded. This issue would not have arisen had the Petitioner properly identified itself in writing to the Court and in other business documents by both its Arabic and English names.

84. However, in relation to the factual matter of the MOU and Award, Bareeq Capital does not appear to be a non-existent entity. It is the correct name, Bareeq Capital, where that name is used interchangeably as the English name for *Al Bareeq for Investments and Project Development*, the Arabic and statutory name for an existing entity registered under the number stated above.

85. I have also considered the stage at which this issue is being raised in light of res judicata principles as well as the Registry amendment which took place on 18th May 2020.

[26] 1895 Q.B. 404

86. The request for the second arbitration was made by the Company on 11th May 2020. They raised the issue of the standing of Bareeq Capital in that request which is exhibited to the Affidavit of Mr. Stothard. The Consent Order was made on the 9th June 2020.

87. Notwithstanding the reservation made on agreeing to the Consent Order, it is inexplicable and surprising that the Company when faced with the prospect of an order enforcing the Award did not seek to challenge the standing of Bareeq Capital in this Court. It is inexplicable that the Company would have agreed to the making of the Consent Order when it was of the view that the MOU had been entered into by an entity which did not exist and that the Award had also been made to an entity which did not exist. Surely that would have been the opportune time to seek to challenge the making of any order to enforce the Award? Instead the Company agreed to the making of the Order and now invite this Court to go behind the Order and to say that the background thereto was improper.

88. Prior to the making of the Consent Order, the Third Affidavit of Mr. El Kheshen was filed on 3rd June 2020 explaining the issue which had arisen and stating that the 'administrative oversight' had been rectified on 18th May 2020.Thus at the time of the making of the Order both names, English and Arabic were properly recorded in the Egyptian Commercial Registry.

89. As a factual matter, this is perhaps a different situation from the cited case of ***In Re Goldthorpe & Lacey Limited***. The amendment to the Register having been made in May 2020, the Petitioner company existed at the time of the making of the Order for enforcement of the Award and exists at the time of the advertising and hearing of the Petition. I do not accept the interpretation urged on behalf of the Company that this was simply the addition of two words to its name. The amendment made was to "*add an English name to the company's Arabic name so that its full name becomes Bareeq for Investments & Projects Development [in Arabic*

letters] and Bareeq Capital [in English Letters][27]." I do not consider that the principle of misnomer applies to the facts of this case, in the manner submitted by Counsel such that there can be said to be a non-existent Petitioner.

90. I do note that the Petition was issued in April 2020 before the amendment to the Register was made. I am satisfied that the Petition presented in April could properly have been amended to reflect both names, that is to include the lengthier statutory name of the Petitioner, had an amendment been sought and there had been no change to the administrative position. There would have been no prejudice to the Company in light of the observations made above that the Company was well aware with whom it had contracted.

CONCLUSIONS

91. In conclusion for the reasons stated above, I do not accept the submissions made on behalf of the Company that there is a bona fide and substantial dispute as to the debt or an issue in dispute arising out of the MOU such that this matter ought to await a second arbitration or that the effect of the application of the principle of misnomer would serve to cause the Court to conclude that the Petitioner is or was non-existent then or now.

92. Having considered all the matters raised and the evidence provided, I conclude on a balance of probabilities that the Petitioner is a creditor of the Company and that the Petitioner is owed the sums stated above which have been demanded and have remained unpaid for an extended period. The Petitioner would therefore be entitled to a winding up order if all other requirements are satisfied. (See ***In re Oryx Natural Resources.***[28]*)*

[27] Extraordinary general assembly resolution, page 10 of Exhibit OE 3 dated 3rd June 2020
[28] 2007 CILR N-6

93. Additionally, the Company has not provided any evidence of solvency or of its assets and liabilities and makes no assertion as to its solvency. ***In Re Weavering Macro Fixed Income Fund Ltd (in liquidation,)***[29] the Court of Appeal stated that the non-obtaining of finance may give rise to a proper inference that none was available.

94. Counsel on behalf of the Company takes no issue with the Petitioner's compliance with the statutory procedural requirements. It is accepted by him that there has been compliance with the CWR, that the Petition has been properly advertised, the requisite verifying and supporting Affidavits have been filed and that the appropriate service has been effected. Neither is there any dispute that the deeming provision would be satisfied in this instance there having been a failure to satisfy the Award, and that this has remained outstanding despite several demands for repayment. In summary, Counsel for the Company accepts that a winding up order may properly be made should the issues raised by the Company be resolved in favour of the Petitioner.

95. The winding up order sought by the Petitioner is accordingly made.

96. I have considered the Affidavits of Christopher Kennedy and Alexander Lawson, the persons proposed as liquidators and am satisfied that in accordance with Order 3 of the CWR, they have the necessary qualifications, experience and independence and may be so appointed.

Dated this the 29th day July 2020

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court

[29] 2016 2 CILR 514