HCAL 949/2021
[2021] HKCFI 3813

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 949 OF 2021

IN THE MATTER of an Application for Leave to Apply for Judicial Review under Order 53, rule 3(2) of the Rules of the High Court, Cap 4A

and

IN THE MATTER of the Decision for the Listing Appeals Committee of the Stock Exchange of Hong Kong Limited to Cancel the Listing of the Applicant

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BETWEEN

UP ENERGY DEVELOPMENT GROUP LIMITED (IN PROVISIONAL LIQUIDATION) (FOR RESTRUCTURING PURPOSES))	Applicant
and	
THE STOCK EXCHANGE OF HONG KONG LIMITED	Putative Respondent

Before: Hon Coleman J in Court

Date of Hearing: 20 December 2021

Date of Judgment: 21 December 2021

J U D G M E N T

A. Introduction

1. The Applicant ("Company") was incorporated in Bermuda with limited liability on 30 October 1992. The Company's shares have been listed on the Main Board of The Stock Exchange of Hong Kong Ltd ("Exchange") since 2 December 1992.

2. Since October 2016, the Company has been in provisional liquidation, with Joint Provisional Liquidators ("JPLs") appointed. As from 28 April 2017, the JPLs have been given full powers, such that the powers of the directors of the Company have ceased.

3. In the meantime, on 30 June 2016, trading in the Company's shares on the Main Board was suspended, due to its failure to release its annual results for the financial year ended 31 March 2016. Resumption of trading has never occurred. Instead, the Company was subject to the Exchange's delisting process, comprising various stages and numerous *de novo* reviews of interim decisions in that process.

4. Ultimately, almost 5 years after the original suspension, the matter came before the Listing Appeals Committee ("LAC") of the Exchange at a hearing on 21 April 2021 ("LAC Hearing"). By its decision dated 30 April 2021 ("LAC Decision"), the LAC decided to uphold the earlier decision under review and to cancel the Company's listing status.

5. By Form 86 dated 6 July 2021, the Company now seeks leave to apply for judicial review of the LAC Decision.

6. On 13 July 2021, I gave directions for a rolled-up hearing of (1) the application for leave to apply for judicial review, and (2) the substantive application for judicial review. I also gave further directions to facilitate the rolled-up hearing, which was subsequently fixed for argument on 20 December 2021.

7. This is my Judgment.

8. At the hearing, the Company was represented by Mr Hector Pun SC, leading Mr Anson Wong Yu Tat, and the Exchange was represented by Mr Victor Dawes SC, leading Mr Joshua Chan.

9. Mr Pun and Mr Dawes were both at pains to remind me that the delisting procedures relevant to the present case differ from the procedures dealt with in other otherwise similar applications recently heard by this Court in, for example, *Brightoil Petroleum (Holdings) Ltd v The Stock Exchange of Hong Kong Ltd* [2020] HKCFI 1601; and *Cai Zhenrong v The Stock Exchange of Hong Kong Ltd* [2021] HKCFI 1899 ("*Blockchain* case"). Whilst it will be necessary to focus on the correct procedures, it is helpful first to set out some further background.

B. Further Background

10. Since 2011, the Company has been engaged in mining, production and sales of coking coal. It has:

(1) three coal mines in the Fukang Region of Xiniiang in the PRC ("Three Mines"); and

(2) three ancillary production facilities for coal coking ("Coking Plant"), coal washing and water recycling.

11. In 2015, the Company suspended construction of the Three Mines, the water recycling plant and the coal washing plant. It did so due to financial difficulties. It also failed to renew the mining licences in relation to two of the Three Mines, and the licences expired in December 2015.

12. In early 2016, the Company defaulted on its repayment obligations in relation to certain convertible bonds, triggering cross-default of other debts. This led, in March and May 2016, to the presentation of winding up petitions against the Company in Hong Kong and Bermuda.

13. As already stated, on 30 June 2016, trading in the Company's shares was suspended.

14. On 7 October 2016, the JPLs were appointed.

15. On 18 October 2016, the Exchange informed the Company that it had been placed into the first of three delisting stages under Practice Note 17 to the Listing Rules ("PN17") – for details of PN17, see below – with the following resumption conditions ("RCs"):

(1) demonstrate that it has a sufficient level of operations or assets of sufficient value as required under Rule 13.24 ("RC1");

(2) publish all outstanding financial results and address audit qualifications (if any) ("RC2"); and

(3) have the winding up petitions against the Company (and its subsidiaries), where applicable, withdrawn or dismissed and the provisional liquidators discharged ("RC3").

16. By letter dated 19 April 2017, the Exchange informed the Company that it was placed in the second stage of delisting, and that the Company must submit a viable resumption proposal at least 10 days before the second stage expires on 29 September 2017.

17. On the day of expiry, 29 September 2017, the Company submitted a draft resumption proposal, which was subsequently modified on 9 November 2017.

18. By letter dated 17 November 2017, the Exchange informed the Company that the draft resumption proposal was not viable and the Company was placed in the third stage of delisting.

19. On 28 November 2017 the Company applied to the Listing Committee ("LC") and subsequently to the Listing (Review) Committee ("LRC") of the Exchange for a review of the decision to place the Company in the third stage of delisting. However, the decision was upheld, and on 31 August 2018 the Exchange informed the Company that it had formally been placed in the third stage of delisting. A requirement was imposed to submit a viable resumption proposal by 25 February 2019.

20. Again on the day of expiry, 25 February 2019, the Company submitted a fresh resumption proposal. That proposal was subsequently modified and clarified in response to queries made by the Exchange.

21. By letter dated 20 March 2020, the LC informed the Company that the LC considered the resumption proposal not viable and

that the LC had decided ("LC Decision") to cancel the listing of the Company's shares.

22. On 30 March 2020, the Company lodged a written request for review of the LC Decision by the LRC.

23. On 30 October 2020, the LRC informed the Company that its resumption proposal was not considered to be viable and that the LRC had decided ("LRC Decision") to uphold the LC Decision.

24. On 6 November 2020, the Company applied to the LAC for a review of the LRC Decision.

25. On 21 April 2021, the LAC conducted the LAC Hearing. There is a transcript of the LAC Hearing. Substantive rounds of written submissions had previously been provided to the LRC by the Company and the Listing Division. At the LAC Hearing, the Company was also permitted to submit a supplemental bundle of written materials. Oral submissions were made, including responses to questions asked by members of the LAC. At the LAC Hearing, the Company also sought a further 3 to 6 months' extension of time in order to resolve the outstanding matters relating to the RCs.

26. On 30 April 2021, the LAC informed the Company of the LAC Decision.

27. Whilst, in the light of the LAC Decision, the Exchange had previously informed the Company that the listing of its shares would be cancelled, some time (including extensions of time) was afforded to the

Company to bring the proceedings ultimately commenced by the Form 86. As a result of the commencement of these proceedings, delisting has not occurred and another 8 months have passed.

C. Legal/Regulatory Framework

C.1 The Exchange's Regulatory Role

28. I can repeat my summary given in the *Blockchain* case at §§25-28 of the Exchange's regulatory role, as follows.

29. The Exchange operates the stock market in Hong Kong pursuant to the Securities and Futures Ordinance Cap 571 ("SFO"), and acts as the frontline regulator of listed companies and their directors.

30. Section 21 of the SFO imposes a duty on the Exchange to ensure, so far as reasonably practicable, an "orderly, informed and fair market". In discharging its duty, the Exchange is further required to act in the interest of the public, having particular regard to the interest of the investing public, and to ensure that the interest of the public prevails where it conflicts with the interest of the Exchange.

31. Section 23 of the SFO empowers the Exchange to make rules for such matters as are necessary or desirable for the proper regulation and efficient operation of the stock market. The Exchange is specifically authorised to make rules for, amongst other things, the cancellation and withdrawal of the listing of, and the suspension and resumption of dealings in, securities listed on the recognized stock market operated by the Exchange.

32. The Listing Rules are made by the Exchange pursuant to section 23 of the SFO. The Listing Rules impose requirements on listed companies and their directors to ensure that investors have and can maintain confidence in the market. Each company listed on the Main Board of the Exchange must undertake to comply with the Listing Rules when the company submits its application for listing.

C.2 Suitability for Listing

33. I can also repeat what I said in the *Blockchain* case at §§29-31 about suitability for listing, albeit subject to further specific notes relating to the circumstances of the present case.

34. The Listing Rules provides that, in order to be listed on the Main Board of the Exchange, issuers must be suitable for listing (Rules 2.03 and 8.04). The Listing Rules set out certain specific requirements which must be met in order for a new applicant to be qualified for listing.

35. Suitability for listing is not, however, simply a matter of compliance with quantitative requirements; it also involves a qualitative assessment of the new applicant by the Exchange. Thus, Rule 2.06 states:

> Suitability for listing depends on many factors. Applicants for listing should appreciate that compliance with the Exchange Listing Rules may not of itself ensure an applicant's suitability for listing. The Exchange retains a discretion to accept or reject applications and in reaching their decision will pay particular regard to the general principles outlined in rule 2.03. Prospective issuers (including listed issuers) are therefore encouraged to contact the Exchange to seek informal and confidential guidance as to the eligibility of a proposed application for listing at the earliest possible opportunity.

36. Once a new applicant is listed and becomes a listed issuer, it must continue to be suitable for listing in order to maintain its listing status, including by the operation of a substantial business.

37. In particular, since amendments which became effective on 1 October 2019, Rule 13.24(1) provides (emphasis added):

> An issuer shall carry out, directly or indirectly, a business with a sufficient level of operations and assets of sufficient value to support its operations to warrant the continued listing of the issuer's securities.
>
> *Note: Rule 13.24(1) is a qualitative test. The Exchange may consider an issuer to have failed to comply with the rule in situations where, for example, the Exchange considers that the issuer does not have a business that has substance and/or that is viable and sustainable.*
>
> *The Exchange will make an assessment based on specific facts and circumstances of individual issuers…*
>
> *Where the Exchange raises concerns with an issuer about its compliance with the rule, the onus is on the issuer to provide information to address the Exchange's concerns and demonstrate its compliance with the rule.*

38. However, prior to 1 October 2019, Rule 13.24 provided (emphasis added):

> An issuer shall carry out, directly or indirectly, a sufficient level of operations or have tangible assets for which a sufficient potential can be demonstrated to the Exchange to warrant the continued listing of the issuer's securities.
>
> *Note: Characteristics of issuers which are unable to comply with rule 13.24 include:*
>
> *(i) financial difficulties to an extent which seriously impairs an issuer's ability to continue its business or which has led to the suspension of some or all of its operation; and/or*
>
> *(ii) issuers which have net liabilities as at their balance sheet date i.e. issuers whose liabilities exceed their assets.*

39. Hence, under the old Rule 13.24, the requirement was for a listed issuer to carry out a sufficient level of operations or have assets of sufficient value to warrant continued listing. But, under the new Rule 13.24, the requirement is for a listed issuer to carry out a sufficient level of operations and have assets of sufficient value to warrant continued listing.

40. However, I agree with Mr Dawes that the amendment actually made little substantive difference to the content of the rule, because under both versions of Rule 13.24 the listed issuer has to demonstrate, by reference to its level of operations or assets, that it has a viable and sustainable business so as to warrant continued listing. As was made clear by Chow J (as he then was) in *China Trends Holdings Ltd v The Stock Exchange of Hong Kong Ltd* [2020] HKCFI 3045 (a case concerned with the old GEM Listing Rule 17.26, which is identical to the old Rule 13.24) at §§39, 41 and 43:

> (1) both the requirements of sufficient level of operations and sufficient assets are tied to the ultimate question of whether the continued listing of the issuer's securities is warranted;
>
> (2) neither the level of operations or the assets of an issuer should be looked at in isolation;
>
> (3) rather, they should be assessed by asking whether they are sufficient to warrant the continued listing of the issuer's securities;
>
> (4) it is obviously inappropriate to permit a company's shares to be listed on a stock exchange if the company does not in fact have operations or assets to enable a viable and sustainable business to be carried out; and

(5) whether a company's level of operations or assets are sufficient to enable a viable and sustainable business to be carried out is a matter of professional judgment, where the Exchange's various reviewing committees are in a much better position than the Court to assess.

41. Those principles were upheld by the Court of Appeal in the same case, [2021] 3 HKLRD 554 at §§48-49, where it was also pointed out that in the absence of any error of law or failure in taking account of relevant matters or taking irrelevant matters into account, the Court should not intervene with such professional judgments.

42. Notwithstanding the change in Rule 13.24, the Exchange notified that there would be a transitional period of 12 months from the effective date of 1 October 2019 for listed issuers who did not comply with the new Rule 13.24 strictly as a result of the amendments. As was stated on behalf of the Exchange at the time, the transitional arrangement was to minimise the impact of the Rule amendments on those issuers by allowing them a 12-month period to comply with the Rules as amended.

C.3 Suspension of Trading

43. Though it is not central to the issues arising in the present case, I can refer to what I said in the *Blockchain* case at §§33-35 about suspension of trading.

44. Where the Exchange considers it necessary for the protection of investors or the maintenance of an orderly market, the Exchange is empowered by the Listing Rules to suspend trading in, and cancel the listing of, a listed issuer's securities in such circumstances and subject to

such conditions as the Exchange thinks fit. The Exchange may also suspend trading in, and cancel the listing of, a listed issuer's securities where the Exchange considers that the issuer does not carry on a business as required under Rule 13.24, or the issuer or its business is no longer suitable for listing.

45. Rule 6.01 states as follows:

> Listing is always granted subject to the condition that where the Exchange considers it necessary for the protection of the investor or the maintenance of an orderly market, it may at any time direct a trading halt or suspend dealings in any securities or cancel the listing of any securities in such circumstances and subject to such conditions as it thinks fit, whether requested by the issuer or not. The Exchange may also do so where:
>
> (2) the Exchange considers there are insufficient securities in the hands of the public (see rule 8.08(1)); or
>
> (3) the Exchange considers that the issuer does not carry on a business as required under rule 13.24; or
>
> (4) the Exchange considers that the issuer or its business is no longer suitable for listing.

46. Rules 6.04 and 6.05 further provide that the procedure for lifting suspension will depend on the circumstances and the Exchange reserves the right to impose such conditions as it considers appropriate. It is also stated as follows:

> The continuation of a suspension for a prolonged period without the issuer taking adequate action to obtain restoration of listing may lead to the SEHK cancelling the listing.

C.4 Relevant Delisting Procedure

47. On 1 August 2018, amendments to the delisting framework under the Listing Rules became effective. Those amendments focus on Rule 6.01A(1) – which gives the Exchange the power to cancel the listing

of any securities that have been suspended from trading for a continuous period of 18 months – and are the provisions previously considered by me in the earlier mentioned cases.

48. But the amendments provided in Rule 6.01A(2)(a) for transitional provisions applicable to a suspended issuer placed in a delisting stage under PN17 before 1 August 2018. In such a situation, as is the case for the Company, PN17 continues to apply.

49. Though PN17 itself describes the procedure as having four stages, Mr Pun and Mr Dawes are both content to proceed on the basis that PN17 really involves a three-stage process for issuers which have failed to comply with Rule 13.24, which can be summarised as follows:

(1) During the initial period of six months following suspension, the Exchange will monitor developments and the issuer must make periodic announcements of developments. At the end of the 6-month period, the Exchange will determine whether it is appropriate to extend this initial period or to proceed to the second stage.

(2) After notification that the issuer has continued to fail to meet Rule 13.24, the issuer is required to submit resumption proposals within the next 6 months. During that period, the Exchange will continue to monitor developments and require monthly progress reports. At the end of the period, the Exchange will consider the issuer's proposals and determine whether it is appropriate to proceed to the third stage.

(3) Where the Exchange determines to proceed to the third stage, it will announce that the issuer does not have sufficient assets or operations for listing, and impose a deadline

(generally 6 months) for submitting resumption proposals. During the third stage, the issuer is again required to provide monthly progress report to the Exchange. At the end of the third stage, if no resumption proposals have been received, the listing will be cancelled.

50. Though PN17 itself does not specifically refer to the requirement to submit viable resumption proposals, it seems obvious (and is not in dispute) that for a resumption proposal to be one which might halt the delisting procedure, it must be a viable proposal. Indeed, the Exchange has issued Guidance Letter GL66-13 'Guidance Letter for Long Suspended Companies' which explains the requirements for a resumption proposal to be considered a viable one. Subject to certain changes, I broadly adopt Mr Dawes' summary as follows:

(1) The resumption proposal must demonstrate the issuer's compliance with Rule 13.24, any other resumption conditions imposed on it, and all other Listing Rules: see §§15 and 25-26.

(2) As to Rule 13.24, the resumption proposal must demonstrate that the listed issuer has a viable and sustainable business. The business must have substance and the business model should be viable and sustainable in the longer term: see §17.

(3) When determining whether that requirement has been fulfilled, the Exchange will take into account amongst other things the nature and size of the business, the business model, competitive strengths and future plans, and the issuer's business performance and financial conditions. The onus is on the issuer to provide all relevant information to prove its case: see §18.

(4) Resumption proposals should be submitted to the Exchange as soon as they can and in any event not less than 10 business days before the end of the relevant delisting stage. If a company submits a proposal at a very late stage, it runs the risk of the proposal failing to meet the Exchange's requirements and the listing being cancelled: see §27.

(5) The resumption proposals should be clear, plausible and coherent, and contain sufficient detail to enable them to be assessed by the Exchange: see §30.

(6) Resumption proposals that are not genuine or lack sufficient details and credibility would be rejected: see §34.

C.5 The Exchange's Decision-Making Process

51. In the *Blockchain* case at §§47-53, I set out some of the salient matters relating to the Exchange's decision-making process, involving the LC and a process of review. As in the situation there described, the powers to suspend trading and to place an issuer in the three delisting stages under PN17 are delegated by the LC to the Listing Division in the first instance, and the LC has reserved to itself the power to cancel the listing of a listed issuer.

52. The major difference between the previous cases and the present case relates to the review procedure. Whereas, in the *Blockchain* case at §§62-65, I dealt with the current delisting regime, under which the LC's decision to delist is subject to one level of review by the LRC, the review procedure applicable to a decision made under PN17 depends upon the nature of the decision made. But, essentially: (1) each decision made by the Listing Division in the first, second or third delisting stages is subject to two levels of review, by the LC and the LRC

respectively; and (2) the LC's decision to delist after the third delisting stage is also subject to two levels of review, by the LRC and LAC respectively. All reviews are conducted *de novo*.

53. It seems that the LAC adopts a primarily paper-based process under which (a) the parties are required to exchange submissions setting out all of their evidence and arguments, and (b) there is then an oral hearing to provide the parties with an opportunity to address the LAC, and for the LAC members to ask questions of the parties.

54. Rule 2B.11(7) of the Listing Rules now provides that:

> At a review hearing before the [LC] or the [LRC], the directors of the new applicant or the listed issuer (as the case may be) have the right to attend the hearing, to make submissions and to be accompanied by one representative of each of the sponsor, authorised representatives, proposed or otherwise, the financial adviser, the legal adviser and auditors of the new applicant or the listed issuer (as the case may be); and authorised representative may be accompanied by his legal adviser.

55. I think the previous rule referred not only to the LC and the LRC, but also to review hearings before the LAC. The deponent for the Exchange in these proceedings says that, to facilitate the just and expeditious disposal of the matter, the primary purpose of the oral hearing is to allow the LAC an opportunity to ask questions and seek clarification on relevant matters after reviewing the parties' written submissions. Parties are therefore expected to keep oral submission succinct and limited as far as possible to matters not adequately covered in the written submissions.

D. Grounds of Intended Review

56. In summary, the Company puts forwards the following grounds of review:

(1) Ground 1: the LAC Decision is tainted with procedural impropriety, in that:

(a) the LAC failed to afford a fair remedial period to the Company;

(b) there was apparent bias on the part of the LAC;

(c) the LAC failed to afford the Company a fair and adequate opportunity to present its case;

(2) Ground 2: the LAC Decision constitutes a disproportionate interference with the right to property of the Company.

57. I will deal with each of the topics in turn.

E. Ground 1(a) - Failure to Afford Fair Remedial Period

58. The Company points to the Exchange's letter dated 18 October 2016, placing the Company into the first delisting stage under PN17, where RC1 was based upon the old Rule 13.24. As a result, the requirement for the Company was to demonstrate either that it had sufficient level of operations or assets of sufficient value as required under the rule.

59. Mr Pun submits that, when the new Rule 13.24 became effective on 1 October 2019, so that RC1 required demonstration of sufficient level of operations and assets of sufficient value, the Company should as a matter of fairness have been given a fresh 18-month remedial period (ie. until 1 April 2021) to comply with the new RC1. Therefore,

in failing to afford that fresh period, the LAC Decision (including the LAC's refusal to exercise its discretion to grant a further 3 to 6 months' extension of time) is unfair.

60. Mr Dawes offers four answers to this point:

(1) First, Mr Dawes submits that the claim that the remedial period given was to comply with the old Rule 13.24 is inaccurate. The Guidance Letter for Long Suspended Issuers (issued as long ago as September 2013) makes clear that suspended issuers are required to comply with all of the Listing Rules, and not just the resumption conditions expressly mentioned in the Exchange's correspondence (see above). All issuers were informed by way of the Exchange's announcement in July 2019 that they would need to comply with the new Rule 13.24. Mr Dawes submits that there was no basis for the Company to think that it would somehow be exempt. I agree.

(2) Second, listed issuers including the Company were given what Mr Dawes calls a "grace period" of 12 months to comply with the new Rule 13.24. He says that the Company has failed to demonstrate that, as a matter of procedural fairness, it should be entitled to a further extension of the remedial period by another 6 months, when it was clearly open to the Exchange (as the regulator appointed by statute) to adopt a transitional period of 12 rather than 18 months. I agree.

(3) Third, as a matter of fact, by the date of the LAC Hearing in April 2021, the Company had enjoyed an extension of around 18 months, but it was still unable to comply with the

new Rule 13.24 (there being no challenge to the merits of the LAC's assessment on that point). I agree.

(4) Fourth, in any event, there is no dispute that the Company failed to fulfil a number of other resumption conditions apart from RC1. So, the Company would have been delisted in any event. I agree.

61. Ground 1(a) is not reasonably arguable.

F. Ground 1(b) - Apparent Bias

62. There is no dispute as to the well-established test for apparent bias. The reviewing Court considers whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there is a reasonable apprehension of bias: see, for example, *Wong Tak Wai v Commissioner of Correctional Services* [2016] 2 HKLRD 1330 at §41. The ultimate question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision-maker has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions raised by the parties: see *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd* [2014] 3 HKLRD 375 ("*Falcon CA*") at §51. The Court of Appeal decision in *Falcon CA* was upheld by the Court of Final Appeal, (2014) 17 HKCFAR 281 ("*Falcon CFA*").

63. I particularly bear in mind that whether the LAC was in fact fair and impartial in the LAC Decision made in this case is beside the point, which is whether a fair-minded and informed observer would reasonably apprehend that the LAC had not brought or would not bring

an impartial mind to bear on the adjudication of the case: see *Falcon CA* at §60. Further, every assertion of apparent bias will lead to a fact-specific enquiry, where everything depends on the circumstances: see *Falcon CFA* §§29, 31 and 34-36.

64. The Company says the specific parts of the transcript of the LAC Hearing which demonstrate apparent bias are as follows:

(1) Following the submissions by Mr Jonathan Lai, one of the JPLs, for the Company, and by Ms Christine Kan, a managing director of the Listing Division, for the Exchange, the Chairman of the LAC asked whether members of the LAC had any questions for any parties present. In response, Dato' Cheah, the Deputy Chairman of the LAC said:

> Yes, thank you Chairman. Yes, I just want to ask Mr Lai and the other colleagues here. You know, if this is really a viable operating business that is deserving of a listing on the Hong Kong Stock Exchange, why am I not seeing any members of the management team? Where is the CFO? Where is the CEO? Where is this missing Chairman? Have you had any contact with the missing Chairman? Who is actually running the business? A real business needs to be properly managed thank you.

(2) Following the answer to that question given by Mr Lai, Dato' Cheah further said:

> Thank you again, Chairman. I just want to express my concern at this hearing that I am worried about latent potential conflicts of interest in such situations where the Joint Provisional Liquidators, who have an interest in earning fees on the Company, are running the Company, but we are the Stock Exchange. Our interest is to have listed companies of high-quality, properly managed and that are good for our investors who make use of our Stock Exchange. So, I am concerned about the situation where the two of us may not have the same interest. That is just a point I want to make.

(3) Immediately following that, the Chairman of the LAC, Ms Anita Fung said:

> Thank you. On Dato' Cheah's point, actually I have a question that I would want to seek some information. For my be other Committee members' information, may we know the basis on which the Provisional Liquidators are appointed? And also, some information about the arrangement of fees or charges without disclosing anything that is not disclosable or appropriate. Thank you.

65. On those passages – which I shall call the first question and the combined second question – Mr Pun makes the same submissions as are set out in the Form 86. He says the JPLs were properly appointed, and were given full powers as provisional liquidators of the Company and the powers of the directors of the Company have ceased. That information was clearly set out in an appendix to the Company's written submissions provided for the LAC Hearing. Further, the JPLs are subject to the supervision of the court, as they are actually officers of the court. There was, therefore, simply no or no reasonable basis for either member of the Committee to raise the queries they did, especially the JPLs' "interest in earning fees".

66. Mr Pun further submits that Dato' Cheah's expression of worry about latent potential conflicts of interest was tantamount to an attack on the professional integrity of the JPLs, including Mr Lai who was the Company's representative at the LAC Hearing. So, given the insidious nature of bias and that it operates on a subconscious level, Mr Pun submits that a fair-minded and informed observer would reasonably conclude that there was a real possibility that the LAC's members' minds (or at least the minds of two of the three of them) would not be open to persuasion on the viability of the resumption proposal put forward by the JPLs on behalf of the Company.

67. Mr Pun places particular reliance on §§61-64 of *Falcon CA*, where he says the Court of Appeal made observations in a comparable context, in a case where it was held that the Judge's criticism of counsel and solicitor was an attack on their professional integrity, not merely their professional skill. Mr Pun submits that the observations apply with even greater force in the present case, because:

(1) this Court is deciding in the first instance whether there was apparent bias by applying the relevant legal principles (rather than being concerned with an appeal from a Judge who has exercised the discretion not to recuse himself);

(2) the LAC members are not, and are to be compared with, professional judges who swear an oath to do justice and are trained to and will differentiate between counsel and client and between counsel and the issues to be decided;

(3) if a judge makes criticisms without any discernible rhyme or reason or which are obviously unfair and unreasonable, this might be factored into what the fair-minded and informed observer might apprehend in terms of apparent bias; and

(4) the criticisms made by Dato' Cheah and Ms Fung are without any discernible rhyme or reason or are obviously unfair and unreasonable.

68. Mr Pun further submits that the fact that those were the only substantive questions raised by the LAC to the Company at the LAC Hearing – and that they were, he suggests, irrelevant to the viability of the resumption proposal or any of the RCs – reinforces the view of the fair-minded observer that the LAC's mind was closed to persuasion, and that the LAC's ability impartially to adjudicate upon the JPLs' submissions was affected by the view it had taken on the JPLs.

69. Mr Dawes submits in response that the questions raised show precisely the opposite of the suggestion that they were not open to persuasion. He says the fact that they raised such questions suggest that they wished to give the Company the opportunity to clarify and explain its position.

70. Though Mr Dawes did not draw specific attention to Mr Lai's response to the questions, the transcript shows that Mr Lai did respond, and did so in some detail and at some length. Though the transcript can be read for the full responses, in summary Mr Lai:

(1) answered the first question (in an answer which occupies half a page of the transcript) by explaining that:

(a) the full power of the Board now rests with the JPLs, so that the JPLs are the ultimate management of the Board, but in the resumption proposal have a proposed nominee in the Board;

(b) the CFO is the same person who has been with the Company since 2015, and the senior financial team in the Mainland are still there;

(c) as a mine, they need to continue to retain the necessary expertise, like the mine manager, safety engineer and other senior people, and they all continue with the Company in fulfilment of the local requirements for operation of mines;

(d) the coking part of the operations continues, in full fulfilment of the local requirements;

(e) so that the Company has "the full team";

(2) answered the combined second question (in an answer which occupies over three and a half pages of the transcript) by explaining that:

(a) he had been personally nominated by the Company, and similar to most insolvency practitioner practices in common law jurisdictions was, together with his fellow JPL, an officer of the Court, duty-bound to the Court to act in the best interests of the stakeholders, especially when the Company was then in an insolvent situation;

(b) they proposed to the Court the scheme of arrangement, so as to maximise recovery for the creditors, and because the restructuring is in the best interests of all the creditors as well as all the stakeholders;

(c) the restructuring process in a common law jurisdiction works in a particular way, and where the Company is insolvent and wants to restructure, then whoever is in control of the Company needs to prepare a scheme of arrangement to present to the Court;

(d) some detail of the particular liabilities, creditors, and participation in the creditors meeting which considered the scheme document;

(e) the time necessary to go through the various processes, including to obtain the Competent Person's Report to say, amongst other things, that the mine was a viable plan;

(f) without something viable, the Company would not be at the LAC Hearing;

(g) the role of the JPLs, and that once the scheme is done, all of the liability of the Company would become zero, meaning the Company with over $10 billion of assets becomes liability free;

(h) thereafter, the JPLs including him would be personally discharged, and they would hand the Company back to the new Board of Directors;

(i) the shareholders are financial institutions or industry participants who have had huge involvement, and have continued to provide funding to help the Company;

(j) the JPLs' fees have been quite similar to the legal profession, and the JPLs had prepared bills regularly provided to the Bermuda Court for approval and reviewed by creditors, with the fees charged on an hourly basis fee scale.

71. Following those full responses, the transcript identifies no further questions from members of the Committee. Instead, the representatives were invited to make any final oral submissions.

72. I disagree with Mr Pun's suggestion that the questions were irrelevant to the issues which the LAC had to decide. It seems to me that the first question was relevant to a determination whether the Company had a viable and sustainable business, including by reference to the identity and expertise of the persons managing the business (and of those who would in future manage the business, it being assumed that the JPLs would in due course cease to be involved). Mr Lai clearly understood the purpose of the question and provided a full response to it.

On the face of the transcript, and the LAC Decision itself, the response was apparently understood and accepted.

73. As to the second line of questioning, Mr Dawes says that the Exchange has pointed out in its evidence that it is well known that parties associated with listed issuers which have been suspended from trading may try to take advantage of the economic value of the 'listed shell' by engaging in a reverse takeover or backdoor listing. Hence, questions about the JPLs' fee arrangements were, as a matter of objective analysis, relevant to such regulatory concerns. Whilst I accept that the Exchange's evidence on this point does not come directly from any member of the LAC, to an extent justifying Mr Pun's description of it as an attempted *ex post facto* justification, against the matters which would have been known to the members of the LAC, I do not think it was irrelevant to have asked a question to elicit information as would potentially remove any regulatory concern. Mr Pun – including by reference to Mr Lai's evidence – submits that there was really no evidence as would have given rise to any such concern in this case, where all the available evidence before the LAC demonstrated that the Company was focused on reviving its earlier business in coking and coal mining. On the other hand, I accept that it was part of the context that members of the LAC would have been aware of potential concerns arising in the market, and it was the answer given to the question which identified that in this case there was certainly no evidential basis as might support any concern over reverse takeover or backdoor listing. I do not accept that raising a question about a potential conflict of interest amounts to an attack on the professional integrity of the JPLs. If Mr Lai himself might have bristled at the line of questions – though that is not in any way shown by the transcript – that is beside the point, when focus is on the

fair-mined and impartial observer. In any event, following a full and detailed answer, and by reference to the LAC Decision, it appears that any possible concern was clearly dispelled by Mr Lai's answer.

74. I do not accept the suggestion that bias is apparent from the fact that any concern about reverse takeover or backdoor listing was never brought up by the LAC members during the LAC Hearing, so that if there was such a real concern it would have been only more questionable if the LAC had such serious suspicion but failed to bring that up for the Company to give its response. Whilst I agree that if the LAC Decision were to have been based on such a concern, then a proper opportunity to meet it directly should have been provided. But the LAC Decision shows that it was not in any way based on such a concern, on the face of the transcript because any such concern was demonstrated by Mr Lai's answer to be one which should not arise in this case.

75. When considering allegations of apparent bias, it is to be presumed that the fair-minded observer would have observed the entirety of the LAC Hearing. The observer would have seen and heard the questions and the answers, and would have viewed them within the totality of the submissions and exchanges at hearing. In this case, the overall transcript of the hearing does nothing to lend any support for the allegation of apparent bias.

76. I do not think that it is reasonably arguable that a fair-minded and informed observer would have concluded on the facts of this case that there was a reasonable apprehension of bias.

G. Ground 1(c) – Fair and Adequate Opportunity to Present Case

77. On this aspect of the alleged procedural impropriety, Mr Pun refers to the Rule 2B.11(7) – see above – which affords the issuer the right to attend the hearing and to make submissions. He also refers to the common law rules on procedural fairness, which I do not think are substantially open to dispute.

78. Indeed, it is trite that a person who is entitled to be heard orally must be allowed an adequate opportunity of putting his own case, and his right to be heard must not be stultified by constant interruptions. The decision-maker is obviously obliged fairly to listen to the contentions of all persons entitled to be represented at the hearing. I accept that where an oral hearing takes place, the assumption must be that an oral hearing has the potential to make a difference. Therefore, I also readily accept that there can be real advantages or benefits of oral hearings of the sort canvassed by Cheung CJHC (as Cheung CJ then was) in *ST v Betty Kwan* [2014] 4 HKLRD 277 at §§46-51.

79. Those benefits include flexibility of a sort not always possible in written submissions, from their nature. I would add that flexibility is available to the decision-maker as well as to the person making oral submissions, which is why the now CJ emphasised the benefit of a more focused hearing concentrating on the real issues and arguments involved. I also accept that where matters involving evaluation and judgment, oral arguments might be a better means of representation than written submissions. But the evaluation and judgment in this case was to be deployed (at least in part) in relation to resumption proposals, which are necessarily explained on paper and which ought to require little oral elaboration or clarification.

80. Further, the standards of procedural fairness are not immutable and depend upon the facts and circumstances of each case. Indeed, it seems to me that a fair and adequate opportunity to present one's case may vary between (1) the situation where there has been the opportunity to provide full written submissions in advance of the oral hearing, which will also have been read and considered by the decision-maker in advance of the oral hearing, and (2) the situation where there are no prior written submissions, but only oral submissions at the hearing. This case deals with the first situation. In such a situation the fair and adequate opportunity to present one's case includes the opportunity afforded by the combination of full written submissions and subsequent oral submissions.

81. Mr Pun submits that the Company was not afforded a fair and adequate opportunity to present its case, because first, when the LAC Hearing started, and after the housekeeping matters, Ms Fung immediately said:

> I would like to remind the parties that the review procedures are designed to be primarily by way of written submissions exchange between the parties prior to the hearing. The principal purpose of the hearing is to allow the [LAC] an opportunity to ask questions and to seek clarification on relevant matters. So, please keep oral submissions succinct and limited as far as possible to matters not adequately covered in the written submissions.

82. With respect to Mr Pun, I think any criticism of that passage is utterly misplaced. Particularly where the parties have had an opportunity to file full written submissions in advance, every oral submission made to any tribunal should, in my view, be succinct and limited as far as possible to matters not adequately covered in the written submissions. Indeed, whilst properly encouraging a succinct approach,

Ms Fung specifically left open to oral submission matters which were not thought by the maker of the submission to be adequately covered already in the written submissions previously filed. In this regard, I note that the Company filed three sets of written materials, including one filed only on the date of the hearing.

83. Mr Pun further criticises Ms Fung for asking, when first inviting the Company to make submissions, if the Applicant wished "to make any *supplementary* oral submissions" (Mr Pun's emphasis). Again, the criticism of the word "supplementary" is utterly misplaced. Simply as a matter of description, the oral submissions were supplementary to the full written submissions previously provided and considered.

84. Mr Pun's next criticism relates to when Mr Lai started by saying he had "to make a slightly more comprehensive submission to facilitate the Committee members and to fully understand the background and the development of the case", Ms Fung interrupted him and asked him to "just focus on the information that has not been submitted previously". With respect, I am not sure that criticism is fairly raised in the context of the full exchange, which was as follows:

> Mr Lai: … Please bear with me today. I have to make a slightly more comprehensive submission to facilitate the Committee members and to fully understand the background and the development of the case. I would first start the basic background of this Company, Up Energy, and then I will go through some development in the last few years, because I have involved in the case since 2016. And then I will finally address some of the issues which we consider in the previous hearing which …
>
> Ms Fung: Mr Lai, may I interrupted? Mr Lai, may I interrupt.
>
> Mr Lai: Yes.

> Ms Fung: You might just focus on information that has not been submitted previously. So, about the Company background part, unless there is something new.
>
> Mr Lai: OK. Yes, understand.

85. Clearly, in context, all that Ms Fung was doing was informing Mr Lai that there was no need to go through the background part relating to the Company, unless there was something new, and it would be better to focus on information that has not been submitted previously. Far from being in any way unfair, I would have thought that was a typically fair approach. The "basic background" which Mr Lai was proposing to deal with was, unless there was something new, well understood. Being told that there was no need to deal with that aspect, but instead to focus on new matters, was helpful. It cannot reasonably be described as denying the Company a fair and adequate opportunity to present its case.

86. Therefore, I reject Mr Pun's submission that the Company was only able to make oral submissions on the new information supplied to the LAC on the day of the LAC Hearing, and later to give an "overall summary" on the "overall position" (notwithstanding that Ms Fung used the phrase "overall position" three times). In context, I think Ms Fung was pointing out that, having heard submissions on the new materials, Mr Lai was being invited to address the position overall. The transcript shows that, following a request made by Ms Fung to Ms Kan as to how to deal with the new information, and Ms Kan's indication that the Listing Division was happy to proceed without any short adjournment to consider the papers, there was the following exchange:

> Ms Fung: Thank you. OK. So, may I now ask the Company to give a summary of the position, if any further addition?

Mr Lai: OK.

Ms Fung: On the overall position. On the overall position. On the overall position.

Mr Lai: On the overall position, in respect of?

Ms Fung: Yes. Mr Lai, yes, we just heard that your additional submission as per se, the information, so may I now have your overall summary, if you have a summary of the …?

Mr Lai: OK. OK. [further submissions]

87. If one reads the transcript of the submissions made by Mr Lai, his submissions do not seem to me to have been limited as now suggested. In any event, it was obviously fair to ask Mr Lai to address the new matters which might lead to a change of view being taken by the LAC in the light of developments since the decision under review taken only on earlier matters as were before the LRC. He was then invited to address the overall position.

88. It is a leap of logic for Mr Pun to suggest that because Mr Lai was invited to make oral submissions on matters not adequately covered in the written submissions, that somehow meant the oral hearing "virtually made no difference and gave the Company no meaningful chance of persuading the LAC" (Mr Pun's words). I reject the suggestion.

89. Nor I do think the Company gains any assistance from looking at what it says is the contrasting position of the submissions made by Ms Kan on behalf of the Listing Division at the LAC Hearing.

90. The Company's criticisms also need to be seen against the background that the Company had had the benefit of seven prior *de novo*

considerations of its resumption proposals by the Listing Division and various committees, and that even by the date of the LAC Hearing the Company had not fulfilled the RCs and was requesting a further extension of time, and that there were no factual disputes to be resolved.

91. Ground 1(c) is not reasonably arguable.

92. Ground 1 as a whole, comprising the three criticisms that the LAC decision is tainted with procedural impropriety, is not reasonably arguable.

H. Ground 2 – Constitutional Challenge

93. This ground is based upon the submission that the LAC Decision constitutes a disproportionate interference with the right to property of the Company, which right exists under Articles 6 and 105 of the Basic Law ("BL6" and "BL105"). The interference is said to arise in that: (1) it is more than is necessary to accomplish any legitimate aim; and (2) it fails to strike a reasonable balance between the societal benefits of the encroachment and the inroads made into the right to property of the Company, resulting in an unacceptably harsh burden on the Company.

94. In short, Mr Pun submits that the restriction or limitation of the right property must satisfy the well-known four-step proportionality test establish in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

95. Mr Pun further relies on the decision of *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 at §6.18 in support of the proposition that property is not confined to tangible assets, but includes

any right which has an economic value so that the word "property" includes a chose in action. Therefore, it is suggested that (1) the Company's listing status is its "property", and the LAC Decision in effect killed the Creditors' Scheme of Arrangement which would otherwise have a real prospect in saving the Company's listing status, and (2) that is more than is necessary and results in an unacceptably harsh burden on the Company.

96. However, I held in *Longrun Tea Group Co Ltd v The Stock Exchange of Hong Kong Ltd* [2021] HKCFI 1883 at §108-113 – referencing my earlier decision in *Kwok Hiu Kwan v Convoy Global Holdings Ltd* [2021] HKCFI 814, as well as (amongst others) the *Interush* decision – that, however generously one approaches the concept of "property" for the purposes of BL105, the listing status of the Company is not within that concept. In that decision, I held that the case of *China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338 – on which Mr Pun now relies – was dealing with a fundamentally different issue, and one which did not simply translate to the idea that the listing status is a form of "property" within BL105. I held that it is not within the concept of "property" at all, and certainly something that cannot properly be described as the "property" of the Company so as to trigger BL105. I further held that, even if it is an asset, the listing status is not property which belongs to the Company. Even in a reverse takeover scenario, the real value of the listing status is to creditors and contributors of the Company, as the value would essentially be taken as a means of removing or resolving the relevant debts upon the restructuring arising out of the insolvency, and the relevant scheme.

97. I agree with Mr Dawes that these comments and propositions apply equally to the present case. Mr Pun's attempt to distinguish the *Longrun* case from the present case is not persuasive. Mr Pun says that:

(1) in the present case, a scheme of arrangement was approved by the requisite statutory majorities of the creditors of the Company at a meeting convened for that purpose, and sanctioned by the Bermudan Court in November 2019;

(2) the creditors scheme has nothing to do with any reverse takeover scenario;

(3) instead, upon implementation of the scheme, all the Company's financial liabilities will be converted to equity of the Company;

(4) but in the event that the Company is delisted, the scheme shall not become effective given one of the conditions precedent to the scheme would require the resumption of trading in the shares of the Company on the Main Board;

(5) therefore, the listing status is vital to the scheme and thus a right which has tremendous economic value to the Company.

98. However, whilst I see that argument, I do not think it assists the Company. To say that the listing status has an impact on the prospect of success of the scheme is simply to state the obvious. So, even if the maintenance of the listing status is a precondition to the contemplated scheme in this particular case, it is still not a right to property of the Company. As Mr Dawes put it differently, whether or not a certain right can properly be described as "property" within the meaning of BL105 is a question of law, which cannot turn on the specific transactions contemplated by the individual company in question. A

listing status cannot amount to "property" because the company in question contemplates a scheme, but not amount to "property" when another company has no such scheme in contemplation.

99. In further response to that point, Mr Pun referred to *R (on the application of Kides) v South Cambridgeshire DC* [2003] 1 P&CR 19 298, at §§132-136, and submitted that even if the listing status does not belong to the Company, it has economic value to the members and creditors, so that the Company has sufficient interest in bringing the challenge to protect the interests of the members and creditors. Where the challenge made is a constitutional challenge, anyone who has sufficient interest can mount the challenge. But, as the passage referred to by Mr Pun makes clear, what was being dealt with was the issue of standing. I do not think that changes the approach to what is or is not property for the purpose of triggering BL105.

100. In my view, the right to property under BL6 and BL105 is not engaged by the LAC Decision.

101. But, in any event, I also agree with Mr Dawes that (if the analysis is relevant) there was no disproportionality. The LAC Decision – made pursuant to the then-prevailing delisting procedure under the Listing Rules – was rationally connected to the legitimate aims identified in the legislation. As I noted in the *Blockchain* case at §36, the build-up of issuers whose shares have been suspended for long periods, with no certainty as to when suspension would be lifted or the issuer delisted, would prevent the proper functioning of the market and undermining its quality and reputation. Further, the proper application of the delisting procedure under the Listing Rules serves the objectives of maintaining a

fair, orderly and informed market, and preserving the quality and reputation of the Hong Kong stock market.

102. It does not assist the Company for Mr Pun to refer to a 'chicken and egg' situation, which rather smacks of a challenge to the merits of the LAC Decision, rather than to the decision-making process. In this particular case, the Company had almost 5 years from the commencement of suspension of trading up to the LAC Hearing to put forward a viable resumption proposal. The Company had no less than 8 separate opportunities to demonstrate the submission of a viable resumption proposal. But, the Company failed to submit a viable resumption proposal, and was not able to demonstrate compliance with the RCs imposed, not just one of them. Even at the LAC Hearing, the Company was seeking a further 3- to 6-month period of time.

103. But in any event, in my view, a decision to delist a listed issuer after the remedial period has lapsed, and all of the review procedures have been exhausted, is proportionate.

104. I do not think Ground 2 is reasonably arguable.

I. Result

105. In the circumstances, the application for leave to apply for judicial review is refused.

106. I see no reason why costs should not follow the event. The Company has in effect had a substantive hearing of its application. Therefore, the Company shall pay the costs of the Exchange to be taxed if not agreed, with certificate for two Counsel. As I did not hear argument

on costs, that will be an order *nisi* in the first instance, and will become absolute after 14 days if no variation application is made. Any variation application will be dealt with on the papers.

(Russell Coleman)
Judge of the Court of First Instance
High Court

Mr Hectar Pun SC and Mr Anson Wong Yu Yat, instructed by Chungs Lawyers, for the applicant

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