In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 383

IN THE SUPREME COURT OF BERMUDA

(COMMERCIAL COURT)

COMPANIES (WINDING UP)

IN THE MATTER OF TITAN PETROCHEMICALS GROUP LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

Before: **Hon. Chief Justice Hargun**

Representation: **Mr. Steven White and Mr. John McSweeney of Appleby (Bermuda) Limited for Sino Charm International**

Mr. Alexander Potts QC and Mr. Rhys Williams of Conyers Dill & Pearman Limited for the Company

Mr. Keith Robinson of Carey Olsen Bermuda Limited for Fame Dragon International Investment Limited and Docile Bright Investments Limited

Ms. Kehinde George of ASW Law Limited for Marine Bright Limited

Date of Hearing: **12-13 July 2021**

Date of Judgment: **11 August 2021**

JUDGMENT

Hearing of a petition to wind up a company based upon a statutory demand; whether debt is disputed bona fide and on substantial grounds; relevance of the proceedings pending in a foreign jurisdiction in relation to the debt in question

HARGUN CJ

Introduction

1. Over a period of two days on 12 and 13 July 2021, the Court heard the Petition presented by Sino Charm International Limited ("**Sino Charm**" or the "**Petitioner**") seeking a winding up order in relation to Titan Petrochemicals Group Limited (the "**Company**" or "**Titan Group**") under section 161(e) of the Companies Act 1981 (the "**Act**"). The Petition was based upon a Statutory Demand for the debt which remained unpaid. The essential dispute between the parties at the hearing was whether the debt in question was disputed *bona fide* and on substantial grounds.

2. The parties have filed extensive affidavit evidence in support and in opposition of the winding up Petition. In support of the Petition, in addition to the affirmation of Xue Zhengye formally verifying the Petition, the Petition was supported by seven affirmations of Mr. Zhou Bing ("**Mr. Zhou**"), a director of Sino Charm. In opposition to the relief sought in the Petition there were three affirmations by Mr. Lai Wing Lun ("**Mr. Lai**"), who is the non-executive Chairman of the Titan Group and has the day-to-day conduct of the liquidation of Fame Dragon International Investment Limited, ("**Fame Dragon**"), a 66.46% shareholder of the Titan Group, two affirmations of Zhang Qiandong ("**Mr. Zhang**"), an executive director of the Titan Group, and an affirmation of Lui Kit Yit of Messrs. Michael Li & Co., solicitors acting for the Titan Group in the Hong Kong proceedings, who exhibits the pleadings filed in the Hong Kong action. The evidence filed by the parties comprised five three-inch ring binders.

3. The Petition is supported by Marine Bright Limited ("**Marine Bright**"), who claims to be a creditor of the Company for at least HK $423,000,000. Marine Bright's standing as a creditor of the Company is disputed by Docile Bright Investments Limited (In Liquidation) ("**Docile Bright**"), who claims to be a creditor of the Company for the same debt and opposes the relief sought in the Petition. The Petition is also opposed by Fame Dragon.

4. The Petition was presented to the Supreme Court on 20 September 2019. In the Petition Sino Charm asserts that on 13 April 2017, Titan Group entered into a Subscription Agreement (the "**Subscription Agreement**") with Sino Charm pursuant to which Titan Group agreed to issue a convertible bond to Sino Charm (the "**Bond**") upon Sino Charm's payment to Titan Group of a subscription sum of HK $78,000,000 (approximately US $10,000,000) ("**Subscription Sum**").

5. The terms and conditions of the Bond Certificate (the "**Terms and Conditions**") provided that:

   (a) The bonds bear interest from the Issue Date to the Maturity Date at the rate of 7 ½ % per annum payable annually.

   (b) If the company fails to pay any principal, premium, yield or any other amount payable under the bonds when due, it shall pay an additional interest on the overdue amount from the due date of payment until the date of actual payment at the rate of 5% per annum.

   (c) Unless previously converted, purchased, and cancelled or discharged, the Company shall redeem the bonds at 100% of their principal amount together with the accrued interest thereon on the date which is the first anniversary from the issue of the bonds (the "**Maturity Date**").

   (d) The Company shall not be entitled to redeem the bonds (in whole or in part) at any time prior to the Maturity Date, except by the mutual consent of the Bondholder and the Company.

6. On 26 April 2019, by a banker's draft bearing reference number HK126047Q4AJRBNK issued by the Bank of Communications Co. Ltd., Hong Kong Branch, Sino Charm remitted the Subscription Sum to the Company. The Company accepts that it has received the Subscription Sum.

7. Pursuant to the Terms and Conditions, the Bond's Issue Date was 28 April 2017 and the Bond's Maturity Date was 28 April 2018.

8. On 15 July 2019, Sino Charm issued a Statutory Demand to the Company which was served on the Company at its registered office demanding payment of HK $96,571,078.77 being:

> *"(1) the principal amount of HK $78,000,000 paid by Sino Charm pursuant to the 7.5% Coupon Convertible Bond issued by the Company to Sino Charm on 28 April 2017 with Bond Certificate No:001 (CBC001); (2) the amount of HK $5,850,000 being the interest accrued on that principal amount at 7.5% per annum from 28 April 2017 to the maturity date of 28 April 2018 (the Maturity Date) pursuant to the terms of CBC001; and (3) the amount due by the Maturity Date at 12.5% per annum between 29 April 2018 and 15 July 2019 pursuant to the terms of CBC001."*

9. The Statutory Demand included a statement that if payment was not made within 21 days of the date on which it was served on the Company, the Company would be deemed to be unable to pay its debts pursuant to section 162(a) of the Act and Sino Charm shall be entitled immediately to apply to the Supreme Court for winding up under the provisions of section 161(e) and 162 of the said Act.
10. The Statutory Demand was not paid, secured or compounded by 5 August 2019 and as a result Sino Charm presented the Petition seeking that the Company be wound up by the Court under the provisions of section 161(e) of the Act.

11. The Company opposes the Petition, on the basis that the Petition debt is *bona fide* disputed on substantial grounds (both because the Company has a defence to Sino Charm's claim, and because the Company has a cross-claim against Sino Charm, which is the subject of

pending proceedings before the Hong Kong Court). The Company invites the Court to dismiss the Petition in light of the dispute between the parties; alternatively, the Company invites the Court to adjourn or stay the Petition pending a final and binding determination of the Hong Kong proceedings (in circumstances where, the Company contends, Hong Kong is the most appropriate forum for the dispute between the parties, which is substantially governed by Hong Kong law).

12. In the written submissions filed on behalf of the Company it is said that the Company's case, which is currently being pursued in ongoing proceedings in the Hong Kong Court against Charm is, *inter alia*, that:

(a) The funds used to pay for the Subscription Sum for the Bond were *siphoned* from the Titan Group and paid to Sino Charm through a series of fraudulent transactions. It is said on behalf the Company that it is not in dispute that Sino Charm received *circa* HK $78m shortly before the Subscription Sum was paid to the Company in the amount of HK $78m.

(b) The issuance of the Bond was in breach of fiduciary duty by the then chairman of the Titan Group, Mr. Zhang WeiBing ("**Mr. WeiBing**"), and the then Chief Executive Officer, Tang Chao Zhang ("**Mr. Tang**"), and is void. As Sino Charm, the Company claims, is controlled by or closely connected to Mr. WeiBing and Mr. Tang, Sino Charm was aware of their wrongdoing at the time of the purchase of the Bond, and at the very least Sino Charm was put on inquiry.

(c) The Bond was issued by the Company under the instigation and direction of Mr. WeiBing and Mr. Tang for improper purposes and in breach of fiduciary duty.

(d) Specifically, by the Bond, Mr. WeiBing and/or Mr. Tang intended (i) to entrench their control within the Company, (ii) to personally benefit from the proceeds of the Bond, and/or (iii) to put themselves in a better position to extract a ransom from potential buyers of shares in the company (the "**Improper Purposes**").

(e) To this end, using a series of suspicious and coordinated transactions conducted using the Company's subsidiaries Petro Tan (HK) Limited ("**HT01**") and Brilliance Glory Limited ("**Brilliance Glory**"), Mr. WeiBing and Mr. Tang caused funds to be *diverted* from the Company to Sino Charm, and the funds were used to finance the Subscription Sum paid by Sino Charm.

13. In support of the proposition that by procuring the Company to enter into the Subscription Agreement so as to entrench their control within the Company, Mr. WeiBing and Mr. Tang acted for an improper purpose, Counsel for the Company relies upon, *inter alia*, *Piercy v Mills* [1920] 1 Ch 77, at 84-85; and *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821 (PC), at 834E-G.

14. Alternatively, argues Counsel, that if the Subscription Agreement is not void or unenforceable, the Company was entitled to rescind the Subscription Agreement, and the rescission was effective immediately upon the communication by the Company of its election to rescind. It is said on behalf of the company that by virtue of the Writ issued by the Company in the Hong Kong Court on 21 October 2019 and/or Mr. Zhang's First Affirmation dated the 22 October 2019, the Subscription Agreement had been effectively rescinded.

15. Central to the allegation of wrongdoing is the assertion by the Company that using a series of highly *suspicious transactions*, Sino Charm, Mr. WeiBing, Mr.Tang, Uni-Loyal International Enterprises Limited ("**Uni-Loyal**"), Sino Champion Corporation Limited and/or Mr. Chan Shu Leung *conspired together* to *divert funds* away from the Company to Sino Charm, so as to facilitate the purchase of the Bond.

16. The "*suspicious transactions*" related to two commodities: buying and selling (i) 20,000 metric tons of bitumen mixture; and (ii) 5,600 metric tons of mixed aromatics. As noted earlier, the Company was not a party to the "*suspicious transactions*". The relevant contracts were entered into by two subsidiaries of the Company: HT01 and Brilliance Glory.

17. Other companies involved in the above-noted commodity transactions, which allegedly *diverted* the funds to Sino Charm, were, according to the affirmations of Mr. Zhang and the pleaded case in the Hong Kong proceedings, Max Joy International Industries Limited ("**Max Joy**") and Uni-Loyal. It is said on behalf of the Company that Uni-Loyal was at all material times controlled and or directed by Mr. WeiBing and Mr. Tang; and Max Joy was at all material times a private company wholly owned by Mr. Tang's friend, Mr. Koo Wai Hong.

18. The *diversion* of the Company's funds, it is alleged, was achieved in three stages. The first stage related to the transfer of funds from HT01 and Brilliance Glory to Max Joy. By a trading contract dated 18 April 2017, HT01 agreed to purchase and Max Joy agreed to sell 20,000 metric tons of bitumen mixture at the price of US $335 metric ton. On 20 April 2017, HT01 paid Max Joy US $6,700,000.

19. By a trading contract dated 18 April 2017, Brilliance Glory agreed to purchase and Max Joy agreed to sell 5600 metric tons of mixed aromatics at the price of Hong Kong $4,624 per metric ton. On 20 April 2017, Brilliance Glory paid Max Joy HK $25,986,880.

20. As a result, the Company contends, the total amount paid by HT01 and Brilliance Glory to Max Joy under these two contracts was approximately HK $78 million.

21. The second stage related to the transfer of funds from Max Joy to Uni-Loyal. By a trading contract dated 18 April 2017 Max Joy agreed to purchase from Uni-Loyal 5600 metric tons of mixed aromatics for the price of HK $4,623 per metric ton. On 21 April 2017, Max Joy paid HK $25,981,260 to Uni-Loyal pursuant to this contract.

22. By a trading contract dated 18 April 2017, Max Joy agreed to purchase from Uni-Loyal 20,000 metric tons of the bitumen mixture at a price of US $334.93 per metric ton. On 20 April 2017, Max Joy paid US $6,698,600 to Uni-Loyal pursuant to this contract.

23. As a result, the Company contends, the total amount paid by Max Joy to Uni-Loyal under these two contracts was approximately HK $78 million.

24. The third stage, according to the Company, related to the transfer of funds from Uni-Loyal to Sino Charm. By a trading contract dated 18 April 2017, Uni-Loyal agreed to purchase from Sino Charm 20,000 metric tons of the bitumen mixture at a price of US $334.77 per metric ton. The Company states that according to the corresponding invoice issued by Sino Charm on that date, the amount to be paid by Uni-Loyal to Sino Charm was US $6,695,400.

25. The Company contends that by a further trading contract dated 18 April 2017, Uni-Loyal agreed to purchase from Sino Charm 5600 metric tons of mixed aromatics at the price of HK $4,620.80 per metric ton. Based on the terms of this contract, the Company contends, the amount to be paid by Uni-Loyal was approximately HK $25,876,480.

26. As a result, the Company contends that the total amount to be paid by Uni-Loyal to Sino Charm under these two contracts was very close to the consideration for the Bond.

The court's approach to determining whether a debt is *bona fide* disputed and on substantial grounds

27. In the ordinary case the Court accepts that the general rule is that *if* it is satisfied that the debt is *bona fide* disputed on substantial grounds then, in the absence of exceptional circumstances, the Court would ordinarily dismiss the petition. In *Stonegate Securities v Gregory* [1980] Ch. 576. Buckley LJ so held at 579C to 580C:

> *"Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending upon whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in paragraph (c) of section 224 (1). If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt the petition will be dismissed or, if the matter is brought before*

a court before the petition is issued, its presentation will in normal circumstances be restrained that is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide dispute.

> *Mr. Justice Ungoed-Thomas put the matter thus in the case of Mann v. Goldstein in (1968) 1 Weekly Law Reports, 1091 at page 1098 below H:*
>
> *"For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court". I gratefully adopt the whole of that statement, although I think it could equally well have ended at the reference to want of locus standi. In my opinion a petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224 (1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings."*

28. The Court also accepts that in the ordinary case the threshold as to what constitutes a disputed debt is not a high one, as was held by Etherton LJ in the English Court of Appeal in *Tallington Lakes Limited v South Keveten District Council* [2012] EWCA Civ 443 at [22].

29. It is also emphasised in the authorities that whether a debt is disputed on substantial grounds is a question of judgment based on the facts of each case (*McPherson & Keary: The Law of Company Liquidation*, Fourth Edition, at 3.080; *Re Alloy Aircraft Company Ltd* [2005] Bda LR 79 at [8]).

30. In considering whether there is a dispute on substantial grounds the court is not bound to accept every assertion set out in the affidavit evidence filed on behalf of the company. The exercise upon which the court is engaged is not equivalent to the determination of an application to strike out a pleading where the court is bound to assume that all the pleaded allegations are true. The court is entitled to take a real-world view of the factual allegations made in the affidavit evidence filed on behalf of the company and is entitled to consider the credibility of those allegations in light of (i) whether the company is in fact insolvent which may colour the question of whether the dispute is *bona fide*; (ii) whether any of the allegations contained in the affidavit evidence were made by the company prior to filing of the winding up petition; (iii) whether any proceedings commenced by the company against the petitioner, in relation to the validity of the debt upon which the petition is based, are merely retaliatory to the winding up proceedings; and (iv) whether the assertions made by the company are consistent with other factual evidence which is objectively verifiable. This approach of the court to consideration of the issue whether the debt is *bona fide* disputed on substantial grounds is supported by several English and Bermuda authorities.

31. In *Re A Company (No 001946 of 1991) ex parte Fin Holding SA* [1991] BCLC 737, the court was concerned with the issue whether the debt, upon which the petition was founded, was disputed *bona fide* and on substantial grounds. The petition alleged that the company had dishonored a promissory note for GBP 5 million presented for payment on 7 January 1991. The company applied to have the petition struck out as an abuse of the process of the court, alleging that the promissory note had been obtained by means of fraudulent misrepresentations. These allegations were first raised by the company in a writ action against the petitioner commenced on the 15 February 1991, 3 days before the petition was presented. Harman J considered the timing of the allegations of fraudulent misrepresentations to be relevant and held at 749 a-e:

"It follows that I am wholly unsatisfied that the disputes raised here are substantial. ***They seem to me to be fanciful, bearing in mind that these serious allegations of fraud were never raised until service of the statement of claim****. They were never raised in a letter before action. They were never mentioned in the discussion between Mr Parretti and others, including the English solicitor acting for the petitioner, which led to the clear answer on 12 February, only very shortly before service of the statement of claim, when allegations were made which were then rebutted and are now dropped.* ***The late raising of the allegations seems to me to show that they are the result of dredging about for any form of defence to avoid payment of this promissory note****.*

I believe I am entitled to bear in mind that it appears on the evidence that this company is very likely insolvent. I accept Mr Siberry's submission that insolvency is not an issue here; what is in issue here is whether the creditor is a true creditor, in the sense of having a debt not disputed upon substantial grounds. ***None the less, an actual insolvency would give the likely motivation for those controlling the company to raise any form of defence that can be grabbed at and dressed up in some way to avoid payment, and that seems to me to be exactly what has happened in this case****. The debt was, as I see it, payable on 7 January. Notice of dishonour was given that day. No payment has been made. No grounds are shown impugning, in any substantial manner, the validity of that promissory note, and, in my judgment, this application ought to and does fail."* (emphasis added)

32. The approach of Harman J in *Fin Soft Holdings* has been followed in Bermuda by Kawaley J (as he then was) in *Re Gerova Financial Group Ltd* [2011] Bda LR 20; and by Kawaley CJ *In the Matter of Titan Petrochemicals Limited* [2013] Bda LR 62. At paragraph 52 of the judgment in the *Gerova Financial* Kawaley CJ said:

"52. Re a Company (No 001946 of 1991), ex parte Fin Soft Holding SA [1991] BCLC 737 was case where no substantial dispute was found to exist in relation to a petition debt based on a promissory note. The dispute was raised "late in the day and the evidence indicated that the company was desperately seeking any defence

which might justify its non-payment of the claim": *McPherson , paragraph 3.037. Whether a dispute is substantial is a question of judgment based on the facts of each case."*

33. The relevance of insolvency of the company, in the context of an assertion that the debt was disputed in good faith and on substantial grounds by the company, was explained by Hoffmann J (as he then was) in the *Record Tennis Centres Ltd* [1991] Lexis Citation 1493 as follows:

> *"The fact that the company against whom the petition is presented is hopelessly insolvent is not, of course, a ground for allowing the petition to go forward if there is a bona fide dispute,* ***but the fact that such insolvency must have been in the minds of the company's officers during the relevant period does tend to colour the question of whether the dispute is bona fide.***
>
> *In my judgment, as an answer to the petitioning creditor's claim, this dispute over the cables, the patch and the weed has been conjured up by the company in an attempt to stave off liquidation. As it is now admittedly insolvent, it seems to me that the proper course is to allow the petition to go ahead, and the motion will therefore be dismissed.* (emphasis added)

34. The need to take a real-world view even in a documents heavy case was emphasised by the Court of Appeal in *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572 where Lord Denning stated at 575:

> *"I entirely agree that a petition for winding up should not be used as the means of getting in a debt which is bona fide disputed on substantial grounds – on which the company would get unconditional leave to defend. But I think the Companies Court should be able to look into the bona fides of the defence. If it is obviously a 'put-up job' – or if it is so insubstantial that a Queen's Bench master would only give conditional leave to defend – then I should think the petition to wind up should stand. In short I think that the Companies Court should keep the remedy flexible – for the sake of all creditors – so that the assets may not be disposed of or removed*

by the company before there is a chance of dealing with them. So I would hold that the statement in Buckley with regard to foreign companies should also apply to English companies if the special circumstances of the case so demand."

And Oliver LJ at 576 and 578:

"Nobody would say that the evidence in this case was jejune. It extends to nine thick volumes of affidavits and exhibits. But the credibility of evidence does not depend upon the number of kilograms achieved on either side, and the two points which ultimately emerge are in fact quite short ones.

...

On an application like this the court necessarily has to take a view whether, on the evidence, there really is substance in the dispute which is raised. In the instant case the argument appears to me to be such a tenuous one that I for my part do not feel that I could identify it as one which appears to me, on the present evidence, to be one of either bona fides or of such substantiality as to warrant the petition being struck out.´

35. In *Derek French: Applications to Wind Up Companies*, Third Edition, the circumstances in which the Court may well be able to take a view whether the debt is disputed, is summarised as follows:

"7.456 ... The fact that cross-examination is required to resolve such issues would in itself normally indicate that there are substantial grounds of dispute. However, the evidence is not to be approached with a wholly uncritical eye. Even in the absence of cross-examination, the court may conclude from critical examination of the evidence that it does not disclose substantial grounds for dispute.

7.457 In Re Richbell Strategic Holdings Ltd [1997] 2 BCLC 429, Neuberger J said, at p 435:

"a judge whether sitting in the Companies Court or elsewhere should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity [are] not been invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law."

NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd [2001] 6 MLJ 57, is an example of "copious affidavits" disguising the fact that there was no dispute at all."

Discussion and analysis

36. The issues raised by the Company (a) whether the funds used for the purchase of the Bond were siphoned from the Titan Group and paid to Sino Charm through a series of fraudulent transactions; and (b) the issuance of the Bond was a breach of fiduciary duty by the then Chairman of the Titan Group, Mr. WeiBing, and the then Chief Executive Officer, Mr. Tang and is void, fall to be considered in light of the following facts and circumstances.

Existence of a prior dispute

37. First, it does not appear that the debt was disputed by the Company until Mr. Zhang filed his First Affirmation on 27 October 2019, thirty months after the Bond was issued by the Company, three months after the service of the Statutory Demand and one month after the filing of the Petition seeking a winding up order. Following the service of the Statutory Demand and three days before its expiry, Conyers, acting on behalf of the Company, advised Sino Charm that the Board of the Company had no knowledge of the circumstances surrounding the Bond as it "*was not in office in April 2017 when the [Bond] allegedly came into existence*". The letter advised that the Board was "*in the process of carrying out an investigation into its background.*"

38. The letter from Conyers admitted that the Company had received the Subscription Sum of HK $78 million by way of a Cashier Order issued by Sino Charm on or around 26 April

2017. There was no suggestion by the Company at this stage that the funds used for the purchase of the Bond were siphoned from the Titan Group and paid to Sino Charm through a series of fraudulent transactions or that the issuance of the Bond was a breach of fiduciary duty owed by Mr. WeiBing and Mr. Tang. The Conyers letter requested 3 months "*to complete the ongoing investigation*" in respect of the Bond.

Alleged diversion of the Company's funds to Sino Charm

39. Second, the allegation that the funds used to purchase the Bond were *diverted* from the Titan Group, first made in the First Affirmation of Mr. Zhang dated 20 October 2019 and in the General Indorsement of Claim in the Hong Kong proceedings filed on 21 October 2019, appears to be misleading. The impression given is that the funds used to pay for the Bond were the property of the Titan Group. Further, that the monies paid to Max Joy (in the approximate amount of HK $78 million) by HT01 and Brilliance Glory, the two subsidiaries of the Titan Group engaged in the relevant commodity trades, to purchase 20,000 metric tons of bitumen mixture and 5,600 metric tons of mixed aromatics, were never recovered by HT01 and Brilliance Glory. Such an assertion would appear to be demonstrably false.

40. As explained by Mr. Zhou in his First Affirmation, trading of commodities is an important part of Titan Group's business (representing HK $920 million in trading revenue in 2017) and the commodity trades are usually through trading by documents to transfer the title of commodities from an "*upstream seller*" to a "*downstream buyer*" rather than by the delivery of actual commodities (which are usually in the tens of thousands of metric tons). Only the end-user will take delivery from the storage warehouse.

41. The normal practice for commodity trades is for the trader to have back-to-back trades with a price difference in order to make a profit. The buy contract and the sale contract may have different unit prices and different payment terms. Such differences justify the profits to be derived by the traders from the back-to-back trades.

42. The contracts referred to in the First Affirmation of Mr. Zhang and in the Hong Kong proceedings are the *buy contracts* under which HT01 and Brilliance Glory purchased

20,000 metric tons of bitumen mixture and 5,600 of mixed aromatics respectively from Max Joy. However, the *buy contracts* are only one side of the entire transaction. The First Affirmation of Mr. Zhang and the allegations made in the Hong Kong proceedings entirely ignore the *sale contracts* whereby HT01 and Brilliance Glory sold the same commodities to another buyer and recouped the consideration paid under the *buy contracts*.

43. The First Affirmation of Mr. Zhang and the pleaded case in the Hong Kong proceedings failed to point out that HT01 and Brilliance Glory in fact sold these two commodities, purchased from Max Joy, to Grand Treasure International (UK) Limited, a Hong Kong based private company ("**Grand Treasure**"). The sale contracts are signed on the same date as the buy contracts, 18 April 2017. In relation to the contract for 20,000 metric tons of bitumen mixture, HT01 purchased this commodity from Max Joy at a price of US $335 per ton and sold it to Grand Treasure at a price of US $338.35 per ton. In relation to the contract for 5,600 metric tons of mixed aromatics, Brilliance Glory purchased this commodity from Max Joy at a price of HK $4,624 per ton and sold it to Grand Treasure at a price of HK $4,670.25 per ton.

44. The First Affirmation of Mr. Zhou confirms that HT01 received the sale price from Grand Treasure, in respect of the sale of 20,000 metric tons of the bitumen mixture, on 27 December 2017 and that payment is confirmed by the relevant bank statement of HT01's current account statement from DBS Bank. Mr. Zhou also confirms that the sale price from Grand Treasure, in respect of 5,600 metric tons of mixed aromatics, was received by Brilliance Glory on such on 30 June 2017 and 29 November 2017, in the total amount of HK $26,153,400. The receipt of these payments is not disputed by the Company.

45. In the circumstances it is clear that HT01 and Brilliance Glory have suffered no financial loss as a consequence of entering into the contracts signed on 18 April 2017 to purchase 20,000 metric tons of bitumen mixture and 5,600 metric tons of mixed aromatics from Max Joy. Indeed, the position is that as a consequence of entering into the corresponding *sale contracts* in relation to the same commodities HT01 and Brilliance Glory (and indirectly the Titan Group) have made a trading profit and have been paid the funds due under the sales contracts. The fact that HT01 and Brilliance Glory entered into the sales contracts;

that they have received the funds due under the sales contracts; and have made a trading profit on those contracts is not disputed by the Company in the evidence filed in these proceedings.

46. As Mr. Zhou points out, by only providing one leg of the back-to-back trades, Mr. Zhang has created the illusion that the Company underwent cash outflow. In fact the Company's net cash flow of the back-to-back contracts was positive. HT01's profit in relation to this contract was HK $722,720 and Brilliance Glory's profit in relation to its contract was HK $166,520.

47. Finally, it is to be noted that the Company does not seek to set aside these commodity contracts in the Hong Kong proceedings. HT01, whilst a party in the Hong Kong proceedings, does not seek to rescind its contract with Max Joy to buy 20,000 metric tons of bitumen mixture. Indeed, Max Joy is not a party to the Hong Kong proceedings.

48. The Company's allegation that funds used by Sino Charm to pay for the acquisition of the Bond were *diverted* from HT01 and Brilliance Glory has to be viewed in light of this evidence.

Approval of the Bond and its purpose by the Board of the Company

49. Third, the issuance of the Bond was announced to the shareholders and investing public on 28 April 2017; following approval of the terms and purpose for which the Bond was required by the entire Board of Directors of the Company on 12 April 2017; and the funds received from Sino Charm were in fact used for the purposes approved by the Board of Directors of the Company.

50. On 28 April 2017, the Board of Directors of the Company, made the following announcement through the Hong Kong Stock Exchange:

> "*The Board is pleased to announce that as all the conditions precedent to the Subscription Agreement had been fulfilled and the Convertible Bonds in the principal amount of HK $78,000,000 have been issued by the Company to the Subscriber on 28 April 2017."*

51. This announcement followed the meeting of the Board of Directors of the Company held on 12 April 2017 for the purposes of considering the issuance of the Bond to Sino Charm. In addition to Mr. WeiBing and Mr. Tang, the meeting of the Board of Directors was attended by five other directors. The meeting was attended by two additional Executive Directors, namely, Mr. Hu Hongwei and Dr. Liu Liming. The meeting was also attended by three additional Independent Non-executive Directors, namely, Ms. Xiang Siying, Mr. Lau Fai Lawrence and Dr. Han Jun. It is to be noted that no allegations of breach of any fiduciary or other duty are made by the Company in these proceedings or in the Hong Kong proceedings against these five directors of the Company in relation to this matter. The other five directors are not parties to the Hong Kong proceedings.

52. After consideration of the terms of the proposed issue of the Bond and the purpose for which the proceeds were required the entire Board of Directors, comprising 7 directors, agreed to the issue of the Bond. The minutes of the Board of Directors' meeting record that:

> *"All directors also note that the* ***proceeds will be used for shipbuilding and ship repair businesses, including the future investment needs or other purposes in Singapore.*** *After discussion, all directors unanimously agreed to issue the convertible bonds and considered that the terms of the subscription agreement on the issue of convertible bonds and the terms of the convertible bonds are general commercial terms and are fair and reasonable and in the interests of the Company and the shareholders as a whole."*

53. It is not disputed that Sino Charm has fulfilled all of its obligations under the Subscription Agreement. It paid the Subscription Sum to the Company on the 26 April 2017 and the Bond was subsequently issued on 28 April 2017. The 2018 Annual Report of the Company reports on how the proceeds of the Bond were used by the Company:

> *"**MANAGEMENT DISCUSSION AND ANALYSIS***
>
> ***Actual use of fund proceeds from convertible bond in 2017***

Based on the records, the proceeds of the issuance of the convertible bond of HK $78,000,000 were used as following (i) approximately HK $20,300,000 was used for the payroll ofor the Group, rental and utility charges of the office, legal and professional fees arising from the fund raising activities of the Company in 2017; (ii) HK $4,700,000 was used for capital injection into Sinozing Shipyard Stock Limited Company, an associate company of the Company, which focuses on marine engineering and equipment and fitting, ship equipment, electro-mechanical equipment and related complementary services (including installation and maintenance services); engaging in the technical development, technical transfer and technical consulting services in the professional fields of shipping and marine engineering machinery, plant leasing arrangement and consulting services to enterprises; (iii) HK $49,000,000 was used for capital injection into Pacific Ocean Marine Limited, a Hong Kong company, which focuses on investment in ship-building industry, and (iv) HK $4,000,000 was used for the capital injection of Century Light Culture Communication Company Limited. The Directors are currently reviewing on the usage of the above funding."

54. In the circumstances it is clear that the purpose for which the Bond was issued was considered and was unanimously approved by the Board of Directors of the Company and it also appears that the actual use of the fund proceeds from the Bond was largely in accordance with the stated purpose. Further and in any event the allegation that the Bond was issued with the primary purpose of entrenching control, by Mr. WeiBing and Mr. Tang, over the Company seems to be at odds with the present application to wind up the Company.

55. In relation to the cases relied upon by the Company, the relevant facts in this case are materially different from the facts found to exist by the court in cases such as *Piercy v S Mills and Co Ltd* [1920] 1 Ch 77 and *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821.

56. In *Piercy v Mills* it was common ground that the company had no financial need for further capital and the sole purpose of issuing additional shares was to defeat the wishes of the

existing majority. In those circumstances the court held that the power to raise additional capital cannot be used for the purposes of maintaining shareholder or director control. Here, the Board of Directors unanimously decided that the Company required additional capital and that purpose was announced to the existing shareholders and to the investing public. The funds raised by the issuance of the Bond were largely expended on the stated purpose.

57. In *Ampol Petroleum* Street J made a finding of fact that "*the primary purpose of the four directors in voting in favour of this allotment was to reduce the proportionate combined shareholding of Ampol and Bulkships in order to induce Howard Smiths to proceed with its takeover offer. There was a majority block in the share register. The intention was to destroy its character as a majority.*" This finding was accepted by the Privy Council. It was because of this finding that the Privy Council agreed with the decision of Street J that the power to issue and allot shares was improperly exercised by the issue of shares to Howard Smith.

The Hong Kong proceedings

58. Fourth, it is plain that the Hong Kong proceedings were commenced in retaliation to the presentation of the winding up Petition in Bermuda. The winding up Petition was presented to the Court on 20 September 2019 and the Hong Kong proceedings were commenced on 21 October 2019. The proceedings were not served upon the Petitioner until about a year later. The Court accepts that the claim itself is hedged with caveats and uncertainty: the pleaded claim is stated in the body to be "*Subject to discovery, interrogatories and/or further investigation*" (paragraph 50 of the general endorsement).

59. Furthermore, as noted earlier, there is no mention in the Hong Kong proceedings that HT01 and Brilliance Glory have not only recovered the price paid for the purchase of the commodities from Max Joy but both subsidiaries have in fact made a trading profit on the contracts. The affirmation of Mr. Zhang in support of the application for service out in the Hong Kong proceedings under the section "*Full and frank disclosure*" repeats at paragraph 102 (2) "*In the midst of this façade of trading activity, funds amounting to approximately HK $78 million (i.e. the amount of the consideration for Sino Charm's subscription of the Convertible Bonds) were indisputably diverted from the Titan Group to Sino Charm (via*

Max Joy and Uni-Loyal), just before the subscription." However, Mr Zhang fails to point out to the Hong Kong Court that HT01 and Brilliance Glory entered into *sales contracts* in relation to the same commodities on the same date with Grand Treasure and have received the sale price from Grand Treasure which have left both subsidiary companies with a trading profit. The impression left with the Hong Kong Court is that as a result of the contracts entered into with Max Joy, the two subsidiaries, HT01 and Brilliance Glory are out-of-pocket for approximately the same amount as the payment made by Sino Charm for the purchase of the Bond. That impression is misleading.

The Company is insolvent

60. Fifth, there is persuasive evidence that the Company is in fact insolvent and was likely to be insolvent at the time of the presentation of the Petition. In relation to the issue of insolvency, the Court takes into account following facts and circumstances.

61. On 28 June 2019, Company made an announcement by the Hong Kong Stock Exchange which revealed that its Hong Kong office downsized as it relocated from its former 6000 square feet office situated in Sun Hung Kai Centre, 30 Harbour Road in Wanchai to a significantly smaller and shared office outfit at Room 802, "Office Plus @ Wanchai" situated at 303 Hennessy Road in Wanchai. I accept this drastic downsizing is an indication that the Company is under financial strain.

62. It appears that Mr. Zhang issued a notice to all directors in May 2019 that the available funds of the Company were less than Hong Kong $500,000 (approximately US $65,000) which again indicates that the Company faced serious cash flow issues.

63. The Company is the indirect owner of Titan Quanzhou Shipyard Company Limited ("**Titan Quanzhou**"), which is a China based Company which performed the business of shipbuilding and ship repairing. Based on the explanatory notes in the Company's consolidated financial statements for the year ending in 2018, Titan Quanzhou is recorded as one of the Company's most valuable assets with a nominal value of issued/registered capital in the sum of RMB1,040,879,823. On 21 November 2019, a winding up application was filed by a Chinese utilities company against Titan Quanzhou seeking a winding up

order on the basis that the company had failed to pay a water bill in the sum of RMB386,783.70 (which was equivalent to US $55,000).

64. On 21 November 2019, the Company's Board of Directors announced that the Company's auditors, Elite Partners CPA Limited ("**Elite Partners**"), had resigned as auditors of the Company with effect from 21 November 2019 after "*taking into consideration the professional risk associated with the audit of the Group, the level of chargeable audit fees and its available internal resources in light of the expected work flows*". The resignation letter from Elite Partners drew attention to the fact that their audit report on the consolidated financial statements of the Titan Group and its subsidiaries for the year ended December 2018 contained disclaimers in respect of the scope limitations including the following:

> ***"[1] Scope limitation - Opening balances and corresponding figures***
>
> *The auditor's report dated 28 March 2018 in respect of the audit of the consolidated financial statements of the Group [being defined as Titan and its subsidiaries], for the year ended 31 December 2017 was disclaimed as a result of the scope limitation on (i) impairment assessment of property, plant and equipment and prepaid land lease payments; and (ii) going concern.* ***As a result, we were unable to obtain sufficient appropriate audit evidence regarding the opening balances and corresponding figures and that there were no alternative audit procedures to satisfy ourselves as to whether the opening balances and corresponding figures were free from material misstatement****. Any adjustments that might have been found necessary may have a consequential effect on the Group's assets and liabilities as at the 31 December 2018 and its results for the year ended 31 December 2018, and the presentation and disclosure thereof in the consolidated financial statements.*
>
> *…*
>
> ***[4] Scope limitation - Going concern***

The Group incurred a net loss of approximately HK $2,370,486,000 for the year ended 31 December 2018 and had net current liabilities of approximately HK $1,844,358,000 as at 31 December 2018.

As explained in the basis of preparation set out in the consolidated financial statements, ***the consolidated financial statements have been prepared by the Directors of the Company on a going concern basis****, the validity of which depends upon the results of the successful implementation and outcome of the measures to be undertaken by the Group as described to the consolidated financial statements.* ***In view of the extent of the material uncertainties relating to the results of the measures to be undertaken by the Group which might cast a significant doubt on the Group's ability to continue as a going concern, we have disclaimed our audit opinion on the consolidated financial statements."***

65. As a company listed on the Main Board of the Hong Kong Stock Exchange, the Company was required to publish audited annual results for 2020, in order to comply with the Main Board Listing Rules. However, the Company failed to publish these annual results by the end of March 2021 and as a result trading in the Company shares on the Hong Kong Stock Exchange has been suspended since 1 April 2021.

66. As the Company has not published its annual results for 2020, the Company's interim results for the 6 months ended the 30 June 2020 are the most recent publicly available financial statements ("**Interim Report 2020**"). The Interim Report 2020 shows that:

    (a) The Company has recorded net current liabilities of HK $934 million;

    (b) the Company's cash equivalent is only about HK $1.65 million, of which about HK $1.13 million was RMB subject to the regulations of foreign exchange control promulgated by the PRC Government and is not therefore freely usable; and

    (c) The Company's cash equivalent has marked a decrease of about HK $1.81 million from about HK $3.46 million (as at the end of 2019) to HK $1.65 million (as at 30 June 2020), despite the company raising funds totalling HK $8 million over this

period, raising doubts as to the ability of the Company to financially support its operating costs.

67. The Company's auditors issued a disclaimer of opinion in the Annual Report 2019 published on 14 May 2020, due to, amongst other things, multiple fundamental uncertainties relating to the ability of the Company, together with its subsidiaries, to continue as a going concern. The disclaimer stated in part:

> *"As described in Note 2 to the consolidated financial statements, although the Group reported a net profit attributable to the owners of the Company of approximately HK $1,647,286,000 for the year ended 31 December 2019, it mainly arose from one-off gain on deconsolidation of the subsidiary and gain on disposal of subsidiaries, net of approximately HK $1,766,417,000 and HK $129,054,000, respectively.* ***In addition, the Group's current liabilities exceeded its current assets by approximately HK $1,050,673,000 and the Group had net liabilities of approximately HK $852,321,000 as at 31 December 2019.*** *As at the same date, the Group's total current bank and other loans and interest payable of bank and other loans amounted to approximately HK $284,381,000 and approximately HK $7,189,000, respectively, while its cash and cash equivalents amounted to approximately HK $3,456,000 only.*
>
> ***These conditions, together with other matters as described in Note 2 to the consolidated financial statements, indicate the existence of material uncertainties which may cast significant doubt about the Group's ability to continue as a going concern and therefore it may be unable to realize its assets and discharge its liabilities in the normal course of business.***
>
> ***We consider the cumulative effect of the above matters on the consolidated financial statements is so extreme that we have disclaimed our opinion."***

68. The Company disclosed in its circular dated 22 February 2021 that its directors were of the opinion that:

> *"after due and careful enquiry, taking into account the present available resources and the estimated net proceeds from the [intended disposal of the Company shares in its PRC subsidiary] as that [17 February 2021], as the total current assets of the Group is less than the total current liabilities of the Group,* ***the Group will not have sufficient working capital for at least the next twelve months from [22nd of February 2021] in the absence of unforeseeable circumstances****."*

69. It also appears to be accepted by the Company that it presently does not have the resources to discharge the indebtedness of the Petitioner if it was ordered to do so by the Court. In paragraph 7 of the Second Affirmation of Mr. Lai Wing Lun, filed on behalf of the Company, he states that even if the debt stated in the Petition is determined by this Court, the Company "*with the support and cooperation of Fame Dragon, DBIL and other creditors would be capable of raising sufficient capital to pay the debt*", implicitly acknowledging that the Company itself does not have the ability to do so.

Transactions relating to the disposal of the Company's assets

70. Sixth, around the time the Company first took the position that Sino Charm acquired the Bond by using the funds of the Company and that Mr. WeiBing and Mr. Tang acted in breach of their fiduciary duty to the Company, the Company embarked on a wholesale disposal of its most significant assets, for nominal consideration to entities potentially connected with Mr. Zhang and his father. As set out in the Seventh Affirmation of Mr. Zhou, since the presentation of the Petition in September 2019, the Company has entered into a number of questionable transactions to entities potentially related to either Mr. Zhang and/or his father, including the apparent disposal of assets at undervalue. Mr. Zhou has brought the following transactions to the attention of the Court:

(a) The sale of the entire share capital of Surplus Full Limited ("**Surplus Full**") to Sunlight Century Capital Limited for HK $10,000 (equivalent to US $1,200) on 6 December 2019. Surplus Full is one of Titan Group's major subsidiaries holding

assets including loan and convertible bonds amounting to over Hong Kong $100 million in value due from another Hong Kong listed company.

(b) The sale of the entire issued share capital of Asia Pacific Aluminum Limited ("**Asia Pacific**") to Prime Wealth Capital Limited for HK $10,000 on 15 December 2019. Asia Pacific is another major subsidiary of Titan Group holding assets including 46% of Yatai Shipyard which Titan Group had acquired for Hong Kong $113 Million in 2017.

(c) The sale of the entire issued share capital of New Gold Union International Limited for Hong Kong $10,000 on 15 December 2019.

(d) The sale of the entire issued share capital of Titan Oil Storage Investments Limited for HK $10,000 on 15 December 2019.

(e) The sale of the entire issued share capital of Brilliance Glory for nominal consideration of Hong Kong $10,000 on 15 December 2019.

(f) On 4 January 2021, the Company announced an agreement to sell the entire issued share capital of Titan Petrochemical (Fujian) Ltd ("**Titan Fujian**") to Fujian Jinqian Investment Co Ltd ("Fujian Investments") for RMB $1. Mr. Zhou states that Titan Fujan's most significant asset is the property ("**Land**") in Quanzhou City. Under the terms of the Purchase and Sale Agreement, Fujian Investments agreed to pay Titan Group's debts in the amount of RMB $160,000,000 (which is approximately US $24 million). Mr. Zhou expresses concern at this transaction given that this amount is even lower than the independent valuation made in 2017 when the Land was pledged as security to a bank in the PRC, amounting to RMB $253,000,000 (approximately US $38 million) and it is well known that land prices in China have significantly appreciated since 2017 and the true value should by now have been much higher.

71. In the circumstances it is reasonably clear from the evidence before the Court that:

(a) The debt in question was never disputed by the Company until Mr. Zhang filed his First Affirmation on 27 October 2019, thirty months after the Bond was issued by the Company, three months after the service of the Statutory Demand was served and one month after the filing of the Petition seeking a winding up order;

(b) HT01 and Brilliance Glory have suffered no financial loss as a consequence of entering into the contracts signed on 18 April 2017 to purchase 20,000 metric tons of bitumen mixture and 5,600 metric tons of mixed aromatics from Max Joy. Indeed, the position is that as a consequence of entering into the corresponding sales contracts in relation to the same commodities HT01 and Brilliance Glory (and indirectly the Titan Group) have made a trading profit and have been paid the funds due under the sales contracts;

(c) The issuance of the Bond was announced to the shareholders and investing public on 28 April 2017; following approval of the terms and purpose for which the Bond was required by the entire Board of Directors of the Company on 12 April 2017. The Board of Directors unanimously decided that the Company required additional capital and that purpose was announced to the existing shareholders and to the investing public. The funds raised by the issuance of the Bond were largely expended on the stated purpose;

(d) It is plain that the Hong Kong proceedings were commenced in retaliation to the presentation of the winding up Petition in Bermuda. The winding up Petition was presented to the Court on 20 September 2019 and the Hong Kong proceedings were commenced on 21 October 2019. The proceedings were not served upon the Petitioner until about a year later;

(e) There is persuasive evidence that the Titan Group is in fact insolvent and was likely to be insolvent at the time of the presentation of the Petition;

(f) The Company's auditors, Elite Partners CPA Limited, have resigned as auditors of the Company with effect from 21 November 2019 expressly pointing out that:" *In view of the extent of the material uncertainties relating to the results of the*

measures to be undertaken by the Group which might cast a significant doubt on the Group's ability to continue as a going concern, we have disclaimed our audit opinion on the consolidated financial statements."

(g) Soon after the presentation of the Petition the Company has engaged in wholesale disposition of its property apparently for nominal consideration to entities associated with Mr. Zhang and/or his father.

72. In light of these facts and circumstances the Court is of the view that the Company's dispute in relation to the Petitioner's debt is not being pursued *bona fide* and on substantial grounds. It appears to the court that a mass of evidence has been filed on behalf of the Company to mask the underlying reality that there are no substantial grounds to dispute the Petitioner's debt which forms the basis of the Statutory Demand. The defences and counterclaims set out in the Affirmations of Mr. Zhang and set out in the Hong Kong proceedings, appear to the Court to be a desperate attempt to avoid the normal consequences of the Statutory Demand which has not been discharged by the Company, and in the words of Hoffmann J (as he then was) in *Record Tennis Centres* have "*been conjured up by the company in an attempt to stave off liquidation*". In stating this, the Court accepts that it will of course remain open to the Liquidators to consider and determine the Petitioner's proof of debt as they consider appropriate and indeed pursue any claims against it if they are so advised.

73. In the circumstances the Court dismisses the application of the Company that the Petition should be dismissed. The Court is now required to consider what relief should be granted having regard to the views expressed by the other creditors and, to the extent relevant, the contributories of the Company.

Views of creditors and contributories

74. Mr. Robinson, who appears on behalf of Fame Dragon and Docile Bright submits that in the event the court determines that the Petition debt is not disputed on bona fide grounds, the appropriate order to be made on the Petition is to adjourn the Petition for the purpose of allowing the Company to raise capital to meet the Petition debt under the control of the

current management or, alternatively, allowing the Company to select and appoint provisional liquidators for restructuring purposes only in order to supervise current management's efforts to raise capital to meet the Petition debt. As noted earlier, Fame Dragon holds 20,358,629,484 fully paid ordinary shares (representing 66.46% of the total issued shares) of the Company.

75. The position of Docile Bright is more complicated and controversial. In 2007, the Company issued 555,000,000 preferred convertible shares at the stated value of HK $0.56 per share, or in total HK $310,800,000 to a third party ("**DBIL Convertible Shares**"). The DBIL Convertible Shares were then made subject to the Bermuda Court supervised Titan Group restructuring in 2016. As at 2016 financial year-end ("**FYE**") immediately after the said restructuring (i.e. 31 December 2016), the DBIL Convertible Shares were valued at HK $379,509,000 (including the due but unpaid dividend for the 2016 FYE of HK $14,608,000). Taken together with the due but unpaid dividend of HK $14,608,000 for each of FYE 2017, FYE 2018 and FYE 2019, the balance due but unpaid as at 31 December 2019 is approximately Hong Kong $423,000,000.

76. On or about 15 July 2019, the DBIL Convertible Shares matured and the full balance fell due and payable as an unsecured liability of the Company.

77. Docile Bright appears to have sold and transferred the Preferred Shares to Marine Bright after the presentation of the DBIL Petition at a consideration of US $20 million on or about 9 February 2017. In a letter written by Conyers BVI, acting on behalf of the liquidators of Docile Bright, to Marine Bright dated 10 July 2019, Conyers referred to the sale of the 555 million Preferred Shares at a consideration of US $20 million by Docile Bright to Marine Bright and stated:

> "*Copies of the Share Transfer and Bought and Sold Notes are attached for your reference. The JLs note that you are the registered shareholder of the Preferred Shares of List Co. However, there is no information to show that the purported consideration of US $20 million was received by the Company at all. In other words, the Preferred Shares were transferred to you for no consideration*."

78. In his Third Affirmation Mr. Lai seeks to further analyse the beneficial interest which Docile Bright may have in the DBIL Convertible Shares and concludes that:

> *"The available information may support a view that DBIL may have acquired the beneficial interests of the Preferred Shares on 10 October 2013, DBIL have not (in particularly it did not in September 2017) make any request for the issuance of the share certificate to itself and/or to register its name in the register of Titan."*

79. In considering this issue the Court reminds itself that the relevant rule is that "*it is sufficient that there is prima facie case that they are a creditor or contributory, even if their claim so is disputed*" (See *Re Opus Offshore Limited* [2017] Bda LR 14 at [22], Hellman J).

80. In this case the Court concludes that Marine Bright should be considered as the creditor of the Company for the purposes of this hearing given that:

    (a) The transfer of the shares from Docile Bright to Marine Bright was approved by the directors of the Company.

    (b) A copy of the register of members of the Company dated 20 September 2017 shows that Marine Bright is the registered shareholder in respect of the DCIL Preferred Shares.

    (c) Marine Bright has been issued Share Certificate No 3 by the Company certifying that Marine Bright is the registered shareholder of 69,375,000 convertible redeemable preferred shares issued by the Company.

81. Ms. George, who appears for Marine Bright, supports the position taken by the Petitioner and supports the immediate winding up of the Company and the appointment of Provisional Liquidators with full powers. In the circumstances it would appear that the majority of the creditors of the Company request the Court to make an order for the immediate winding up of the Company.

82. Against that are the submissions made on behalf of Fame Dragon, a 66.46% shareholder of the Company. Given that the Company appears to be insolvent the wishes of the

contributories must take a subsidiary position to the wishes of the majority of the creditors of the Company.

83. In relation to Mr. Robinson's submission that the appropriate order to be make is to adjourn the Petition for the purpose of allowing the Company to raise capital to meet the Petition debt under the control of the current management or, alternatively, allowing the Company to select and appoint provisional liquidators for restructuring purposes only in order to supervise current management's efforts to raise capital to meet the Petition debt, there is no objective basis on which the Court can conclude that the Company has the ability to raise the funds to pay the debt and/or to achieve an effective restructuring.

84. Mr. Robinson also submits that an immediate winding up petition would immediately deprive the Company of any opportunity to keep its listing status on the Hong Kong Stock Exchange which is fundamental to any attempt to raise additional capital.

85. It is only in exceptional circumstance that the Court would not accept the wishes of the majority of the creditors for an immediate winding up order particularly, as here, the Company appears to be insolvent. In addition there are good reasons why the Court should make an order for the immediate winding up of the Company. As noted earlier, the Company has failed to publish its annual results by the end of March 2021 and as a result trading in the shares on the Hong Kong Stock Exchange has been suspended since April 2021. The Company's auditors have resigned issuing a disclaimer of their previous opinion and highlighting the significant doubt about the Company's ability to continue as a going concern. Furthermore, these winding up proceedings against the Company have been outstanding since 20 September 2019, an exceptionally long period of nearly 2 years. It is contrary to the legislative scheme and the interest of the creditors of the Company, that they should endure a further period of uncertainty.

86. Finally, the Court is bound to express its concern at the substantial disposition of the Company's property, shortly after the Petition was filed, for nominal consideration to companies associated with Mr. Zhang and/or his father. Having regard to the dispositions of the Company's property, identified in paragraph 70 above, it is in the interests of the

general body of creditors and the wider public interest that the transfers of property be investigated by independent liquidators appointed by this Court.

Conclusion

87. In the circumstances, the Court is satisfied that the appropriate order to make is that Titan Petrochemicals Group Limited be wound up by the Court under the provisions of sections 161 (e) of the Act and the Court so orders.

88. The Court also orders that (i) Man Chun So (also known as Christopher So) and Yat Kit Jong (also known as Victor Jong) of PricewaterhouseCoopers, 22/F, Prince's Building, 10 Charter Road, Hong Kong; and (ii) James Ferris of PricewaterhouseCoopers Advisory Limited, 16 Church Street,' Hamilton, Bermuda be appointed as the joint and several Provisional Liquidators of the Company. The Court also orders that the costs of the Petitioner be paid out of the assets of the Company.

89. Mr. White, appearing on behalf of the Petitioner, submitted that if the Court determined that there is a genuine dispute on substantial grounds, the court retains the discretion to wind up the company and in support of that proposition he cited *Parmalat Capital Finance Ltd v Food Holding Ltd & Anor* [2008] UKPC 23 at [9] and *Lacontha Foundation v GBI Investments Ltd* [2010] 2 BCLC 624. The Court accepts that it retains the discretion to make a winding up order in exceptional circumstances even though there is a *bona fide* dispute as to the debt in question. At paragraph 71 of his written submissions, Mr. White sets out the facts and circumstances which should lead the Court to conclude that this is such an exceptional case. Whilst paragraph 71 of the written submissions makes a compelling case, particularly having regard to the dispositions of the Company's property set out at paragraph 70 above, it is unnecessary for the Court to express a concluded view given that the Court has held that the debt in question is not disputed *bona fide* and on substantial grounds.

90. The Court will hear the parties in relation to any outstanding issue relating to costs.

Dated this 11th August 2021

NARINDER K HARGUN
CHIEF JUSTICE