

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION



CAUSE NO. FSD 200 of 2019 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF ALTAIR ASIA INVESTMENTS LIMITED

**APPEARANCES:** Jeremy Goldring QC, counsel for the Petitioner and Mr Marc Kish and Marie Skelly of Ogier

Mr Tom Smith QC, counsel for the Company and Mr Rupert Bell and Mr Peter Kendall of Walkers

**BEFORE:** THE HON. RAJ PARKER

**HEARD:** 2 July 2020

**Draft Judgment  
Circulated:** 23 July 2020

**Judgment  
Delivered:** 28 July 2020

### Headnote

*Winding up petition - s.92 and 95 Companies Law - bona fide and substantial dispute - decisions of Hong Kong court in respect of the same issues – waiver – affirmation - abuse of process - discretion.*

### JUDGMENT

#### Introduction

1. Safe Castle Ltd (the Petitioner) presents a petition under s .92 of the Companies Law to wind up Altair Asia Investments Limited (the Company). The petition is based upon a debt<sup>1</sup> in respect of redemption proceeds said to be, owing by the Company following an alleged redemption of shares held by the Petitioner in the Company, and that the Company is insolvent and unable to pay its debts.

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<sup>1</sup> Of approximately US\$16m

2. On 7 March 2019 the Petitioner filed a winding up petition against a guarantor of the Company in Hong Kong. A hearing took place in Hong Kong before Harris J on 27 September 2019.
3. On 11 October 2019 the Petitioner presented a petition in this court to wind up the Company (the principal debtor). A hearing took place in this court on 21 January 2020.
4. The petition in this court was adjourned for the reasons given in a judgment dated 16 March 2020. It is not necessary to repeat the background which can be found in that judgment.
5. A subscription agreement (the Subscription Agreement) and a side letter (the Side Letter), each dated 10 October 2017 were put in place when the investment was made<sup>2</sup> by the Petitioner. The Side Letter provided for various extraordinary redemption events which entitled the Petitioner to request the redemption of all or any portion of its shares if one of those events occurred. One such event did occur relating to the average of the closing price of the shares of RM Group Holdings (Clause 1.1.11 the Closing Price Triggering Event). It has never been disputed that this was a valid redemption notice pursuant to that event<sup>3</sup>.
6. What was disputed was whether certain conditions precedent were satisfied in respect of a waiver letter dated 23 January 2018 (the Waiver Letter), and whether the partial payments made pursuant to that letter waived or affirmed the Petitioner's claim to the full redemption proceeds.
7. In short, having heard Leading Counsel for both parties, this court adjourned the petition to await the outcome of a Judgment in Hong Kong covering substantially the same issues. The court also reached the provisional view, without determining the matter, that there was a *bona fide* and substantial dispute as to the existence of the petition debt<sup>4</sup>.
8. The Hong Kong decision has now been obtained and the Petitioner now renews the application to wind the Company up. The Company continues to oppose the winding up petition.

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<sup>2</sup> HK\$200m (approximately US\$25m)

<sup>3</sup> There is a dispute as to the other redemption request's validity as it proceeded on the basis of clause 1.1.11 whereas in fact it was a 1.1.12 (Anniversary Triggering Event). This request was not pursued by the Petitioner in oral argument at this hearing although it was addressed at the last hearing in January 2020. For completeness I should state that I remain satisfied that there is a *bona fide* and substantial dispute raised by the Company as to the validity of the second redemption request-see petition at § 25 and Liu 1 § 23 as to the Petitioner's intention. See also §§ 35-36 of this court's decision of 16 March 2020

<sup>4</sup> "Without determining the matter one way or another I am however satisfied that there is a *bona fide* and substantial dispute as to the existence of the debt on which the petition is based in relation to the arguments concerning the failure to satisfy the conditions precedent set out in the Waiver Letter and the redemption requests. As can be discerned from my summary of the submissions made by both Leading Counsel, the points at issue are not straightforward and in my judgment are genuinely arguable" at § 46.



9. The court decided that the petition should be adjourned<sup>5</sup> because the petitions in Hong Kong raised the very same issues as in the petition in this court as they were based on the alleged liabilities of China Silver Asset Management (Hong Kong) Limited (China Silver) and Mr Frank Dominick as guarantors of the Company's alleged liability to the Petitioner in respect of the claimed redemption proceeds.
10. The court was concerned not to run the risk of conflicting judgments and acknowledged that comity and cooperation is particularly important in the field of cross-border insolvency. In addition, in view of the commonality of the critical underlying issue as to whether the Company is liable to the Petitioner for the redemption proceeds, the court exercised its discretion to adjourn the petition for a relatively short period of time during which it was expected that the Hong Kong Court would hand down its judgment<sup>6</sup>.

***Clause 2 (6) of the Waiver Letter and the proceedings in Hong Kong***

11. The Waiver Letter dated 23 January 2018 is governed by Cayman Islands law, and made reference to the Subscription Agreement and Side Letter dated 10 October 2017 and the Redemption Letter dated 5 January 2018 (which dealt with the Closing Price Triggering Event). It provided by clause 2 that notwithstanding the redemption request which was in the sum of HK\$209m, it was waived up to HK\$140m, and the parties had agreed to settle the matter on certain terms<sup>7</sup>.
12. There were, however six conditions which needed to be satisfied by the Company before the Petitioner agreed to irrevocably waive its rights to request early redemption up to this amount.
13. So far as CP 2(1) and (2) are concerned the conditions were for the payment of HK\$60m and US\$7.5m respectively. In return for that partial payment by the Company the remainder of the redemption request outstanding was to be waived in accordance with the terms of the Waiver Letter.
14. Importantly, if any one of the conditions precedent was not satisfied by a certain date or waived by the Petitioner all rights of the Petitioner would remain in full force and effect.
15. The last of these conditions, CP 2(6), imposes an obligation on the Company to pay the reasonable legal fees and expenses incurred by the Petitioner including in particular legal documentation costs in respect of the transaction.
16. It provides:



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<sup>5</sup> Pending the judgment of the court of first instance at the High Court of the Hong Kong Special Administrative Region (the Hong Kong Court).

<sup>6</sup> §§67, 68, 69 and 76 of the judgment of this court dated 16 March 2020.

<sup>7</sup> See this court's judgment dated 16 March 2020 § 32-33

*'The company has settled, or has arranged the settlement of, reasonable costs and expenses incurred by Safe Castle (including legal documentation costs) in the amount of approximately HK\$ 150,000 on or before [15 February 2018]'*.

17. The Hong Kong Court has now given judgment<sup>8</sup>. The Hong Kong Court concluded that there was indeed a *bona fide* dispute on substantial grounds in relation to all but one of the issues, namely compliance with the condition precedent at clause 2(6) (CP 2 (6)) of the Waiver Letter dated 23 January 2018<sup>9</sup>.

18. On CP 2(6) the learned Judge found:

*"It seems to me clear that Altair [the Company] were in breach of clause 2(6) of the Waiver Letter and that this justified Safe Castle [the Petitioner] treating the condition precedents as not being met and it becoming entitled to enforce its rights under the other side letter and the redemption letter": at §17 per Harris J.*

19. The learned Judge also rejected the defence that the Company had accepted partial payment from the Petitioner after the deadlines under the Waiver Letter had passed and that by accepting the late payments an unequivocal representation that it would continue with the Waiver Letter and forego its right arising from delayed payments was demonstrated: see §10.

20. A winding up order was accordingly made against China Silver on 11 March 2020. The Official Receiver in Hong Kong has been appointed as provisional liquidator and will summons a meeting of creditors and contributories to determine the appointment of liquidators to China Silver.

21. The Hong Kong decision is the subject of a pending appeal to the Hong Kong Court of Appeal. An application to Harris J seeking a stay of the winding up order pending appeal was made but dismissed on 5 June 2020 by the learned Judge (on the papers) having received detailed written submissions.

22. The Company asserts that the Hong Kong decision is unsafe for a number of reasons and wrong.<sup>10</sup> It invites this court to dismiss the Petition or to adjourn it pending the outcome of the appeal in Hong Kong.

23. The Petitioner submits that the developments in the Hong Kong Court amount to a significant change in circumstances and that any reasons why this court may have had not to make a winding up order against the Company at the conclusion of the January hearing have now fallen away.

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<sup>8</sup> Harris J, 11 March 2020.

<sup>9</sup> As to CP 2 (1) and 2 (2) see § 12; CP 2(3) and 2 (5) see § 14; CP2 (4) see § 15.

<sup>10</sup> Harris J in the stay decision did not accept that the Company had good prospects of succeeding on appeal- see§ 17.





### ***Submissions of the parties***

24. Mr Jeremy Goldring QC for the Petitioner contends that there is no *bona fide* and substantial dispute as to the existence of the petition debt and the court should not reach an inconsistent finding to the Hong Kong Court. The Petitioner is currently owed a redemption sum by the Company because it validly requested redemption of its shares pursuant to the Closing Price Triggering Event and by Redemption Requests 1 and/or 2. This equates to a quantum of debt of at least HK\$145,250,000 (plus costs and interest) which the Company is demonstrably unable to pay. While this court retains a discretion whether to make a winding up order under section 95 of the Companies Law, generally an unpaid creditor of an insolvent company is entitled to an order *ex debito justitiae*<sup>11</sup>.
25. Mr Goldring maintains that the Company did not satisfy any of the conditions precedent in the Waiver Letter including 2(6), although it is sufficient for the Petitioner that any one condition precedent is not satisfied. The effect of non-compliance with any of the conditions precedent is that the Waiver Letter did not become effective and the Company has no *bona fide* and substantial defence in relation to the redemption proceeds.
26. In that regard Harris J, who has considered substantially the same evidence as that which is now before this court<sup>12</sup>, determined that the Company was clearly in breach of CP 2(6)<sup>13</sup>, although there was a *bona fide* and substantial dispute as to whether the Company was in breach of the other conditions precedent.
27. As to the facts concerning CP 2(6), payment of costs pursuant to the Subscription Agreement, Side Letter and Waiver Letter was sought from the Company<sup>14</sup>. The Company had agreed under the Subscription Agreement and the Side Letter to pay for all costs charges and expenses incurred in connection with negotiating preparing and implementing the agreement<sup>15</sup>.
28. The Company accepts that it never paid (or arranged payment of) those fees or any part of them, whether by 15 February 2018 or at all and it follows that any waiver and affirmation argument (based on alleged acceptance of late payment by the Petitioner) can have no application to CP 2(6). The payment for the waiver as regards the legal expenses was never received and so CP 2(6) was never satisfied. The Petitioner is entitled to payment under the redemption letter dated 5 January 2018.
29. As to the Company's argument that the invoices were addressed to the wrong company, Mr Goldring QC relied upon Harris J's conclusion that this defence had no substance:

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<sup>11</sup> *Re ACL ASEAN Tower Holdco Limited (Kawaley, J, Grand Court, unreported 8 March 2019)*

<sup>12</sup> This court has been referred to Dominick 3 and 4 dated 3 January and 15 June 2020, Poon 2 dated 7 May 2020 and Liu Yao 1 and 2, 11 October 2019 and 13 January 2020 and Dominick 1 and 2, 3 January 2020.

<sup>13</sup> See §16-17 of Harris J's judgment.

<sup>14</sup> See Liu Yao 1 §62-69 Liu Yao 2 §101-106-The fees were payable to Raymond Liu.

<sup>15</sup> Clause 12.1 Part A, Schedule to Subscription Agreement and § 12 Side Letter.



*“There is nothing unusual about legal fees incurred by an investment vehicle being payable by its holding company and [FD] must have known this as he explains in his affirmation that he has worked for some years in a number of sophisticated financial services companies. [FD] has not exhibited any emails with Intertrust dealing with this issue and he has not provided any evidence that after 4 October 2018 he informed Ms Wu that the bills would be paid by Intertrust (which is not what clause 2(6) provides) and that it would do so if the bills were reissued in the name of Safe Castle”.*

30. To find otherwise, suggests Mr Goldring QC, would be to elevate form over substance and would be uncommercial. He submitted that an experienced Judge of a coordinate jurisdiction, applying Hong Kong law, which is to all intents and purposes the same as Cayman Islands law, to the same evidence has decided that there is no defence to the Petitioner’s claim and the same outcome should now follow in this court.
31. Just as the guarantor has been wound up, the principal debtor should be wound up and to do anything else would create conflicting judgments on a common issue which the court had been concerned about on the last occasion. Harris J’s judgment is persuasive and should not be second guessed by this court. As a matter of comity and principle this court should simply follow the Hong Kong judgment having adjourned the matter on the last occasion at the Company’s request for this reason. It would be paradoxical for a different approach to be taken by this court in relation to the principal debtor than in relation to the guarantor in Hong Kong.
32. He argues that by rejecting the submission that the Waiver Letter can be regarded in isolation, so finding that there was no arguable waiver, Harris J clearly considered that the Subscription Agreement and the Side Letter are independent sources of the Petitioner’s rights and under those documents payment was still owed, even if the Waiver Letter was ineffective. The partial payments did not represent that the Company was agreeing that the Waiver Letter would continue, because it was equally consistent with the Waiver Letter not having any effect and the payments being made pursuant to the Subscription Agreement, Side Letter and Redemption Notice. By accepting HK\$60 million and HK\$7.5 million, paid late<sup>16</sup>, the Petitioner did not waive all the conditions precedent and/or affirm the Waiver Letter. Moreover those payments cannot have any application in relation to CP 2(6) where no payment has been made at all.
33. Mr Goldring QC argues that the doctrine of affirmation has no application because the only issue is whether the conditions precedent have been satisfied or waived within the meaning of the Waiver Letter. The affirmation cases relied upon by the Company is not dealing with a situation where there are rights that exist independently of the contract. They are dealing with the different question of where the contract is repudiated by breach to determine the effect of the innocent party

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<sup>16</sup> HK\$7.5m paid on 12 March 2018, HK\$60m paid as to HK\$40m on 13 April and the balance of HK\$20m on 8 August 2018.

continuing to press for payment. In those sorts of cases pressing performance can amount to an unequivocal act. The position is different where there is an independent underlying contract where pressing for performance is not an affirmation. Requiring compliance with the redemption obligation is not an unequivocal act in relation to the Waiver Letter.

34. As to the fairness argument and the criticisms the Company makes of Harris J's judgment, he says that the arguments have already been dealt with by Harris J in his stay decision and he is in the best position to assess the matter.<sup>17</sup> It is not something that this court should second-guess. In any event the CP 2(6) point was plainly within the scope of the Hong Kong proceedings and is part of the Petitioner's case in this court<sup>18</sup>. Paragraph 22 of the petition makes clear that the non-satisfaction of conditions precedent by the dates specified in the Waiver Letter is not limited to the late payment of the sum of Hong Kong \$60m on 21 February 2018<sup>19</sup>.
35. It is also clear that Mr Dominick understood the case being made against the Company<sup>20</sup>. Mr Goldring QC submits that what matters is that these invoices have still not been paid whatever the position in relation to addressee, scope and timing<sup>21</sup>.
36. Mr Goldring QC, in support for a winding up order against the Company to be made and not put off for any longer, relies on the well-established policy of discouraging long or repeated adjournments of winding up petitions. It is inconvenient for a company to have a pending petition hanging over its head. The winding up order if made would date back to the presentation of the petition and the adjournments might make the process of liquidation more complex<sup>22</sup>. It is, he submits, also unfair to a creditor to be kept waiting assuming that there is a valid debt and it is a proper case for a winding up order to be made.
37. Mr Tom Smith QC for the Company argues that the debt, which is the subject of the petition, is disputed *bona fide* on substantial grounds and the petition should be dismissed. His alternative position is that the petition should be adjourned pending the appeal against the judgment of the Hong Kong Court which is pending before the Hong Kong Court of Appeal.
38. He submits that the Hong Kong decision is wrong. It is also, he submits, curious and procedurally unfair because although CP 2(6) was referred to briefly in evidence it was not relied on in the Petitioner's skeleton arguments which concentrated solely

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<sup>17</sup> See §16.

<sup>18</sup> See § 21 of the petition in this court.

<sup>19</sup> This is also referred to in 1 Liu § 20 and 22: "By reason of the above breaches the Petitioner was entitled to request full redemption. However as regards the remainder of the Conditions Precedent, it should be noted that none of them was satisfied by the dates stipulated in the Waiver Letter or at all".

<sup>20</sup> See § 33 Dominick 1 and § 50 where he deals with clause 2 (6) and Lui 2§ 60-69 where he responds.

<sup>21</sup> He also says it is clear that the costs and expenses are not limited to the Waiver Letter but are to be looked at more widely in relation to putting together the transaction.

<sup>22</sup> French, *Applications to Wind Up Companies*, Third Edition § 5.113.



on clauses 2(3) and 2(5)<sup>23</sup>. Harris J found on the Petitioner's principal arguments that China Silver had a *bona fide* defence on substantial grounds that they had each been satisfied<sup>24</sup>.

39. He submits that there were no oral submissions made on CP 2(6) at all and it was simply not addressed. In the circumstances, it was reasonable for the Company to assume that it had been implicitly abandoned<sup>25</sup>.
40. In support of this submission he relies upon the facts in Harris J's decision of 5 June 2020 (refusing to stay his earlier decision pending an appeal), in which he said:

*"The company's defences were technical, but I accepted that in all but the case of clause 2(6), the company had managed to show a bona fide defence on substantial grounds."* §15

*"... the Petitioner did not address this point in its skeleton argument, although the company did."* §16<sup>26</sup>

*"the hearing lasted two hours and my notes do not record Counsel making oral submissions on this issue."* §16

41. Mr Smith QC argues that, whether or not the point was technically abandoned, it is clear from the skeleton arguments in the Hong Kong case that CP 2(6) was not being pursued by the Petitioner as part of its presentation at the hearing and was not in fact orally pursued at the hearing so the court had no oral submissions on the point at all. Traditions of advocacy in England, Hong Kong and in the Cayman Islands are based upon the court deciding matters upon oral submissions. These are made with the assistance of written arguments as a pre read and an aide memoire in support of the oral argument. Although the guarantor, China Silver, had the opportunity to deal with CP 2(6) in written submissions, it was not afforded the right to deal with it in oral submissions because it was not a point pursued by the Petitioner.
42. Mr Smith QC submits that overall the decision is procedurally irregular and unsafe and in breach of the basic standards of procedural justice and fairness. The Company expects that it will be set aside on appeal by the Hong Kong Court of Appeal in due course.
43. Mr Smith QC submits that this court should form its own view of the Company's case and that no reliance should properly be placed on Harris J's decision<sup>27</sup>.

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<sup>23</sup> §23-26 Petitioner's skeleton 18 September 2019 and § 5 of Petitioner's reply skeleton of 25 September 2019.

<sup>24</sup> As well as in respect of CP 2 (1) (2) and (4).

<sup>25</sup> Harris J rejected these 'fairness' arguments in the stay decision of 5 June 2020 at §16.

<sup>26</sup> *The Company did do so at §§46 and 47 of its skeleton argument dated 24 September 2019.*

<sup>27</sup> It is to be noted that there was no oral argument on CP 2(6) before this court on 21 January 2020 either.





44. As to CP 2(6), he relies on Mr Dominick's first affidavit at pages 293 - 298 which refers to the provision of three invoices to the Company on 31 October 2017, 15 December 2017 and 30 January 2018 which contained the wrong addressees and included work undertaken which did not relate to the transaction. This had been pointed out by the administrator, Intertrust.
45. These issues were raised by Mr Dominick on 21 February 2018 with the Petitioner, which resulted in revised invoices being sent to the Company, but not until much later on 4 October 2018. Even then they were addressed to China Shandong Hi-Speed Financial Group Limited (the Petitioner's holding company)<sup>28</sup>, not the Company.
46. Mr Smith QC argues that it cannot be suggested that the Company was in breach by failing to pay the original set of invoices in circumstances where it is accepted by reason of the submission of revised invoices (which were in reduced amounts) that these were misstated and incorrect. The revised set of invoices were only submitted on 4 October 2018, almost 6 months after the deadline in CP 2(6) and the waiver had already taken effect. The obligation was only to reimburse expenses incurred by the Petitioner not expenses incurred by China Shandong Hi-Speed Financial Group Limited and so the revised invoices were not compliant and were correctly rejected by the administrator.
47. He criticises Harris J's reasoning on this as being mere unsupported assertion. He argues that if legal fees are incurred by an investment vehicle it would be usual for the lawyers to address any invoices to that investment vehicle, not a holding company.
48. Mr Smith QC submits that the partial payments which were made pursuant to CP 2(1) and CP 2(2) were made explicitly and unarguably under the Waiver Letter. Although they were made late, they were accepted by the Petitioner.
49. Mr Smith QC also put forward another reason why the court should not make a winding up order and should instead strike out the petition as an abuse of process. He relies on the well-established rule that the petition should not be advertised until at least seven days have elapsed following presentation so that the company is afforded a breathing space to take advice and decide how to respond.
50. In this case the Petitioner on the same day as the presentation of the Petition wrote to the administrator, Intertrust, informing it of the petition with the clear intention of causing the administrator to freeze the company's assets<sup>29</sup>. Reference was made to section 99 of the Company's Law and the letter stated

*" when a winding up order has been made **any disposition of the company's property** and any transfer of shares or alteration in the status of the*

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<sup>28</sup> Dominick 1 §53.

<sup>29</sup> Ogier's letter of 11 October 2019.



company's members made after the commencement of the winding up is, unless the court otherwise orders, **void**".

....

Pursuant to section 100(2) of the Law the winding up of the Company is deemed to have commenced at the time of the presentation of the Petition for winding up.

....[ref to similar provision in Hong Kong]

Having been put on notice of sections 99 and 100(2) of the Law and their application to you we trust that you will govern yourself accordingly (in particular in relation to any intended disposition of the Company's property) pending the hearing of the Petition."<sup>30</sup>

51. Mr Smith QC submitted that the court should not allow the procedures and mechanisms for a fair and orderly winding up to be abused in order to put improper pressure upon a company<sup>31</sup>.
52. On this last point Mr Goldring QC says there has been no abuse of process and striking out would in any case be entirely disproportionate. The CWR<sup>32</sup> do not expressly say that parties cannot draw attention to a petition in this way. There was no reason to infer that the reason for sending the letter was to impose improper pressure on an entity that disputed the obligation<sup>33</sup>.

#### **The law**

53. The court set out the relevant law in its judgment of 16 March 2020 (at paragraphs 41-44) and it is unnecessary to repeat it.
54. The rule of practice concerning a creditor's disputed debt is long established and well-known. The court will usually dismiss the petition and leave the creditor to establish his claim in an action if the debt is *bona fide* disputed on substantial grounds. The court however retains the discretion to make a winding up order even though there is a dispute on substantial grounds<sup>34</sup>. There is therefore a threshold question to determine.
55. The burden is on the company to establish the substance of any dispute that is raised. In this case the Hong Kong judgment is impugned but the fact that there is an

<sup>30</sup> The Company's bank account was then frozen see Dominick 1 at § 83; (although no particulars were given).

<sup>31</sup> *Re Bill Hennessy* [1992] BCC 386.

<sup>32</sup> *Companies Winding Up Rules*, 2018 (as amended).

<sup>33</sup> See *SN Group* [1993] BCC 506.

<sup>34</sup> *Parmalat Capital Finance Ltd v Food Holdings Ltd* [2008] UKPC 23.



appeal pending does not itself demonstrate that there is a *bona fide* dispute as to the debt<sup>35</sup>.

56. The court is also astute to identify cases where an unwilling debtor raises technical objections late in the day and puts forward many issues of law and fact on affidavit (and claims that cross-examination is required to resolve disputes of fact) so that the petition should not be heard at all. Or cases where matters are deliberately made opaque or overcomplicated by unwilling debtors<sup>36</sup>.
57. In an appropriate case the court can refuse to dismiss or stay the petition and can determine the question of a disputed debt in the petition itself.
58. Such cases include those where the court doubts that the debt is disputed *bona fide* on substantial grounds, or where the creditor if he established his debt, would otherwise lose his remedy altogether, or where other injustice might result<sup>37</sup>.

### **Decision**

#### *Analysis of the position after the Hong Kong judgment*

59. As can be seen from the judgment of 16 March 2020, this court did not form a concluded view on the question of the disputed debt. However, on a provisional basis, and before the Hong Kong judgment was reviewed, the court was satisfied that there was a *bona fide* and substantial dispute as to the existence of the debt in relation to the arguments concerning the failure to satisfy the conditions precedent set out in the Waiver Letter and the redemption requests. It regarded these points as not straightforward and genuinely arguable<sup>38</sup>.
60. It adjourned the petition for the reasons I have rehearsed above relating to the risk of conflicting judgments, judicial comity and the commonality of issues in Hong Kong. At that stage because the judgment of the Hong Kong Court was awaited this court did not think it appropriate to make a determination before that judgment was obtained.<sup>39</sup> The adjournment was not granted on the basis that the court would be bound by the outcome in Hong Kong and it is not so bound.
61. The court now has the benefit of the Hong Kong judgment and in addition the benefit of Harris J's judgment refusing a stay pending appeal.
62. The court had reached a provisional view that a winding up order should not be made because there were genuine disputes based upon substantial grounds raised by the Company. The question I have to determine is whether there has been a fundamental change as a result of the Hong Kong judgment, as Mr Goldring QC

<sup>35</sup> *Re China Hospitals Inc* [2018(2) CILR 335] per Kawaley J at §27.

<sup>36</sup> *Re a Company 6685 of 1996* [1997] BCC 830 at 832 and 835 per Chadwick J and *Re Richbell Strategic Holdings* [1997] 2 BCLC 429 at 435g per Neuberger J.

<sup>37</sup> See *GFN Corporation Ltd* [2009] CILR 650 at §94 (b)(c) and (d), per Vos J.

<sup>38</sup> See § 45-50 of the judgment of this court

<sup>39</sup> See §§ 75-76 of the judgment of this court



submitted, such that the provisional view the court arrived at no longer remains valid.

63. Mr Smith QC has sought to impugn the Hong Kong judgment both as to its procedural fairness and as to the persuasiveness of its reasoning. No doubt those matters will be dealt with in the Hong Kong Court of Appeal in due course.
64. I accept Mr Goldring QC's submission that the Hong Kong judgment has persuasive effect. It is not *res judicata* between the parties, as they are different.
65. Indeed, the parties in this court have proceeded on the basis that it is for this court to determine the question of whether the redemption debt is *bona fide* disputed on substantial grounds.

**CP 2(6)**

66. A critical issue this court must have regard to is Harris J's finding that the Company was in breach of CP 2(6), which entitled the Petitioner to enforce its rights under the Subscription Agreement.
67. It seems to me that CP 2(6) is plain and unambiguous that the costs and expenses had to have been incurred by the Petitioner and that they had to be settled by the Company on or before 15 February 2018. The obligation on the Company under the clause was to reimburse expenses incurred by the Petitioner, not expenses incurred by another entity (China Shandong Hi-Speed Financial Group Limited)<sup>40</sup>.
68. It is also clear from the evidence that the invoices<sup>41</sup> contained items for work which did not relate to the transaction. This was pointed out on 21 February 2018 by Mr Dominick in an email to the Petitioner but revised invoices were not sent until 4 October 2018, almost 6 months later. Those invoices were different in that the sums had been reduced in each case, from which it is to be inferred that some items of work were indeed not properly chargeable to the transaction.
69. The Petitioner did respond to the queries raised by the Company about certain items included by email on 5 March 2018 and continued to chase the Company for settlement of its legal costs in August 2018. I am not satisfied that the 5 March communication addressed the relevant concerns.
70. It is also the case that the Company seems to have had a meeting with the Petitioner on 16 May 2018 where no on-going concerns seem to have been raised by Mr Dominick's email following the meeting<sup>42</sup>.

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<sup>40</sup> Which is apparently the parent of the Petitioner.

<sup>41</sup> Dated 31 October 2017, 15 December 2017 and 30 January 2018

<sup>42</sup> Liu 2 §63-69



71. It is therefore fair to say that on the evidence there seems to be a lack of clarity between the parties as to what was still being revised and on what basis after the deadline had passed.
72. However, what is important to the analysis is that the Company was under an obligation to pay legal expenses incurred by the Petitioner in respect of the transaction by a certain date. As the invoices requiring payment were wrong in material respects, which was pointed out to the Petitioner (albeit 6 days after the deadline for payment), it seems to me plainly arguable that the Company was not in breach of CP 2(6) by the deadline.
73. It was incumbent on the Petitioner to supply correct invoices if it seeks to rely on a condition precedent not being satisfied to pay them by a certain date. It would not be just in my view to allow the Petitioner to rely on its own non-compliance with the plain terms of CP 2(6) to assert that the Company is in breach of a condition precedent and therefore should lose the benefit of the waiver. I am satisfied that it is arguable that the Petitioner did not supply compliant invoices until after the deadline in the Waiver Letter had passed and as a consequence the Company is not in breach of CP 2(6).
74. True it is that the Company has not paid the earlier or later (revised) invoices at all as Harris J correctly observed, but non-payment of the revised invoices in October 2018 does not relate to the question of satisfying the conditions precedent in the Waiver Letter because they had to be paid by 15 February 2018. They could not be paid by that date because they were incorrect through no fault of the Company. There is no escaping the fact that revised invoices were raised and not received until six months after the deadline in the Waiver Letter had passed.
75. I have given anxious consideration as to whether these points, which can be fairly described as technical, are more 'form than substance' as Mr Goldring QC contends and have been taken late by the Company after a long period of not raising any defence to the debt.
76. I have considered the submission that underlies the Petitioner's case that at least prior to the commencement by the Petitioner of the Hong Kong proceedings on 7 March 2019 there appears to have been no dispute raised by the Company as to the Petitioner's status as creditor, rather than shareholder.
77. However, I have reached the clear conclusion that there are *bona fide* and substantial grounds to dispute that the Company was in breach of clause 2(6) from the point of view of its clear and unambiguous language, the evidence, and whether as a matter of fairness the Petitioner can rely on its own failure to provide the means by which the condition precedent could be satisfied.
78. I therefore come to a different view to Harris J in relation to the only issue upon which he found that there was no *bona fide* dispute based upon substantial grounds.



79. I have of course had the benefit of extensive oral argument on the point, which he apparently did not, and I have also had the additional benefit of having had an opportunity to review both of his decisions on the matter.
80. I note that Harris J in finding that no payment had been made in respect of the October 2018 invoices did not deal with the fact that the original invoices were deficient and that by the time the revised invoices were submitted the deadline in CP 2(6) had passed.

***Waiver and affirmation***

81. I have also formed the view that there is a *bona fide* dispute based upon substantial grounds that in any case the Petitioner affirmed the Waiver Letter by accepting payments due under it and thereby waived any failure to satisfy the conditions precedent.
82. The payments due under CP 2(1) and 2(2) to the Waiver Letter were made by the Company (albeit late) and they were accepted by the Petitioner<sup>43</sup>. In relation to these payments the Petitioner only delivered the necessary redemption information on 26 February 2018 and so it was not possible for the Company to pay the sums by 15 and 21 February 2018 as provided for in the Waiver Letter. The Petitioner's case on CP 2(1) and 2(2) therefore fails.
83. The payments were clearly made pursuant to the Waiver Letter because they correspond to the amounts required to be paid under those conditions precedent.
84. They were not made pursuant to the Redemption Letter or any independent obligation that subsisted under the Subscription Agreement or Side Letter as argued by Mr Goldring QC. They were made pursuant to the terms of the Waiver Letter that the parties had negotiated. I do not accept Mr Goldring QC's argument that the Petitioner was accepting payments under the Redemption Letter whether the Waiver Letter did or did not exist.
85. By continuing to press for those payments<sup>44</sup> and by accepting those payments without more when received late the Petitioner waived any entitlement to rely on the non-satisfaction of the conditions precedent<sup>45</sup>. It follows that the Petitioner waived its right pursuant to clause 1.1.11 of the Side Letter to redemption of the remaining HK\$140m of shares and it remains a shareholder in respect of those shares.

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<sup>43</sup> Dominick 1 § 34 and 38-43. Harris J concluded that it was arguable that the necessary information was not provided before the due dates for payment by the Petitioner-§12 of the Hong Kong decision.

<sup>44</sup> Liu 1 § 28 - waiver letter emails.

<sup>45</sup> As regards the other three CPs I accept there is a *bona fide* and substantial dispute that these were either fulfilled or waived; Dominick 1 § 44-46 and Liu 2 § 40-47, 48-59. There was no oral argument in this court about CP 3, 4 and 5. Harris J found that there was a *bona fide* dispute on substantial grounds in relation to all of the CPs except CP 2 (6). I have also reviewed Liu 2 §28-39(CP1 and 2) and §40-47 (CP 3 and 5), and §48-59 (CP4).



86. The acceptance of the payments which were made late can also be expressed in law as an affirmation of the contract<sup>46</sup>. Affirmation arises where a party has a right to treat a contract as terminated as a result of the counterparty's breach. The innocent party can choose whether to accept the termination, or treat the contract as continuing and to affirm it<sup>47</sup>. Affirmation can be express or implied. It will be implied if with knowledge of the breach and of his right to choose to treat himself as discharged, the innocent party performs an unequivocal act from which it may be inferred that he intends to treat the contract as continuing, regardless of the breach. In this case the Petitioner affirmed the contract because it continued to press for payments under CP 2(1) and 2(2) and ultimately received payments after the 15 February 2018 deadline had passed. There was no other act or any reliance on the part of the Company required to make good the principle.
87. I note that the principle of affirmation was not expressly dealt with by Harris J. He referred to whether a representation was made and whether it was unequivocal, which is more the language of waiver by estoppel, where a party represents to the other who is in breach that he will not enforce the term and the other party relies on that representation<sup>48</sup>.

#### **Discretion**

88. Having reached these conclusions on the material issues, the right course in the exercise of my discretion is to dismiss the petition. It would not be appropriate or in the interests of justice to further delay the petition for an indeterminate period of time to allow for appeals in Hong Kong. I accept that this is inconsistent with the outcome in Hong Kong and is an undesirable outcome. However, as I have sought to explain in my reasons, I have concluded that there is a *bona fide* and substantial dispute as to the petition debt vis a vis the principal debtor.

#### **Abuse**

89. It is not necessary for my decision to reach any findings in relation to the Petitioner's letter to Intertrust (by its attorneys) dated 11 October 2019. However, since the matter was argued, I should state that the letter does not in my view amount to an abuse of process. It may be seen to have been a tactical device to attempt to put pressure on the Company, but in my view it falls short of conduct which is abusive. It could also be interpreted as a communication to the administrator which sought to protect the interests of creditors. As a stand-alone ground it would not provide a reason for not to make a winding up order against the Company, assuming the other conditions for the court making such an order were satisfied.

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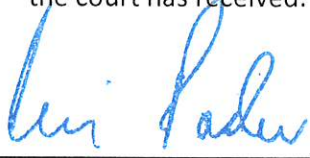
<sup>46</sup> See *The Brimnes* [1975] QB 928 at 954-956.

<sup>47</sup> See *Chitty on Contracts*, 33<sup>rd</sup> Edition 24-003.

<sup>48</sup> At §10



90. I would like to thank Leading Counsel and their teams for the efficient way the case has been prepared for hearing and the cogent submissions (both oral and written) the court has received.



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**THE HON. RAJ PARKER**  
**JUDGE OF THE GRAND COURT**