

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

3 CAUSE NO. FSD 110 OF 2013(AJJ)

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6 Before The Hon. Mr. Justice Andrew J Jones QC
7 In chambers, 21st and 22nd August 2013

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10 IN THE MATTER OF SECTION 93 OF THE COMPANIES LAW (2012
11 REVISION)
12 AND IN THE MATTER OF ORDER 29 OF THE GRAND COURT RULES

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16 BETWEEN:

17 SIBERIAN MINING GROUP LIMITED

18 Plaintiff

19 AND

20 KEYSTONE GLOBAL COMPANY LIMITED

21 Defendant

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25 **Appearances:** Mr Nigel Meeson QC and Mr Ben Hobden of Conyers Dill & Pearman
26 for the Plaintiff

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29 REASONS

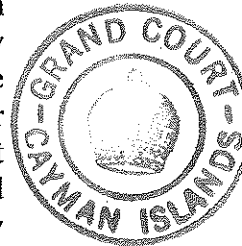
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31 1. This is an *ex parte* application by Siberian Mining Group Limited (“SMG”) for an
32 interlocutory injunction pending the hearing of an originating summons by which
33 it seeks a permanent injunction to restrain Keystone Global Co Ltd (“Keystone”) from
34 presenting a creditor’s winding up petition based upon a statutory demand
35 dated 1st August 2013. The principal evidence in support of the application
36 comprises two affirmations made by Lim Ho Sok who is an executive director
37 and chairman of the company’s board of directors.
38
39 2. SMG is a company incorporated under the Companies Law whose shares are
40 listed on the Hong Kong Stock Exchange. Mr Sok’s affirmations say very little
41 about the nature of its business, save that it owns and operates a coal mine in
42 Russia. By a written Coal Sale and Purchase Agreement dated 20 June 2012 and
43 made between SMG and Keystone, SMG agreed to grant to Keystone an
44 exclusive right to be supplied with various grades of coal produced in Lot 1 of the
45 Lapui Mines (or other sources in Russia) and an exclusive right to distribute the
46 coal in Korea and such other territories as may be mutually agreed from time to

1 time. SMG originally agreed to supply Keystone with 100,000 metric tonnes of
2 coal each year for five years commencing from November 2014. Pursuant to
3 Clause 1(1) of the contract, Keystone agreed to pay a deposit of US\$3.5 million,
4 which it duly paid. By a supplemental agreement made as of 20th December 2012,
5 the amount of coal to be supplied was reduced to 88,500 metric tonnes each year,
6 with the result that the amount of the deposit was agreed to be reduced to US\$3.1
7 million and SMG duly repaid \$400,000 to Keystone. As I understand Mr Sok's
8 evidence, the position today is that SMG holds the deposit of US\$3.1 million
9 which will be applied in discharge of the price payable by Keystone in respect of
10 future deliveries of coal commencing in November 2014.
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12 3. The Agreement is expressed to be subject to various conditions subsequent. By
13 Clause 4(1)(b), SMG is under and obligation to repay the whole of the deposit
14 plus interest at 5% per annum "in case of SMG or a third party's filing for SMG's
15 bankruptcy, insolvency, rehabilitation, etc., or existence of such risk." On 1st
16 August 2013 Keystone served a statutory demand on SMG by which it alleges
17 that the deposit and accrued interest is now presently due and owing by reason of
18 the fact that this condition has been fulfilled. The facts and matters relied upon in
19 support of this conclusion are set out in a clear and concise way in the statutory
20 demand itself. By an announcement published on the Hong Kong Stock Exchange
21 website on 22nd April 2013, SMG stated that it had received a demand for
22 repayment of loans in the sum of HK\$14.5 owing to First Glory Limited and that
23 it did not have sufficient cash to make payment. Keystone's statutory demand
24 goes on to say that in the light of this announcement (and in the absence of any
25 subsequent announcement reflecting a material change of circumstances)
26 Keystone considers that Clause 4(1)(b) of the contract has been engaged.
27

28 4. The Agreement is written in English, but I have not overlooked the fact that it is
29 expressed to be governed by the laws of the Republic of Korea and that the parties
30 have irrevocably submitted to the jurisdiction of the Seoul Central District Court
31 in respect of disputes arising out of the contract. However, in the circumstances of
32 this case I cannot decide whether there is a bona fide and substantial dispute about
33 the existence of the debt relied upon in Keystone's statutory demand without
34 taking a view about the meaning and application of Clause 4(1)(b). It seems to me
35 that Keystone had an arguable case for asserting, as at 22nd April 2013, that there
36 was a "risk" that some form of bankruptcy, insolvency or rehabilitation
37 proceeding may be commenced against SMG. It seems to me that on its true
38 construction Clause 4(1)(b) is only engaged if it can be said that the risk is real,
39 not merely fanciful or speculative. The risk must exist in the sense that there is a
40 real likelihood that a proceeding will be commenced in the immediate or
41 foreseeable future. SMG's directors must have considered the risk to be a real
42 one in April 2013 otherwise they would not have made the stock exchange
43 announcement.
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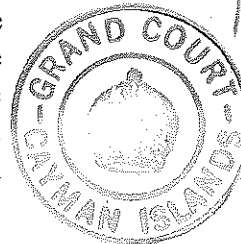
45 5. However, four months have now elapsed since that stock exchange announcement
46 was made. No insolvency proceeding has been commenced by First Glory



1 Limited or any other creditor. According to Mr Sok's first affirmation, a great
2 deal has happened in the meantime which bears upon SMG's financial condition
3 and the risk that it might become insolvent. Suffice it to say that with the passage
4 of time, the risk of insolvency proceedings being commenced by First Glory
5 Limited appears to have diminished. Mr Sok admits that SMG is still in financial
6 difficulty but he explains at length why its board of directors consider that it is not
7 insolvent. Most importantly for present purposes, his evidence is that the day
8 before yesterday (20th August) SMG reached an accommodation with First Glory
9 Limited by which it agreed not to proceed to wind up SMG before the end of
10 December 2013 on the condition that there is no winding-up petition filed against
11 the company in any jurisdiction and that a repayment proposal can be agreed by
12 the end of the year. It seems to me that it is at least arguable that this agreement
13 undercuts the statutory demand. It can no longer be said that there is a real and
14 present risk that this creditor will commence insolvency proceedings. To put it
15 another way, it may be said that whatever risk existed as at 22nd April (when the
16 stock exchange announcement was made) or as at 1st August (when the statutory
17 demand was served) has been cured, at least until the end of the year.
18

19 6. Keystone's answer to this point is to be found in its attorney's letter of 16th
20 August 2013. Its argument is that Clause 4(1)(b) was triggered from the date of
21 SMG's first knowledge of its risk of insolvency proceedings. This is said to have
22 been on the 19th April, being the date upon which it first became aware of the
23 facts and matters which gave rise to the need to make the stock exchange
24 announcement on the 22nd April. As I understand it, the argument is that the
25 obligation to repay the deposit arose at that time and is not capable of being cured
26 or reversed by any subsequent event. I think that this is an arguable interpretation
27 of the Agreement.
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29 7. It is well established as a matter of Cayman Islands law that the winding-up
30 jurisdiction of the Court may not be invoked by a purported creditor in respect of
31 a debt which is disputed on bona fide and substantial grounds. (*Re Times Property*
32 *Holdings Limited* 2011(1) CILR 223). In order to justify granting an interlocutory
33 injunction restraining the presentation of a winding up petition by Keystone based
34 upon this particular statutory demand, the onus is on SMG to satisfy the Court
35 about the following matters. First, SMG must demonstrate a good arguable case
36 that the cause of action pleaded in the originating summons falls within one or
37 other of the categories specified in GCR Order 11, rule 1, failing which it is not
38 entitled to leave to serve it out of the jurisdiction. I am satisfied that it does fall
39 within sub-rule (b) because it discloses a cause of action for a permanent
40 injunction to restrain Keystone from doing an act in this jurisdiction, namely the
41 presentation of a winding up petition. Second, the Court must also be satisfied
42 that the originating summons and supporting affidavits disclose a serious issue to
43 be tried on the merits. In the context of this case, this means that I must be
44 satisfied that there is a bona fide and substantial ground for disputing the
45 existence of the debt relied upon in the statutory demand, such as to justify the
46 grant of a permanent injunction. This is a mixed question of law and fact. It turns

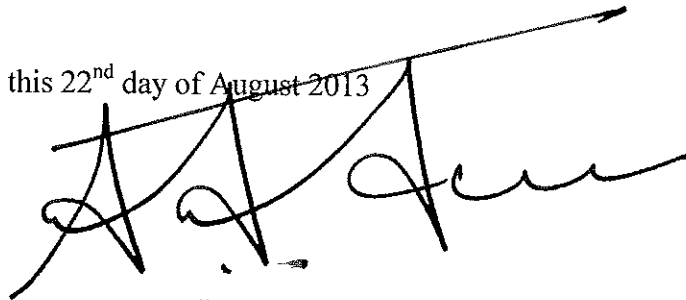


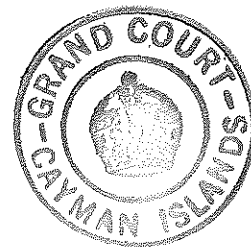
1 upon the true construction of the Agreement which is expressed to be governed by
2 Korean law. Whilst the basic facts are unlikely to be in dispute because Keystone
3 is relying upon SMG's own statements published through the stock exchange, the
4 conclusion to be drawn from these facts and their application to Clause 4(1)(b) of
5 the Agreement is open to legitimate argument. For the reasons which I have
6 explained, I think that there is a bona fide ground for arguing that the obligation to
7 repay the deposit does not presently exist with the result that the presentation of a
8 winding up petition based solely upon this statutory demand would be an abuse of
9 the process.

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11 8. Finally, I should add that I was satisfied that the circumstances justified hearing
12 SMG's summons as a matter of urgency without having served Keystone. The
13 matter is urgent because the 21 day period specified in the statutory demand
14 expires today. Keystone has instructed local attorneys who have engaged in
15 correspondence about this matter over a period of time. Copies of the documents
16 (except for Mr Sok's second affirmation) were delivered to them on Monday.
17 They were instructed not to accept service and so chose not to participate in the
18 hearing. Keystone was not prepared to give any undertaking to refrain from
19 issuing a petition pending a resolution of the issues about the true construction
20 and application of Clause 4(1)(b) of the Agreement. In these circumstances it is
21 reasonable to infer that the Keystone will present a winding up petition in the
22 immediate future unless restrained by order of this Court.

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24 9. For these reasons I grant the injunction sought by SMG.

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27 Dated this 22nd day of August 2013

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34 **The Hon Mr. Justice Andrew J. Jones QC**
35 **JUDGE OF THE GRAND COURT**