THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 161 OF 2018 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2018 REVISION)
AND IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

BETWEEN

TIANRUI (INTERNATIONAL) HOLDING COMPANY LIMITED
PETITIONER

AND

CHINA SHANSHUI CEMENT GROUP LIMITED
FIRST RESPONDENT

ASIA CEMENT CORPORATION
SECOND RESPONDENT

CHINA NATIONAL BUILDING MATERIAL CO. LTD
THIRD RESPONDENT

Before:	**The Hon. Mr Justice Segal**
Heard:	**4 May 2022**
Appearances:	**Mr David Allison QC instructed by Walkers appeared for the Second Respondent** **Mr. Tom Lowe QC instructed by Ogier appeared for the Petitioner**
Draft judgment circulated:	**13 May 2022**
Judgment handed down:	**20 May 2022**

HEADNOTE

Application for security for costs – exercise of the Court's inherent jurisdiction in respect of foreign companies who have presented a winding up petition – establishing reason to believe that the petitioner's assets will be insufficient to pay the respondent's costs – inferring a real risk of and reasons to believe insufficiency of assets where the petitioner fails to provide or only provides limited information as to its financial position

JUDGMENT ON SECOND RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

Introduction

1. This is an application for security for costs made by Asia Cement Corporation (***ACC***), the second respondent to the winding-up petition presented by Tianrui (International) Holding Company Limited (the ***Petitioner***) for the winding up of China Shanshui Cement Group Limited (the ***Company***). The application is made by a summons dated 16 March 2022 (***Summons***).

2. ACC seeks an order that the Petitioner gives security for ACC's costs up to the close of the parties' factual evidence in the petition in the sum of US$1,019,294.87. ACC relies on the Court's inherent jurisdiction to order security for costs against a foreign company petitioner in winding-up proceedings. The Summons is opposed by the Petitioner.

3. The Summons was heard on 4 May 2022. Mr. David Allison QC appeared on behalf of ACC and Mr Tom Lowe QC appeared on behalf of the Petitioner at the hearing.

4. For the reasons discussed below, I have decided that the Petitioner must give security for ACC's costs up to the close of the parties' factual evidence in the sum of US$815,347.35.

The Evidence

5. ACC has filed evidence in support of the Summons in the form of the first affirmation (***Wang 1***) and the second affirmation (***Wang 2***) of Mr Wang Chaoyu (***Mr Wang***). Mr Wang is the Assistant Vice President of ACC. The Petitioner opposes the application and relies on the seventh affirmation (***Li 7***) and the eighth affirmation (***Li 8***) of Ms. Li Xuanqi (***Ms Li***). Ms Li is an assistant to the chairman who is a majority shareholder of the Petitioner.

The Sealing Summons

6. There were two exhibits to Li 7. One was labelled "*Confidential LX-7*" (which I have not read). Simultaneously with the filing of Li 7, on 18 December 2021 the Petitioner filed a summons (the ***Sealing Summons***) seeking an order this exhibit be sealed and kept confidential until further order of the Court. Ms Li explained in Li 7 (at [12]-[14]) why she considered that there was a need for Confidential LX-7 to be sealed and not disclosed to ACC. She said that this exhibit "*contains the Petitioner's Audited Accounts which include commercially sensitive information of the Petitioner's business operations and which as the Petitioner is a privately held company the Company, ACC and/or [the third respondent to the petition, China National Building Material Co. Ltd] have no entitlement to see. In circumstances where [each of those parties] are competitors of the Petitioner, the information contained in the Petitioner's Audited Accounts must not be disclosed to [those parties].*" ACC vigorously opposed and objected to the Sealing Summons, arguing *inter alia*, that it would be wholly inappropriate and inconsistent with basic principles of procedural fairness for the Court to be asked to adjudicate on an application based on evidence which one party was prevented from seeing.

7. Prior to the hearing, the Petitioner confirmed that it would withdraw and not ask the Court to make an order on the Sealing Summons. In the Petitioner's skeleton argument filed in advance of the hearing, it was said that "*In resisting ACC's application for [security for costs], the Petitioner does not intend to rely on Confidential LX-7, or the information extracted about Confidential LX-7 in the text of Li 7*" (see [28] and footnote 21). At the hearing Mr Allison QC sought an order that the Petitioner pay ACC's costs of and associated with the Sealing Summons to be taxed on the standard basis if not agreed, which order Mr Lowe QC did not oppose. I shall therefore make an order in those terms.

Security for costs – the law

8. The jurisdiction to make an order for security for costs against a foreign or overseas company that has presented a winding-up petition arises under the Court's inherent jurisdiction, as was explained by Chadwick P in *Dyxnet Holdings Ltd v Current Ventures II Ltd* [2015] (1) CILR 174 (***Dyxnet***). As Chadwick P said (at [52]) when summarising his decision on the appeal (and

agreeing with the appellant's submissions) "*the Court [has] an inherent jurisdiction to grant security for costs "to be exercised in accordance with the principles relating to a non-resident limited liability company when there is reason to believe that its assets will be insufficient to pay the costs of the defendant*."" The inherent jurisdiction is to be exercised in relation to foreign company petitioners in the same manner as the Court's statutory jurisdiction to make orders for security for costs against Cayman registered companies pursuant to section 74 of the Companies Act (2022 Revision). This is necessary to avoid improper discrimination between Cayman and foreign corporations (see *Dyxnet* at [48(f)] and [48(g)]). Section 74 is in the following terms (underlining added):

> *"Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if that person is satisfied that there is reason to believe that if the defendant is successful in that person's defence the assets of the company will be insufficient to pay that person's costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."*

9. Both parties accept that in deciding whether to make an order for security for costs in this case there is a two-stage test to be applied (see *Cesar Hotelco (Cayman) Limited v Ryan* [2012] 2 CILR 164 at [45] (***Cesar Hotelco***)).

(a). the first question is whether there is reason to believe that if ACC is successful in defending the petition, the Petitioner's assets will be insufficient to pay ACC's costs (as ordered to be paid by the Court). This is a matter of evaluation. The Court has to consider whether there is a real risk that ACC's costs will not be paid. The onus is on ACC as applicant to satisfy the Court as to this, but ACC does not need to prove on the balance of probabilities that the Petitioner will be unable to pay a costs order. However, something more than mere doubt or concern about the future ability to pay is required. It is not sufficient for the Court or ACC to be left in doubt about the Petitioner's ability to pay ACC's costs. The test is *will not* be able to pay, not *might not* be so able (see *Eagle Ltd v Falcon Ltd* [2012] EWHC 2261 at [22]). The Court has to consider whether the Petitioner will pay the costs ordered to be paid by the Court within the time ordered, usually fourteen or twenty-eight days of the end of the trial or a subsequent costs order (*Holyoake v Candy* [2016] 6 Costs LR 1157 at [63] and [64] (***Holyoake***)). As Nugee J said in *Holyoake* at [67] (although I would substitute "*a real risk*" for "*more than fanciful*"):

"The general principle is that a defendant who is sued by an impecunious company should not be at risk, if he succeeds in his defence and has an order for costs in his favour, of that order being left unsatisfied. It is therefore generally just, once the risk has been shown to be more than fanciful, that security should be ordered."

(b). the second question, which arises if the Court is satisfied that there is a real risk that ACC's costs will not be paid if its defence of the petition is successful, is whether the Court is satisfied, in the exercise of its discretion, that it would be just to order security for costs having regard to all the circumstances of the case. Some guidance is found in the authorities as to the matters which the Court should take into account (see for example Lord Denning's list of seven factors in *Sir Lindsay Parkinson v Triplan* [1973] QB 609 at 626) but the Court must have regard to the facts and circumstances of the case before it.

Security for costs – the first question

The Evidence

10. So I must begin by asking whether ACC has adduced sufficient evidence of the Petitioner's inability to satisfy a costs order. It is necessary to review all the evidence filed (the Court's evaluation has to be made on the totality of the evidence: see *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120, [2016] 1 CLC 336 (CA) (***Sarpd***)) and consider whether that evidence demonstrates that the Court has reason to believe that the Petitioner will be unable or unwilling to meet an order for costs.

11. It is convenient to start with the evidence adduced and relied on by the Petitioner. I recognise that since the burden of proof is on ACC, the evidence it has adduced is important. But the Petitioner's evidence as to its assets and ability to pay a costs order sets the scene for considering ACC's case and the evidence on which it relies:

(a). Ms Li avers (in Li 7 at [11]) that "*The Petitioner is a financially sound company. It has sufficient assets and will be able to pay ACC's costs if ordered from its current assets*" (although as I discuss below ACC argues that the Petitioner cannot rely on this statement since it is expressed, at least implicitly, to be based on the evidence in Confidential LX-7, which the Petitioner has now withdrawn).

(b). Ms Li also avers that the Petitioner owns shares in a number of companies.

(c). first, the Petitioner owns 21.85% of the issued shares of the Company. Prior to the Summons being issued, the Petitioner's attorneys, Ogier, had written on 23 June 2021 to ACC's attorneys, Walkers, to say that it would be unnecessary and inappropriate for an order to be made against the Petitioner because it had more than sufficient assets to meet any costs order against it and "*has sufficient valuable assets within the jurisdiction of the Court in the form of its shares in the Company*" (see Wang 1 at [18]). However, in fact, all the Petitioner's shares in the Company are pledged to a lender. The Petitioner has asserted that this was an error that was not designed to mislead, and that the existence of the pledge was in the public domain and known to the Company (Li 8 at [8]). This is an issue to which I shall return since ACC relies on the Petitioner's failure to provide correct, reliable, and complete information at the outset as justifying little weight being given to the Petitioner's evidence as to its financial position where that evidence is not supported and substantiated by the filing of the relevant underlying documents.

(d). it is now clear, as Ms Li's evidence sets out, that the Petitioner has pledged *all* of the shares in the Company that it owns to China Bohai Bank Co. Ltd (***Bohai***) to secure a bank loan. The amount of the Bohai loan has not been disclosed by the Petitioner but the Petitioner does not assert that there is any residual value in these shares above the secured debt which should be taken into account on this application.

(e). secondly, the Petitioner owns shares in two wholly owned BVI subsidiaries, Holy Eagle Company Limited (***Holy Eagle***) and Yu Qi Company Limited (***Yu Qi***), which together own all the shares in another BVI company, Yu Kuo Company Limited (***Yu Kuo***). Yu Kuo owns 69.58% (2,044,484,822 shares) of the issued shares in China Tianrui Group Cement Company Limited (***Listco***). Listco is a Cayman incorporated company whose shares are listed on the Hong Kong Stock Exchange (***HKSE***). Listco publishes

consolidated accounts in accordance with the requirements of the HKSE. Ms Li says that as a result the Petitioner "*holds an indirect 69.58% interest in Listco*." She goes on to say (at [13] of Li 8) that "*Yu Kuo has pledged 1,012,000,000 of its 2,044,484,822 shares in the Listco to third parties*." Ms Li referred to Listco's annual report for 2020 (which had been exhibited to Li 7 but Li 7 had not referred to the pledge of Yu Kuo's shares) which included audited financial statements for the financial year ending 31 December 2020 and a note stating that (underlining added) "*As at 31 December 2020, based on the disclosure of interest forms filed, Yu Kuo pledged <u>its</u> 1,012,000,000 shares of [Listco] (approximately 34.44% of the issued share capital of [Listco] in favour of third parties*." It appears that the note was not intended to mean that Yu Kuo had pledged all of its shares in Listco and certainly Ms Li is clear in her evidence that the pledge only relates to part of Yu Kuo's shareholding. Accordingly, on Ms Li's evidence, Yu Kuo has 1,032,484,822 unencumbered shares. Ms Li deals with the value of these unencumbered shares. She says (at [14] of Li 8) that "*Based on the trading price of HK$6.79 as at 5 April 2021, the unencumbered shares in Listco have a current indicative value of over US$500m."* However, it appears that the reference to 2021 was an error. The Petitioner's skeleton argument on this application referred to the trading price as having been calculated as at 5 April 2022 (see [13]) and in response to a question from me during the hearing on this point, Mr Lowe QC confirmed that the reference to 2021 in Li 8 was indeed a mistake and that it should have been a reference to 5 April 2022. He undertook that Ms Li would file a further supplemental affirmation to correct the mistake.

(f). in Li 7, Ms Li (at [10]) had set out figures for the Petitioner's current assets, non-current assets, current liabilities, non-current liabilities, and total income in 2021. Ms Li averred that these figures were based on ("*demonstrated*" by reference to) the Petitioner's audited accounts dated 10 December 2021, which were exhibited in Confidential LX-7. As I have already noted, the Petitioner has confirmed that it does not rely on that exhibit, or the information extracted therefrom. During the hearing, Mr Lowe QC accepted and confirmed that, in consequence, the Petitioner could not and did not rely on [8] – [10] inclusive of Li 7 although he argued that the Petitioner could still rely on the statement made at [11] that "*The Petitioner is a financially sound company. It has sufficient assets and will be able to pay ACC's costs if ordered from its current assets*." Mr Lowe QC argued that this statement was not dependent on Confidential LX-7, which had been

withdrawn, although he accepted that following such withdrawal the statement made was unsupported by any documentary evidence. Mr Allison QC, however, submitted, that since the statement made at [11] must be understood as being based on the accounts exhibited in Confidential LX-7, the Petitioner was unable to rely on it.

(g). the financial statements included in Listco's annual report exhibited to Li 7 were consolidated accounts for what Ms Li described (at [7]) as the "*Tianrui Group.*" At page 54 (internal numbering) of these accounts, it is explained that they relate to Listco and its subsidiaries (defined as the "Group"). Accordingly, these financial statements do not deal with the assets and liabilities of the Petitioner, Holy Eagle, Yu Qi, or Yu Kuo, which being BVI companies, do not publish (and are under no obligation to publish) separate financial statements and audited accounts of their own.

12. Mr Wang's evidence can be summarised as follows (I would note that his affirmations on occasions did impermissibly set out ACC's "*position*" and make submissions rather than adduce evidence, but the Petitioner did not apply to strike out any parts of Wang 1 or Wang 2):

(a). the only assets disclosed and relied on by the Petitioner are the unencumbered shares held by Yu Kuo.

(b). but the number of shares pledged by, and the value of the unencumbered shares held by Yu Kuo was unclear. First, Ms Li had not filed any documentary evidence of the number of shares held by Yu Kuo. She simply relied on the statement in Listco's audited accounts as to the number of shares pledged. She had not, Mr Wang says in Wang 2 (at [22]), provided "*a definitive statement as the number of unencumbered shares held by Yu Kuo*." Secondly, the information in the audited accounts was out of date, as the accounts were prepared as at 31 December 2020. Mr Wang said that it was "*remarkable*" that Ms Li did not give evidence of the number of shares, unencumbered and encumbered, held at the date of her affirmation (April 2022). Thirdly, it was insufficient to rely only on the trading price (even if the trading price on 5 April 2022 had been used) to establish a realistic and reliable market price for the unencumbered shares.

(c). enforcement of a costs order made against the Petitioner "*will be a costly and time-consuming process, particularly given the indirect nature of [the Petitioner's] holding in the Listco shares*" (Wang 2 at [37]). Mr Wang says that while he is not a qualified BVI lawyer (and no opinion from a BVI lawyer is referred to), he understands that "*it seems likely that any attempt to enforce against the Listco shares would require ACC to obtain permission to enforce against [the Petitioner] in the BVI, and then to take multiple legal steps in the BVI against multiple parties, to take control first of [the Petitioner] (for example, by the appointment of receivers), and subsequently the other subsidiaries … in order to compel Yu Kuo to realise sufficient value in the shares and to make payment to ACC*." Mr Wang concluded (at [38] of Wang 2) that the "*process is likely to be incredibly unwieldy … [and] has the potential to become particularly complicated if a number of other creditors seek payment from Yu Kuo's assets at the same time*."

(d). a search by ACC's attorneys conducted at the BVI Financial Services Commission Companies Register on 11 April 2022 (copies of the filings on the Register were exhibited to Wang 2) had revealed that Yu Kuo had granted a charge in favour of Nanyang Commercial Bank (China) Limited (***Nanyang***) over shares in Listco. This charge had been registered on 4 January 2022. Mr Wang exhibited a form R401 which referred to a share charge dated 30 December 2021 entered into between Yu Kuo and Nanyang. Mr Wang said (in Wang 2 at [29]) that "*However, Ms Li and therefore the Petitioner has itself failed to mention that Yu Kuo …. is itself subject to a charge by [sic] Nanyang, that has to date been undisclosed to ACC. The security agreement itself in respect of this charge to Nanyang is not disclosed in the Search Report, therefore the extent of the encumbrance is not clear to me*."

(e). he further noted (in Wang 2 at [30]) that the Search Report showed that Yu Kuo had entered into more than thirty registered charges since its incorporation "*including [charges] in respect of both (i) the shares it holds in Listco but also (ii) in respect of the deposits, securities, precious metals and other assets or property of Yu Kuo itself, many of which appear to remain unreleased.*" He said that "*Yu Kuo clearly has a pattern of charging the shares it holds in Listco or its other assets, which leads me to suspect that if ACC were to obtain judgment against the Petitioner ACC may find that Yu Kuo's shares in Listco are fully charged.*" The exhibit to Wang 2 contained nearly one thousand pages

but Mr Wang only identified as relevant pages 794 to 796 of the exhibit, which related to the charges over deposits, securities, precious metals and other assets or property of Yu Kuo to which he had referred at [30]. The document at page 794 of the exhibit recorded a charge granted by Yu Kuo on 4 February 2021 in favour of LGT Bank AG, Hong Kong branch (***LGT***), over "*deposits, securities, precious metals and other assets or property of Yu Kuo from time to time deposited with, delivered, or transferred to or registered in the name or held in the possession or to the order of or under the control of direction of [LGT]*." The secured liabilities are described as all monies owing by Yu Kuo to LGT from time to time.

(f). Mr Wang considered (in Wang 2 at [27]) that there was a real risk that Yu Kuo (or the Petitioner and its other subsidiaries) may grant further security over the unencumbered shares in Listco or otherwise dissipate assets during the course of these proceedings. There was no obligation to make public details of security granted or the financial position of the BVI companies including their assets and liabilities so there could be further dealings in the shares in Listco without ACC being able to find out. He also noted that the Petitioner had not offered an undertaking to ensure that it retained sufficient (unencumbered) assets during the course of these proceedings.

(g). the Petitioner's conduct in relation to, and in ACC's view breach of, the undertaking given by the Petitioner to this Court on 17 November 2015 (the ***Undertaking***), was clear evidence of a wider disregard by the Petitioner for this Court's jurisdiction and any obligations that may be assumed to the Court (see Wang 1 at [17]). Mr Wang referred to the Company's and ACC's pleadings which dealt with the Undertaking (the Company's Defence at [19.3] and [64]-[71] and ACC's Defence at [38]-[61] in particular) and the relevant background in Wang 1 (at [7]-[18]). In summary, the Company had issued US$500 million 7.50% senior notes due in 2020 (the ***2020 Notes)*** which included certain events of default (including a change of control event) the occurrence of which could trigger repayment obligations under the 2020 Notes, resulting in the Company being subject to an immediate liability of approximately US$550 million. In late 2015, the Company was experiencing significant financial difficulties and as a result, on 10 November 2015, the board of the Company presented a petition in this Court to wind up the Company, and for provisional liquidators to be appointed to restructure the finances of the Company. The petition was opposed by the Petitioner and on 17 November 2015 it

provided an undertaking to the Company and this Court pursuant to which it undertook to procure that the Company would have the financial means to repurchase the 2020 Notes within 30 calendar days if the board of the Company was to be reconstituted at its forthcoming EGM (such that a change of control event under the 2020 Notes would be triggered, rendering the Company liable immediately to repurchase all validly tendered 2020 Notes); the Company was not wound up; and provisional liquidators were not appointed. ACC asserts that the Petitioner's subsequent conduct constituted and gave rise to a breach of the Undertaking. While accepting that the Petitioner disputes the allegation that it acted in breach of the Undertaking, ACC says that the Petitioner has in the past acted in disregard of its obligations to this Court, both in relation to the Undertaking and by failing to comply with directions of the Court made in these proceedings (as identified by Walkers in their letters dated 25 August 2021 and 11 November 2021 (which were exhibited to Wang 1)). Mr Wang concluded (at [18] of Wang 1 as follows):

> *"Given the lengths that [the Petitioner] has gone to in its struggle to take control of the Company and/or to harm the interests of ACC and CNBM as shareholders, there is genuine basis for concern that it may take similar lengths to frustrate any order of the Grand Court."*

(h). the Petitioner was subject to a substantial contingent liability in respect of sums which it may be ordered to pay in the proceedings in the High Court of the Hong Kong Special Administrative Region (the ***HK 548 Proceedings***). Ms Li and the Petitioner had failed to deal with this in their evidence or explain whether they had taken this into account when calculating the Petitioner's liabilities. The relevant background and the nature of these proceedings is summarised in previous judgments of mine in these proceedings, in particular in my judgment dated 6 April 2020 (but was assumed by Mr Wang and not particularised in his evidence). In that judgment, I explained that the HK 548 Proceedings had been brought by the Company against various defendants including the Petitioner and alleged that the failure by the Petitioner's nominees on the Company's board to enforce the Undertaking had resulted in the Company having to issue convertible bonds in 2018 in order to raise funds for the repurchase of the 2020 Notes and a claim was made against the Petitioner for reimbursement of the high-rate interest paid by the Company on the new bonds. The relief sought in the HK 548 Proceedings had, at the time of that judgment and as my judgment summarised, included a claim, as

against the Petitioner, for a declaration that the Petitioner was liable to account to the Company and others as a constructive trustee for benefits received as a result of the breaches of fiduciary duty, knowing receipt and conspiracy complained of and equitable compensation for dishonest assistance and/or knowing receipt or damages for unlawful means conspiracy. Mr Wang referred in Wang 1 to the correspondence between Walkers and Ogier on this issue, in particular Walkers' letter dated 21 September 2021 responding to Ogier's letter dated 6 July 2021, and said, in Wang 1 at [29], that:

> *"Walkers pointed out that Ogier's letter failed to make any mention of the fact that [the Petitioner] has [a] substantial contingent liability in so far as it is currently a defendant in proceedings commenced by the Company and three of its subsidiaries before the High Court of the Hong Kong Special Administrative Region in HCA 548 of 2019 (the "**548 Proceedings**"). The plaintiffs in the 548 Proceedings are seeking significant damages/compensation against Tianrui, including in relation to its failure to honour the undertaking that it gave to the Company on 17 November 2015 to procure that the Company had sufficient funds to redeem in full the 2020 Notes (as defined in the Company's Defence to these Petition Proceedings)."*

ACC's submissions

13. ACC submitted that there is reason to believe that ACC's costs will not be paid if its defence of the petition was successful, having regard to what was known and in evidence about the Petitioner's financial position and its other contingent liabilities, arising from other litigation. ACC submitted that the Court could properly infer, from the Petitioner's failure to provide detailed information concerning its financial position, and from its reticence to do so (including by its pursuit of the misconceived Sealing Summons) that there was no answer to ACC's case in this respect:

(a). the Petitioner together with Holy Eagle, Yu Qi and Yu Kuo were BVI companies so that it was impossible to obtain information from public sources as to their assets and liabilities. Such evidence as was available concerning the Petitioner's financial position demonstrated that there was a real risk that an adverse costs order will go unmet. Insofar as the Petitioner was known to have any assets within the jurisdiction, they were encumbered or held through multiple layers of offshore intermediaries.

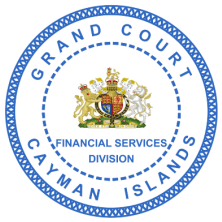
(b). the Petitioner's shares in the Company, since they were fully charged, were to be excluded from its assets for current purposes and the shares indirectly held in Listco were not an asset readily available for the purpose of enforcement. A significant and unverified tranche of Yu Kuo's shares in Listco was encumbered and the value of the unencumbered shares was uncertain and not properly verified. In addition, there were likely to be difficulties (and consequent costs) in any enforcement process in the BVI.

(c). there were liabilities of the Petitioner and Yu Kuo which the Petitioner had either failed to disclose or to explain how they were taken into account when determining the Petitioner's financial position and the sufficiency of its assets to meet a costs order:

(i). first, there were the undisclosed pledges granted by Yu Kuo identified and referred to in Wang 2 securing substantial liabilities to external financial creditors.

(ii). secondly, there was a failure to disclose the external liabilities of Holy Eagle, Yu Qi, and Yu Kuo (a point briefly referred to in ACC's written submissions but elaborated on during oral argument in response to questions from me).

(iii). thirdly, there was the failure to deal with the potentially substantial liability of the Petitioner in the HK 548 Proceedings relate to the Petitioner's failure to satisfy the Undertaking. ACC said that the Undertaking gave rise to an obligation to make a payment of at least US$485 million such that if the Petitioner was unsuccessful in the HK 548 Proceedings, it was at risk of owing a very substantial judgment debt, and in all likelihood, substantial orders for adverse costs. ACC argued, therefore, that even if Ms Li's evidence as to the value of the unencumbered shares in Listco were uncritically accepted (which ACC did not), and even if the risks of non-payment flowing from the difficulties of enforcement via the intermediate BVI holding companies (contrary to ACC's submissions) there was nevertheless a real risk that if the Petitioner was held liable in the HK 548 Proceedings its assets will be exhausted in satisfying a judgment and adverse costs order there (and ACC noted and invited the Court to have regard to the fact that, as had been explained in Wang 1 at [31], the HK 548 Proceedings did not appear to have been referred to in



Listco's description of the Group's contingent liabilities and litigation in its financial reports).

(d). in light of this evidence, and the Petitioner's failure to provide evidence to respond to the issues raised by ACC and to clarify and resolve the doubts concerning its financial position, it was appropriate for the Court to draw an inference that the Petitioner holds no other valuable, unencumbered assets in the jurisdiction and that even were the Petitioner to provide the necessary further evidence such further evidence would not make good its case as to the sums that could be realised from the unencumbered shares in Listco and upstreamed to the Petitioner:

(i). the Petitioner had failed to adduce detailed evidence of its financial position, or to respond to the concerns identified by ACC in a satisfactory manner, and in such a case, the Court of Appeal had confirmed in *BTU Power Management Company v Hayat* [2011] (1) CILR 315 (***BTU***) that if the applicant established a *prima facie* case to answer, the Court may properly infer, from the respondent's failure to answer, that there was no answer to the case (see [17] and [18]-[28] per Chadwick P, Forte and Mottley JJA agreeing). In other words where, as in this case, there was *prima facie* evidence of a real risk that the defendant's costs will not be paid if the defence was successful, the Court may properly draw an adverse inference from the respondent's failure to demonstrate that its financial position was adequate.

(ii). Chadwick P had summarised the position at [17] as follows:

> *"Put simply, if an applicant establishes by evidence, however weak, that there is a case to answer, then the court may infer, from the failure or refusal to answer that case, that there is no answer to it. It may infer that, if there were an answer, it would have been brought forward, and the fact that it has not been is a sufficient indication that there is indeed no answer. But if the material adduced by the applicant on whom the burden of satisfying the court lies does not raise even a prima facie case to answer, then there is simply no basis on which to draw the inference. A proper inference in such a case is that, because there is no case to answer, the party against whom the allegation is made can say "I need not answer it." No inference is to be*

drawn from his failure to do something which, on a proper analysis, he need not do."

(iii). the same approach had been taken by the English Court of Appeal in *Sarpd* (at [17] and [19]).

(iv). the Petitioner had twice attempted to identify an unencumbered asset in the jurisdiction against which an order for costs might be enforced, in its efforts to resist providing security for ACC's costs, first, in the letter from Ogier to Walkers dated 23 June 2021 (referred to above, which referred to its shares in the Company) and more recently in its evidence on this application (which referred to its interest in Listco) but upon being confronted with contrary evidence it had failed to identify any such asset. The Cayman assets it had identified were, by its own admission, encumbered and/or held through intermediate companies. In these circumstances, ACC submitted, the Court may properly infer that, if the Petitioner could point to a substantial, unencumbered Cayman asset, it would have done so, and its failure to do so indicated that no such asset(s) exist.

(e). furthermore, ACC submitted that since it was clear that the Petitioner had provided information concerning its financial position that was incomplete and, in context, had the potential to lead the recipient to an incorrect conclusion, the Court ought to give little weight to the Petitioner's bare and unparticularised assertions concerning its financial position.

(f). Ms Li's statement at [11] of Li 7 was based and made at least implicitly by reference to the accounts exhibited in Confidential LX-7, and so could not be relied on. Even if that is not correct, the statement was wholly unsupported by any evidence and should be given no weight.

The Petitioner's submissions

14. The Petitioner submitted that it had filed sufficient evidence of and established that it owns, albeit indirectly, assets (namely the shares in Listco) which have a substantial value, and which will be more than sufficient to allow it to pay ACC's costs in the petition. Ms Li had also clearly stated on oath that the Petitioner had sufficient assets to pay any order for costs made against it.

15. The Court had to be satisfied that there was a real risk that that the Petitioner will have insufficient assets to pay ACC's costs and to find facts from which such a risk could be inferred. Mere suspicion was insufficient.

16. The Petitioner argued that there was no dispute that it owned, through wholly owned subsidiaries, the shares in Listco and no serious dispute that they were liquid assets (as listed shares) that had a market value, by reference to a trading price, in the hundreds of millions of US dollars, which far exceeded the maximum liability for costs to which it would be subject. ACC's challenge to and questioning of the value of Yu Kuo's shares in Listco was without substance and not based on any evidence. Furthermore, steps were being taken to correct and confirm the date on which the trading price had been determined in Li 8 at [14]. 5 April 2022 was the date that had been used so that an up-to-date trading price had been relied on.

17. During the hearing, Mr Lowe QC submitted that the documents from the BVI charges register exhibited to Wang 2 showed a large number of share charges being created and then released, which suggested that Yu Kuo regularly rolled over and replaced the security it had granted over its shares in Listco. There was nothing, he argued, sinister about this.

18. The Petitioner submitted that it was impermissible for the Court to draw adverse inferences from the Petitioner's failure to deal in its evidence with the liabilities of Holy Eagle, Yu Qi, and Yu Kuo and other charges granted by Yu Kuo. The burden of proof when it came to establishing a lack of financial ability was on ACC and the Petitioner had no burden to adduce evidence of its financial position in order to resist the application for security for costs. No adverse inferences could be drawn from a failure to adduce such evidence in the absence of at least other *prima facie* evidence of the claimant's lack of ability and no satisfactory explanation

for the failure to adduce. In this case, there was no such evidence and the Petitioner had provided a reasonable explanation as to why it did not produce its accounts and accounts for Holy Eagle, Yu Qi, and Yu Kuo. It was insufficient for ACC just to say that the Petitioner had failed to produce its accounts despite having been asked on numerous occasions to do so.

19. In support of his submissions on this point Mr Lowe QC referred me to the decision of the English Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 and the quotation in Brooke LJ's judgment (at 329) from the judgment of Cockburn CJ in *McQueen v Great Western Railway Company* (1875) LR 10 QB 569 (***McQueen***) at 574. Lord Justice Brooke said this (underlining added):

> *"…Mr Grime [counsel for the health authority which was the defendant in the main action] accepted that there is a line of authority which shows that if a party does not call a witness who is not known to be unavailable and/or who has no good reason for not attending, and if the other side has adduced some evidence on a relevant matter, then in the absence of that witness a judge is entitled to draw an inference adverse to that party and to find that matter proved. On this occasion, however, he says that Dr Renninson was known to be unavailable, and there was a good reason for his unavailability; the Plaintiff had not adduced any evidence which tended to show what Dr Renninson would have done if he had attended; and so far from drawing an adverse inference the judge was willing to draw a benign inference (in the light of the view he took of the case) that this negligent doctor would have behaved in a non-negligent way if he had in fact attended.*
>
> *The need for the party relying on such an inference to establish a prima facie case on the matter in question was established in* McQueen v Great Western Railway Company *(1875) LR 10 QB 569, where it was more likely that a servant of the railway company (rather than a member of the public) would have stolen the plaintiff's goods from a truck in a railway siding to which the public had access, but the plaintiff did not call any evidence to show that this was what had in fact happened. In those circumstances, Cockburn CJ said at p 574:*
>
> > *"If a prima facie case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not displace the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."*

20. Mr Lowe QC noted that the passage from Cockburn CJ's judgment in *McQueen* had been cited and relied on by Chadwick P in *BTU* (at [15]) when considering whether Henderson J's approach had been correct. Chadwick P had said as follows at [13] – [15] (underlining added):

> *"13. the judge went on to say that he was unable to conclude, even to the relatively low standard of "reason to believe," that any of the allegations were true. The result, in his view, was that the applicant had failed to satisfy him that there was any evidence which could support the conclusion required by s.74 of the Companies Law. He said this: "That circumstance prevents me from drawing any adverse inference against this plaintiff for its failure to file evidence of its financial position."*
>
> *14. The first ground on which the judge's conclusion is challenged is that it is said that he was wrong to hold that there had to be— ". . . other evidence of the plaintiff's lack of ability or willingness to pay costs before he could infer from a failure by a plaintiff company to provide information regarding its assets that there was reason to believe that its assets would be insufficient to pay the costs." It is said that the requirement for "other evidence" is not established in any of the English authorities.*
>
> *15. I would reject that challenge. As it seems to me, the judge's approach was consistent with the general principle stated in McQueen..."*

21. Mr Lowe QC also submitted that a number of the dicta in the English Court of Appeal cases relied on by ACC were not consistent or fully in accord with the approach taken by the CICA in *BTU* and this Court should exercise caution before following them (as Chadwick P had himself noted at [28] of *BTU*). He noted in particular the following statement, relied on by ACC, made by Auld LJ in *Mbasogo v Logo Ltd* [2006] EWCA Civ 608 (***Mbasogo***), at [12], which Chadwick P had considered and, to the extent that it suggested that a party's failure to make disclosure of his means was itself a sufficient ground on which to form a view that there was reason to believe that he could not [meet/satisfy] an order for costs, said did not represent the law in this jurisdiction:

> *"... [W]here [the lack of information as to the financial position of the respondent] arises as a result of the party against whom the order is sought either providing unsatisfactory financial information as to his or its affairs, or as in this case none at all, it is not a big step for the court to take to conclude that there is reason for such belief [that that party would be unable to pay the other party's costs if and when ordered to do so]."*

22. The Petitioner also argued that it could rely on various claims it had against the Company as additional assets. Mr Lowe QC referred in his written skeleton to the letter from Ogier to Walkers dated 16 December 2021 in which Ogier had pointed out that the Petitioner was "*the beneficiary of numerous orders for costs to date in these proceedings against the Company, the benefit of which may be assigned to [ACC]*" and that the Company was indebted to the Petitioner "*for an amount far in excess of any adverse costs order and such debts may also be available for assignment in circumstances where it is common ground that the Company is solvent*." I would note that Walkers, in their response to Ogier dated 4 January 2022 (exhibited to Wang 1 at page 83 of the exhibit), had noted that they had previously pointed out (in their letter dated 21 September 2021) that the Company disputed that it was liable to the Petitioner as alleged, that ACC did not understand the reference to the costs orders being assignable to ACC and that neither of these matters had been dealt with in the Petitioner's evidence.

23. The Petitioner also argued that it had provided a reasonable explanation as to why it had failed to provide the further financial information requested. As Ms Li had explained in Li 7 (at [13]) and Li 8 (at [18]-[20]), the Petitioner's audited accounts include commercially sensitive information of its business operations, which it had no obligation (as a BVI private company) to disclose, and ACC had no entitlement to see. Furthermore, since the Company, ACC and CNBM were the Petitioner's competitors, if the information in these accounts were disclosed to them it could and might well be misused and result in serious damage to the Petitioner's business. ACC's request to the Petitioner "*to provide sworn evidence confirming full details of its assets and confirmation that its assets exceed its liabilities is therefore nothing more than a fishing expedition by a direct competitor seeking access to commercially sensitive information*" (Li 8 at [20]). The Petitioner submitted that it could still rely for the purpose of resisting ACC's application for security for costs on this explanation for not disclosing the accounts, despite it having withdrawn Confidential LX-7 and the Sealing Summons.

24. The Petitioner denied that it had any liability in respect of the Undertaking or that provision for such a liability needed to be made for the purpose of this application when assessing the Petitioner's ability to pay a costs order. It disputed the assertion and claim, and argued that it had not been established, that it had acted in breach of the Undertaking. This was a live issue in the proceedings in Hong Kong and in the petition. Furthermore, ACC had not justified the

assertion (by reference to the pleadings in the HK 548 Proceedings or otherwise) that there was a real risk of the Petitioner being subject to a liability of nearly US$500m.

> *"The plaintiffs in the 548 Proceedings are seeking significant damages/compensation against Tianrui, including in relation to its failure to honour the undertaking that it gave to the Company on 17 November 2015 to procure that the Company had sufficient funds to redeem in full the 2020 Notes (as defined in the Company's Defence to these Petition Proceedings)."*

25. The Petitioner argued not only that ACC was wrong to claim that a substantial provision for its potential (or contingent) liability for a breach of the Undertaking had to be treated as a liability affecting its ability to pay a costs order but also that no weight could be given on this application to the allegation made by ACC of misconduct based on the asserted breach of the Undertaking. Nor, the Petitioner argued, was there any basis for concluding, as ACC had asserted, that the Petitioner will or might take steps to dissipate its assets or avoid a liability to pay costs. In fact the evidence showed that the Petitioner had complied with substantial costs orders made in the proceedings in Hong Kong. In any event, the assessment of the Petitioner's conduct was only relevant at the second stage, when the Court came to consider whether to exercise its discretion.

26. The criticisms made by ACC of Ogier (and the Petitioner) for relying in their letter 23 June 2021 on the Petitioner's shares in Company and failing to disclose or explain that all of those shares were charged, was unjustified. Ogier had made an error, and there had been no intention to mislead as had been explained and confirmed on oath by Ms Li in her evidence (see Li 8 at [8]). Furthermore, the fact that Yu Kuo's shares in Listco had been charged could be found in Listco's annual report that had been exhibited to Li 7.

Discussion and conclusion

27. ACC argues that its evidence shows that:

    (a). Yu Kuo has granted charges over:

        (i). its shares in Listco, and

(ii). other assets,

beyond and in addition to the charges disclosed by the Petitioner.

(b). the Petitioner is at risk of being subject to a very substantial liability in the HK 548 Proceedings.

(c). so that there is evidence, at least sufficient to make out a *prima facie* case, that the number of unencumbered shares in Listco held by Yu Kuo is materially less than that claimed by the Petitioner, that Yu Kuo has material liabilities to third parties and that there is a real risk that the Petitioner has substantial liabilities which taken together will mean that the value of the Listco shares available to the Petitioner, and the net assets of the Petitioner after taking into account other liabilities, will be insufficient to enable it to pay a costs order in ACC's favour.

(d). the Petitioner has failed to adduce evidence to rebut this case.

28. I shall first consider the position with respect to the Listco shares. I note two points as to this. First, that the evidence filed by Mr Wang, in particular the form R401, shows that the share charge granted by Yu Kuo to Nanyang dated 30 December 2021 was in fact a third-party charge, granted to secure the liabilities of Listco rather than Yu Kuo. This is made clear by the short description in form R401 of the liabilities secured, which refers to a facility agreement dated 30 December 2021 between Listco (referred to as the borrower) and Nanyang relating to a loan of up to US$30m. This is not a point that was referred to by either party but appears to me to be clear from the evidence. Secondly, I note that the Listco shares which are charged by the Nanyang charge are those specified in schedule 1 of the charge, however that schedule is not attached to the form R401 or in evidence. It is therefore impossible to ascertain from the evidence filed by the parties whether the Nanyang charge covers all or only part of Yu Kuo's holding of shares in Listco.

29. In my view, in these circumstances it can be argued (although these points were not made by the Petitioner in its submissions or by Mr Lowe QC at the hearing) and it seems to me to be right to conclude that the charge granted by Yu Kuo to Nanyang *cannot* be regarded as evidence:

(a). that Yu Kuo is subject, as a debtor, to personal liability in respect of the secured borrowing.

(b). of a real risk that the Nanyang charge will be enforced, and the value of the charged shares applied to the discharge of the secured debt, since Listco, the principal debtor and borrower is, as shown both by the consolidated audited accounts for 2020 and the trading price of its shares, manifestly and substantially solvent.

(c). that Yu Kuo has granted share charges over more than the 1,012,000,000 shares in Listco referred to in Li 8 and the consolidated accounts for the financial year ending 31 December 2020. It is possible that the Nanyang charge is one of a number of charges granted by Yu Kuo over shares which in aggregate amount to 1,012,000,000 shares (the exhibit to Wang 2 evidenced a large number of charges over the Listco shares having been created). To that extent, the evidence of the existence of the Nanyang charge is consistent with Ms Li's evidence.

30. However, the charge granted to LGT is evidence that Yu Kuo has incurred liabilities on its own behalf and that it has other assets over which it has granted charges. There is no evidence as to the amount of such liabilities or the value of the assets. This evidence, in my view, is, to use Chadwick P's words in BTU (at [24]) "*other material which called for an answer*" by the Petitioner. ACC has put in issue and made a case, albeit a limited case, that Yu Kuo has liabilities and I see no reason for concluding that such liabilities could not turn out to be material.

31. I also consider that the large number of charges granted by Yu Kuo and the large and potentially increasing number of Listco shares secured by these charges puts in issue the extent to which further charges will be granted and the extent to which they may adversely affect the Petitioner's interest in the value of those shares. However, since as I have said it appears that

the shares charges granted by Yu Kuo only secure the borrowings of a solvent Listco, there should be no risk of those charges being enforced and I do not consider that this issue can of itself add to the risk of the Petitioner's assets being insufficient.

32. ACC has also put in issue the extent of the Petitioner's liabilities. ACC has shown that the Petitioner is facing a substantial potential liability in the HK 548 Proceedings. It is true that the liability is disputed and that if the Petitioner is successful in those proceedings it will have no such liability. But there is a risk of the Petitioner being subject to a substantial liability. It is not, in my view, possible on this application for the Court to form a considered view as to the merits of the claim against the Petitioner and to calibrate the risk of it losing or winning, or as to the quantum of any liability for damages or otherwise. I was certainly not provided by ACC with sufficient material from which I could conclude, as ACC alleged, that the Petitioner could be held liable to pay US$485 million in respect of its alleged breach of the Undertaking.
Nonetheless, it does appear, and I do not understand the Petitioner to challenge this, that there is a risk that the Petitioner could be held liable for a sum in the hundreds of millions of dollars. It seems to me, from the evidence before me, that the risk of liability cannot be ignored or treated as wholly immaterial.

33. ACC has therefore adduced evidence which puts in issue the extent of Yu Kuo's and the Petitioner's liabilities and makes a case which, although limited and to that extent weak, meets the *prima facie* case standard that there is a real risk (a significant danger) that these liabilities could be substantial and sufficiently substantial to mean that the Petitioner's assets will be insufficient to enable it to pay a substantial costs order in favour of ACC.

34. The Petitioner's own case as to the sufficiency of its assets is exclusively based on the value of the shares in Listco and on 1,032,484,822 of those shares being unencumbered. But where, as here, those shares are held by a sub-subsidiary, the value of the shares to the Petitioner is dependent on the liabilities owed by Yu Kuo (and Holy Eagle and Yu Qi). Having information regarding those liabilities is therefore critically important in the assessment of the Petitioner's sufficiency of assets and ability to pay a costs order. The Petitioner has adduced no evidence as to Yu Kuo's liabilities (in response to the issues raised and evidence filed by ACC).

35. In addition, the Petitioner's own liabilities are important in the assessment of its sufficiency of assets. As Henshaw J noted in *Pisante v Logothetis* [2020] Costs LR 1815 (***Pisante***) at [53] "*The existence of assets even if not specifically encumbered does not allow conclusions to be drawn about Mr Pisante's net assets.*" Once again, the Petitioner has adduced no evidence as to the amount of its own liabilities (in response to the issues raised and evidence filed by ACC).

36. The Petitioner has therefore failed to answer the *prima case* made out by ACC. It could have put in evidence as to the amount of Yu Kuo's and its own liabilities to rebut that case and confirm and clarify the position. It failed and refused to do so. It withdrew the Sealing Application and chose to withdraw and not rely on the financial information contained in Confidential LX-7. In my view, the confidentiality concerns raised by Ms Li are not a sufficient justification for failing to provide at least aggregate and headline figures that would have been sufficiently responsive. Even assuming without deciding that the Petitioner had a reasonable and proper basis for saying that providing ACC with the Petitioner's audited accounts in full (see Ms Li's statement in Li 8 at [20] quoted above), which the Petitioner was under no obligation to make public, would have involved revealing commercially sensitive information to a major competitor, and that this justified withholding some financial information, the Petitioner could have provided aggregate figures for the total amount of Yu Kuo's external borrowings and liabilities (without the need to disclose the identity of the lenders, if not already disclosed in the BVI charges register, or the tenor, terms and purpose of the borrowings or liabilities) and of the Petitioner's liabilities. I cannot conceive how such information, aggregated and generalised, in headline terms, could have been commercially damaging to the Petitioner if, as it claims, its net assets are substantial and obviously sufficient to be able to satisfy a costs order against it.

37. In my view, the Petitioner is unable to rely on the averment made by Ms Li in Li 7 at [11] after its withdrawal of and confirmation that it did not rely on the documents and information in Confidential LX-7. The statements made by Ms Li in that paragraph are part and parcel of her evidence based on Confidential LX-7 and in my view it is wholly unrealistic for the Petitioner to say that it can withdraw that evidence but still rely on those parts of Li 7 that did not specifically refer to Confidential LX-7. In any event, even if the Petitioner was able to rely on that paragraph, Ms Li's bare assertion in, unsupported by any detail or documents, that the Petitioner is financially sound and has sufficient assets to enable it to pay ACC's costs from its current assets, is (as ACC submitted) insufficient on its own to rebut the *prima facie* case made against the Petitioner.

38. It seems to me that Ms Li's averment at [14] of Li 8 regarding the total value of Yu Kuo's unencumbered shares, after being corrected by the further affirmation that Mr Lowe QC has undertaken will be filed, is to be taken as saying that all the shares in Listco held by Yu Kuo, other than the 1,012,000,000 pledged to third parties, are unencumbered and worth over US$500m. Her statement in [14] of Li 8 that "*Based on the trading price of HK$6.79 as at 5 April 2021, the unencumbered shares in Listco have a current indicative value of over US$500m"* follows immediately after the discussion in [13] of the pledge referred to in Listco's annual report of 2020 and her statement that Yu Kuo had pledged "*1,012,000,000 of its 2,044,484,822 shares in Listco*." The clear implication is that the full balance of Yu Kuo's shares in Listco, of 1,023,484,822 shares, was unencumbered as at 5 April 2022. Accordingly, I do not accept ACC's submission that the Petitioner's evidence as to the number of Listco shares charged by Yu Kuo is out of date and that Ms Li cannot be understood as giving evidence as to the up-to-date number of unencumbered shares and their current value. Nor do I consider that there can be a challenge to Ms Li's evidence as to the number of Listco shares held by Yu Kuo, the number of shares charged and the market value of the shares. While Ms Li did not file share certificates evidencing Yu Kuo's holding, the audited consolidated accounts for the year ending 31 December 2020 confirm that Yu Kuo owned 69.58% at that date and the number of shares pledged. There is no evidence to contradict Ms Li's averment that Yu Kuo still holds that number of shares and has only encumbered 1,012,000,000 shares (I have noted above that the note to the accounts is oddly worded because it refers to Yu Kuo as having "*pledged its 1,012,000,000 shares*", suggesting all its shares, but it is clear that the intention is to state that the pledge only relates to part of Yu Kuo's holding since the note says that the

pledged shares constitute 34.44% of Listco's shares and the accounts had earlier recorded that Yu Kuo's held 69.58% in total). Nor is there any evidence to contradict Ms Li's averment as to the share price on 5 April 2022 (and she exhibited a screenshot of the listed price in support).

39. I do not consider that the Petitioner is entitled to say that the Court must assume, in view of this evidence as to the substantial value of the Listco shares, that it is bound to be able to afford to pay any costs order against it, even on the assumption that Yu Kuo does have material liabilities and it turns out that the Petitioner is ordered by the Hong Kong court to pay a sum in the hundreds of millions of dollars in the HK 548 Proceedings. To accept such an argument would sanction a defendant to a security for costs application being able to say, even when serious questions are raised as to the extent of its liabilities, that it only needed to adduce evidence as to the value of its assets and could ignore and stay silent as to the quantum of its liabilities (in other words, such a defendant could say that because it owns a valuable asset whose value is large compared to the likely quantum of its costs liability it need not say anything about its liabilities even where some reliable evidence has been adduced showing that it has material undisclosed liabilities which could seriously affect its ability to pay the costs). That seems to me to be an unacceptable result which is not supported by the authorities. I accept Mr Lowe QC's submission, based on *BTU*, that in this jurisdiction before the Court can draw an adverse inference against a party there must be a *prima facie* case made against it on the point in issue and that the Court cannot treat that party's failure to give any or adequate details of its financial position, however suspicious or unattractive such conduct may be, *on its own* as sufficient to draw the inference that the party cannot have (and that there is reason to believe that it does not have) sufficient assets to cover the costs. But once a *prima facie* case has been made out and an issue properly raised as to the extent of the party's liabilities, the Court can, as it seems to me, readily conclude that there is such a reason and real risk of an insufficiency of assets, if the party fails to adduce any or adequate evidence of its liabilities. Mr Justice Henshaw's comments in *Pisante* at [81] on the approach to be taken by the Court seem to me to be on point in this context (even after taking into account the different approach of the English courts in a case where a defendant to a security for costs application has remained silent and no *prima facie* case to answer has first been made out):

> "*..there can be reason to believe that a company will lack the means to pay, even in circumstances where some information about assets has been provided, particularly if the information provided about the claimant's financial affairs is unsatisfactory (see [Mbasogo at [12]]. Moreover, I do not consider that the defendant is required in this context to demonstrate a lack of probity or solid evidence of a risk of asset dissipation such as might justify a freezing order..*"

40. Accordingly, making the required evaluation having regard to the totality of the evidence including the absence of relevant evidence from the Petitioner as to the extent of Yu Kuo's and its liabilities, where it is the only party able to provide that evidence and ACC has made out a *prima facie* case that material liabilities exist, I conclude that there is reason to believe that the Petitioner's assets will be insufficient to pay ACC's costs.

41. In view of these conclusions, ACC succeeds on the first question and does not need to rely, and I do not need to deal in any detail, on its further argument that the problems associated with enforcing a costs judgment in the BVI separately establishes a real risk that it would be unable to recover its costs. I would just say this. Mr Wang's evidence was rather thin on this point and did not provide me with much assistance in forming a view as the real extent of the enforcement problems that ACC might face. Mr Wang's review of applicable BVI law was brief and did not provide any detail as to the applicable BVI law or a legal analysis of the issues that might arise thereunder. But it seems to me that on the basis that Yu Kuo has granted a number of charges over its shares in Listco to secure substantial sums and is to be treated as being subject to other material liabilities, it is right to conclude that there is a real risk that ACC would face substantial obstacles to enforcing successfully a costs judgment and being paid its costs in full. While it is to be expected, having regard to general principles of enforcement in common law jurisdictions and the little that I have been told by Mr Wang as the law to be applied in the BVI, that ACC could obtain a charging order (or its equivalent) and/or the appointment of a receiver over the Petitioner's shares in Holy Eagle and Yu Qi (which would allow the receiver to exercise the rights of those companies as shareholders to take control of Yu Kuo and procure a sale of Yu Kuo's shares in Listco), it does not follow that this will result in the full (or sufficient) value of the unencumbered Listco shares finding its way to ACC. The secured creditors of Yu Kuo may, if they see ACC taking steps to obtain control of Yu Kuo and sell the unencumbered shares in Listco, enforce their security over the Listco shares and take steps themselves to obtain control of Yu Kuo, thereby adversely impacting the listed price of the Listco shares and interfering with ACC's process of selling and distributing the proceeds of

the unencumbered shares. Furthermore, unsecured creditors of Yu Kuo may take action and in any event will need to be paid before funds can be upstreamed to the Petitioner.

Security for costs – the second question

42. I now turn to the exercise of the Court's discretion. There was no dispute between the parties as to the approach to be adopted by the Court. It was accepted that the Court must take into account all the circumstances, including those identified by Lord Denning in *Sir Lindsay Parkinson* and referred to above, and carry out a balancing exercise, weighing on the one hand the risk of injustice to the Petitioner against the risk of injustice to ACC. It is clear that whether the defendant to the application has given a full account of his means is relevant at the second stage (*Al-Koronky v Time Life* [2006] EWCA Civ 1123).

43. The Petitioner relied in its written submissions and at the hearing on one main point going to discretion. It said that even if I concluded that there is a *prima facie* case of inability to pay costs, I should nonetheless decline to exercise my discretion to require the Petitioner to give security because it would be unfair to do so when these proceedings (in the petition), and ACC's and China National Building Material Co. Ltd.'s (***CNBM***) defence of these proceedings, was seen in the wider context of the multi-jurisdictional and multipartite litigation that has arisen out of the dispute over control of the Company, to which the Petitioner was in substance and reality the defendant.

44. The Petitioner said that (a) ACC and CNBM were behind (and the real parties in interest being in substance the plaintiffs or at least controllers of the plaintiffs) in the HK 548 Proceedings, in which the Petitioner was being sued on the basis and for the relief I have outlined above (even though the plaintiffs in the HK 548 Proceedings were the Company and three of its subsidiaries); (b) that ACC and CNBM were relying in the petition proceedings on the same facts and cases as were relied on by the Company and the other plaintiffs in the HK 548 Proceedings; so that (c) if the Petitioner were required to provide security for costs in these proceedings, it would, again in substance, be being forced to provide security for and to fund the costs of the parties suing it in Hong Kong (the plaintiffs in the HK 548 Proceedings).

45. As Mr Lowe QC put the point in argument, it is said that the petition is part of multifaceted litigation involving ACC, CNBM and the Company in which the Petitioner is in reality the defendant and it would be unfair for the Petitioner to be singled out as the one party to be required to pay security for costs. There was, he submitted, bound to be a substantial overlap between the work to be done and costs incurred in the petition and the HK 548 Proceedings so that the Petitioner would be required to provide security for the costs not just of these proceedings but also the costs incurred in relation to the HK 548 Proceedings.

46. Mr Lowe QC did also submit during the hearing that it was clear on the evidence that Listco was the principal listed trading company within the Tianrui group ("*the jewel in its crown*", to use Mr Lowe QC's phrase) so that the Court should take into account the fact that it was self-evident, or that it could be inferred, that the Petitioner would not refuse and fail to pay a costs order where to do so would result in enforcement against its shares in Holy Eagle and Yu Qi, and therefore loss of control of Listco.

47. ACC strongly denied that it (or CNBM) were behind the HK 548 Proceedings. At the hearing, Mr Allison QC said that the Petitioner's allegation was not pleaded and that the Petitioner had not filed affirmation evidence to support it. The Petitioner therefore had no basis for arguing that costs incurred by ACC in the petition proceedings could, for the purpose of ACC's security for costs application, be treated as duplicative of costs incurred in the HK 548 Proceedings. The Court should therefore not treat the alleged risk of duplication or overlap as a ground for refusing to order security or for reducing the amount of security to be given by the Petitioner.

48. ACC submitted that there were a number of matters that the Court should take into account which supported the exercise of the discretion in favour of making the order for security for costs:

    (a). the Petitioner's past conduct in this jurisdiction, as could be seen from Mr Wang's evidence, in particular the Petitioner's conduct in respect of the Undertaking. ACC accepted that the Petitioner had denied that it had breached the Undertaking but said that it did not appear to be in dispute that the Undertaking was given, that the Court had relied on the Undertaking (upon receipt of the Undertaking the Court had dismissed the 2015 winding up petition), and the Undertaking had not been satisfied by the Petitioner.

There were therefore proper grounds for concern about the possibility that the Petitioner may either fail to comply with an order of this Court or might seek to otherwise frustrate or evade its operation. In addition, ACC argued that while the Petitioner was entitled to attempt to maintain the confidentiality of its financial information its novel attempt (via the Sealing Application) to rely on such information on the Summons by allowing the Court but not ACC to see it was also suggestive of a willingness to frustrate the usual process of the Court in its litigation with ACC.

(b). ACC noted that the Petitioner had relied on its compliance with a costs order made in the HK 548 Proceedings (see Li 8 at [15]-[17]). However, ACC submitted that little weight should be given to this and the Petitioner's conduct in this respect did not rebut the serious concerns as to its conduct that arose from its conduct in this jurisdiction, on which ACC relied. The quantum of the Hong Kong costs order was just US$387,000 a figure that will, inevitably, be very substantially less than any order for adverse costs in these proceedings. Moreover, the order was in favour of the Company, and not ACC. ACC argued that the Court may properly take the view that a litigant in the Petitioner's position is inherently more likely to pay an adverse costs order to a company in which it is a substantial shareholder, than to a company which it regards as a direct competitor. In addition, the costs order in question was interlocutory so that, had the Petitioner failed to satisfy it there would probably have been significant adverse consequences for its further conduct of the HK 548 Proceedings. No such incentive existed in respect of an order for costs made at the conclusion of these proceedings.

(c). it was relevant to the exercise of the Court's discretion that the Petitioner had failed to provide evidence of the location and quantum of its assets. ACC relied on a passage from my judgment in *Jafar v Abraaj Holdings* (FSD 203 of 2020 (NSJ), unreported, 10 August 2021) (***Jafar***) at [70(b)]:

> *"… the Plaintiff has declined to provide details of the location of his assets and to show that he has valuable assets in jurisdictions against which a costs order could clearly be enforced. It is a matter for him whether or not he does so but if he decides not to provide such information… he must accept that in substantial, complex and lengthy litigation such as this, he is putting the defendants at substantial risk which the Court will take into account and to which it will attach considerable weight on a security for costs application.…"*

(d). the Petitioner had adduced no evidence to suggest that it would suffer any prejudice if it were ordered to pay security for costs but were ultimately to prevail at trial (in other words, if security for costs were, in effect, ordered unnecessarily). Conversely, if no order for security was made, ACC faced the prospect that it will be unable to enforce any order for costs that is ultimately made in its favour. The balance of prejudice was therefore clearly in favour of an order for security being made in ACC's favour.

49. Having reviewed all the circumstances, and balancing the risk of injustice on the one hand to the Petitioner and on the other to ACC, I am satisfied that an order for security should be made:

(a). the parties have not addressed me on any of the matters referred to by Lord Denning in *Sir Lindsay Parkinson*, in particular the Petitioner's prospects of success on the petition (for the purpose of the Summons, I assume that the Petitioner has a reasonable prospect of success).

(b). what is of particular importance in my view is that an order for security will not have the practical effect of preventing the Petitioner from proceeding with the petition. There is no risk of an order stifling a genuine and serious claim and the Petitioner has not claimed that an order against it would impose financial burdens that it could not meet or hinder its prosecution of the petition.

(c). the Petitioner's conduct of its defence of the Summons and unjustified reticence over the disclosure of financial information which the Court and ACC needed to see in order fairly to be able to form a view as to the sufficiency of its assets is both relevant and weighs in favour of the making of an order. It seems to me that the Petitioner seriously mischaracterised ACC's case when Ms Li (in Li 8 at [20]) referred to ACC's requests for further information as "*nothing more than a fishing expedition by a direct competitor seeking access to commercially sensitive information*" and thereby misunderstood the reason for and importance of providing proper evidence as to the sufficiency of its assets in this case. The Petitioner had it within its power to resolve the issues raised by ACC regarding Yu Kuo's and its liabilities, but it declined to do so. It was slow to respond to issues legitimately raised by ACC and provide information regarding the Listco shares charged by Yu Kuo, changed tack at a late stage regarding reliance on the information contained in Confidential LX-7, and despite at the last minute withdrawing the Sealing

Summons and accepting that reliance could not be placed in that information, it nonetheless proceeded to resist the Summons.

(d). I do not however take into account the Petitioner's conduct in relation to the Undertaking. In circumstances where the Petitioner strongly argues that it has not acted in breach of the Undertaking or improperly and where the facts are in dispute and yet to be decided, I consider that it would be wrong to give any weight to ACC's allegations that the Petitioner has shown a course of conduct and willingness to ignore and act in breach of orders of this Court. I accept that, as ACC says, the circumstances in which the Petitioner came to satisfy the costs order in the HK 548 Proceedings may be different from those existing at the time of an adverse costs order in these proceedings, but since I do not consider that ACC has established that the Petitioner ignored orders of this Court, the Petitioner's response that it complied with the Hong Kong costs order is not a material matter for the purpose of the exercise of my discretion.

(e). I have noted the Petitioner's allegation that ACC is one of the true parties in interest in and is behind the HK 548 Proceedings and that costs may be incurred in the petition proceedings which when properly characterised are to be treated as costs incurred both for the purpose of the petition and the HK 548 Proceedings or primarily for the purpose and benefit of the latter. However, the allegation that ACC is behind or responsible for the funding or management of the HK 548 Proceedings is, as I have noted, strongly denied and clearly I can make no finding on this application as to its veracity. Indeed, as Mr Allison QC pointed out, at this stage the allegation has not been made in the pleadings or the evidence and so can be given no weight. Even if the allegation had been properly made in the pleadings or evidence, it seems to me that this is a point that does not justify a refusal to make an order but would only go to quantum. The issue will be dealt with on a taxation wherein a decision would need to be taken as to how costs incurred which relate to both sets of proceedings are to be dealt with and what will be allowed and disallowed. ACC will only be able to recover on a taxation those costs which were properly and reasonably incurred in and for the purpose of the petition proceedings. If it is established that work was done and costs incurred which related to (or were for the benefit of) both sets of proceedings there would probably need to be a fair and appropriate apportionment. The petition and the HK 548 Proceedings are distinct

and ACC is entitled to rely in its defence in the petition on whatever matters it considers appropriate, even if they overlap with the facts and matters on which the HK 548 Proceedings are based, at least unless and until parts of the defence are struck out. The taxation process will ensure that the costs to which ACC is entitled in the petition proceedings, should ACC be successful and a costs order is made in its favour, are limited to what is properly recoverable (that is what is reasonable having regard and proportionate to the matters in issue in the petition).

Quantum

50. ACC submitted that in assessing the quantum of security for costs, the Court takes a broad-brush approach, and will seek "*to arrive at a fair and realistic, not necessarily a precise or generous, estimate of the costs to be incurred*" (relying on my judgment in *Jafar* at [26] and [72]). Moreover, the Court will usually resolve doubts in favour of a defendant: (*Jafar* at [72]).

51. ACC relied on Mr Wang's evidence as to its likely costs in the period from the time of its being joined to the petition to the close of the factual evidence in the petition. This is dealt with in Wang 1 at [51]-[65] and in the exhibit to Wang 1, which includes a costs schedule prepared by Walkers (the ***Costs Schedule***). ACC, based on this evidence, seeks security for costs in the amount of US$1,019,294.87. It submitted that the quantum sought was reasonable, and, indeed, a conservative estimate of the likely costs that it will incur on a party and party basis.

52. Mr Wang (in Wang 1 at [54]) set out the methodology used to calculate the estimate these costs and ACC relied in particular on the following points:

(a). the estimate had been calculated by excluding legal fees and disbursements related to onshore counsel that would not be recoverable on the standard basis.

(b). the estimate had applied relevant caps to charge-out rates as required by PD 1 of 2011.

(c). costs incurred to date were included and set out.

(d). the estimate was based on the identification of the key workstreams that needed to be undertaken (further directions and the further case management conference; discovery; witness statements and general correspondence) and a review by Walkers of the numbers of hours that would reasonably need to be spent by attorneys at the different levels of seniority for each workstream.

(e). a 30% deduction had been applied to both historic and estimated legal fees in order to take account of the effect of taxation on the standard basis

(f). the estimate assumed that there will only be one case management conference before the close of factual evidence, no additional interlocutory applications and no material change of circumstances. However, the history of these proceedings indicated that these were conservative assumptions.

53. The core components of the estimate, after the 30% deduction, were as follows:

(a). incurred costs: attorneys US$278,493.32 and counsel: US$207,900 (totalling US$486,393.32).

(b). estimated costs (totalling US$454,846):
directions and case management: attorneys and counsel: US$71,820
discovery: attorneys and counsel: US$164,990

witness statements: attorneys and counsel: US$131,152
general correspondence: attorneys and counsel: US$86,884

(c). disbursements: incurred: US$22,961.75 and estimated: US$55,093.80.

54. Mr Wang provided more detail as to and an explanation of how these sums were calculated.

55. ACC submitted that while the Petitioner disputed that the quantum of ACC's claim was reliable (see Li 8 at [22]), the Petitioner had not advanced any evidence in support of that position.

56. The Petitioner submitted as follows:

(a). the impact of the HK 548 Proceedings and other proceedings in Hong Kong should be taken into account. The Petitioner, reiterating the submission made in opposition to the making of an order, said that it was obvious that there will be huge duplication between the costs incurred by ACC in the petition proceedings and the HK 548 Proceedings, so that it would be wrong (to quote from the Petitioner's skeleton argument) to give ACC a "*free pass to incur costs in Cayman and secure itself fully for work it has no doubt been doing in Hong Kong (both in controlling the Company but also as a party to proceedings of its own)*."

(b). Wang 1 failed to provide a breakdown of Walkers' billed fees to date or any information about the disbursements incurred. Accordingly, it was not possible to determine whether those fees and disbursements had been reasonably incurred or whether they would likely be recoverable following taxation. In any event, the Petitioner disputed that a substantial portion of the costs incurred in relation to preparing ACC's defence were reasonably incurred in circumstances where, as the Petitioner's Reply confirms, a large number of the matters pleaded in ACC's defence are wholly irrelevant to the issues to be determined on the petition.

(c). the estimate provided for discovery was unreliable in circumstances where the parties had yet to agree on a discovery protocol, a list of issues, date ranges or custodians. Furthermore, the list of issues proposed by ACC (and supported by CNBM) included a number of issues that were entirely irrelevant to the determination of the petition and therefore the Petitioner reserved its position as to costs incurred by ACC.

(d). Wang 1 had confirmed that, in estimating ACC's costs in relation to general correspondence (US$124,120 or US$86,884 after deductions), provision had been made for correspondence in relation to inspection requests; queries and challenges regarding the parties' relevance and privilege assessments and in respect of any documents subject to restrictions on disclosure; and requests for further and/or particular discovery.

However, there was no justification at this stage to conclude that such requests will be necessary. Accordingly, no provision for costs in relation to such correspondence ought to be made.

(e). the final page of the Costs Schedule suggested that ACC intended to prepare three witness statements (including from a third-party witness) and will need to review witness statements filed by the Petitioner and at least three other defendants. However, other than ACC, there were only two respondents to the petition (CNBM and the Company) and the Company's participation in the petition proceeding was limited to providing discovery. Accordingly, the estimate provided by ACC for preparing and reviewing witness statements was inherently unreliable.

(f). the Costs Schedule also indicated that ACC anticipated incurring US$50,000 in translation costs. However, Wang 1 did not identify its proposed witnesses and so it was impossible to determine whether such costs were likely to be necessary.

(g). the total estimated costs for Walkers and Counsel in the Costs Schedule of US$704,873.80 (which is the gross figure of US$649,780 plus disbursements) was unreasonably high in view of the fact that the costs only covered the period up to the close of the factual evidence.

57. The approach to be adopted when deciding on the amount of security to be paid was set out in my judgment in *Jafar* (and I note in particular the summary of the applicable principles at [27] and [72]). I have decided, having carefully reviewed the evidence including the Costs Schedule, and considering the parties' submissions, that the Petitioner should provide security for costs in the sums claimed by ACC subject to two important adjustments:

(a). the gross amount payable in respect of Walkers' and Leading Counsel's incurred costs should be reduced by 50% rather than 30% (to US$347,423.80).

(b). the gross amount payable in respect of Walkers' and Leading Counsel's estimated costs should be reduced by 40% (rather than 30%) (to US$389,868).

58. As regards incurred costs, I was not provided with any details or breakdown of the work done by the various fee earners listed in the Costs Schedule (for example by reference to workstreams). In the circumstances and in light of the issues raised by the Petitioner it seems to me to be fair and reasonable to apply a 50% discount to these costs.

59. As regards estimated costs, I have been provided with a breakdown by reference to workstreams and a brief explanation by Mr Wang of the basis on which the projected costs have been prepared. These show that the estimates have been carefully prepared according to an appropriate methodology. But the Petitioner has raised a number of issues and concerns which in my view require a cautious approach to be adopted and a discount of 40% seems to me to be appropriate.

60. In view of the relatively low amounts involved and the brief explanations provided with respect to estimated disbursements, I consider that I should make an order in the amount claimed by ACC (US$22,961.75 and US$55,093.80, totalling US$78,055.55)

61. Accordingly, the Petitioner must give security for ACC's costs up to the close of the parties' factual evidence in the sum of US$815,347.35, being US$737,291.80 in respect of costs and US$78,055.55 in respect of disbursements. Such security shall be given within fourteen days of the date on which the order giving effect to this judgment is sealed and in the manner set out in paragraph 1 of the Summons.

62. I shall invite the parties to agree the order as to costs. If they are unable to do so within seven days from the date on which this judgment is handed down they must file with the Court written submissions of no more than three pages setting out the costs order they seek and their submissions as to costs.

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The Honourable Mr. Justice Segal
Judge of the Grand Court,
Cayman Islands
20 May 2022