

HONG KONG / JUDGMENT

RE SHIFT ENERGY ASIA LTD

[2025] HKCFI 6415

COURT

Court of First Instance

DECIDED

24 December 2025

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HCCW 405/2025

[2025] HKCFI 6415

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES WINDING-UP PROCEEDINGS NO 405 OF 2025

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance Cap.
32 of the Laws of Hong Kong

and

IN THE MATTER of SHIFT ENERGY ASIA LIMITED (Business Registration No. 69995141)

Before: Deputy High Court Judge Alexander Stock SC in Court

Date of Hearing: 6 November 2025

Date of Reasons for Judgment: 24 December 2025

REASONS FOR JUDGMENT

At the hearing of the winding-up petition (the “Petition”) in this matter on 6 November 2025, I made an order to dismiss the Petition with costs to the company, Shift Energy Asia Limited (“C”).

I now provide my reasons for doing so.

The Petitioner, Brawn Capital Development Fund (formerly known as Brawn Capital Energy Opportunities 2 LLC) (“P”) was represented by Mr Anson Wong SC leading Mr Terrence Tai. C was represented by Ms Esther Mak.

A.

BACKGROUND FACTS AND ISSUES

P is an investment fund incorporated as a limited liability company in the Cayman Islands on 18 January 2019. C is a Hong Kong company.

According to P’s evidence:

the “Brawn Group” is a private equity group which raises funds from third party investors and invests such funds into renewable energy projects across the Asia-Pacific region;

the “Shift Energy Group” consisting of Shift Energy Corporate Holding Inc. (“SECHI”) and its subsidiaries, develops and operates renewable energy projects in Japan, Taiwan and Vietnam;

SECHI was previously the parent company and majority shareholder of the Brawn Group until late 2024, when SECHI sold its shareholding in the Brawn Group to “Capital SG” (the “Brawn Transfer”). It was in this context that the Waiver Deed, referred to below, was signed.

The Petition dated 7 July 2025 was presented on the basis of non-compliance with a statutory demand dated 13 June 2025. The Petition and statutory demand are based on a debt said to be payable from C to P pursuant to a loan agreement dated 4 September 2020 (as amended).

C disputed the petition debt on the basis that it was waived/compromised/extinguished under a Waiver and Release Deed dated 16 January 2025 (the “Waiver Deed”). C further relied on an arbitration clause 13 (the “Arbitration Clause”) in the Waiver Deed providing for disputes thereunder to be resolved by arbitration in Singapore under the rules of the Singapore International Arbitration Centre (“SIAC”).

In the broadest terms, P disputed that the petition debt is covered by the Waiver Deed and denied that it is party to that deed; given inter alia that P is not a named party to the Waiver Deed.

On 11 September 2025, C (together with SECHI) commenced arbitral proceedings against P and other parties in Singapore by filing a notice of arbitration with SIAC, seeking inter alia a declaration that the petition debt in these proceedings has been waived pursuant to the Waiver Deed. On 26 October 2025, P indicated to SIAC that it would raise a jurisdictional objection in the said arbitral proceedings.

The main issues before me were:

whether the court should exercise its discretion to make a winding-up order and/or entertain the question of bona fide dispute on substantial grounds, given C's reliance on an arbitration clause and the principles derived from *Re Guy Lam* (2023) 26 HKCFAR 119; and

whether C has raised a bona fide dispute on substantial grounds in respect of the petition debt, on the basis of the Waiver Deed.

B.

BONA FIDE DISPUTE ON SUBSTANTIAL GROUNDS

Principles and approach

The principles applicable where a company opposes a winding-up petition on the basis of a bona fide dispute of the debt on substantial grounds, are well-known: see eg summary in *Hong Kong Investments Group Limited* [2018] HKCFI 984, Ng J at §§11-15, cited by P.

I will not repeat those principles.

As noted above, C relied on the Arbitration Clause to invoke the principles in *Re Guy Lam* and *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] 2 HKLRD 1064 (the "Guy Lam principles"), to argue primarily that the question of bona fide dispute (and the petition debt) should be decided by the parties' chosen forum ie arbitration before SIAC.

P argued that, for various reasons referred to below, the Guy Lam principles were not engaged in the present case, such that the court should determine the question of bona fide dispute on substantial grounds, which should be resolved in P's favour.

Alternatively, P argued that if those principles were engaged the matter was in any event one where the court's multi-factorial discretion should be exercised in P's favour to make a winding-up order, or alternatively to stay rather than dismiss the Petition.

Whilst it may be thought logical to consider first the Guy Lam principles, I consider it more helpful to start with the issue of bona fide dispute. That is because the strength of C's alleged defence based on the Waiver Deed goes also to the question whether there is a binding arbitration agreement, which must have at least potential relevance to the Guy Lam question.

Parties to the Waiver Deed

A central area of disagreement is whether P is party to the Waiver Deed.

The named parties to the Waiver Deed are:

SECHI, a Delaware company;

Blue North (BVI) Limited, a BVI company ("Blue North"), formerly known as Brawn Capital (BVI) Limited.

Scott Paul Reinhart, a director of Blue North, who gave affidavit evidence in support of the Petition;

Brawn Capital Limited, a Hong Kong company (“Brawn HK”);

Brawn Capital (Cayman) Limited, a Cayman Islands company (“Brawn Cayman”); and

Brawn Capital Management (Singapore) Pte Ltd, a Singapore company (“Brawn Singapore”).

The Operating Agreement

It was apparently common ground that since P is a Cayman Islands Limited Liability Company, the management and control structure differs to that of an ordinary company, and is governed by the terms of its Operating Agreement.

C highlighted that the Operating Agreement provides inter alia that:

the management and control of P (referred to therein as the “Fund”) is vested exclusively in the Manager, not in any Member in its capacity as such (section 2.01(a));

the decision-making powers of the Manager are in the Manager’s discretion, with broad powers to take into account such matters as the Manager considers appropriate (section 2.01(b));

the Manager is given extensive powers and authority to act in the name of the Fund in numerous aspects of the Fund’s business and operations, including acquiring, holding, managing and settling investments, and making distributions to Members (section 2.02);

the Manager has power to make investments of the Fund (or any class) on any terms and conditions that the Manager (or any class manager) determines (section 3.01(a));

the Manager owes no duty (fiduciary or otherwise) to the Fund or any Member other than to act in good faith (section 1.05(d));

the Members lack control and governance rights; they do not have any right to vote on the core activities of the Fund, including investment decisions made by the Manager (section 3.01) and the creation of new classes or admission of new Members (sections 107(a), 106(d)).

The Manager of P

The parties’ affidavits raise a factual dispute whether the Manager of P at the time of the Waiver Deed was Blue North or Brawn Cayman; which is in turn relevant to the dispute whether the Waiver Deed covered the petition debt and bound P: see below.

The Petition indicates that it is presented by P, represented by Blue North which is the Manager of P, appointed on 14 February 2019 and duly authorised pursuant to the terms of the P’s Operating Agreement effective on 3 December 2019.

In evidence opposing the Petition, C alleged that the Manager of P was at all material times Brawn Cayman, rather than Blue North, and on this basis argued that the Petition was not properly presented by P. C produced a series of documents mostly from 2019, said to indicate that P's Manager was Brawn Cayman. These included extracts from two versions of the Operating Agreement said to be dated 5 March 2019 and 4 December 2019, which identify Brawn Cayman as P's Manager.

In its reply evidence, P produced what it said were more recent and official documents to demonstrate that Blue North is and was at the material time its Manager, notably: (i) P's Register of Managers dated 10 April 2024 stating that Blue North has been P's Manager since 17 April 2020 prior to which the Manager was Scott Reinhart since 18 January 2019; (ii) P's Certificate of Incumbency dated 5 February 2025 stating the Blue North was P's Managing Member since 17 April 2020; and (iii) P's register of LLC Members dated 14 May 2024. P referred also to various amendments to the loan agreement between P and C in which Blue North signed for and on behalf of P.

C also clarified that whilst the Petition stated that Blue North was appointed as P's Manager on 14 February 2019, the correct date should be 17 April 2020.

I conclude that the weight of evidence favours P's position that at the time of the Waiver Deed, P's Manager was Blue North.

Construction of the Waiver Deed

Leaving aside for one moment the question whether P was party to the Waiver Deed – referred to below – I consider that it is at least reasonably arguable that clauses 3.1(b) and 4.3(a) and (b) of that deed covered debts or claims owing from C to P.

I rely on the following points.

First, the parties disagreed on the correct construction of “subsidiary”, which is a defined term in clause 1.2(u) of the Waiver Deed. Clause 1.2(u) provides: “references to a “subsidiary” means in relation to a person (other than a natural person) where another person has or obtains direct or indirect control of the power to direct or cause the direction of the management and decision-making of that person without reference to any other person”.

In essence, P argued that this refers to voting and governance rights derived from equity ownership. Since P was not a subsidiary in this sense of any of the “Brawn Group” or the “Blue North Parties” as defined in clause 1.1 of the Waiver Deed, the waivers and releases given in clauses 3.1(b), 4.3(a) and (b) did not cover P's claims.

Conversely, C argued that on a proper construction of the Waiver Deed, P was a “subsidiary” of its Manager – whether P's Manager was Blue North or Brawn Cayman - since under the Operating Agreement extensive powers of management and control were vested in P's Manager rather its members: see §20 above.

In short, I consider C's construction and argument to be at least arguable. Whilst I agree that the natural meaning of the word "subsidiary" itself would likely reference equity ownership, one must have regard not only to the defined term but the defining words used, which are wide and on literal application would or could cover the control exercised by P's Manager under the Operating Agreement.

Second, if C is correct on this point then - subject to the question of contracting parties - the wording of the Waiver Deed is such that the petition debt has been waived and compromised: see clauses 3.1, 4.3(a) and (b).

That is because the waiver, release and covenants not to sue in those clauses are given by the "Brawn Group" and the "Blue North Parties" as defined at clause 1.1, which includes the "subsidiaries" of both Blue North and Brawn Cayman; such that whichever is the Manager of P, the debts of P to the "Shift Released Parties" and the "Shift Released Claims" would be released.

The Contractual Context

Both parties referred to the contractual context and background factual matrix, in aid of their construction of the Waiver Deed.

P's evidence was that the Waiver Deed was entered into against the backdrop of the Brawn Transfer in late 2024 (see §5(3) above). The Waiver Deed was intended to allow the Brawn Group and the Shift Energy Group to separate amicably and settle any disputes in their own capacities arising from their direct dealings with one another as a result of the previous shareholding relationship; but did not relate to loans advanced by investment funds (the "Funds") which are managed by entities within the Brawn Group, including P. P's evidence was that all of the members of the Funds (other than Brawn Special Member LLC and Blue North) are independent of the Brawn Group and/or Blue North, which have minimal economic interest in the Funds.

P argued that this context was undisputed, and supported P's construction of the provisions of (and parties to) the Waiver Deed. The purpose of the Waiver Deed in the context of the Brawn Transfer was to secure a mutual release of liabilities between the Brawn Group and the Shift Energy Group owed to each other in their own capacities arising from their own dealings, and there was no reason for it to be construed so as to cover the Funds including P, thereby adversely affecting the interests of the independent members of the Funds who had nothing to do with the Brawn Transfer.

C's evidence was that the dispute between P and C had at its root a long-standing feud between the "Brawn Capital camp" and the "Shift Energy camp", which eventually resulted in a complex corporate restructuring with the two camps separated from their common parent in 2024. It was intended by the two camps that the Waiver Deed should settle all disputes between them.

C argued that the Waiver Deed creates a clear symmetry of waiver between the Shift Energy Group and the Brawn Released Parties defined therein; that the commercial purpose was to effect a clean break between the two “camps”; and a piecemeal settlement whereby some entities within a group were released and others exposed, would be commercially nonsensical and defeat the purpose of the Waiver Deed.

Whilst I can see the potential force in P’s arguments, I do not think that the contractual context is sufficiently clear or undisputed to enable the matter to be fairly resolved summarily. I note that P’s evidence on contractual context is contained in a few short paragraphs of reply evidence. I take the view that factual exploration of the detail of the background context to the Waiver Agreement through a non-summary process could potentially assist in shedding light on the Waiver Deed’s purpose and resolving the issues of construction and agency which separate the parties.

Whether P was Party to the Waiver Deed

Mr. Wong SC argued strenuously that, whatever the conclusions on the correct construction of the provisions of the Waiver Deed themselves, if P was not a party thereto there could be no defence.

C argued that although P was not one of the six named parties to the Waiver Deed (see §18 above), the Manager of P (whether Blue North or Brawn Cayman) had entered into the Waiver Deed as agent for P.

I accept that, of course, even if the provisions of the Waiver Deed purport to compromise P’s claim, they cannot avail C unless P was party to that deed.

For the following reasons, I consider that C’s arguments that P was a party to the Waiver Deed through agency, are at least arguable.

First, the powers of P’s Manager are broad (see above) so that P’s Manager - be it Blue North or Brawn Cayman - would appear to have authority to enter the Waiver Deed on P’s behalf. Both Blue North and Brawn Cayman are party to the Waiver Deed.

Second, the intention expressed under the contractual provisions of the Waiver Deed was *inter alia* that all claims of the Brawn Group and the Blue North Parties and their subsidiaries be waived; and I have concluded above that it is at least arguable that this included P. This intention could only have been given effect if P’s Manager signed as agent for P.

Further arguable support for this is given in Recital A to the Waiver Deed which provides that the parties to the deed and their subsidiaries desire to settle and waive all Claims as defined therein between them.

Third, Mr Wong placed heavy reliance on the express provisions on agency in clause 3.1(b) of the Waiver Deed, which provides for waiver by: (i) “each of Brawn Cayman, [Brawn HK] and Brawn Singapore (for themselves and as agents for each member of the Brawn Group)...”; and (ii) “the

Blue North Parties”. Mr Wong argued that the presence of an express provision for agency in respect of the Brawn Group showed that where the parties to the Waiver Deed intended there to be agency, that was expressly spelled out; such that the conspicuous absence of a similar express provision in respect of the Blue North Parties clearly showed that there was no intention for agency in the case of those entities. The point was further reinforced by clause 3.1(a), which again expressly spells out agency by SECHI in respect of the “Shift Group”.

Assuming that P’s Manager was Blue North rather than Brawn Cayman, I think this is a strong argument. However, I am again not persuaded that it is sufficiently strong to resolve the matter summarily in P’s favour. The point must be weighed against the apparent contractual intention to waive claims of the Blue North Parties including subsidiaries, which could only be given effect if they were privy to the contract through agency.

Fourth, P relied on what was described as the “signature principle”, applied and discussed by the English Court of Appeal in *Gregor Fiskens Ltd v Carl* [2021] 4 WLR 91, especially at §§54 to 64. P argued that the effect of the principle was that generally, where a person signs a contract with no qualification as to the capacity in which he signs, he will be a party unless the contract makes clear that he contracted as agent. The mere description of the person as an agent elsewhere may not be sufficient to outweigh the effect of the unqualified signature. If the signature principle applies, the contract itself makes clear that the signatory contracted personally, and extrinsic evidence is inadmissible to contradict this.

Since Blue North signed the Waiver Deed without any indication that it did so as agent, P argued that it was accordingly taken to have signed as principal rather than agent.

However, I do not regard this as necessarily conclusive:

Gregor Fiskens and the cases referred to therein concern an assertion – often by a party seeking to avoid liability on a contract – that a party who signed without qualification is nevertheless not privy to the contract since it only signed as agent. The present scenario is or may be distinguishable since it is presumably C’s position that P’s Manager signed both for itself and as agent.

The indicia in *Gregor Fiskens* are not so much to the effect that the unqualified signature is conclusive on point, but that this feature is given particular weight in the overall assessment and exercise of construction.

If the signature principle were strictly applied in this case in the manner contended for, that would seem to defeat also the express provisions of agency in respect of the Brawn Group and Shift Group, which is arguably surprising.

Fifth, P relied on certain evidence subsequent to the Waiver Deed.

The said evidence filed in reply comprised: (i) a Separation Plan prepared by Kroll on 22 May 2025 for “Shift Energy and Brawn Capital”; (ii) the engagement letter for the same; and (iii) email correspondence from March to May 2025 showing, broadly speaking, the involvement and

consultation of Mr Lara of C in the preparation of the Separation Plan; including that the Separation Plan was sent to Mr Lara on 22 May 2025 and he responded the following day. In essence, P argued that the Separation Plan clearly proceeded on the basis that the subject loan from C to P was still outstanding, and that Mr Lara never objected to this proposition notwithstanding detailed involvement with the preparation of the Separation Plan. The defence presently relied upon was only for the first time raised in response to the Petition, which showed that it lacked credibility.

P accepted that evidence subsequent to the Waiver Deed was inadmissible on the issue of the Deed's construction; but argued that it was admissible and highly pertinent on the question of agency (and showed, in effect, that all along C knew and intended that the Waiver Deed did not compromise the subject loan).

In short, I can again see some force in P's argument but I do not think it is sufficiently strong to enable the matter to be summarily disposed on the basis of affidavit evidence only.

Conclusion on bona fide dispute

As noted above, I can see the potential force in various of P's arguments, but on balance I take the view that C has done enough to raise a bona fide dispute on substantial grounds.

Winding-up is for (very) clear cases, and I do not think that the questions of construction and agency are so clear on the basis of the present evidence that they should be summarily resolved in P's favour without any further factual exploration through a non-summary process.

C.

THE ARBITRATION CLAUSE AND THE GUY LAM PRINCIPLES

Given the above conclusions, I think it strictly unnecessary to consider the significance of the Arbitration Clause and the Guy Lam principles. I will in any event do so and indicate how I would (and to the extent necessary do) exercise my discretion under those principles.

As noted above, the Arbitration Clause in the Waiver Deed provides for disputes relating to that deed to be resolved by arbitration in Singapore; and such arbitral proceedings have been commenced by C and SECHI, with P having raised a jurisdictional challenge.

The Guy Lam Principles

In *Simplicity & Vogue* (supra), the Court of Appeal set out the principles applicable where a petition for bankruptcy or winding-up is premised on an alleged debt which is subject to an arbitration clause; and in essence followed the approach of the Court of Final Appeal in *Re Guy Lam* (supra) in relation to exclusive jurisdiction clauses ("EJC").

I will not set out the Court's full analysis from §§32 to 42, but will refer to a few central points:

The threshold character of a dispute about indebtedness leaves room for the exercise of a discretion by the court to decline to exercise the jurisdiction to determine that question, leaving the dispute to be resolved by arbitration as agreed and with regard to the public policy in holding the parties to their agreement. Such public policy consideration is not the only consideration, and it may exist in an attenuated form, as when a wholly frivolous defence is mounted that would constitute an abuse of process. (§38, also §36[100]).

In deciding whether to exercise its jurisdiction to make a bankruptcy or winding-up order, or when making a determination whether there is a bona fide dispute on substantial grounds, or in ordering the petition to be dismissed or stayed, the court is exercising a discretion which is multi-factorial. The public policy of the legislative scheme for the court's insolvency jurisdiction may be more prominent where the grounds for disputing the debt are obviously insubstantial. The significance of this public policy may be much diminished where there is no supporting creditor and no evidence of a creditor community at risk. The "strong reasons" or "wholly exceptional circumstances" tests should not obscure the range of considerations relevant to the court's discretion. The countervailing factors of the risk of insolvency affecting third parties, and a dispute that borders on the frivolous or abuse of process are just instances where the court may exercise its discretion not to hold the parties to the agreed dispute resolution mechanisms. By this approach, the court retains flexibility to deal with the case as the circumstances require. (§39).

It is sensible for the court to require itself to be satisfied of a genuine intention to arbitrate on the part of the respondent, before exercising its discretion to defer to the arbitral tribunal in respect of the parties' dispute over the petition debt. (§42).

Arguments and Analysis

Ms Mak for C argued that the since the parties' dispute over the petition debt was governed by the Arbitration Clause and subject to pending arbitral proceedings in Singapore, the petition ought to be dismissed pursuant to the said principles.

Mr Wong SC for P made a number of arguments on the Guy Lam principles.

First, P argued that since the Waiver Deed was governed by Cayman Islands law, I should apply the approach in *Sian Participation Corp v Halimeda International Ltd* [2024] 3 WLR 937 (PC) which was followed in the Cayman Islands in *Re NaaS Technology Inc* [2025] CIGC (FSD) 28.

In the broadest terms, the Privy Council in *Sian Participation* considered that the approach of the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 and cases which followed it were wrong (§88) as a matter of BVI law. The Privy Council reverted to what has in Hong Kong been called the "Established Approach" whereby the insolvency court itself considers the question whether the petition debt is disputed on genuine and substantial grounds, notwithstanding an arbitration clause or EJC; and declines a stay unless such a dispute is established (§99).

P relied in particular on §89 of the reasoning in *Sian Participation* that a contractual obligation contained in a typical arbitration clause did not preclude the presentation of a winding-up petition. P argued that since the Waiver Deed was governed by Cayman law, the Arbitration Clause should be so construed such that the approach in *Sian Participation* ought to be applied.

I am not persuaded to accept this argument. In Hong Kong proceedings for winding-up I am bound by the approach of the Court of Appeal in *Simplicity & Vogue*, the reasoning in which I consider to be substantially based on the provisions and policies of the arbitration and winding-up legislation in Hong Kong and how they interact with one another, rather than on principles of contractual construction. Accordingly, I proceed on the basis of the principles set out in *Simplicity & Vogue*.

Second, P argued that in *Guy Lam* and similar cases, there was no dispute as to the existence of a valid binding arbitration clause (or ECJ) governing the parties' dispute in question. The present case differed because the arbitration clause relied on by C is contained in the Waiver Deed such that it is disputed whether it binds the parties and applies at all.

In written submissions, P argued that the parties' dispute on this anterior question should be resolved at the threshold of a bona fide dispute on substantial grounds. In oral argument, Mr Wong SC supplemented that in the exercise of the court's multi-factorial discretion, the public policy consideration of holding the parties to their arbitration agreement would be diminished in a case where there was a dispute on the "anterior question"; in other words, the parties' dispute on the existence and application of the arbitration clause was a matter to be weighed in the discretion.

I note that in the different context of a mandatory stay to arbitration, the onus is on the applicant for a stay to prove a good prima facie or plainly arguable case supported by cogent (not dubious or fanciful) evidence that an arbitration clause exists: see commentary in *Hong Kong Civil Procedure* 2026 at §U1/20/2. See also *OCBC Wing Hang Bank Ltd v Kai Sen Shipting co Ltd* [2020] 1 HKLRD 1217 per Au-Yeung J at §§15 to 16: the onus is to show a prima facie case that the parties are bound by an arbitration agreement. Unless the point is clear, the court should not attempt to resolve the issue and the matter should be stayed for arbitration. The applicant only needs to show an arguable case; and if whether or not an arbitration clause has been incorporated is capable of giving rise to reasonable argument from both sides, the issue should be resolved in favour of arbitration.

I accept that in order to engage the *Guy Lam* discretion, C should at least satisfy such a minimum merits threshold that there is prima facie or arguably an arbitration agreement governing the dispute, and that the strength of the arguments on this point may be taken into account in the exercise of the multi-factorial discretion.

Third, P argued in its Reply Skeleton that even if the Guy Lam principles applied, the court should not decline jurisdiction because: (i) the dispute raised by C is hopeless and borders on frivolous or abuse of process; and/or (ii) C is incontestably and massively insolvent, quite apart from the petition debt, referring to *Re Guy Lam (CA)* (supra) at §86.

In respect of the second of these points, P's reply affidavit contained evidence that C was also substantially indebted to Brawn Busan Pte Ltd ("Brawn Busan"), one of the Funds managed by the Brawn Group, which had also issued to P a statutory demand. During the hearing, P further argued that there was evidence of a creditor community at risk, by reference to the Separation Plan (referred to above), said to show that C had negative assets and was indebted to other entities.

In response, C argued that there were no other debts pleaded in the Petition, and no other creditor had come forward to support the Petition. In respect of other debts alleged to be owed to the Brawn Group and/or the Funds, C was likely to raise the same defence of waiver based on the Waiver Deed. C again argued that the contents of and details set out in the Separation Plan came from Kroll and had not been approved or agreed to by C.

Fourth, in respect of a "genuine intention to arbitrate", P complained that C had only commenced the Arbitration on the eve of the first hearing of the Petition, and had not responded to the SIAC Secretariat's request for quantification of their claim; though I understand that by the time of the hearing before me that response had been given.

I have considered the parties' evidence and arguments on point, and the various policy imperatives pertinent to the exercise of the discretion described in *Simplicity & Vogue*. For the following reasons, I consider that the multi-factorial discretion should be exercised to decline to exercise the winding-up jurisdiction and to dismiss the Petition.

I consider that there is at least an arguable case that the dispute is governed by the Arbitration Clause (see Section B above). I take into account that this is, however, disputed, such that the imperative in favour of leaving the matter to the arbitral tribunal is or may be reduced.

I accept that there is some evidence of other creditors and C's insolvency apart from the petition debt; although I note that there is no evidence of other creditors issuing proceedings and no creditor supporting the Petition. I also note that C may raise a similar dispute in relation to other debts said to be owed to the "Funds"; and I do not think it can fairly be said that C has approved the details set out in the Separation Plan such that they should be taken as unquestionably accurate. I do not think that C is "incontestably insolvent" even leaving aside the petition debt.

I take into account that the Arbitration before SIAC is currently on foot in respect of the petition debt; and I am satisfied that there is a genuine intention to arbitrate. I consider on balance that the discretion should be exercised to decline to exercise the court's insolvency jurisdiction in these circumstances, taking into account the legislative policies referred to and approach in *Simplicity & Vogue*.

I have considered whether the Petition should be stayed rather than dismissed; as P proposed as a fall-back. However, I take the view that even P's jurisdictional challenge in the Arbitration would likely take some considerable time to resolve. I think it undesirable for the winding-up proceedings to be held in abeyance for a long period of time, and accordingly consider it preferable and appropriate to dismiss the Petition.

I do not need to deal with C's complaint that the Petition is defective since P's manager was Brawn Cayman rather than Blue North; but for completeness I do not accept this point given my conclusion at §26 above.

Lastly, I thank both teams of counsel for their able assistance in this matter.

(Alexander Stock SC)

Deputy High Court Judge

Mr Anson WONG, SC leading Mr Terrence LAI instructed by Messrs Hill Dickinson Hong Kong, for the Petitioner

Ms Esther MAK instructed by Messrs ONC Lawyers, for the Company

The attendance of the Official Receiver was excused

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