IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 161 of 2018 (IMJ)

IN THE MATTER OF SECTION 94 OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

IN CHAMBERS

Appearances:	**Mr. Tom Lowe QC instructed by Ms. Gemma Lardner of Ogier for the Petitioner** **Mr. Vernon Flynn QC instructed by Mr. James Eldridge and Mr. Adrian Davey of Maples and Calder for the Company.**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**10 and 11 October 2018**
Judgment Delivered in Draft:	**19 October 2018**
Finalised Judgment Circulated:	**24 October 2018**

HEADNOTE

Application to strike-out - just and equitable contributory winding-up petition - abuse of process – whether alternative remedies - whether unreasonable not to pursue-collateral purpose – Application for appointment of joint provisional liquidators – Whether Misrepresentation or Misleading by Petitioner on inter partes application – effect thereof.

JUDGMENT

1. China Shanshui Cement Group Limited (the "**Company**") is a Cayman Islands exempted company established on 26 April 2006 under the laws of the Cayman Islands.

2. The registered office of the Company is situated at Tricor Services (Cayman Islands) Limited, P.O. Box 10008, Willow House, Cricket Square, George Town, Grand Cayman, Cayman Islands.

3. The Company's principal place of business in Hong Kong SAR is Room 2609, 26/f, Tower 2, Lippo Centre, 89 Queensway, Admiralty and its principal place of business in the People's Republic of China ("**PRC**") is Shanshui Industrial Park, Gusha Town, Changqing District, Jinan, Shandong, PRC. The Shanshui Industrial Park address is the Group's operational headquarters ("**Operational Headquarters**").

4. The Company's Memorandum of Association provides for unrestricted objects. The main object for which the Company was established was to act as a holding company for an international corporate group which is principally engaged in the production, distribution and supply of cement and related construction products primarily in the PRC. In 2016 and in 2017 the Company was the 6th largest cement company in the PRC when measured by annual production capacity.

5. The authorised share capital of the Company is US$100 million divided into 10 billion ordinary shares of US$0.01 each.

6. The Petitioner, Tianrui (International) Holding Company Limited ("**Tianrui**") with registered office in the British Virgin Islands, is a major shareholder of the Company. The Petitioner is also a creditor of the Company in respect to a number of loans made to the Company and, as a result of guarantee liabilities that it has undertaken in respect of the Company, it is additionally a contingent creditor.

7. On 30 August 2018 Tianrui presented a petition to wind up the Company in accordance with section 92(e) of the ***Companies Law (2018 Revision)*** (the "***Law***"), on the grounds that it is just and equitable for the Company to be wound up.

8. In the Petition, it is stated that, although the Company has failed to release audited accounts for the current reporting period, Tianrui believes that the Company and the Group are solvent and that upon liquidation there will be a surplus for shareholders. However, in its written submissions, Tianrui now say that the Company may be of doubtful cash flow solvency, though it is not Tianrui's case that the Company is balance sheet insolvent.

9. On the 10 and 11 October 2018, the following applications were listed for hearing:

(a) The summons dated 6 September 2018 issued by Tianrui pursuant to section 104(2) of the ***Law***, in which Tianrui sought the appointment of Margot MacInnis, David Bennett and Barry Tong of Grant Thornton as joint provisional liquidators ("**JPLs**") of the Company. The Company opposes the application to appoint JPLs and opposes the JPLs nominated by Tianrui. Whilst the Company continued to oppose this application, there has now been agreement from Tianrui that they have no objection to the Company's nominees of FTI being appointed JPLs, should the Court be minded to grant the application. This contested application was heard and judgment was reserved.

(b) The summons dated 11 September 2018 issued by the Company seeking an order that the Petition be struck out ("**the Strike Out Summons**") on the basis that the Petition is an abuse of the process of the Court. This application was heard and vigorously opposed by Tianrui and judgment was reserved.

(c) The summons dated 21 September 2018, filed by the Company seeking a validation order pursuant to Section 99 of the Law, to make certain payments. After hearing brief arguments, principally about whether certain undertakings were to be attached to the Validation Order sought, the substance of the Order having been, in essence, not opposed by Tianrui after the taking of instructions, the Court ruled and made a Validation Order in terms discussed at the hearing, without attaching the undertakings sought by Tianrui.

(d) The summons dated 9 October 2018 filed by Tianrui seeking to Strike Out the Strike Out Summons on the basis that that application involves a prolonged and serious argument such that it is inappropriate to proceed with the hearing of the Strike Out Summons. After discussion between both Leading Counsel as to the approach that was to be taken on the Strike Out Application, Tianrui's Summons was not proceeded with.

10. For completeness, I note that Tianrui has filed an ancillary petition in the Hong Kong Court and on 11 October Cayman time, I was advised by Counsel that Lam J made a validation order on 10 October Hong Kong time, in similar terms to that which I made here.

11. This is my Judgment on the Strike Out Summons, and on Tianrui's Summons to Appoint JPLs.

The Strike Out Summons

The background

12. At paragraph 6 of the Petition, Tianrui states that it believes that as at the date of the Petition the shareholding in the Company is made up as follows:

Shareholder	Number of Shares	% of Shares in Issue
Tianrui	951,462,000	28.16
China Shanshui Investment Company Limited	847,908,316	25.09
Asia Cement Corporation	902,914,315	26.72
China National Building Material Co. Ltd.	563,190,040	16.67

Other Shareholders	113,665,569	3.36
Total	**3,379,140,240**	**100.00**

13. The most significant of the Company's subsidiaries is Shandong Shanshui Cement Group Company ("**Shandong Shanshui**") which directly wholly owns the group's operating subsidiaries and therefore controls the source of the group's revenue and fixed assets.

14. There has been a long history of shareholder disputes and take-over battles amongst some of the major shareholders. It is common ground between Tianrui and the Company that there is a complex and voluminous history of disputes between the four major shareholders, who are:

(i) Tianrui with 28.16% of the issued share capital. Tianrui is also a competitor of the Company in the Chinese cement market. In 2016 Tianrui was the ninth largest cement company in the PRC.

(ii) Asia Cement Corporation ("**Asia Cement**"), which controls 26.72% of the shares in the Company. Asia Cement is also a competitor of the Company in the Chinese market. In 2016 it was the tenth largest cement company in the PRC.

(iii) China Shanshui Investment Company Limited ("**Shanshui Investment**"), which holds 25.09% of the shares in the Company. Shanshui Investment is the vehicle by which the employees of the Company's underlying business participated in the flotation of the Company.

(iv) China National Building Materials Co. Ltd ("**China National**") which holds 16.67% of the Company. China National is a joint stock limited company and the PRC state is a significant shareholder in it. China National is the largest cement business in China and the largest cement producer in the world.

15. It is common ground between the parties that in November 2014 the PRC government issued an emergency decree prohibiting any expansion of capacity and development of new projects in the cement industry. That decree significantly altered the competitive

landscape of the PRC cement industry, as cement producers could no longer expand their capacity through development of new projects. Instead they could only resort to corporate activities such as mergers and acquisitions if they wished to expand.

16. On 4 July 2008 the Company's shares were listed for trading on the main board of the Stock Exchange of Hong Kong Limited ("**HKSE**'").

17. Rule 8.08 of the HKSE Main Board Listing Rules ("**Listing Rules**") requires an open market in listed securities which would normally require that at least 25% of the issuer's total number of issued shares be held by the public ("**the Public Float**").

18. China National acquired its shares in the Company under a subscription agreement that allotted and issued new shares in the Company to it on 3 November 2014.

19. In or around December 2014 Asia Cement acquired most of its shares in the Company from the open market.

20. In April 2015 Tianrui acquired its shareholding in the Company from the open market.

21. Trading in the shares of the Company was suspended on 16 April 2015 because the public float had fallen well below the 25% required for the Company's listing. The present deadline for the Company's taking remedial action to avoid delisting is 31 October 2018.

22. According to the Company, it is extremely unlikely that the 31 October deadline will be extended. Further, that if the free float is not restored by 31 October 2018, the Company says that it will almost certainly lose its listing, which will be severely detrimental to it. The Company further advised that a review hearing before the Exchange is due to take place on 18 October 2018 (although, as discussed below, on 16 October 2018 the Court was informed that the Listing (Review) Committee of the HKSE had adjourned that review hearing until after annual general meeting and extraordinary general meeting of

the Company to be held on 30 October 2018). Given the time critical nature of the circumstances, the Company encouraged the Court to reach an urgent decision.

23. This Court has previously been exposed to the shareholder disputes and bitter battle between warring factions for control of the Company, its fortunes, and its boardroom.

24. Since 2015, the Company has faced liquidity issues due to the highly leveraged nature of its balance sheet. On 10 November 2015 the Company made an application to the Grand Court to be wound up on the basis of cash-flow insolvency and for the appointment of JPLs. Tianrui and Shanshui Investment, jointly applied to the Court to strike out the Petition, taking a preliminary point that the Petition was an abuse of the process of the Court. The basis of the application was a technical jurisdictional one, that in the circumstances of the case, the directors had no authority or standing to present the Petition or to apply for the appointment of JPLs. The preliminary point succeeded and the Petition was struck out. My judgment in ***Re China Shanshui Cement Group*** was delivered on 25 November 2015 and is reported at [2015 (2) CILR 255].

25. In the meantime, behind the scenes, other battles had continued raging in the Courts of Hong Kong.

26. Indeed, since the 2015 Petition was struck out, as Mr. Lowe QC, who appears for Tianrui, points out at paragraph 16 of its Skeleton Argument ("**SKA**"):

> *"..., the Company has also been plagued by intense factional in-fighting among the shareholders of the Company since this time, with the Petitioner on one side, ACC and CNBM on the other, and CSI's position changing over time depending on who had control of its underlying shares and was appointed to its board. As the Company itself acknowledges in the Affirmation of Ms. Wu, this is contrary to the best interests of the Company, as "reputationally damaging information concerning the*

Company's shareholder disputes and corporate governance failures are well known to investors and the public."

The instant Tianrui Petition

27. Tianrui alleges that the affairs of the Company have been conducted with a lack of probity and Tianrui has justifiably lost confidence in the management of the Company.

28. One of Tianrui's main complaints in the Petition concerns what it says were improper issues of convertible bonds. The Company issued US$530 million of convertible bonds in August and September 2018 (the "**Bonds**" and the "**Bond Issue**"). Tianrui claims that it did so in circumstances which were bound to excite suspicion in the context of parties who have been warring in the manner in which they have. Tianrui maintains that there is ample basis for inferring that these transactions were on uncommercial terms (particularly the interest rates) and are not at arms' length and, if so, they were parties with whom Asia Cement and China National must have had some understanding as to control.

29. Tianrui contends that the purpose of the Bond issue was to dilute its shareholding so that it would be unable to resist special resolutions and hence a squeeze out merger by Asia Cement and China National in concert with others. It says that if proved, this would mean that the Bonds have been issued for an improper purpose. Further, that such conduct amounts to a lack of probity. At paragraph 36 of Tianrui's SKA it is stated: *"Whether this is so* [i.e. the Bonds were issued for an improper purpose] *will require investigation at trial of the state of mind of members of the Company's board."*

30. Tianrui also complains of a lack of sufficient information about the management of the Company, expresses its concern that audited financial accounts for the year ended 31 December 2017 have not been published, and asserts that an investigation by independent insolvency practitioners is required.

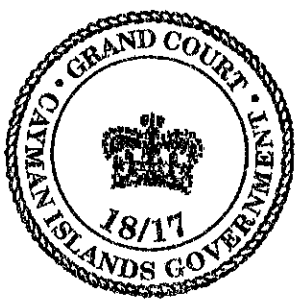
31. As is often the case in these types of matters, there are a number of moving parts. On 7 October 2018, after the dates at which it had been originally agreed between the parties that evidence would be filed, the Company made an announcement on the HKSE of a new transaction to transform the Bonds into shares. The Company announced its share trading resumption plan and convened the adjourned annual general meeting and an extraordinary general meeting (the "Meetings") to be held on 30 October 2018 to approve its share trading resumption plan.

32. Further, whilst the Court was working with the review hearing scheduled for 18 October 2018 in mind, the Court was informed by the Company's lawyers that the Company had made an announcement in Hong Kong on the HKSE on 16 October 2018 that the Company had applied to the Listing (Review) Committee of the HKSE to adjourn the review hearing until after the Meetings. Further, that the Company had received a notification letter from the Listing (Review) Committee on 16 October 2018 allowing the Company's request for adjourning the review hearing.

The Company's arguments on the Strike Out Summons

33. In its opening parry, the Company in its SKA, at paragraphs 2 and 3, asserts that:

> *"2. These proceedings arise from the Petitioner's cynical, misleading and destructive attempts to seize control of the Company to the detriment of the Company and its other shareholders.*
>
> .....
>
> *3. Since it first acquired a significant stake in the Company in the course of 2015, the Petitioner's misconduct has seriously harmed the Company...."*



34. The Company's arguments in favour of a strike out may be grouped under three main heads. These are (A) Tianrui's alleged misrepresentations in these proceedings; (B) The

existence of alternative remedies that the Company alleges Tianrui unreasonably failed to pursue; and (C) Improper Collateral Purpose.

(A) Tianrui's misrepresentations in these proceedings

35. It is the Company's position that Tianrui has failed to give an accurate account of the circumstances relating to the Company and its own conduct in relation to the management of the Company and its involvement in previous legal proceedings concerning the Company. These matters have been raised in the Company's evidence, in particular, the First Affirmation of Wu Ling-Ling, an executive director of the Company, filed 26 September 2018.

36. Mr. Flynn QC, who appeared for the Company, asserts that this is not simply a case of there being a disputed interpretation of facts. The Company makes the serious allegation that the evidence reveals systematic misrepresentation of the position and omitted material on the part of Tianrui from the Petition and the evidence filed in support of its application for the appointment of JPLs which it must know gives a highly misleading and inaccurate impression of the position.

37. According to the Company such an approach has been even more invidious given the way that Tianrui sought to bring about this hearing. The Company points to the fact that Tianrui filed its application seeking the appointment of the JPLs on 6 September 2018, claiming urgency and seeking an *inter partes* listing for as early as 14 September 2018. This request was refused by the Court. The Company urges the Court to, however, take the view that this appears to have been a failed attempt by Tianrui to (1) avoid the need for an *ex parte* hearing where it would have had an enhanced duty of full and frank disclosure; while (2) leaving little time for the Company properly to respond to the evidence.

38. Mr. Flynn made the submission that all parties have a duty not to mislead the Court, whether at an *inter partes* hearing or at an *ex parte* hearing. Heavy reliance was placed on

the decision of Flaux J in ***Boreh v Republic of Djibouti*** [2015] 3 All E.R. 577 at [224]. Mr. Flynn indicated that he appreciates that the instant case is different from ***Boreh*** in that the Company has been able to point out the misleading matters before any relief has been obtained by Tianrui. However, he argues forcefully that the fact that the Petitioner has provided an inaccurate and incomplete account of matters that are obviously of central relevance in determining whether or not to grant any of the drastic relief sought by Tianrui, should militate heavily against the granting of any such relief to it. Reference was made to the decision of Christopher Clarke J in ***Re OJSC Yugraneft*** [2009] 1 BCLC 298, at paragraph [107] as an example of a case in which the English Court made clear that the appointment of provisional liquidators would have been set aside and the underlying proceedings dismissed because the petitioner in that case misled the court. Mr. Flynn hastened to make it clear that no allegations of misleading or misrepresentation was being made against Tianrui's legal team in any shape or form. He also made clear that he appreciates that the duty he is describing is not the same as the duty of full and frank disclosure.

Tianrui's failure to inform the Court that its representative did not accept an invitation to join the Company's board of directors

39. The Company asserts that in the Petition and in the evidence in support of the summons for the appointment of JPLs, Tianrui gives the impression that it has been excluded from the present board of the Company and that as a result it has been deprived of information in relation to the Company's affairs so that some sort of "*investigation*" of the matters about which it complains is required.

40. Reference was made to the Second Affirmation of Li Xuanqi ("**Li 2**"), the Assistant of Tianrui's Chairman, filed 7 September 2018, at paragraph 68 where she states that:

"the Petitioner is currently excluded from the Board".

A number of other references are made to Li 2, including the following:

a. At paragraph 82 where she says that "*[w]hat the Petitioner did not know at the time (and the Company did not announce until 31 August 2018) was that whilst the Petitioner was waiting for a response that never came from HSF on 30 August 2018, the Company had entered into more subscription agreements.*"

b. At paragraph 90 where she says that "*the Petitioner has not seen the Further Subscription Agreements (and must rely again solely on an announcement prepared by the same Board the Petitioner is complaining about), the* [sic] *appear from the Company's announcements to have been entered into on similar terms to the First Subscription Agreement.*"

c. At paragraph 91 where she says that" *I do not understand why the Company would enter into such financial arrangements without disclosing the counterparties to the arrangement to the market*".

d. At paragraph 103(c) where she criticizes the present board for "*failing to meet minimum standards of transparency which shareholders of Cayman incorporated companies listed in the HKSE are entitled to expect (by, among other things, failing to disclose the names of the subscribers under the Further Subscription Agreements).*"

42. The Company's position is that from these and other matters it is clear that the complaint that Tianrui has been deprived of relevant information by the Company as a result of the appointment of the present board is a crucial plank of Tianrui's claim to be entitled to the relief it seeks.

43. The Company avers that, as a result of developments in proceedings in Hong Kong, in May 2018 the present board (which comprises two executive directors put forward by major shareholders and three non-executive directors) were able to take control of the Company with the aim of urgently tackling the various crises including the imminent threat of permanent de-listing from the HKSE and the Company's liquidity crisis.

44. According to the Company under the leadership of the present board, with the assistance of highly reputable professional advisors, the Company has (1) regained control of its

main operating subsidiary Shandong Shanshui; (2) alleviated the Company's urgent liquidity problem by the Bonds; and (3) published audited accounts on 7 October 2018 and resolved most of the outstanding audit issues from 2015 and 2016 when Tianrui was in control of the Company.

45. The Company says that the present board has also engaged in extensive negotiations with the HKSE culminating in the detailed resumption plan that has been announced.

46. Mr. Flynn submits that although Tianrui has said in its evidence that it also regards saving the listing as a very important matter, its own conduct in issuing this Petition and seeking the appointment of JPLs is now the principal threat to the Company's listing.

47. Mr. Flynn posits that it is therefore misleading for Tianrui to fail to inform the Court that at the time that the present board was appointed in May 2018, a resolution was also passed appointing Mr. Li Liufa, Tianrui's Chairman, to the board of the Company but through his own decision not to sign and return a consent to act form, he was not ultimately appointed to the board.

48. The argument continues that, if Mr. Li Liufa had accepted the invitation to join the present board then in that capacity he (and therefore Tianrui) would have been entitled to all of the information which the Petitioner now complains it did not have access to, or was not informed of until a public announcement had been made.

49. Learned Counsel suggests that Tianrui's supposed lack of information is therefore "*entirely self-inflicted*". The criticism that the Company makes of Tianrui on this matter is that it made no mention of this fact in the Petition or in its original evidence in support of the application for the appointment of JPLs. The point was only addressed in Tianrui's reply evidence after the Company raised it.

50. Tianrui has suggested that there was some doubt about the validity of Li Liufa's appointment. However, the Company has two responses. Firstly, it says that this

explanation does nothing to eliminate the fact that this was plainly a material matter, and that if Tianrui had any reasonable explanation for its conduct then it could and should have addressed that in the Petition and in its evidence.

51. Secondly, the Company says that this is an implausible and unsatisfactory explanation, not least because Li Liufa's alleged doubt as to the validity of the resolution appointing him as a director has never before seen the light of day. Learned Counsel argues that if Li Liufa had genuinely believed that there was any doubt, then he could and should have raised it in May 2018 rather than waiting until the service of reply evidence on an application for the appointment of the JPLs to advance what he describes as a spurious justification for Li Liufa's unilateral withdrawal from the management of the Company.

52. The Company says that instead of its Chairman taking up a seat on the board, Tianrui has continued its selfish and destructive conduct by presenting the Petition here and the ancillary petition in Hong Kong, thereby jeopardizing the present board's efforts to restore the Company's fortunes.

Tianrui's failure to comply with its previous undertaking to the Court

53. During the course of the 2015 Petition proceedings before me, Tianrui gave an undertaking "*in favour of*" the Company, Shanshui Investment, Citicorp International Limited (The Trustee for the Note holders), and the Grand Court. Essentially that in the event that the Board was reconstituted in the manner proposed by Tianrui, it would procure that within 30 days the Company had sufficient funds to redeem the 2020 Notes in full. That undertaking was given, but not in the face of the Court.

54. Tianrui had also given an equivalent undertaking to the Hong Kong Court on 2 October 2015.

55. The Company maintains that another central plank of Tianrui's case is that the Bonds are an improper arrangement because if the Company needed additional funds it should have

first approached its major shareholders in order to ascertain if the shareholders might be willing to provide a loan on more favourable terms if asked. Ms. Li Xuanqi expressly so states at paragraph 78 (c) (iv) of Li 2, and also reminds that Tianrui claims to have even advanced loans to the Company on an interest free basis.

56. The point being made here is that having suggested that Tianrui might have been in a position to provide such a loan to the Company, it was misleading for Tianrui to fail to mention in this regard that it had given an undertaking to this Court in November 2015 to procure funding to redeem the 2020 Notes. But that however it had not been able to raise the funds do so in the period of around two and a half years that it controlled the board of the Company.

57. At paragraphs 42-47 of her Third Affirmation, Li Xianqi seeks to explain the reasons surrounding Tianrui not being able to fulfill the undertaking it gave.

58. The Company's stance is that if there was any proper basis for Tianrui to be released from its obligations (which were triggered more than two and a half years ago) then Tianrui could and should have applied to the Court to be released from its undertaking and/or to set aside the undertaking.

59. Further, learned Counsel states that Tianrui's belated attempts to justify its breach of undertaking do not provide any justification for Tianrui's egregious failure to draw these matters to the Court's attention rather than waiting until after the point had been raised by the Company, and thus merely dealing with it in reply evidence.

The misrepresentation of the Company's obligation to redeem the 2020 Notes

60. In the Petition and in Li 2, Tianrui emphasises upon a number of occasions that the Bonds do not make commercial sense if they are to be used to redeem the 2020 Notes because the rate of interest under the 2020 Notes is 7.5% whereas the rate of interest under the Bonds is 20%.

61. The necessary implication of that argument is that the Company has a choice about whether it must redeem the 2020 Notes (i.e. that the Company is willingly replacing a lower interest debt obligation with a higher interest debt obligation).

62. The Company says that in 2016, when the Company's Board was under Tianrui's control, the Company made a tender offer to the 2020 Noteholders to purchase the 2020 Notes at 101% of their par value. However, although most of the 2020 Noteholders accepted this offer, the Company has in fact only paid 15% of the purchase price for the 2020 Notes which were tendered in response to the tender offer. This has left the Company with an outstanding liability under the 2020 Notes of over US$400 million for over two and a half years.

63. The Company further says that as a result of Tianrui's failure to procure funding to redeem the 2020 Notes, in November 2017 one of the noteholders under the 2020 Notes instituted proceedings against the Company in New York to recover the sums due under the 2020 Notes and has sought summary judgment. The Judge presiding over those proceedings is said to have indicated that he will hear the summary judgment application on 31 October 2018 and that he has formed tentative conclusions. The Company has also received recent correspondence, dated 7 September 2018 from other Noteholders represented by DLA Piper Hong Kong demanding payment of the 2020 Notes.

64. The Company says that Tianrui's arguments are misleading, because it well knows, at the very least since the Company made the tender offer in January 2016, that the Company has had a current obligation to pay sums in excess of US$400 million to the 2020 Noteholders.

65. The Company says that this is yet another troubling instance of Tianrui misrepresenting the circumstances in which the Bonds were issued in order to portray those actions as being suspicious. Consequently, the Court can have no confidence that Tianrui has presented an accurate case in this regard.

Tianrui's failure to refer to the judgment in the Hong Kong proceedings revealing its misconduct

66. The Company refers to that aspect of the Petition where Tianrui asserts that Asia Cement and China National have entered into some form of undisclosed arrangement with Mr. Mi (Director of Shandong Shanshui) and his associates to seize control of Shanshui Investment and of the Company.

67. The necessary implication of this, it is argued, is that Tianrui considers that any conduct by which a major shareholder attempts covertly to take control of Shanshui Investment is improper and constitutes oppression of the other shareholders.

68. In that context and against the background of that allegation, the Company asserts that it is extraordinary that Tianrui did not mention that there is a public judgment in Hong Kong, i.e. Lam J's judgment of 31 January 2018 in which receivers have been discharged on the basis that Tianrui had covertly sought control of Shanshui Investment but had concealed this fact from the Hong Kong Court.

Whether Tianrui has unreasonably failed to pursue alternative, less drastic remedies

69. Mr. Flynn referred me to the leading Cayman Islands authority, the decision of the Court of Appeal in ***Camulos Partners v Kathrein*** [2010 (1) CILR 303]. That case is authority for the proposition that in relation to the striking out of contributories' petitions, the Court must address the following questions:

    a. Whether there is an alternative remedy available to the Petitioner;
    b. Whether the petitioner is acting unreasonably in not pursuing that remedy.

70. Reference was also made to the decisions of Kawaley J in ***CTrip Investment Holding v EHI Care Services*** (Unreported, Grand Court, 29 June 2018, under appeal), and that of McMillan J in ***Re Torchlight Fund L.P.*** (Unreported, Grand Court, 25 September 2018).

71. At paragraph 3 of ***Ctrip***, Kawaley J made it clear that a Petition should only be used "*to advance a class remedy on behalf of other shareholders*" and that it is not proper for the shareholder to seek "*to advance its own individual commercial interests*". Justice Kawaley granted an application to strike out the just and equitable contributory winding up Petition before him as being an abuse of process, on a number of bases, including improper collateral purpose.

72. In ***Torchlight***, where at trial the Court dismissed a just and equitable petition, at paragraph [1134] Mc Millan J similarly noted that "[T]*he Petitioners must demonstrate that the Petition has been pursued in the interest of* [the shareholders] *as a class and not merely for their own individual interests whatever they may be*".

73. The Company submits that it could never be just and equitable to wind up a company on the basis that a minority shareholder has been excluded from the management of that company in circumstances where the minority shareholder has voluntarily chosen not to participate in the Company's management. Otherwise, a minority shareholder could obtain a winding up order by voluntarily withdrawing from the management of a company.

74. Reference was made to ***O'Neill v Phillips*** [1999] 1 WLR 1092 at 1104F where Lord Hoffman rejected the submission that the Court would grant relief to a shareholder who had withdrawn from the management of a company in the context of an unfair prejudice petition. Mr. Flynn submitted that in principle the position is no different on a just and equitable winding up petition since otherwise the "*no fault divorce*" solution which was rejected by the House of Lords could otherwise be obtained by a shareholder commencing proceedings by means of a petition under the just and equitable ground.

75. It was submitted that if Tianrui's case in relation to the Bonds had any merit, then it ought to have been relatively straightforward for Tianrui to commence a derivative action against the present board and the other parties to the Bonds and to obtain injunctive relief either preventing the execution of the transactions or restraining the conversion of the

Bonds or freezing the funds advanced under those transactions pending the determination of the claim.

76. However, as the Company points out, if Tianrui had taken that alternative route, it would have had to establish that the Company was in "*wrongdoer control*" and that it was acting bona fide, and that it had established a *prima facie* case on the merits in order to obtain leave to continue a derivative claim. Reference was made to ***Konamaneni v Rolls Royce*** [2002] 1 WLR 1269 at paragraphs 26 and 27 and ***Renova Resources Private Equity Limited v Gilbertson & Ors.*** [2009 CILR 268] at 274 and 283. Tianrui would then have been required to establish a sufficiently strong case to justify the grant of an injunction, to demonstrate that the balance of convenience favoured the grant of an injunction, as well as providing a cross-undertaking in damages.

77. It was submitted that other than seeking an injunction, Tianrui could also have filed a Writ of Summons and sought a declaration that the Bond Issue was void or voidable, this being yet another alternative remedy.

78. The Company says that the inference to be drawn from Tianrui's failure to pursue these alternative and less drastic remedies to deal with its allegations in respect of the Bonds is that Tianrui knows that its case is not well-founded and that if it had applied for an injunction it would not have been granted for that reason.

79. The Company rounds off this aspect of the submission by asserting that the existence of this alternative remedy which ought reasonably to have been pursued is fatal to a winding up on the just and equitable ground and that therefore the Petition should be struck out for this reason alone.

Whether Impermissible Collateral Purpose

80. However, the Company also views Tianrui's failure to apply for an injunction in another way. It was submitted that this failure also demonstrates that the Petition is being used for an impermissible collateral purpose.

81. Although the Court has now, on the application of the Company granted a Validation Order in terms agreed to by Tianrui, the practical effect of the presentation of the Petition was that the Company was unable to use the funds obtained pursuant to the Bonds because the consequence of the Company's Bankers being informed of the Petition was that the Company's bank accounts (including the funds obtained from the Bonds) were frozen.

82. Thus, merely by presenting the Petition, Tianrui has been able to obtain all of the benefits if an injunction without any of the burdens of having to satisfy the Court that this is an appropriate case in which to grant injunctive relief, or of giving (and likely fortifying) the necessary cross-undertaking in damages. It was submitted that the use of a petition for such a collateral purpose (i.e. to obtain a *de facto* injunction without having to negotiate an *ex parte* hearing, let alone an *inter partes* hearing) is an obvious abuse of the Court's process and provides a further reason why the Petition should be struck out.

83. It was submitted that although in its SKA Tianrui now claim to be unsure whether the Company may be cash flow insolvent, there is no dispute that the Company is balance sheet solvent.

84. It was submitted that it is clear that the provisions of section 99 of the Law are intended to protect the interests of creditors where the company is insolvent. That the provision was not intended to permit a petitioner who objects to a particular transaction proposed by a company's board, to obtain an injunction by the back door.

85. Reference was made to the decision of Hoffman J (as he then was) in ***Re a company ex parte Schwarcz*** [1989] BCLC 424 at 426 a-c in the context of the equivalent provision of the English Insolvency Act 1986.

86. Reference was also made briefly to the Summons for Directions filed by Tianrui which was of course not before the Court for hearing. However, it does seek far-reaching discovery. Mr. Flynn submits that general discovery on a winding up petition is unusual and further, those and other directions sought confirm that Tianrui is seeking to litigate this as a Writ action, holding on to the *de facto* injunction for an even longer period. It was submitted that a Writ action, and not a winding up petition is exactly what should have been filed if Tianrui wished to complain about the Bond Issue.

Tianrui's Arguments

87. Mr. Lowe QC addressed the question of alternative remedies by referring to the decision of the Court of Appeal in ***Asia Pacific v Arc Capital LLC*** [2015 (1) CILR 299], at paragraphs 40-46. The case demonstrates that where one runs an argument as to the availability of an alternative remedy, unless there is some relevant *a priori* rule, then the matter is fact sensitive. Learned Counsel also made the point that the question to do with alternative remedy is a nuanced one, since not only must there be an alternative remedy, but it must be an adequate one.

88. As I understood Mr. Lowe's submissions, he said that Tianrui could not get an injunction to restrain the Subscription Agreements in time to stop them because it did not know about them. He indicated also that one couldn't actually injunct the Subscription Agreement on grounds such as those discussed in ***Howard Smith v Ampol*** [1974] A.C. 821. Alternatively, it would be very difficult and uncertain.

89. As regards making an application to restrain the Company from using the proceeds of the Bonds, Mr. Lowe expressed the view that that would be "*killing the goose*", in that it was not certain that Tianrui would have wanted to restrain that use of the proceeds, because if

that was done and the transaction is set aside, then the proceeds would be held on trust by the Company and would have to return the money to the Bondholders. It was submitted that therefore this would not provide an adequate alternative remedy to the complaint about the Bonds.

90. Mr. Lowe referred to the fact that Tianrui seek a winding up on the just and equitable ground. As pointed out in many cases, including the oft-cited ***Loch v Blackwood*** [1924] A.C.783, at the foundation of such applications must lie a justifiable lack of confidence in the conduct and management of the company's affairs.

91. Mr. Lowe concedes that his client could have made an application such as that made in ***Howard Smith v Ampol.*** However, he submits that whilst that type of application would perhaps have dealt with the question of whether the loss of confidence is "*justifiable*", this would not deal with Tianrui, which is still stuck with its shares in the Company, and its loss of trust and confidence.

92. Reference was also made to the recent decision of the Supreme Court in ***Eclairs JKX Oil and Gas*** [2016] BCC 79 at [14] and [15] in relation to the proper purpose rule, which is concerned with the exercise of powers by directors and other fiduciaries.

93. Mr. Lowe also went on to say that he had not been able to find a case in which an injunction had been granted to restrain performance such as the Bond Issue in this case.

94. Reference was made to the decision of the Judicial Committee of the Privy Council in ***Ebbvale Ltd. v Andrew Lawrence Hosking (Trustee in Bankruptcy for Andreas Michaelides)*** [2013] UKPC 1, as authority for the proposition that there are a range of purposes that a Petitioner can pursue in presenting a winding up petition. Though it is necessary for a petition to be presented for the proper purpose of the proper administration of the company's assets for all in a relevant class, this does not mean this has to be the Petitioner's principal purpose – see paragraphs 28 and 33. He submitted that

the question of whether there is an improper collateral purpose cannot be ascertained on a summary basis.

95. Mr. Lowe also submitted that, in order to examine whether Tianrui is acting unreasonably, this has to be examined in context. He submits that this has to be examined against the backdrop of Asia Cement and China National's cynical and unreasonable conduct from as far back as 2015. Further, that Tianrui is not simply a major shareholder, but is also a legitimate creditor and contingent creditor and this is relevant to the question of trust and confidence.

Alleged Misrepresentations

96. Mr. Lowe made a general submission from which to frame his specific response to the allegations of misrepresentation. He stated that there is not a single instance of anything stated in the Petition or the affidavits that could be considered an untruth or lie. He cautioned that one had to be careful about the Company's submissions about omissions meeting the test, because this is an inter partes hearing and non-disclosure is irrelevant and inapplicable here. Nor is this a case where Tianrui got an order ex parte and we are now at the inter partes stage.

97. It was also submitted that these are plainly adversarial proceedings, and therefore each side has the opportunity to put before the Court the facts and matters that it considers relevant. He submitted that none of the matters relied on as being relevant, apart from the matter of the undertaking are relevant to the strike out or JPL application. Therefore, to say that Tianrui have misled the Court or suppressed matters is absurd.

Tianrui's failure to inform the Court that its representative did not accept an invitation to join the Company's board of directors

98. At paragraphs 62-64 of the Third Affirmation of Li Xianqi, the criticisms of Mr. Li Liufa are addressed. Essentially, it is said that at the time of the appointment of the current board and the removal of the former board on 23 May 2018, a resolution was passed to

remove Mr. Li Liufa as Chairman and Director of the Company and a subsequent resolution was passed to re-appoint him as an executive director of the Company. It is conceded that Mr. Li Liufa did not sign and return the letter consenting to act. However, Mr. Li Liufa considered that the landscape had changed and that he was concerned about the validity of some of the resolutions passed, and certain inconsistencies. Tianrui maintains that it was indeed kept out of the management of the Company.

99. Mr. Lowe in submissions said that since this is not a partnership case, the case is not about a complaint of being excluded from management. The point being made really was focused on how management has shown repeated aversion to transparency and refusing to answer the most basic questions or requests for information. The point made is that not having a director on the board, does not excuse the Company from mistreating a shareholder.

Tianrui's failure to comply with its previous undertaking to the Court

100. In Li Xianqi's Third Affirmation, at paragraphs 42-49, she deals with the matter of the Undertaking. Paragraphs 44 -49 state as follows:

> *"44. Tianrui Parent entered into the Undertaking in good faith and on the understanding that the financial and asset position of the Company would not be substantially different if and when it was called upon to meet the Undertaking. The facilities that had been conditionally approved to Tianrui Parent had been granted expressly on the same terms.*
>
> *45. However, when the Petitioner did gain control of the Company on 1 December 2015, it discovered (as explained in paragraphs 54 to 57 of Li 2) that on 14 October 2015, the articles of association of Shandong Shanshui had been altered (without notifying Tianrui Parent, the Petitioner or any outside parties), the books and records of Shandong Shanshui and the Company had been*

removed from the Company's offices, and the Shandong Shanshui chop was missing, meaning that the incoming board members could not transact on behalf of Shandong Shanshui. At paragraph 204 of her affirmation, Ms. Wu does not appear to seriously dispute that by 1 December 2015: Company records were missing: (ii) the Shandong Shanshui chop was missing and (iii) Shandong Shanshui's articles of association had been altered.

46. *The combined effect of these factors was that Shandong Shanshui, which held 99% of the Company's assets, had been removed from the control of the Company (and consequently, Tianrui Group Co) and were not available as security for the facilities contemplated in the Undertaking.*

47. *In these circumstances and having regard to the misrepresentation to Tianrui Parent at the time of providing the Undertaking, it was neither possible for Tianrui Parent to meet its obligations under the Undertaking, nor for the Company to legitimately expect it to do so.*

48. *Having said that, and notwithstanding the radically different circumstances of the Company after December 2015, as set out in paragraphs 59 to 66 of Li 2, the Petitioner nevertheless took steps available to it to meet the financial obligations, including:*

    (a) *providing interest free loans to the Company to cover interest and principal repayments as and when they fell due (as set out in paragraph 38 of Li 2 and in further detail at paragraph (x) below): and*

    (b) *procuring loans from financial institutions to the Petitioner, guaranteed by the Company, in order that those funds could be used to redeem certain of the 2020 Notes (for example the Bank of China Limited loan facility of RMB 400 million advanced on 14 September 2016).*

49. *For these reasons, the Petitioner denies that it is now or ever has been in breach of the Undertakings."*

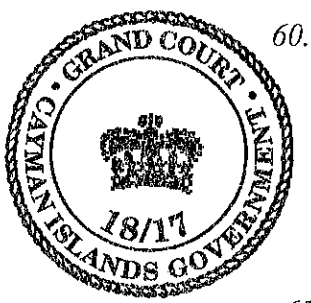
101. In his submissions, Mr. Lowe reinforced that Tianrui has given financial support to the Company, and has explained the reason why it was unable to fulfill the Undertaking that had been given, and that notwithstanding, Tianrui had taken all reasonable steps that it could.

102. He also makes the point that, contrary to what is said in the Company's evidence, it is not the change of control in 2015 that caused default on the Notes, it was the decision of Asia Cement in control of the Company then, to file the Winding Up Petition that caused that- this is referred to in the letter from DLA Piper Hong Kong dated 20 August 2018. In short, it is denied that Tianrui has misled anyone, and this ought not to be a basis for strike out.

Tianrui's failure to refer to the judgment in the Hong Kong proceedings revealing its misconduct

103. Li Xuanqi in her Third Affirmation, at paragraphs 58-61 deals with this allegation. He states that the decision of Lam J arises in the China Shanshui Investment breach of trust litigation and is too complex for him to attempt to summarize in his reply evidence. At paragraphs 59-61, he states as follows:

> *"59. The Petitioner was not a party to these proceedings. The Petitioner was also not buying the CSI shares. The Petitioner does have a previous association with Mr. Chen Hongqing, who used to be employed to the Petitioner.*
>
> *60. I understand that the dispute over ownership of the CSI shares is ongoing in Hong Kong, between Mr. Chen, and those aligned with ACC. I also understand that the arguments of ACC's allies have changed as to whether ownership of the shares is due to a loan agreement, or a share purchase agreement.*
>
> *61. Should Mr. Chen ultimately be successful in those proceedings, the Petitioner would naturally hope that Mr. Chen is cooperative with*



the Petitioner in voting the shares. The Petitioner has never made any secret of the fact that it wants a check on the voting power of ACC and CNBM, and their ability to oust management and thereby oppress the Petitioner."

104. Mr. Lowe submits that there is no question of suppression, or unclean hands or anything like that. He submits that the Take-Over Code of Hong Kong distinguishes between acquisition of voting rights and acquisition of shares, and that there is nothing wrong with acquiring a beneficial interest in shares.

105. Further, apart from the fact that Mr. Justice Lam's judgment deals with facts primarily concerned with what was happening in 2015, Tianrui was not a party to those proceedings, it did not participate, whatever is said about straw nominees. The allegations about China Shanshui Investments and control thereof, it was submitted are wholly irrelevant to the instant Petition. The Petition is about the exercise of directors powers to dilute Tianrui's shareholding in 2018 and about winding up on the just and equitable basis.

Discussion and Analysis

Whether alternative remedies were available and whether it was unreasonable for Tianrui not to pursue such remedy

106. I have decided to approach the issues in the order in which Tianrui did, rather than the Company, simply because it seems convenient.

107. In ***Loch v Blackwood***, Lord Shaw of Dunfermline, at page 788 gave guidance that remains classic today. His Lordship there stated:

"It is undoubtedly true that at the foundation of the applications for winding up, on the "just and equitable" rule, there must be a justifiable lack of confidence in the conduct and management of the company's affairs. But

this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from satisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."

108. Winding up is a drastic measure and it is clear that the Court has jurisdiction to protect from abuse of the winding –up procedure. As Chadwick P elucidated in ***Camulus***, at paragraph 62:

*"**Contributory's Petition***

62. Given that the power to strike out a creditor's petition under the inherent jurisdiction of the court is plainly exercisable in order to protect the court's winding up process from abuse- and is not confined to cases where the petitioner's claim is bound to fail-it would be (at the least) surprising if the position were different when the petition is brought by a contributory under the "just and equitable" ground. Analysis of the authorities shows that there is no difference in principle: the difference in outcome follows from the fact that it will often be found, on the facts, that the petitioner has no alternative remedy. It cannot be said to be an abuse of the court's process if winding up is the only method available to meet the wrong of which the petitioner complains, unless, of course, the petition for a winding up order is bound to fail. Further, it may well be said that, ***in a case where the petitioner does have an alternative remedy which, in the court's view it is unreasonable for him not to pursue, the petition is bound to fail because it cannot be "just and equitable" to make a winding up order in circumstances where the court's winding up process is being***

abused or alternatively, that it cannot be "just and equitable" to make a winding up order in circumstances where it is not needed in order to provide the petitioner with a sufficient remedy."
(My emphasis)

109. At paragraphs 77 and 78 the learned President gave guidance with regard to alternative remedies as follows:

> ***"The two questions to be addressed***
>
> *77. In the light of the judgments in Charles Forte Invs. Ltd v Amanda and the observations of the Privy Council in CVC / Opportunity Equity Partners Ltd. v Demarco Almeida, there can be no doubt that it is relevant, in considering whether to restrain presentation of, or to strike out, a contributory's petition to wind up on the just and equitable ground, to address the questions* ***(i) whether there is an alternative remedy available to the petitioner; and (ii) whether the petitioner is acting unreasonably in not pursuing that alternative remedy. If a court is satisfied that both of those questions should be answered in the affirmative, then it can be expected to take the view that the presentation of the petition is an abuse of its process or, alternatively, that the petition is bound to fail because it would not, in those circumstances, be "just and equitable" that the company should be wound up.***
>
> *78. In the context of a contributory's petition, the editors of French, Applications to Wind Up Companies (op. cit. at, 178) may well be right in their view... that-*
>
> > *"it is very likely that there is no difference between the epithets 'abuse of process' and 'bound to fail': a petition which is bound to fail is an abuse of process and a petition which is an abuse of process is bound to fail."*
>
> ***But it is important to appreciate, in that context, that a petition is bound to fail not only because the petitioner is unable to prove his allegations but also because, if he has an alternative remedy***

which it is unreasonable for him to choose not to pursue, the court will take the view that it would not be "just and equitable" that the company be wound up."

(My emphasis)

110. I note that in reply, Mr. Flynn responded to Mr. Lowe's submission that he had not been able to find a case where a contract such as the Subscription Agreement was injuncted by referring to the decision in ***Fraser v Whalley*** [1864] 2 Hen & M 10 KB, (which is actually in Tianrui's bundle of authorities). The headnote to that case reads as follows:

> *"The directors of a railway company are not justified in acting on an old resolution authorizing the issue of shares after the particular purpose for which the authority was given has ceased to be available.*
> *Nor in issuing shares supposing them to have the power, for the express purpose of creating votes to influence a coming general meeting.*
> *And an injunction will be issued to restrain the issue of such shares: it not being a question of the internal management of the company, but an attempt on the part of the directors to prevent such management from being legitimately carried on.*
> *Foss v Harbottle (2 Hare, 461) distinguished."*

111. Mr. Flynn relied on this authority to say that this case demonstrates that injunctive relief is available and that what Mr. Lowe was really saying was not that Tianrui could not have applied for injunctive relief but that it was difficult and uncertain. Mr. Lowe for his part pointed out that, although he accepts that in that case the Court was restraining an issuing of shares, the Court was so acting to restrain an ultra vires use of power by the directors. He indicated further that it was not a case where an injunction was granted in respect of the ***Howard Smith v Ampol*** type situation.

112. However, I think it is important to look briefly at three cases that are also in ***Tianrui***'s bundle of authorities in which the principles in ***Fraser v Whalley*** were applied, and r/approved.

113. In ***Punt v Symons*** [1903] 2 Ch. 506, the headnote in part reads as follows:

> "...
>
> *Where shares had been issued by the directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power:-*
>
> ***Held**, applying the principle of Fraser v Whalley, (1864) 2 H. & M. 10, **that they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.***
>
> (My emphasis)

114. Byrne J, having referred to ***Fraser v Whalley***, at page 517, stated as follows:

> *"It is true that is a case relating to a railway company, and not to a company under the Joint Stock Companies Act, and it is also true that the plaintiffs were in time to prevent the issue of the shares in question; but the principle appears to me to apply. If I find as I do that shares have been issued under the general and fiduciary power of the directors for the express purpose of acquiring an unfair majority for the purpose of altering the rights of parties under the articles, **I think I ought to interfere. I propose to grant an injunction, but to confine it to restraining the defendants from holding this confirmatory meeting."***
>
> (My emphasis)

115. In ***Piercy v S. Mills & Company Ltd.*** [1920] 1 Ch. D. 77, there was an action in which the plaintiff claimed a declaration that the allotment of certain shares was void. Peterson J, after discussing ***Fraser v Whalley***, at page 83-85 discussed the matter as follows:

> *"It was said that the real point of that case was that the directors were using what the Vice-Chancellor calls a stale resolution, **but I think the real substance of his judgment is that the directors are not entitled to***

issue shares for the express purpose of preventing the free action of the shareholders. In Punt v Symons & Co the question was again somewhat similar to that in the present case.

.....

The basis of both cases is, as I understand, that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, open to the directors for the purpose of converting a minority into a majority, to issue the shares which are in dispute in the present action.

In my opinion therefore the issue of the shares in question to the four defendants was a breach on the part of the directors of their fiduciary powers. In the case of the last two allotments..., they were made to them with full knowledge that the allotments were being made for the illegitimate purpose which I have described. I am therefore of opinion that these four allotments were invalid and ought to be declared void."

(My emphasis)

116. Interestingly, in the recent decision of the UK Supreme Court in ***Eclairs Group Ltd. v JKX Oil and Gas Plc*** [2015] U.K.S.C.71, cited on behalf of Tianrui, at paragraph 16 it appears to me that ***Fraser v Whalley*** was approved without any qualification as to the principle of injunctive relief being available. At paragraph 16 of ***Eclairs***, Lord Sumpton, with whom Lord Hodge agreed, stated:

"16. A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of its powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle of company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only the abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders. ***Thus in Fraser v Whalley (1864) 2 H.&M. 10, the directors of a statutory railway company were restrained from exercising a power to issue shares for the purpose of defeating a shareholders' resolution for their removal.***"
(My emphasis)

117. The proper purpose rule is primarily taken from the well-known speech of Lord Wilberforce in ***Howard Smith v Ampol***. That case also concerned a share issue in a take –over context. It was a case in which proceedings were brought in the New South Wales Court of Equity to set aside the issue of shares. A long trial ensued. At page 835, delivering the advice of the Privy Council, Lord Wilberforce observed:

"In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion as to whether that purpose was proper or not. ***In doing so it will necessarily give credit to the bona fide opinion of the directors; if such is***

found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to which side of a fairly broad line on which the case falls."
(My emphasis)

118. At page 834, Lord Wilberforce observed:

> *"The directors, in deciding to issue the shares, forming part of Millers' unissued capital, to Howard Smith acted under clause 8 of the company's articles of association. This provides, subject to certain qualifications which have not been invoked, that the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and either at a premium or otherwise and at such time as the directors may think fit. Thus, and this is not disputed, the issue was clearly intra vires the directors. But, intra vires though the issue may have been, the directors' power under this article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted."*

119. In ***Eclairs***, the challenge was brought in proceedings in the Chancery Division. At paragraph 24 of ***Eclairs***, the following interesting discussion of the ***Howard Smith v Ampol*** case takes place. Lord Sumption there pointed out that:

> *"24. The main interest of the decision for present purposes lies in the fact that it was a case of multiple concurrent purposes. The company was genuinely in need of fresh capital, and the directors had received legal advice that this was the only ground on which they could properly authorize an issue of shares. The number of shares to be issued and the amount of the subscription had been carefully calculated to match the company's capital requirements.* ***After a trial lasting 28 Days in***

which the four directors supporting the share issue gave evidence, Street J had found that the company's need for capital, although urgent, was not yet critical and that its normal practice had been to meet its capital requirements by borrowing rather than issuing shares. *For this reason he rejected the evidence of the four directors that their sole purpose was to meet the company's shortage of capital and found that their primary purpose was in fact to dilute the shareholdings of those who opposed the bid. Lord Wilberforce adopted the primary purpose test which had been applied by the judge (832 B-C) and affirmed his decision (832F-H):*

> *"when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial, or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme."*

Lord Wilberforce did not express the point in terms of causation, but it is I think clear that by "substantial or primary purpose", he meant the purpose which accounted for the board's decision. He approved the judge's adoption of Dixon J's test (831-832), and went on to adopt an analysis of the facts based on that test. Although the directors were influenced by the company's need for capital, the decisive factor in Howard Smith v Ampol Petroleum Ltd was that but for their desire to convert the majority shareholders into a minority, the directors would not have sought to raise capital by means of a share issue, nor at that point of time."

(My emphasis)

120. Having reviewed these cases, it is very plain to me that there were alternative remedies available to Tianrui. It could have brought a Writ action and sought an injunction in its own right, complaining of the dilution of its shareholding. It could have injuncted the use of the proceeds, or the issue of shares, or restrained meetings to confirm or approve transactions. A more complicated, but possible course is for Tianrui to have brought a derivative action on the basis of the alleged lack of commerciality of the Bonds and sought an injunction in those proceedings.

121. Tianrui could also have filed a Writ action and claimed declaratory relief.

122. For the Court to examine the question of whether Tianrui has a justifiable loss of trust or lack of confidence in the conduct and management of the Company's affairs in the circumstances of this case would require the kind of trial process (and therefore be more amenable to a Writ action or some process that is not a Just and Equitable Winding Up Petition), carried out in ***Howard Smith v Ampol.***

123. In addition, in my judgment, just as was the case in ***Ctrip*** before Kawaley J and in ***Torchlight*** before McMillan J, whatever the ***Ebbvale*** decision signifies in terms of a Petitioner having a range of purposes, it is plain that this Petition was not presented with the purpose of advancing a class remedy on behalf of other shareholders.

124. I did not quite follow how Tianrui could say that they are not clear that they would have wanted to restrain the Company from using the proceeds because that might have "*killed the goose*" (and I know Mr. Lowe Q.C. may have just used the term, in the moment, so I take that into account too). Nevertheless, the impression I formed was that it is very odd to not wish, or not be sure one would want to restrain the use of the proceeds from the Bonds, but yet want to take the far more drastic and austere step of winding up the Company. It would seem to me that it is the applying to wind up the Company that amounts to the killing of the goose.

125. In my view, not only were there other alternative, less drastic remedies, but it was unreasonable for Tianrui not to have pursued the remedy of Writ action and either injunctive or declaratory relief or both.

126. The existence of alternative remedies which Tianrui ought to have pursued, is fatal to a winding up petition on the just and equitable ground and therefore, on this ground alone, the Petition must be struck out.

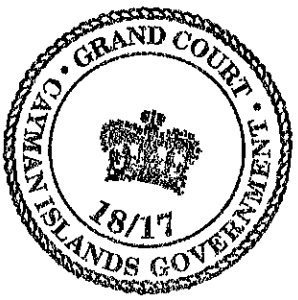
Improper purpose

127. In ***CVC/Opportunity Equity Partners Ltd. v. Demarco Almeida*** [2002 CILR 77], at paragraph 57, Lord Millett pointed out that:

> *"57. The special nature of winding up proceedings and the loss which they may cause the company and its shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondents to yield to the petitioner's demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition for the making of a winding up order."*

128. In a related context, I wholly endorse the reasoning of Hoffmann J in ***Re a company, ex parte Schwarcz*** where at paragraph 426 a-c, in the context of the English provision equivalent to section 99 of the ***Law***, he stated:

> *"It does not seem to me right that that jurisdiction should be used in a case where there is no question about the company being able in the end to pay all its lawful debts and therefore no such protection is required. What I am being asked to do is to use the s.127 jurisdiction in order to give the*



petitioners what would amount to an interlocutory injunction restraining the company's board from dealing with its assets in a certain way on the ground that that would be a breach of their fiduciary duty. If an application for such an injunction were made, the basis on which the court would go into the matter would be rather different from the way in which it has been put to me now. It would be concerned with the balance of convenience as between the parties and it would also of course be necessary for the petitioners to give a cross-undertaking in damages."

129. It seems plain to me that this Petition was also brought for the improper collateral purpose of obtaining a *de facto* injunction in relation to the Bonds and the Bonds Issue, this without having to satisfy the guidelines for the grant of injunctive relief and without giving a cross-undertaking as to damages. The Petition was brought to put pressure on the Company, placing it under destructive circumstances in the paralyzing condition of having its assets *de facto* frozen. The matter of Tianrui's handling of the undertaking which it gave in favour of this Court and the Hong Kong Court in 2015 would also have been relevant and come under scrutiny on this issue, and on the question of requiring fortification of an undertaking as to damages. This is also an independent basis upon which this Petition falls to be struck out.

130. During the hearing of the application for the appointment of the JPLs I asked Mr. Lowe for a draft of the orders Tianrui would be seeking. This was kindly provided to me. Tianrui quite reasonably agreed to the validation orders sought by the Company, although the undertakings which it sought were not granted by me.

131. I take into account that the Company filed quite substantial late evidence, including its announcement of the Resumption Plan on 7 October 2018, and thus Tianrui have not had much opportunity to respond.

132. However, Tianrui has responded, and its response is telling. When I look at the orders being sought currently in relation to the appointment of the JPLs, those really seem to be

a markedly down-graded version of what was initially being sought. Tianrui now seek to appoint JPLs on a soft (rather feather-like) touch basis. The orders sought are the least intrusive of powers, where for example, the JPLs would have no power to affect or deal with the listing with the HKSE, but could perhaps report to the Court, was the suggestion in argument. Though Tianrui cast doubt on the possibility of success for the announced Resumption Plan, it is clearly keen at this time for the attempt to avoid the de-listing to be made by the board. I think that Mr. Flynn has a point when he says this light touch, is a sign of a case falling away, and of Tianrui appearing simply to just want to get back involved with management control in some way or another. I infer that Tianrui does not really want to kill the goose after all, especially now that it may have the chance to be, (or indeed is already) getting fatter.

The question of Misrepresentation

133. In ***Boreh***, a decision on which the Company placed heavy reliance, Flaux J held that the duty not to mislead the Court applies at all stages and that, although the duty of full and frank disclosure does not apply at the *inter partes* stage, the Court should apply the same principles by analogy when considering the duty not to mislead the Court and the consequences of a breach of that duty. See paragraphs [221] to [224].

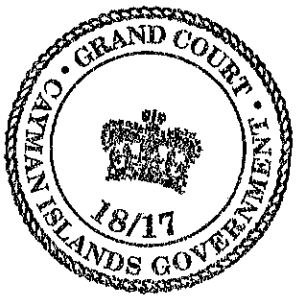
134. The Company also referred to ***Re Yugraneft***, a case which was referred to in ***Boreh***.

135. In my judgment, the undertaking and the circumstances surrounding it, as well as the fact that Mr. Li Liufa had not signed and returned the consent to act letter, were relevant matters that should have been brought to the attention of the Court by Tianrui. However, in my judgment, those matters do not rise to the status of misleading the Court. I also think that it is concerning that Tianrui did not explain the surrounding circumstances involving the 2020 Notes more fully, before portraying the board's actions as being suspicious and the Bonds Issue as not making commercial sense. However, I do not think that they rise to the level of misleading the Court and nor do they fit into a category of misconduct such as to show that Tianrui has not come to seek equity with clean hands.

136. I accept Mr. Lowe's submission that these are adversarial proceedings and therefore each party is expected to put the matters it considers relevant before the Court. I do not think that it is a cause for complaint that Tianrui did not refer to the decision of Lam J. There have been many contentious proceedings involving the main players in this matter and it seems to me that none of the parties are past applying strategic positioning or a tactical approach to litigation. They have been jostling for power and control and engaged in tactical and cynical behaviours for years, even within the Courts of the Cayman Islands, and in Hong Kong.

137. There is also an important feature that distinguishes this matter from the circumstances in ***Boreh*** and ***Re Yugraneft***, and that is that the Court had not yet granted any relief before the Company appropriately pointed out the omissions and shortcomings of Tianrui's filed Petition and evidence.

138. However, the matters that the Company has raised and to which Tianrui has filed reply evidence, have assisted in another way, and that is in shedding light on Tianrui's motivation and purpose in filing the Petition. Now that the Court is better placed to see the full picture, particularly: (a) regarding Mr. Li Liufa's not signing the Consent nor complaining closer to the time of the meeting about his concerns as to the validity of resolutions, yet complaining in the proceedings that Tianrui has been excluded from management of the Company and; (b) regarding the Company's pressing obligation to redeem the 2020 Notes, I am bolstered in my view that the Petition was presented for improper collateral purposes, and that it is just to so find. Pitching the case in the way in which Tianrui did originally, is plainly a form and manifestation of pressurizing the Company to yield to Tianrui's demands and positions it advocates. That is also an improper purpose.



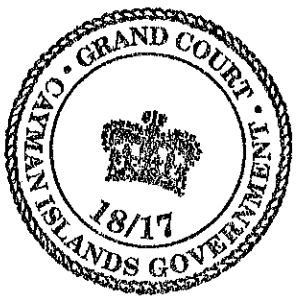
Disposition

The Strike Out Summons

139. In the result, the Petition is struck out, with costs to the Company to be paid by Tianrui, to be taxed if not agreed.

Appointment of JPLs Summons

140. As the Strike Out Summons has succeeded, Tianrui's Summons for the Appointment of the JPLs also falls to be dismissed with costs to the Company against Tianrui, to be taxed if not agreed.



THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT