Neutral Citation Number: [2022] CA (Bda) 13 Civ

Case No: Civ/2021/13

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 383

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 09/08/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL SIR ANTHONY SMELLIE

- - - - - - - - - - - - - - - - - - - -

Between:

TITAN PETROCHEMICALS GROUP LIMITED

Appellant

- and -

SINO CHARM INTERNATIONAL LIMITED

Respondent

- and -

(1) FAME DRAGON INTERNATIONAL INVESTMENT LIMITED
(2) DOCILE INTERNATIONAL INVESTMENT LIMITED
(3) DOCILE BRIGHT INVESTMENTS LIMITED
(4) SINO TEAM INVESTMENT LIMITED
(5) MARINE BRIGHT LIMITED

Interested Parties

Mr. Alexander Potts QC and Mr. Rhys Williams of Conyers Dill & Pearman Limited for the Appellant
Mr. Steven White and Mr. John McSweeney of Appleby (Bermuda) Limited for the Respondent
Ms. Kehinde George of ASW Law Limited for the 5th Interested Party

Hearing date: 8 - 10 March 2022

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APPROVED JUDGMENT

CLARKE, P:

1. On **13 April 2017** Titan Petrochemicals Group Limited ("**Titan Group**" or "**the Company**") entered into a Subscription Agreement (the "**Subscription Agreemen**t") with Sino Charm International Limited ("**Sino Charm**") pursuant to which Titan Group agreed to issue to Sino Charm convertible bonds (the "**Bonds**") upon Sino Charm's payment to Titan Group of a subscription sum of HK $ 78,000,000 (approximately US $ 10,000,000).

2. The terms and conditions of the Bonds provided that:

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

   (b) If the company failed to pay any principal, premium, yield or any other amount payable under the Bonds when due, it should 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 had to redeem the Bonds at 100% of their principal amount together with the accrued interest thereon on the date which was the first anniversary from the issue of the Bonds (the "**Maturity Date**");

   (d) The Company was not 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.

3. On **26 April 2017** Sino Charm remitted the Subscription Sum, by way of a Banker's draft, to the Company. The Issue Date of the Bonds was **28 April 2017**, so that the Bond Maturity Date was **28 April 2018**. Titan Group failed to honour the Bond on that date or thereafter.

4. On **15 July 2019** Sino Charm issued a Statutory Demand to the Company demanding repayment of HK $ 96,571, 078.77 being (i) the principal due; (ii) interest at 7.5% from 28 April 2017 to 28 April 2018; and (ii) interest at 12.5% between 29 April 2018 and 15 July 2019.

5. The Statutory Demand was not paid and, as a result, Sino Charm presented, on **5 August 2019** a Petition seeking that the Company be wound up by the Court under the provisions of section 161 (e) of the *Companies Act 1981* on the ground that the Company was unable to pay its debts, as was deemed by section 162 (a) to be the position if the Company had failed to pay Sino Charm a debt that it owed. The Petition was not put on any other basis; nor did it rely on any other debt than the one said to be owed under the Bond.

6. The Petition was heard by the Chief Justice on **12-13 July 2021**.

7. The following parties gave notice of appearing on the Petition:

   (a) Docile Bright Investments Limited ("**Docile Bright**" or "**DBIL**") which is in liquidation in the British Virgin Islands, which appeared below as a creditor for HK$ 423m (c. US$57.9m), said to be owed in respect of a holding of 555m preferred convertible shares (the "**Disputed Shares**") and opposed the Petition.

   (b) Marine Bright Limited ("**Marine Bright**") which appeared as a creditor asserting the same claim as Docile Bright in respect of the Disputed Shares, but which supported the Petition.

   (c) Fame Dragon International Investment Limited ("**Fame Dragon**") which is the Company's largest shareholder (with 2.378bn shares) and is in compulsory liquidation in Hong Kong, the order of the Hong Kong Court being dated 8 February 2018, which opposed the Petition.

   (d) Sino Team Investment Development Limited, said to be a member holding 791,666,667 shares in the Company which opposed the Petition.

   The first three appeared at the hearing of the Petition and the position of the fourth was apparent from the first affirmation of Mr Zhang who indirectly owned it.

8. On **11 August 2021** the Chief Justice ordered that the Company be wound up under section 161 (e) of the *Companies Act 1981* and he appointed three persons as joint provisional liquidators of the Company.

9. Titan Group contends that it has a good defence to the debt. Sino Charm contends that it does not. Accordingly, the central question between the parties before the Chief Justice was whether the debt was *bona fide* disputed on substantial grounds. The Chief Justice held that it was not. We must now decide whether he was right, or at least entitled, so to find.

10. In his judgment the Chief Justice summarised the Company's case for disputing the debt, as set out in its written submissions, in the following way:

> *"(a) The funds used to pay for the Subscription Sum for the Bonds 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, Dr Zhang WeiBing ("**Dr 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 Dr 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 Bonds were issued by the Company under the instigation and direction of Dr WeiBing and Mr. Tang for improper purposes and in breach of fiduciary duty.

*(d) Specifically, by the Bonds Dr 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**")*[1].

*(e) To this end, using a series of suspicious and coordinated transactions conducted using the Company's subsidiaries Petro Titan (HK) Limited **("Petro Titan"** or **"HT01")** and Brilliance Glory Limited **("Brilliance Glory").** Dr 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."*

11. Accordingly, so it is said, the Subscription Agreement was void or unenforceable. Alternatively, if it was not, the Company was entitled to rescind the Subscription Agreement and the rescission was effective upon the communication by the Company of its intention to rescind, which was effected by virtue of the Writ issued by the Company in the Court in Hong Kong on **21 October 2019** and/or by the first affirmation of Mr Zhang dated **22 October 2019.**

The Hong Kong Action

12. The Company, together with Petro Titan (HK) Limited ("**Petro Titan**"), commenced proceedings in Hong Kong against six defendants, namely (i) Sino Charm, (ii) Dr WeiBing, (iii) Mr. Tang, (iv) Uni-Loyal International Enterprises Limited ("**Uni-Loyal**") International Enterprises Ltd, (v) Sino Champion Corporation Limited ("**Sino Champion**") and (vi) Chan Shu Leung (as to the latter three see [23], [25] and [26] below).

13. In this action Titan claims, *inter alia*, that the Subscription Agreement for the Bond was void and/or has been rescinded and/or should be set aside and (ii) damages and equitable compensation from, *inter alia*, Sino Charm, significantly in excess of the Petition debt. If the action is substantially successful it will eliminate that debt.

[1] Mr Potts points out that, even if the Company went into provisional liquidation, its creditors would have influence when it came to implementing a scheme of arrangement.

14. In the Hong Kong proceedings it is alleged that at all material times Dr WeiBing and/or Mr Tang had been, and still were, the ultimate controller of Sino Charm and/or had acted and still acted as shadow directors of Sino Charm by virtue of their real influence over its affairs, and that until their respective departures from Titan Group the two of them were the ultimate controllers of Titan Group's then board of directors, and that Uni-Loyal and Sino Champion were at all material times controlled and/or directed by Dr WeiBing and Mr Tang and/or their close associates.

15. It was Titan Group's case at the hearing of the petition that the issue which was the subject of the dispute should be resolved in the Hong Kong action through the normal litigation process, with the benefit of discovery and cross-examination, and that the Petition should be dismissed or stayed/adjourned pending a final judgment in the Hong Kong action.

Progress of the HK Proceedings.

16. By the time of the hearing before the Chief Justice the following events had occurred. The Statement of Claim was produced, dated **3 February 2020**. Chan Shu Leung and Sino Champion had filed their defences (on **27 April** and **14 May 2020)**, and the Plaintiffs had made a request for further and better particulars of Chan Shu Leng's defence and thereafter issued a summons for an order requiring further and better particulars which was fixed for a hearing on **1 September 2021**. On **12 August 2020** the plaintiffs had applied for leave to serve the Writ of Summons dated **21 October 2019** and their Statement of Claim dated **3 February 2020** outside the jurisdiction on Sino Charm, WeiBing and Tang. That application was successful – the order was made on **28 August 2020** - on the basis, as claimed in the affidavit of Mr Zhang, that there was a serious issue to be tried and a good arguable case that the claims fell within one or more the relevant jurisdictional gateways for service out under Order 11 of the Rules of the High Court, and that Hong Kong was clearly and distinctly the *forum conveniens*.

17. Service was made on Sino Charm on **14 October 2020** at its registered address in the BVI. Sino Charm never disputed that leave to serve out of the jurisdiction was correctly granted and it served its defence on **7 April 2021**. Sino Charm took out a summons for security for costs – an application which, itself, assumes or at least contemplates that there will be a trial - in the sum of HK $ 2.85 million, against Titan Group and Petro Titan on **25 May 2021,** which was due to be heard on 13 August 2021; and the Plaintiffs made a request for further and better particulars of the Sino Charm defence on **2 July 2011**. The Plaintiffs were in the course of arranging service out of the jurisdiction on Dr WeiBing and Mr Tang in China. Uni-Loyal had not filed any defence. In short, by the time of the hearing before the Chief Justice the litigation was, as Mr Potts put it, "*rumbling towards quite a developed stage*".

Relevant companies and individuals

18. A string of companies and individuals feature in this case. I propose, at this point, to identify the more important ones.

The group of which the Company was part

19. Titan Group is a Bermuda Company, listed on the Hong Kong Stock Exchange. It was owned, by Fame Dragon and its subsidiaries as to 48.35 %[2], and as to 18.1 % it was owned indirectly by Mr Zhang Qiadong **("Mr Zhang")** through, for the most part, Sino Team Capital Development Ltd ("**Sino Team**") and Sea Rich International Limited ("**Sea Rich**")[3].

20. Titan Group had two indirect wholly owned subsidiaries, namely **Petro Titan** and Brilliance Glory Ltd ("**Brilliance Glory**"). Petro Titan (sometime referred to as "**HT 0**1", and sometimes as "**Titan HK**") and Brilliance Glory were engaged in shipbuilding and ship repair, manufacture of steel structures and trading in commodities.

21. Fame Dragon, incorporated in Hong Kong, is a wholly owned subsidiary of Guangdong Zhenrong Energy Co Ltd **("GZE**"), a company established in the People's Republic of China ("PRC"). Fame Dragon and GZE are currently in liquidation. Fame Dragon was ordered by the Hong Kong court to be wound up on 3 April 2017, when the Official Receiver was appointed to be its provisional liquidator of the company. The current liquidators of Fame Dragon - Mr Arab and Mr Wong, who are insolvency practitioners - were appointed on 6 February 2018. The interval between 3 April 2017 and 6 February 2018 was, Mr Potts submits (with some force), a period in which there was no active scrutiny of the affairs of the Company, which delayed any thorough investigation as to what had been going on.

22. **Docile Bright**, an asset holding company, was incorporated in the BVI on 9 July 2012 and is a wholly owned indirect subsidiary of GZE, through GZE's 100% ownership of Guangdong Zhenrong (Hong Kong) Co Ltd **("GZEHK")**, now in liquidation, and GZEHK's ownership of Docile Bright. Mr Stephen Briscoe was appointed by GZEHK as the sole liquidator of Docile Bright on **4 February 2019**; Mr Lai (see [24] below) was appointed as joint liquidator at a meeting of creditors on **10 April 2019**, and became the sole liquidator after Mr Briscoe retired at some date between March 2020 and July 2021.

The Board of Titan Group

23. At the date of the Bonds Issue the Chairman of the Board of Titan Group was Dr WeiBing. He had been a director since 23 July 2015 and chairman from 23 September 2016 and he remained so until his resignation on 2 March 2018. He was a director of Petro Titan at all material times until 31

[2] This included 22.55% shares in Titan Group which are said to have been improperly transferred from Fame Dragon or its subsidiaries after the presentation of the Petition.

[3] Mr Zhang explains in his First Affirmation that until 3 April 2018 he had held his shares through Sino Team Investment Development Limited, which was the company which gave notice of an intention to appear on the hearing of the Petition.

July 2018. Another director was Mr Tang**,** who was a director from 26 March 2013, Chief Executive Officer from 16 September 2015, and chairman from 3 March 2018, until 29 October 2018. He was a director of Petro Titan at all material times until 15 February 2019 and a director of Brilliance Glory at all material times up to the commencement of the Hong Kong proceedings. It is Dr WeiBing and Mr Tang who are said to have been the prime movers of the impugned transactions.

24. On **22 July 2018** Mr Lai Wing Lu **("Mr Lai")** became a non-executive director of the Company. Mr Lai was also a director of both Fame Dragon and GZEHK, appointed in each case by their liquidators, and a liquidator of Docile Bright (appointed on **10 April 2019**).

Sino Charm International Limited

25. Sino Charm is incorporated in the British Virgin Islands. Its sole shareholder is **Chan Shu Leung**. It is clear that he is a nominee for others, since he is merely an employee of a small sized local company providing secretarial services in Hungham, Hong Kong. Sino Charm is said to be subject to the control of Dr WeiBing and/or Mr Tang.

Companies connected with Dr WeiBing and/or Mr Tan

26. Some five companies are said to have been controlled by or closely connected with Dr WeiBing and/or Mr Tang. They are as follows:

(i) **Sino Champion**, the fifth defendant in the Hong Kong proceedings. Mr Tang was a 70% shareholder as of 19 April 2016 and 19 April 2017 and a director of it at all material times until 28 November 2016;

(ii) Max Joy International Industrial Limited ("**Max Joy**"). This company was at all material times a private company wholly owned by Mr Koo Wai Hong, who was its sole director. He is said to be a friend and close associate of Mr Tang, and subject to his direction and influence (Lai 2 [44]). This is supported by a written confirmation by Max Joy dated 18 October 2019 that between 2016 and 2017 the Titan Group's commodities transactions with Max Joy were all arranged by Mr Tang and constituted "*channel business"*, which I take to mean that they were a conduit for the flow of funds: (D1/1532)[4];

(iii) Grand Treasure International HK Limited ("**Grand Treasure**"), of which Mr Koo Wai Hong was at all material times a director and an 85%, and then on 23 January 2019, a 100% shareholder: see the annual returns at 20.12.16 (D2/1868); 20.12.17 (D2/1877); 20.12.18 (D2/1886); and 20.12.19 (D2/1895);

(iv) Top Win Energy Limited *("***Top Win**"), formerly known as ING Success. Mr Tang was a director and 40% shareholder of ING Success as of 24 April 2013. Sino Champion and Top

[4] These references are to the appeal bundles.

Win shared the same registered office and the same company secretaries according to their 2013 to 2017 Annual returns: D2/2438-2488;

(v) **Uni-Loyal**. Mr Lu Shao Wei was at all material times a 50% shareholder of Uni-Loyal: D2/2497 -2544. From at least 24 April 2014 to at least 24 April 2016 Mr Lu was a 30% shareholder of ING Success/Top Win. The other 50% shareholder was Zhang Zhong Bao. In the Hong Kong proceedings Uni-Loyal and Sino Champion were represented by the same law firm.

27. The nature of the fraudulent transactions relied on was summarised by the Chief Justice in these terms:

> *"18 The diversion of the Company's funds, it is alleged, was achieved in three stages. The **first stage**[5] 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.*[6]
>
> *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.*

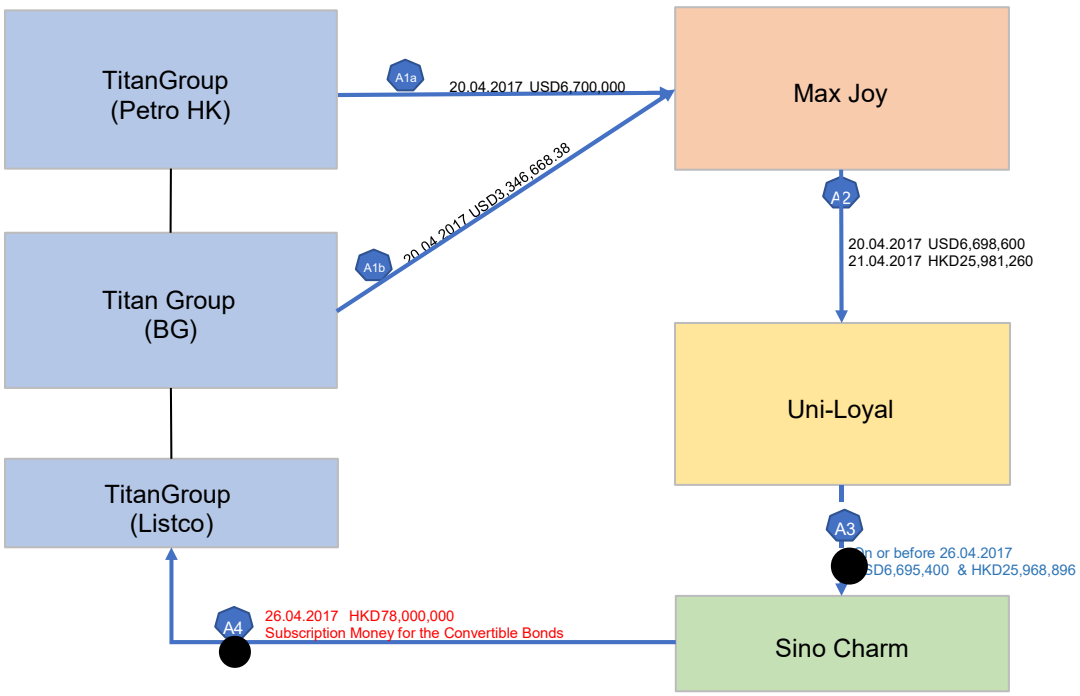
[5] Bold added in this, and other, citations.
[6] Payment was in fact made of the US dollar equivalent: US$ 3,346,668.38: D3/49/2562

*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 the two contracts was very close to the consideration for the Bond."

28. The route taken by the transfer of funds was expressed diagrammatically by Mr Lai ("Lai 2") in Lai 2 as follows:



29. Documents vouching the payments to Max Joy and from Max Joy to Uni-Loyal are exhibited to Lai 2; and contracts dated 18 April 2017 between Uni-Loyal and Sino Charm for the purchase by Uni-Loyal from Sino Charm of bitumen mixture and mixed aromatics, the total purchase price of

which was close to HK $ 78 million, and which provided for delivery before 30 April 2017 are exhibited in ZQD 1: D1.43/1357-8 & 1361-2.[7]. These contracts were found by Titan Group's staff amongst Titan Group's transaction records, which would suggest that they were left behind when Messrs WeiBing and Tang, the controllers behind Sino Charm, neglected to take them away when they left the Titan Group board. The inference that Sino Charm's payment of the subscription amount, which financed the purchase of the Bonds, was, itself, derived from a payment by Uni-Loyal arises from the closeness of the likely date, and the amount, of the payment from Uni-Loyal (apparent from its contracts with Sino Charm) to the known date and amount of the subscription by Sino Charm.

30. It is this flow of funds and the contracts relating thereto which is set out in the general endorsement of the writ in the Hong Kong proceedings.

The Court's approach to determining whether a debt is bona fide disputed

31. The Chief Justice set out a number of principles which he regarded as applicable in deciding the approach which the Court should take in determining whether a debt was *bona fide* disputed and on substantial grounds, and cited a number of passages from authorities dealing with them. Those principles may be summarised as follows:

(a) In the ordinary case the general rule is that, if the Court 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: *Stonegate Securities v Gregory* [1980] Ch 576, 579C to 580C[8];

(b) In the ordinary case the threshold as to what constitutes a disputed debt is not a high one: per Etherton LJ, as he then was, in *Tallington Lakes Limited v South Keveten District Council* [2012] EWCA Civ 442;

(c) Whether a debt is disputed on substantial grounds is a question of judgement based on the facts of each case: *Re Alloy Company Ltd* [2015] Bda LR 78 at [81];

.

(d) *"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*

[7] In its defence in the Hong Kong proceedings Sino Charm denies that it was party to these contracts, which, if true, would mean that the documents exhibited (with Sino Charm chops) are forgeries. Mr Zhou does not deal with this point in his evidence.

[8] The passage cited by the judge states that "*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 a debt which is bona fide disputed"*. And in the pages referred to it is observed that, if there is a bona fide dispute the petitioner has no *locus standi* to bring the petition.

behalf of the company[9]*. 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":* [30] of the judgment.

32. The Chief Justice referred to a number of authorities including:

(a) In *Re a Company (No 001946 of 1991) ex parte Fin Soft Holdings SA* [1991] 3 BCLC 737 where allegations that a promissory note had been obtained by means of a fraudulent misrepresentation were first raised by the company in a writ action against the petitioner commenced three days before the petition was presented, a matter which Harman J bore in mind when concluding, having first considered the allegations in the statement of claim and the evidence on affidavits, that the dispute raised was fanciful. In that case, the company was not simply responding to the petition to wind up but was applying to strike out the petition as an abuse of process.

Harman, J also took into account that the company was very likely insolvent because that would give a likely motivation for those controlling the company to raise "*any form of defence that can be grabbed at*". In that case the supposed fraudulent misrepresentation had never been mentioned in a letter before action or in a discussion with the company's solicitor in which allegations were made, which allegations were then rebutted and dropped.

See also the approach of Hoffmann J, as he then was, in *Record Tennis Centres Ltd* [1991] Lexis Citation 1493, to similar effect ("*the fact that the company …is hopelessly insolvent is not, of course, a ground for allowing the petition to go forward, 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")*.

[9] Or, one might add, on behalf of the petitioner.

(b) *Re Gerova Financial Group* [2011] Bda LR 20 (Kawaley J) and *in the Matter of Titan Petrochemicals Limited* [2013] Bda LR 62, (Kawaley CJ), which followed *Fin Soft Holdings* and emphasized that whether a dispute is substantial is a question of judgment based on the facts of each case.

(c) *Re Claybridge Shipping Co SA* [1997] BCLC 572, which emphasised the need to take a view on whether, on the evidence, there was real substance in the dispute, however voluminous the paper.

(d) In *Re Richbell Strategic Holdings Ltd* [1997] 2 BCLC 429 where Neuberger J, as he then was, referred to the need for a judge to be alive to ensure that the very expansiveness and complexity of the evidence presented are not invoked to mask the fact that there is, on a proper analysis, no arguable defence to a claim, citing *NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd* [2001] 6 MLJ 5 as an example of "*copious affidavits*" disguising the fact that there was no dispute at all.

33. The appellants do not take much issue with the principles thus summarised (nor do I), save to observe, correctly, that the propositions enumerated are derived from widely different factual circumstances the facts of which bear little resemblance to those of the present case, and that in none of the cases was it held that the late commencement of the action was no more than a tactic in circumstances where the petitioner for winding up had gone on actively to defend, rather than seek to strike out, the action against it.

34. I would add that it seems to me clear, as was not disputed, that, if the petitioner has shown the existence of a debt and that a statutory demand has been served and not complied with, it is for the company to show that there is a *bona fide* dispute on reasonable grounds. That this is so is said at para 7.451 of the 3rd edition of *French* on *Applications to wind up Companies* to be what most courts have held; and the learned editors submit that the "*onus must be on the company, which is the applicant and is the party asserting the existence of a dispute*. In the 4th edition at 7.587 it is said that, on hearing a petition, the burdens are reversed (from what they are where there is an application by a company to prevent presentation or continuation of a creditor's petition) "*because being an undisputed creditor is an essential element of the petitioner's case".* Reliance is placed on Australian and New Zealand authorities, which antedate the 3rd edition. I agree with the proposition stated in the 3rd, but disagree with the one stated in the 4th edition.

35. There is much discussion in the cases and the textbooks (which I do not propose to cite) as to whether "*bona fides*" adds much to "*substantial grounds*". It probably does not. If there are substantial grounds for dispute *bona fides* is likely to fade from consideration[10] (and a good defence will not be invalid simply because it is advanced out of spite). But whether a person is acting in good faith in proffering a defence may cast light on whether the defence suggested is one of substance.

[10] Quaere the position where there is, objectively an apparently plausible defence, but the proponent of it has expressed the view that it is in fact hopeless.

36. The Chief Justice then proceeded to consider the issues raised by the Company – viz: *"whether (a) 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*" – by reference to six sets of circumstances. Having done so he concluded that the resistance to the Petitioner's debt was not being pursued *bona fide* and on substantial grounds [72]. I consider those circumstances below.

1 Existence of a prior dispute

37. The Chief Justice characterised the position as follows. It was reasonably clear that the debt was never disputed by the Company until Mr Zhang, who by then had become the sole executive director of Titan Group, filed his first affirmation on **27 October 2019** ("Zhang 1") which was 30 months after the Bonds were issued, 3 months after the service of the Statutory Demand, and 1 month after the filing of the Petition. Following the service of the Statutory Demand Conyers, acting on behalf of the Company, had advised Sino Charm in a letter written 3 days before the expiry of the Demand that the Board 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 the background".* It made no suggestion that the funds used to purchase the Bonds had been siphoned from the Titan Group.

2 *Alleged diversion of the Company's Funds to Sino Charm*

38. The Chief Justice said that it appeared to him that the allegation that funds were diverted from the Titan Group, first made in Zhang 1, was misleading. The suggestion that the monies paid to Max Joy by HT 01 and Brilliance Glory to purchase 20,000 metric tons of bitumen mixture and 5,600 metric tons of mixed aromatics were never recovered by HT 01 and Brilliance Glory appeared, he held, to be demonstrably false.

39. Trading of commodities was an important part of Titan Group's business and such trades were usually effected by documents which transferred title from an "upstream seller" to a "downstream buyer" and then further down a chain with only the ultimate purchaser and end-user taking delivery from the storage warehouse. The trades are usually back to back with different prices and payment terms, such that profit is derived by a buyer selling at a unit price which is greater than that at which he bought the commodity.

40. The reason why what was suggested appeared to the Chief Justice to be demonstrably false was that the contracts referred to in Zhang 1 were the *buy contracts* under which HT01 and Brilliance Glory purchased 20,000 tons of bitumen mixture and 5,6000 of mixed aromatics. But Zhang 1 (and the Writ in the Hong Kong Proceedings) made no mention of the *sale contracts*.

41. As to them, as the Chief Justice recorded:

> "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*[11] *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*[12]*. 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 (sic) 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."*

As appears from the figures in Appendix 1 in respect of transactions PT 2017 0004 and BG 2017 0004 the profit on the bitumen mixture contract was US $ 67,000 and on the mixed aromatics US $ 6,331.70. In relation to the former, the sale proceeds were received on 15 December 2017 (US $ 3,950,000) and 27 December 2017 (US $ 2,817,000).

42. It is not surprising that the Chief Justice found the position presented by Zhang 1 in respect of the contracts for the purchase of bitumen and mixed aromatics misleading, since the affirmation appeared to suggest that money had simply passed from HT01 and Brilliance Glory to Max Joy, without mentioning the fact that HT01 had made a profit from the sale of that which it had purchased.

43. That said, the purchase and sale contracts, although back to back in the sense that they were sales of the same quantity of bitumen and mixed aromatics that had been purchased, had markedly different dates for payment. The price under the bitumen and mixed aromatics contracts was paid on 20 April 2017; but the sale contracts to Grand Treasure only called for payment within 92 days after title transfer. Payment was not received in the case of the bitumen contract until 15 December 2017 (HK $ 30,810,000) and 27 December 2017 (HK $ 21,972,800). The mixed aromatics contract

[11] A, or the, director of Sino Charm

[12] The bank statement is dated 31 December 2017 and refers to two payments: of HK $ 30,810,000 on 15 December and HK $ 21,972,800 on 21 December 2017. D2/1789.

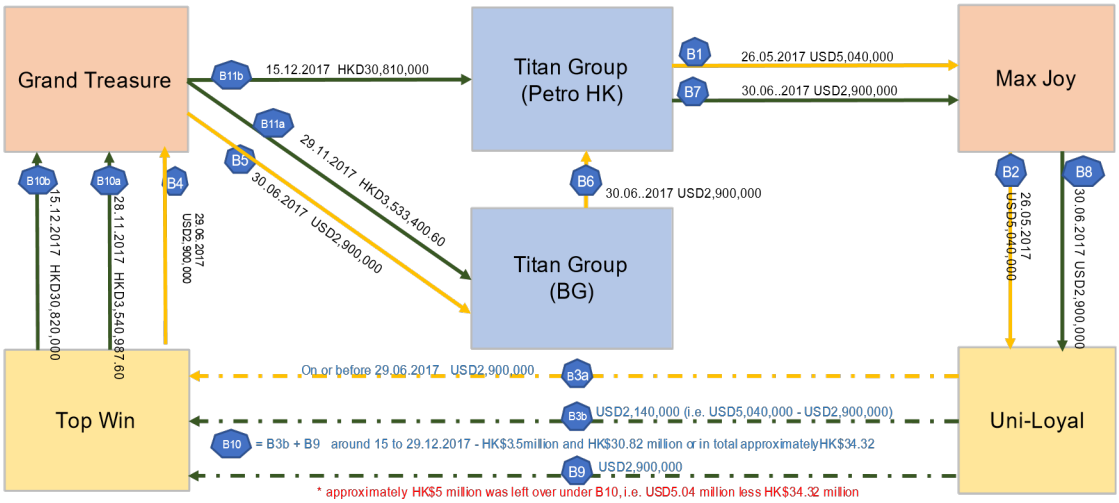
was also paid for on 20 April 2017 but, again, payment for the sale contract was not received until 30 June 2017 (US$ 2,900,000) and 29 November 2017 (HK $ 3,533,400.60). Mr Potts submitted that these intervals were (a) unusual – in back to back trading you would expect the same five-day payment provisions; and (b) afforded the opportunity to use the purchase price in the interval in the circle of payments leading eventually to Sino Charm.

44. As to that, the facts summarised in the previous paragraph appear to be part of a set of 3 fund flows which are described fully in the Second Affirmation of Mr Lai ("Lai 2"). Mr Lai is a director of RSM Corporate Advisory (Hong Kong) Limited and leads its forensic accountancy practice. Two of his fellow directors are the Court appointed joint and several liquidators of Fame Dragon, the Company's largest shareholder. Mr Lai is the case manager of the liquidation of Fame Dragon. Mr Lai is, also, the non-executive Chairman and non-executive director of Titan Group, and., now, the sole liquidator of Docile Bright. He is a member of a Special Investigative Committee of Titan Group established to investigate, *inter alia*, the wrongdoing alleged in the Hong Kong Action. He is, therefore, particularly well qualified to assist the Court in an analysis of the facts at issue.

45. The data set out in Lai 2 was the product of an examination by him of 9 commodities transactions in 2017 which involved Petro Titan or Brilliance Glory, on the one hand, and Uni-Loyal, Max Joy, Grand Treasure and Sino Champion Corporation Limited, on the other.

46. The first fund flow is that described at paragraph [28] above.

47. The second fund flow is the following:



48. The payments represented by continuous yellow lines (B 1,2,4,5, and 6) are vouched by documents exhibited to Lai 2, and establish:

(a) payment of US $ 5,040,00 from Petro Titan to Max Joy (B 1) and by Max Joy to Uni-Loyal (B2); and

(b) payment of US $ 2,900,00 from Top Win to Grand Treasure (B4), from Grand Treasure to Brilliance Glory (B5), and from Brilliance Glory to Petro Titan (B 6). The payment of US $ 2,900,000 from Uni-Loyal to Top Win (Step B3A), the first in the chain, is sought to be inferred.

49. The payments represented by the continuous green lines (B 7, 8, 10a and 10b, 11a and 11 b) are all vouched by documents. The payments at B3a & b and B9 are inferred. The position is summarised by Mr Lai as follows:

(a) Petro Titan paid US $ 2,900,000 to Max Joy on 30 June 2017 (Step B7) and Max Joy paid Uni-Loyal US $ 2,900,000 on 30 June 2017 (Step B8);

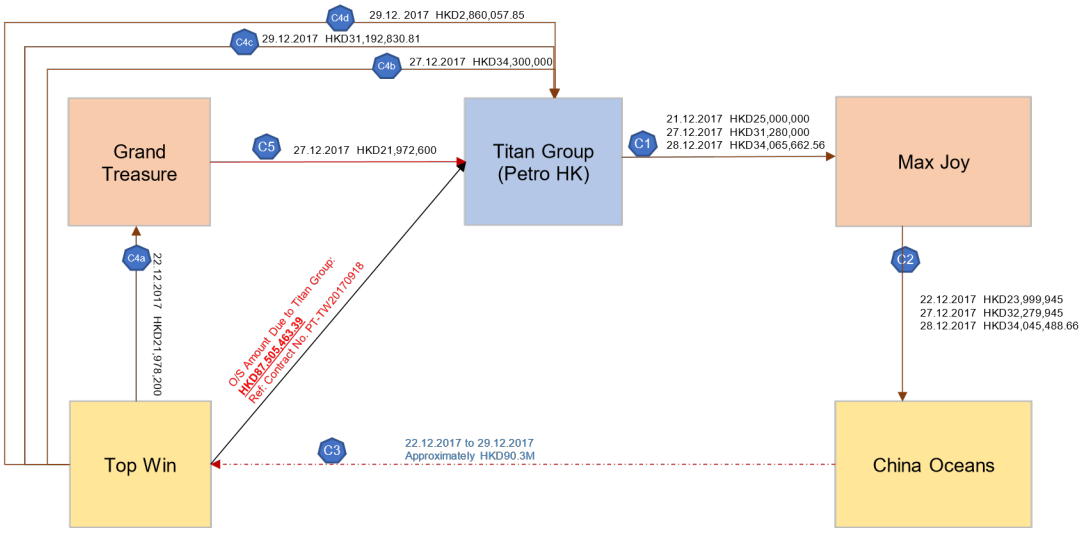
(b) Top Win made payments of HK $ 3,540,987.60 (Step B10A) and HK$ 30,820,000 (Step 10 b) to Grand Treasure on 28 November 2017 and 15 November 2017;

(c) On 29 November 2017 Grand Treasure paid HK $ 3,533,400.60 (Step B11a). It appears that this payment was funded by the payment of HK $ 3,540,987.60 (Step B 10a) from Top Win;

(d) On 15 December 2017 Grand Treasure paid HK $ 30, 810,000 to Petro Titan (Step 11b). It appears that this payment was funded by the payment of HK$ 30,820,00 (Step 10 b) from Top Win;

(e) The payments made by Max Joy to Uni-Loyal amounted to US $ 7.94 million (Steps B2 and B8); but the payments made by Top Win to Grand Treasure amounted to c US $ 7.3 million (Steps B4, B 10a and B 10b). Therefore, it can be inferred that c US $ 0.64 million was retained or absorbed by Uni-Loyal and/or Top Win, or siphoned off elsewhere by them.

50. The third fund flow is the following:

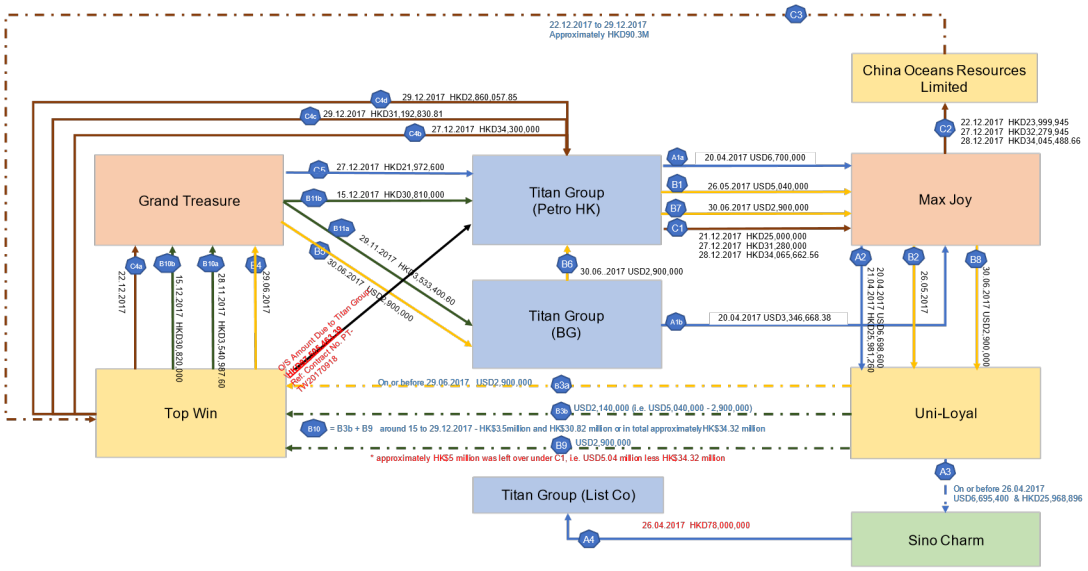


51. In summary, Petro Titan made three payments to Max Joy between 21 and 28 December 2017 totalling HK$ 90,345,662,56 (Step C1). Between 22 and 28 December 2017 Max Joy made three payments totalling HK$ 90,325,378.66 to China Ocean Industry Group ("**China Ocean**"). In turn Top Win and Grand Treasure, collectively, made 4 payments totalling HK $ 90,325,488.66 to Petro Titan (Steps C4b, C4c, C4d and C5). The HK $ 21,978,200 paid by Top Win to Grand Treasure on 22 December 2017 appears to have funded the HK$ 21,972,600 paid by Grand Treasure to Petro Titan on 27 December 2017. The payment at C 3 is inferred.

52. Steps B 11 b (HK $ 30,810,000 = US$ 3,950,000) and C5 (HK$ 21,972,600 = US $ 2,817,000) are the payments made pursuant to the sale of 20,000 m.t. of bitumen to Grand Treasure referred to at paragraph 44 of the Chief Justice's judgment: see [41] above. Steps B 5 (US $ 2,900,000) and 11a (HK $ 3,533,400 = US $ 453,000) are the payments made pursuant to the sale of 5,000 m.t. of mixed aromatics referred to in the same paragraph. The relevant transactions are referenced as PT 2017 0004 and BG 2017 0004 and the details are set out in the Table set out at paragraph [54] below and in the Appendix to Lai 2 (where the HK$ amounts are converted to US$), which is referred to at paragraphs [58] ff. This is of importance. Mr Lai's analysis is not misleading by reason of any omission of these receipts from Grand Treasure (although tracing where they are to be found requires some attention to detail) [13].

53. The overall effect of the three fund flows is as follows:

[13] The documentation related to the downstream sales was included in the exhibit to Zhang 1. And Mr Zhang had, himself, said "*it is likely that the flow of funds was actually circular running in a closed loop. In other words, after the Titan Group (as intermediary) made payments to the upstream sellers, the same payments would ultimately, in one way or another, end up in the hands of the downstream purchasers*".



54. Mr Lai summarises the ultimate effect of the transfers and payments to Titan Group referred to in his flow charts in the following chronological summary of the consolidated cash flow charts of the Titan Group, the result being a net cash flow of approximately US $ 1 million:

Transaction ref.	Fund flow Chart Ref.	Vendor	Purchaser	Date of Payment / Receipt	Payment/ Receipt Amount	Payment/ Receipt Amount (in USD)	Aggregated Balance (in USD)
PT 20170004		Max Joy	Titan HK	20-Apr-17	(6,700,000.00)	(6,700,000.00)	US$ (6,700,000.00)
BG 20170004		Max Joy	Titan HK	20-Apr-17	(26,104,013.36)	(3,346,668.38)	US$ (10,046,668.38)
		Subscriber: Sino Charm	Titan Listco	26-Apr-17	78,000,000.00	10,000,000.00	US$ (46,668.38)
PT 20170005		Max Joy	Titan HK	26-May-17	(5,040,000.00)	(5,040,000.00)	US$ (5,086,668.38)
PT 20170005		Max Joy	Titan HK	30-Jun-17	(2,900,000.00)	(2,900,000.00)	US$ (7,986,668.38)
BG 20170004		Titan HK	Grand Treasure	30-Jun-17	2 ,900,000.00	2,900,000.00	US$ (5,086,668.38)
BG 20170004		Titan HK	Grand Treasure	29-Nov-17	3 ,533,400.60	453,000.08	US$ (4,633,668.30)
PT 20170004		Titan HK	Grand Treasure	15-Dec-17	3 0,810,000.00	3,950,000.00	US$ (683,668.30)
PT 20170006		Max Joy	Titan HK	21-Dec-17	(25,000,000.00)	(3,205,128.21)	US$ (3,888,796.51)
PT 20170004		Titan HK	Grand Treasure	27-Dec-17	2 1,972,600.00	2,817,000.00	US$ (1,071,796.51)
PT		Titan HK	Top Win	27-Dec-17	3 4,300,000.00	4,397,435.90	US$ 3,325,639.39

20170005							
PT 20170006		Max Joy	Titan HK	27-Dec-17	(31,280,000.00)	(4,010,256.41)	US$ (684,617.02)
PT 2070006		Max Joy	Titan HK	28-Dec-17	(34,065,662.56)	(4,367,392.64)	US$ (5,052,009.66)
PT 20170005		Titan HK	Top Win	29-Dec-17	3 1,192,830.81	3,999,080.87	US$ (1,052,928.78)

55. Mr Lai observes that among the four commodities trading transactions involved in the three cash flow cycles there were the following outstanding payments leading to a bad debt loss to the Titan Group of US $ 10,796,264,56:

Transaction ref	**Vendor**	**Purchaser**	**Date of Payment/ Receipt**	**Payment/Receipt Amount**	**Payment/ Receipt Amount (US $)**	**Aggregated Balance (US$)**
PT20170005	Max Joy	Titan HK	Outstanding	US$ (422,384,589)	(422,384.59)	(422,384.59)
PT20170006	Titan HK	Top Win	Outstanding	HK$ 87,505,463.39	US$ 11,218,649.15	US$ 10,796,264.56

56. The US$ 10,796,264.56 can, Mr Lai says, be regarded as the loss of the Titan Group in the 3 cash flow cycles and/or the manipulated commodities trading transactions and bond subscription. The figure basically tallies with the sum of the amount retained by Top Win and/or Uni-Loyal in the second fund flow of US $ 0.64 million together with the Bend subscription money of $ 10 million i.e., US$ 10,64 million *in toto*, the difference of US $0.15 million being due to rounding off and/or the insignificant sums retained by the entities in the transfer.

57. These figures and calculations are put forward by Mr Lai to show that the subscription money of the convertible Bonds was sourced from the Titan Group and that, "*during the rounds of round robins"*, i.e. what are said to be circular fund flows generated by artificial transactions[14] between connected parties, the US$ 10 million for the purchase of the Convertible Bonds, plus US $ 0.64 million retained in Top Win or Uni-Loyal were taken out from the commodities trading transaction chain and were finally outstanding and became a bad debt.

58. In Appendix 1 to his affirmation Mr Lai sets out details of the nine commodities transactions in 2017 (Transactions PT 2017 0001- 6 and BG 2000 1-3) involving Petro Titan and Brilliance Glory and the counterparties referred to above (Max Joy, Grand Treasure, Sino Champion and Top Win). Appendix 1 is attached hereto.

[14] "Artificial" in the sense that, although they involved the transfer of "real" money their purpose was to fund the subscription for the bonds, and to give the appearance of regular commercial trading in commodities on arm's length terms.

59. These details show the dates of the contracts and payments and the commodity in question. The relevant contracts and bank statements are annexed to the Affirmation. Four of those transactions (PT 2017004-6 and BG 2017004) took place from around April, the month in which Sino Charm subscribed for the Bonds; and it is those transactions which form the ingredients of the three round robin cash flows. The fourth table – Transaction PT 2017 0004 – and the ninth table – Transaction BG 2017 0004 - include the downstream sale contracts, which were not explicitly referred to in Zhang 1 and show a modest profit. The significant point is that, taking the transactions as a whole, there is a loss, represented by the amount outstanding from Top Win to Petro Titan, less the amount outstanding from Petro Titan to Top Win, which is, it is said, the amount of the Bond subscription, conveniently lost in the proverbial wash.

60. There is very limited reference in the Chief Justice's judgment to Lai 2, which is a complex work. He refers to it at paragraph [2] in his list of those who had provided evidence; at paragraph [69] where he cited the passage to which I refer at [104] below; and at [78] in the passage to which I refer at [153 (1)] below. But he makes no mention of the evidence of Mr Lai which I have summarised above, and of Mr Lai's support for the *bona fides* of the dispute[15]; nor does he give any reason for discounting it in its entirety, if that is what he did (as opposed to ignoring it). Further, he does not refer to the fact that the transactions which appear to have been the source of the finance of the subscription sum also appear to be part of a larger series of transactions constituting a pattern of fund flows involving entities said (not without reason) to be controlled by the conspirators.

61. The Chief Justice was not assisted by the restricted reference that was made to Mr Lai's evidence by counsel in the course of oral argument. Mr Potts' written and oral submissions focused on the generally endorsed writ in the Hong Kong proceedings, the more particularised Statement of Claim, and Zhang 1 and 2 to substantiate the Company's "funds flow" argument[16]. At the very end of his submissions Mr Potts invited the Chief Justice to read carefully through his written skeleton "*and also obviously to have regard to our affirmation evidence as well as Mr Lai's' evidence, although the latter affidavits were filed on behalf of through Mr Robinson's team. So I'll let him take you through that evidence*".

62. This was a prospect which did not materialise. At the very end of his submissions Mr Robinson, counsel for Fame Dragon and Docile Bright, said this:

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[15] At [5] of Lai 1 Mr Lai said that "*having had sight of the evidence filed in these proceedings the [Fame Dragon] and [Docile Bright} Liquidators have reached the conclusion that there is (at minimum) a substantial dispute as to the validity of the debt claimed by Sino Charm*". At [6] he said that the two sets of liquidators took "*the view that the Petition …is not being pursued in the interests of Sino Charm in its character as a creditor, but is in fact being pursued in furtherance of a scheme designed and executed by [Titan's] former management …, to improperly take control of [Titan] and/or divert the benefit of its substantial business interests to their use."*

[16] An approach which may have been affected by the time constraints applicable to the zoom hearing and, perhaps, by the possibility that the time extension in respect of Lai 2 might not be granted, Whether it should be appears to have been left open because the Chief Justice said, on Day 1 , that he was "*presently advised, not minded to shut that evidence out*" to which Mr White responded that he was pragmatic and suspected that the Court had already read it, as the Chief Justice said that he had.

"I don't intend, my Lord, I don't think it would be helpful to go over Mr Lai's evidence with regard to the flow of funds. Mr Potts has dealt with that on the company's evidence, Mr Lai, of course, does go over that, my learned friend Mr White objects[17] *but I simply invite my Lord to consider the whole of Mr Lai's evidence in support of both Fame Dragon as the majority contributory and also Docile Bright we say as a majority of the creditor[s]"*

63. I, of course, accept, as Munby P put it in *Re F (Children)* [2016] EWCA Civ 546 *"that the task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions*" but "*to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable*". But in the present case the judge does not deal with Lai 2 in any detail nor does he analyse it.

64. The slenderness of reference to Lai 2 in the judgment stands in marked contrast to the "*centrality*" which, in the submissions before us, it was said to have. However, as it seems to me, properly analysed Lai 2 provides strong support for the proposition that what was happening was that Petro Titan and Brilliance Glory, the two Titan Group subsidiaries, and the circle participants Max Joy, Uni-Loyal, Sino Charm, Top Win and China Oceans, were companies under the control of Dr WeiBing and Mr Tang which were being used as vehicles to move money round in circles so as to enable Sino Charm to finance the purchase of the Bonds with money derived from Titan Group subsidiaries, the money being taken out of the commodity transaction chain, and its extraction from the chain resulting in the bad debt owed by Top Win.

65. Whilst it is possible that these transactions were all entirely run of the mill commodity trading transactions, a combination of factors provides significant support for the proposition stated above.

66. Those factors include the following:

    (a) the repetition of chains using the same or similar participants;

    (b) the characteristics of the participants which suggest that they were all under the control of Dr WeiBing and Mr Tang;

    (c) the similarity between the outstanding debt revealed by Mr Lai's calculations and the amount due in respect of the Bonds; and

    (d) a number of other "*anomalies and red flags*" (to use Mr Lai's phraseology) in respect of the transactions, which suggest that they had no, or little, commercial sense;

[17] Lai 2 had been filed late in the day on behalf of Fame Dragon and Docile Bright and the evidence in it relating to fund-flows re-introduced much of the evidence in relation to the first fund-flow that had previously been struck out of Zhang 2 by an order dated 21 February 2020. This reintroduction of evidence was something of which the Chief Justice expressed considerable disapproval.

67. These anomalies are set out in paragraph 42 of Lai 2. I summarise them below:

(a) **The markedly low profitability in respect of the five completed transactions**. Three of them yielded only 0.1% profit and the remaining two 1 % and 0.19%. Even in annualised terms the profit was below 2% except for PT 2017 0001 (4.02%) and PT 2017 0003 (6.58%). Those rates were lower than the Titan Group's cost of capital or the interest rate under the Bonds There was, in Mr Lai's view, no commercial justification to undertake such low profitability transactions, especially when they were unsecured.

(b) **In respect of all but one of the counterparties, either no or very little information was available about them on line**. Most of the transactions were performed by Top Win, Uni-Loyal, Grand Treasure and Max Joy which were private companies, incorporated in Hong Kong, with insignificant issued capital, varying from HK $ 25 to HK $ 10,000.

(c) **the counterparties appear to have been connected and the transactions not to be at arm's length**.

(d) **lack of supporting documents and contemporaneous independent third-party documents**.

(e) **in almost all of the transactions Titan Group paid its upstream seller before receiving payment from its downstream buyer**. In transactions PT 20170004, PT 20170005 and BG 20170004) Titan Group paid its suppliers between more than 150 and 200 days before it was paid. These would be abnormal credit terms to extend to private companies which are not well known.

(f) **the odd timing of actual payment**. In PT 2017 0005 Top Win was required to pay Petro Titan on or before 30 November 2017 (itself several months after Petro Titan was due to pay under its purchase contract) but did not do so until 27 and 29 December 2017. In PT 2017 0006 Petro Titan was only required to pay Max Joy on or before 30 March 2018 but paid over HK $ 90 million to Max Joy during 21-28 December 2017, which, as Mr Potts submits, would facilitate further circulation of funds. Top Win was only bound to pay Petro Titan before 30 March 2018, which, Mr Potts submits, would mean that any auditor concerned about payment for the matching sale contract, could be told that it was not due until the next financial year.

(g) **the absence of security**. The Titan Group never sought or obtained security, collateral or bank guarantees in respect of the buyers for transactions with prices in the range US$ 3-11,000,000.

(h) **oddities in respect of BG 2017 0002.** This transaction was purportedly cancelled on 11 January 2017 but Uni-Loyal still paid US $ 13,024,982 to Brilliance Glory on 13 January

2017. On 23 May 2017 Brilliance Glory recorded a purported refund of US $ 3,495,000 to Uni-Loyal by payment to the vendor to the Titan Group in the transaction, namely Top Win (D2/2496), but this was not the whole price.

(i) **the similarity between the amounts of receipts and payments** for supposedly independent and unrelated transactions;

(j) **the substantial loss of over HK $ 87.5 million** as the result of an unpaid debt from Top Win: see [55] above.

68. Lastly, whilst Sino Charm is presently under no obligation to reveal the precise source of its investment in the Bonds, it would have been the work of a moment to do so. What was said (Zhou 1 [30]-[31]), affirmed on 7 January 2020 i.e. after the writ was issued in the Hong Kong action, and after Mr Zhang's extensive affirmation of 22 October 2019), was that Sino Charm was funded by a number of "*seasoned and reputable investment professionals*" – including Mr Yun Yong **("Mr Yun**"), Mr Chen Xi and Mr Wu Wensheng – and that the money came from "*investment capital*".[18] This looseness of expression, which reveals nothing about who paid what amount to Sino Charm, when, and how, in order to finance the subscription price of the Bond, or, more particularly, as to any fund from which payment of the subscription price came and how it did so, does little to rebut, and, in my view, tends to support the inference which, on the present material, I would draw that the price was derived from the flow of funds from Titan Group.

69. In the light of Lai 2 it does not seem to me possible to say that the defence being put forward is a sham and that the claim being made in the Hong Kong action is abusive. Rather the defence is one of substance which cries out for proper examination following pleadings, disclosure and evidence.

3 The announcement to shareholders and the meeting of the Board

70. The third matter to which the Chief Justice referred was that the issuance of the Bond had been announced to the shareholders and the investing public on 28 April 2017 (the announcement is set out at [50] of the judgment) following approval of the terms of the Bond and the purposes for which the Bond was required by the entire Board of Directors of the Company on 12 April 2017; and that the funds received from Sino Charm were in fact used for the purposes approved by the Board of Directors of the Company. Titan Group does not challenge these findings, whilst reserving the right to do so in the Hong Kong action.

71. The Board Meeting of 12 April 2017 was attended by Dr WeiBing and Mr Tang, together with five other directors. Two of them – Mr Hu Hongwei and Dr Liu Liming – were additional Executive Directors; and there were three additional independent non-executive directors namely Ms Xiang Siying, Mr Lau Fai Lawrence and Dr Han June. No allegations of breach of duty are

[18] In his third affirmation Mr Zhou said that Sino Charm's source of funds was none of Titan's business.

made against these five in the Hong Kong proceedings to which they are not parties. Mr Lawrence was still a director at the time when the statutory demand was received.

72. The Minutes of the 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."*

73. As to the use of the fund the 2018 Annual Report reported as follows:

> ***"MANAGEMENT DISCUSSION AND ANALYSIS***
>
> ***Actual use of fund proceeds from convertible bond in 2017 19***
>
> *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 for 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 shipbuilding 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."*

74. These matters are plainly relevant and suggest that there was nothing untoward in the raising of capital by the Bonds. But they are in no way determinative. They are not inconsistent with Dr WeiBing and Mr Tang having arranged for the subscription to the Bonds by Sino Charm to be funded by Titan Group subsidiaries. It is entirely possible that most of the Board (i) thought that the raising of money by a Bond could be justified, (ii) assumed that the money which Sino Charm used to pay for the Bonds came from Sino Charm alone; and (iii) were ignorant of what Dr WeiBing and Mr Tang were about.

75. It is also material to note that the actual use of much of the proceeds of the Bonds may well not have been in the Company's best interests. The HK 49,000,000 injected into Pacific Ocean Marine Limited ("**Pacific Ocean**") - a special purpose vehicle incorporated by Titan's (former) indirect wholly owned subsidiary, Surplus Full Ltd ("**Surplus Full**") - was used by Pacific Ocean to subscribe about HK $ 100 million for a convertible bond issued by **China Ocean**, a poorly performing and currently insolvent company: see Lai 2 [38[and Zhang 1 [83]. The subscription of the convertible bonds was completed on 21 November 2017, and Dr WeiBing became an executive director of China Ocean, with a salary of HK $ 1.2 million per year plus bonus.

76. Surplus Full had no control over Pacific Ocean, holding only 1 ordinary share, and 48,999,999 preferred shares. Plymart Resources Limited ("**Plymar**t"), a BVI company controlled by Liang Bing, an associate of Dr WeiBing, which invested HK $ 11,000,000 held 10,999,99 preferred shares and 1 ordinary one. Wan Zhang Qing **("Mr Qing")** an associate of Mr Tang, who invested HK 40,000,000, held 40,000,000 ordinary shares. On behalf of Surplus Full Dr WeiBing agreed that Plymart would be entitled to appoint two directors of Pacific Ocean and Surplus Full and Mr Qing only one each: see Article 25 of Pacify Ocean's Articles (D1/096) By this means Dr WeiBing and Mr Tang could, in practice control the board of Pacific Ocean, and exclude the influence of Titan Group (through Surplus Full). Dr WeiBing and Mr Tang, through Plymart, appointed Liang Bing (said to be a friend of Dr WeiBing) and Zhou Deming (said to be an ex-colleague of Dr WeiBing's wife) as directors of Pacific Ocean. These arrangements whereby, although Surplus Full was the largest individual investor, it had minimal influence over the operation of Pacific Ocean cast doubt on the regularity of the subscription raising exercise. In the event, as its 2018 accounts reveal, the Titan Group was wholly unable to obtain any financial information relating to Pacific Ocean for the financial year 2018 and it became necessary to write off its full HK $ 49 million value,

77. A further HK 4,700,000 of the principal amount of the Bonds was, under Dr WeiBing and Mr Tang's direction, injected into Sinozing Shipyard, through Titan Oil Storage Investment Ltd ("**Titan Oil**"), a wholly owned subsidiary of Titan Group. As appears from Zhang 1 [77] – [81], this was done pursuant to a Memorandum of Agreement, signed by Dr WeiBing on behalf of Titan Oil, under which Titan Oil was to be a 40% shareholder. The other two shareholders, with shareholdings of 40% (NingBo MeiYue, controlled by Si Bo, Dr WeiBing's personal assistant)) and 20% (Yao Xuan) respectively, were associates of Dr WeiBing. By the memorandum the board was to consist of five directors, two to be appointed by Titan Oil, and the other three by the other 40 % shareholder. In effect, therefore, Dr WeiBing controlled the Board. In January 2018 Titan Group acquired a further 20%. Titan Group has been unable to access information relating to Sinozing Shipyard's affairs and the current Titan Group board had been unable to evaluate the benefits or disadvantages which the investment has brought, or to exercise control over the company. Proceedings have been brought against Sinozing Shipyard by Mr Zhang, who on 10 October 2018 became the legal representative of Yao Xuan, the 20% shareholder, in the PRC seeking to access the statutory documents, books and records; but the documents and records requested have not been produced. Titan Group's interest in Sinozing Shipyard has been treated

as fully impaired as of 31 December 2018, as is recorded in the accounts of 2018 (note 17) and 2019 (note 26).

78. There is significant evidence as to what Dr WeiBing and Mr Tang were about. In Lai 2 Mr Lai produced detailed evidence (to which the Chief Justice did not advert) of his interaction with various alleged conspirators, including Dr WeiBing (through Si Bo) and Mr Xue Zhengye ("**Mr Xue**"). Si Bo was at all material times Dr WeiBing's personal assistant and the sole shareholder and director of Marine Bright: Lai 2 [22] & Lai 3 [17 (c)]. Mr Xue made the affirmation verifying the Petition in which he described himself as a consultant to Sino Charm. He appears to have been a classmate of Dr WeiBing's wife at University: Zhang 1 [92]; and to be an associate of Dr WeiBing. He has filed no evidence other than that affirmation.

79. The evidence of Mr Lai was that:

(a) the result of the Bond issue was that Dr WeiBing (through Si Bo) and Mr Xue controlled (or, in 2019, claimed to control) the major indebtedness owed by Titan, namely the Bonds payable to Sino Charm and the Disputed Shares, which were originally owned by Docile Bright and are now said to be owned by Marine Bright, together with the shares previously owned by Fame Dragon[19]: Lai 2 [27].

(b) In late May 2019 (i.e. after the Bonds matured in April), as Mr Lai was informed by the representative of one of the potential investors in Titan Group[20] (hereafter "the investor"), that the investor was approached by, or met, Dr WeiBing and others, who claimed that they could assist the investor to take control of Titan . They told the investor that they were in control of the shares in Titan previously owned by Fame Dragon, the preferred shares owed by Docile Bright, and the Convertible Bonds, and that they could manage or influence Titan Group to issue additional new shares under a "general mandate". Dr WeiBing's side suggested that the potential investor pay them about HK$/RMB 100 million in order for them to resolve all the issues and give the control of Titan to them. Lai 2 [27];

(c) in mid-August 2019 the investor met with Mr Xue in Hong Kong, who impliedly claimed that he and Dr WeiBing were in control of the preferred shares owned and originally held by Docile Bright, and the Bonds. Mr Xue requested the investor to offer and make a global settlement payment to them (semble the group including Dr WeiBing and himself) as part of the investor's acquisition of the interests in Titan Group from the Fame Dragon and Docile Bright liquidators. The investor rejected this request.

[19] 22.5% of the ordinary shares in Titan Group were transferred from Fame Dragon, or its subsidiaries, after Fame Dragon went into liquidation, principally to HKSCC Nominees Ltd and Capital Creation Holdings Ltd ("CCH"). The Liquidators of Fame Dragon are seeking to recover the CCH shares.

[20] Mr Lai later questioned two persons who were at the meeting with the investor. They denied that the content of the meeting was as Mr Lai i had been told by the representative of the investor.

(d) in September 2019 Mr Xue called Mr Lai and asked whether the Fame Dragon liquidators would accept a settlement offer of HK $ 10,000,000 or so to buy all the shares in Titan Group then registered under Fame Dragon. Mr Xue also threatened that he, Dr WeiBing or Sino Charm would file a winding up petition against Titan Group based on the Bonds if that proposal was not accepted: Lai II §§28;

(e) in early 2018 Dr WeiBing threatened (in communication with Mr Lai and Mr Arab, one of the liquidators of Fame Dragon), that Titan Group might be wound up if it could not raise funding from the issuance of new convertible bonds to Newton Asset Management Limited ("NAML") (see Lai II §34), a corporation incorporated in Vanuatu which was wholly owned by Mr Xue, who was its sole director and chief executive.

80. There are also sound grounds for inferring that Sino Charm was not a wholly independent third party but was under the control of Dr WeiBing and/or Mr Tang. These include:

(i) Sino Charm's position in the first fund flow;

(ii) the absence of any proof of payment by the investors from whom. or by the fund from which, the subscription of to the Bonds by Sino Charm was financed;

(iii) Mr Yun is said to be one the investors funding Sino Charm's purchase of the Bonds: Zhou 1 [30]. He is, together with Mr Zhou, a director of Capital Creation Holdings Limited ("CCH"). In the Hong Kong action, it is said to be a circa 15.38% shareholder of Titan and Mr Yun to be CCH's beneficial owner: Zhang 2 [13]. If so Mr Yun would have been a substantial indirect shareholder of Titan and the Bond subscription would not have been an arm's length transaction as Mr Yun would have a significant interest on both sides.

(iv) Mr Tang has known Mr Yun very well for some time. Titan has exhibited contemporaneous WeChat messages showing Mr Tang and Mr Yun in conversation with each other and Mr Yun appears to be closely connected with Mr Zhou who is a director of both Sino Charm and CCH: see Zhang 2 [11] and [13] (1) and (2).

(v) none of the matters in (iii) and (iv) were disclosed in Titan's public announcements made under the supervision of Dr WeiBing and Mr Tang. In Zhou 1 [14] Mr Zhou adopted Titan's announcement in relation to the proposed issue of the Bonds that:

"*To the best of the Directors' knowledge, information and belief, the Subscriber and its ultimate beneficial owner (s) are independent third parties".*

(vi) Titan produced WeChat messages showing Dr WeiBing using Sino Charm as a corporate vehicle for the sale of shares in Wider Link, a company controlled by him, to Better Shine

Limited, a BVI company, and nominating Sino Charm to receive payment for the shares at a particular account with the HKSBC[21].

81. This evidence, to which the Chief Justice did not advert, provides support for the proposition that the conspirators were seeking to make use of the Bonds for the purpose of obtaining benefits or advantages from the investor or the Fame Dragon liquidator against the threat of winding up the Company by causing Sino Charm to petition therefor. They would have been assisted to that end by the fact that it was a term of the Bonds that a "Change of Control" was an event of default allowing Sino Charm to call in the Bonds; and Change of Control was defined as Dr WeiBing ceasing to be an executive director or the chairman of the Company.

82. Lastly it is material to take account of the evidence of Mr Lai (Lai 2 [37]) that shortly before the issue of the Bonds in April 2017 Titan had just finished its restructuring a few months earlier and had substantial cash or cash equivalent reserves of about HK 258 million and current assets of HK $ 601 million (net current assets being HK 73.8 million after deduction of current liabilities of HK 527 million) and no immediate need for cash funds: see the audited accounts for the year ending 31 December 2016. These accounts also reveal that the Company's total assets less current liabilities were some HK 2,641 million; its Net Assets (after taking into account non-current liabilities) were HK $ 97.3. million; its equity was, also, HK $ 97.3 million; and its profit for the year ending 31.12.16 was HK $ 1,889 million. Its secured loans of HK $ 153.498.000 were well covered by investment property, buildings and prepaid land /seabed lease payments, valued in all at HK $ 227,727,000. The Group's banking and other facilities were secured or guaranteed by a number of different items set out at page 37 (internal numbering) of the Report.

83. The figures for 2017 i.e. as at 31 December 2017 were as follows. The cash or cash equivalent figure was HK $ 83.4 million. Total current assets were HK $ 604.2 million. Net current liabilities (i.e. current assets less current liabilities) were HK $ 865.3 million. Total Assets less current liabilities were HK $ 2,673 million. Net Assets were HK $ 247 million. Equity was HK $ 247 million. The accounts reveal a large increase (c HK $ 1,000 million) in non-current assets including the addition of figures for goodwill on the acquisition of a subsidiary, interests in associated companies and available-for- sale financial assets and a similar increase in total current liabilities. Part of the latter was HK $ 81.9 million, the amount of the Bonds.

84. Sino Charm contends that these figures are not consistent with the appellants' case and that, had the Bond not been issued either there would have been no expansion by the use of the amount subscribed in the manner in which, it is conceded, it was used, or Titan would have been left without working capital. In my judgment neither the 31 December 2016 nor the 31 December 2017 figures mean that the appellants' case is ill founded. The 2017 figures indicate a healthy cash reserve shortly before the subscription for the Bonds, which could be said to negate the need in April 2017 to raise cash. And neither the figures for 2016 nor 2017 cast any light on the question whether the Sino Charm subscription was funded by the use of monies generated by the purchase

[21] The sequence of messages and payment are most helpfully set out in the appellant's first instance submissions at paragraph [54].

by Titan subsidiaries of commodities and the circulation of monies in a sequence of round-robin transactions.

4 The Hong Kong Proceedings

85. The fourth matter to which the Chief Justice referred was the progress of the Hong Kong proceedings which, as he held, were plainly commenced in retaliation to the presentation of the winding up petition. The Petition was presented to the Court on **20 September 2019** and the Hong Kong proceedings were commenced on **21 October 2019**, and not served until about a year later.

86. The Chief Justice drew attention to the affirmation of Mr Zhang in the application for service out where under the section headed "*Full and frank disclosure"* he referred to the diversion of funds amounting to approximately HK $ 78 million from Titan Group to Sino Charm via Max Joy and Uni-Loyal just before the subscription, without pointing out that HT01 and Brilliance Glory entered into separate contracts in relation to the same commodities for which they received the purchase price, leaving the Hong Kong Court with the erroneous impression that HT01 and Brilliance Glory were out of pocket in approximately the amount of the payment made by Sino Charm for the purchase of the Bonds.

87. As I have already said, the misleading nature of Zhang 1 understandably casts a shadow over the *bona fides* of the dispute and formed a basis for the submission to us that Lai 2 was a belated attempt to remedy the deficiency of the case as put in Zhang 1 But the detailed analysis in Lai 2, with supporting material, is not misleading and supports Titan Group's contentions. Further, although the Hong Kong Proceedings can be looked at as a form of retaliation against Sino Charm, they were plainly under consideration before the Petition.

88. As to that, Sino Charm sent a letter of demand for the amount outstanding on **28 June 2019**. It required payment by **5 July 2019.** The Statutory Demand was made on **15 July 2019** requiring payment within 21 days of service in order for the Company to be deemed to be unable to pay its debts. On **30 July 2019** Conyers told Appleby that they were in the process of carrying out an investigation.

89. On **2 August 201**9 Conyers wrote to Appleby again. The letter recorded that the Board (meaning the current Board) had no knowledge of the circumstances surrounding the Bonds as they were not in office in April 2017. It set out a number of preliminary findings which led them to suspect that Mr Chan and Sino Charm must have been fronting for a third party; and said that a full investigation was needed in respect of the Bonds and the background to Sino Charm's subscription before Sino Charm proceeded with a winding up petition, adding:

> *"As the matter now stands, the Company disputes the existence or genuineness of the debt demanded under the Statutory Demand".*

90. The letter said that the public interest required that a full investigation in respect of the Bond and the true background of Sino Charm must be carried out[22] before Sino Charm proceeded with a winding-up petition, and that the Board would require at least 3 months' investigation and invited confirmation that no winding-up petition would be presented in the interim. It also invited disclosure of all documentary evidence demonstrating the ultimate source of the subscription sum (which has never been provided). On **12 August 2019** Appleby offered to hold off winding up proceedings for a further 14 days to allow Titan Group time to put forward substantive grounds of dispute. This was not done within that timescale; nor was any application made for an order striking out the petition, or preventing its continuance; nor was any affidavit filed in opposition.

91. But this is not a case, as the Chief Justice characterised it, where "*it does not appear that the debt was disputed by the Company until Mr Zhang filed his first affirmation on 27 October 2019"* [37]. Conyers had made clear that there was a dispute, although no evidence had yet been produced which would show that any dispute was *bona fide* and on reasonable grounds. Nor is this a case where there was no change of management between the dates of the events complained of and the date of the petition with no claim (or only a different one) being made before then. There had been a fundamental change in the membership of the Board in mid-2018, when Mr Lai became the non-executive Chairman and a non-executive director. Mr Zhang was the sole executive director. There were also a number of other non-executive directors.

92. Moreover, no step has ever been taken by Sino Charm to challenge the validity of the Hong Kong proceedings. Sino Charm has filed a defence (consisting for the most part of denials or non-admissions). In particular Sino Charm has never challenged the leave given by the Hong Court to serve it outside the jurisdiction, which order was made on the basis that there was a serious issue to be tried and that there was a good arguable case[23] that each of the substantive claims fell within at least one of the gateways. In successfully obtaining leave Titan must have satisfied the Hong Kong Court that there was a good arguable case that Titan and/or HT01 had suffered damage within the jurisdiction (as attested to in Zhang 1 [81] – [83]) as a result of the tort of unlawful means conspiracy committed by the defendants including Sino Charm. There is no evidence that the Hong Kong Court regarded itself as misled.

93. Sino Charm was not, of course, precluded from advancing its petition for winding up because Titan Group had initiated proceedings in Hong Kong; nor was Sino Charm bound to seek to strike out the Hong Kong proceedings when success in establishing in Bermuda that the debt was not *bona fide* disputed and that the company should be wound-up might, in practice, bring the Hong Kong action to an end. But the absence of any challenge to the order giving leave to serve the Hong Kong proceedings out of the jurisdiction is somewhat difficult to square with the proposition that there is simply no *bona fide* defence to the debt asserted by Sino Charm.

94. The Chief Justice held [50] that the Hong Kong had been seriously misled because of the failure to refer to the relevant sales contracts with Grand Treasure, so that, as he put it, "*the impression*

[22] In [10] of Lai 2 Mr Lai explained that Titan had faced tremendous difficulty in gathering all the evidence that could be made available to dispute the alleged debts despite Titan's best efforts to retrieve documents internally, as well as request relevant documents from third parties,

[23] See *Tugushev v Orlov* [2019] EWHC 645 (Comm) at [56] – [61] and the cases there referred to.

left with the Hong Kong is that as a result of the contract entered into with Max Joy, the two subsidiaries HT01 and Brilliance Glory were out of packet". This may have caused him to attribute no significance to the fact that no challenge had been made by Sino Charm to the service of the proceedings out of the jurisdiction. But, as Lai 2 indicates, the omission of reference to those sales does not have the significance attributed to it by the Chief Justice. Moreover an examination of paragraphs 33-35 of the generally endorsed writ, shows that the details of transaction PT 2017 0006, which led to the outstanding figure of HK $ 87,505.463.39 (i.e. US $ 11,218,649,16) are set out in support of the proposition that the outstanding receivable from Top Win of c HK $ 87.5 million shows that Sino Charm did not have the financial ability to finance the purchase of the Bonds by itself and that part of the outstanding debt which should have been paid to the Titan Group had been siphoned off to Sino Charm for the purchase of the Bonds. Put another way, the Titan Group never received the amount of the Bonds from Sino Charm because what it received had been derived from itself, with the result that the series of round robin transactions ended up with an amount outstanding which was close to the amount of the Bonds.

95. I readily confess that the discovery of this link between the figures in Lai 2 and the general endorsement of the writ was something which I was only able fully to appreciate after significant consideration of the considerable complexities of Lai 2 and the underlying documents.

5 *The Company is insolvent*

96. The Chief Justice found there to be persuasive evidence that the Company was in fact insolvent and was likely to have been insolvent at the time of presentation of the Petition [69]. In this respect he relied upon the following matters.

97. On **28 June 2019** the Company made an announcement by the Hong Kong Stock Exchange which revealed that its Hong Kong office had downsized from its former 6,000 square feet office in the Sun Hung Kai Centre, 30 Harbour Road in Wanchai to a significantly smaller shared office outfit at Room 802 "Office Plus @ Wanchai", situated at 303 Hennessy Road in Wanchai,

98. In **May 2019** Mr Zhang issued a notice to all directors that the available funds of the Company were less that HK $500,000 (c US$ 65,000).

99. The Company is the indirect owner of Titan Quanzhou Shipyard Company Limited ("**Titan Quanzhou**"), a China based ship building and repairing company. In the Company's financial statements for the year ending on 31 December 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 RMB 1,040,879,823. But on **21 November 2019** a winding up application was filed by a Chinese utility company against Titan Quanzhou seeking a winding up on the basis that it had failed to pay a water bill in the sum of RMB 386,783.70, the equivalent of US $ 55,000.

The 2018 accounts

100. Also on **21 November 2019** the Company's Board of Directors announced that Elite Partners CPA Limited 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 of the auditors drew attention to the fact that their audit report, dated **29 March 2019**, in respect of the consolidated financial statements of the Titan Group and its subsidiaries for the year ended 31 December 2018 contained disclaimers in respect of scope limitations which included 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****."*

The 2019 Accounts

101. The Company's auditors issued a disclaimer of opinion in the Annual Report 2019 published on **14 May 2020** due to multiple fundamental uncertainties relating to the ability of the Company together with its subsidiaries to operate 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****."*

The 2020 Accounts

102. In a circular dated **22 February 2021** the Company disclosed 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 at the [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*****."**

103. The Company failed to publish audited annual results for 2020 by the end of March 2021 as required by the Main Board Listing Rules of the Hong Kong Stock Exchange. As a result, trading in the shares of the company on the Hong Kong stock exchange has been suspended since **1 April 2021**.

104. The Company's interim results for the 6 months ending **30 June 2020** revealed the following:

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

(b) the Company's cash equivalent was 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 had 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, which raised doubts as to the ability of the Company to financial support its operating costs.

105. The Chief Justice also said that it appeared to be accepted by the Company that it did not presently have the resources to discharge the indebtedness of the Petitioner, if ordered to do so, as was apparent from paragraph 7 of Lai 2 where Mr Lai said that , even if the debt stated in the Petition is determined by the 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 presently have the ability to do so.

6 *Transactions relating to the disposal of the Company's assets*

106. The last matter to which the Chief Justice referred was that, at about the time when the Company first took the position that Sino Charm had acquired the Bonds by using the funds of the company, and that Dr WeiBing and Mr Tang had 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 to Mr Zhang and his father.

107. The transactions to which Mr Zhou referred in his seventh Affirmation were the following:

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

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

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

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

(e) The sale of the entire issued share capital of Brilliance Glory for HK $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 Jinqian**") for RMB $1. Titan Fujian's most significant asset was the property ("**the 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, so that the true value should by now have been much higher. Mr Zhou also suggested that the RMB $ 160,000,000 was due to a company that Sino Charm believed from its own investigations (unidentified) was closely connected to Mr Zhang.

The Chief Justice's conclusions

108. In the light of all the above matters, and his characterisation of them, the Chief Justice held that it was reasonably clear 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 Bonds were 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 had 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 was 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) had made a trading profit and had been paid the funds due under the sales contracts.

(c) The issuance of the Bonds was announced to the shareholders and investing public on 28 April 2017; following approval of the terms and purpose for which the Bonds 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 Bonds were largely expended on the stated purpose.

(d) It was 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 Sino Charm until 14 October 2020, leave to do so having been sought on 12 August 2020.

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

(f) The Company's auditors, Elite Partners CPA Limited, had 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 28 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 had engaged in wholesale disposition of its property apparently for nominal consideration to entities associated with Mr. Zhang and/or his father.

109. In the light of the matters set out in the previous paragraph the Chief Justice concluded that the Company's dispute in relation to the Petitioner's debt was not being pursued *bona fide* and on reasonably grounds. The mass of evidence filed masked the underlying reality that there were no substantial grounds to dispute the Petitioner's debt which formed the basis of the Statutory Demand. The defences and counterclaims set out in the Hong Kong proceedings appeared to him to be a desperate attempt to avoid the normal consequence of the Statutory Demand and were "*conjured up by the company in order to stave off liquidation*".

110. In those circumstances he dismissed the application of the Company that the Petition should be dismissed. He accepted that it would remain open to the Liquidators to consider and determine the Petitioner's proof of debt as they considered appropriate and to pursue any claims against the Petitioner if so advised.

Discussion

111. It seems clear that the major, but not the only, reason, why the Chief Justice took the view that the debt was not *bona fide* disputed on substantial grounds was because, contrary to the misleading impression given in Zhang 1, the purchase contracts of HT01/Petro Titan and Brilliance Glory in respect of 20,000 m.t of bitumen and 5,000 m.t. of mixed aromatics, had been matched by sales of the same quantity of products, at a modest profit. On one view, this removed the substratum of the Company's case.

112. But that was not the end of the story. A careful consideration of Lai 2 (which, as I have said, received scant consideration) gives, in my view, a clear (and sound) basis for the contention that the funds of the Titan Group's subsidiaries, transmitted in the first of three round robin transactions, were used to enable Sino Charm to fund the purchase of the bonds, and that the absence of any payment of the purchase price of the Bonds by Sino Charm, unfinanced by Titan Group's subsidiaries, was hidden in the outstanding debt from Top Win to Titan HK.

113. I see no good reason to accept the suggestion that Mr Lai's analysis of the circular fund flows should be regarded as tainted by "*confirmation bias*". On the contrary his analysis addresses all the nine commodities transactions executed by the Titan Group in 2017; sets out the receipts and payments in chronological order; and indicates the process of reasoning (not speculation) by which he draws the inferences that he does. (I do not regard the fact that there a number of such inferences as rendering the analysis no more than speculative). The transactions and the receipts and payment are constituted, or evidenced, by the contracts and bank documents produced. There is no indication that he has ignored inconvenient facts. Further Sino Charm has not put together an alternative analysis based on the materials exhibited. Whether or not in the end the defence put forward turns out to be well founded, and the Court finds that all the transactions are entirely regular and/or that the companies in the apparent chain were not under the control of Dr WeiBing/Mr Tang and/or that the amount owing by Top Win represents no more than a run-of the mill bad debt - will, of course, depend on the totality of the evidence, including, but not limited to, what is produced (or not produced) on discovery.

114. Those circumstances alone, in my judgment, mean that the debt should not be assessed as one which is not *bona fide* in dispute and on substantial grounds

115. Further the other matters that are relied on are not sufficient to justify a decision that there was no *bona fide* dispute. As to those:

    (a) the fact that the debt was not disputed by any evidence until Zhang 1, dated **27 October 2019**, three months after the service of the Statutory Demand, is of much reduced significance in circumstances where (i) the evidence filed does, in my judgement, raise a *bona fide* defence; (ii) the individuals responsible for the wrongdoing were no longer in charge of the company when the statutory demand was made; and (iii) the Company's solicitors, instructed by the new regime, had on **2 August 2019** said that the debt was disputed and that they suspected that Sino Charm was fronting for someone else, and asked for further time to enable them to review the position.

    (b) the fact that the issuance of the Bonds was announced to shareholders and the investing public, following approval of the terms and purpose for which the Bonds were raised by the entire Board, and that the funds raised by the issuance of the Bonds were largely expended on the stated purpose, does not, in my judgment, for the reasons stated in [74], establish that there was no misapplication of the Group's funds to enable Sino Charm to subscribe for the Bonds. It is, as I have said, entirely possible that most of the Board (i) thought that the raising

of money by a Bond could be justified; and (ii) assumed that the money which Sino Charm used to pay for the Bonds came from Sino Charm alone; and (iii) were ignorant of what Dr WeiBing and Mr Tang were about.

(c) the Hong Kong proceedings can be looked at as a form of retaliation to the claim for the alleged debt. But I cannot regard that as having a great deal of significance. This is not a case where there is a retaliatory counterclaim which has no or limited connection to the debt claimed. This is a case where the basis of the defence and counterclaim is that the creation of the supposed debt was itself the result of a fraudulent contrivance. And, whilst the Company could have begun proceedings at any time, it is not particularly surprising that it waited until Sino Charm struck the first blow, and retaliated when it did. The Hong Kong proceedings cannot, in my judgment, properly be described as "*merely retaliatory*".

Insolvency

116. Mr Potts, QC, for Titan Group, submits that the Chief Justice was in error in relying on evidence that Titan Group was insolvent as one of the six matters influencing his decision that there was no *bona fide* dispute on substantial grounds. The gist of his submissions was as follows:

(a) the grounds on which a winding-up petition is sought must be stated in the petition itself; it is not sufficient to state them in the accompanying evidence. At the hearing the petitioner will be limited to the grounds stated in the petition: *French* on *Applications to Wind Up Companies* 94th Ed.) at 2:218, and the authorities there cited;

(b) the Petition was founded solely on Titan Group's statutorily deemed insolvency arising from its alleged "*failure"* to comply with the demand; no allegation of insolvency was made;

(c) the Chief Justice improperly allowed Sino Charm to rely on assertions that were not pleaded in the Petition, including allegations of actual insolvency and an alleged "*flurry of [post-petition] dispositions*";

(d) his discussion of the insolvency allegation led him to the conclusion that there was "*persuasive*" evidence that Titan was insolvent at the hearing of the Petition and was "*likely*" to have been so at the time of its presentation. He also appeared to have been persuaded that there was substance in Sino Charm's allegations in relation to the suspect transactions;

(e) the Chief Justice treated these extraneous allegations as relevant to his assessment of the merits of the issue as to the whether the debt was *bona fide* disputed on substantial grounds: see [71] of the judgment. But Sino Charm had not introduced these matters for that purpose. The allegations were relied on in the submissions below in support of an argument that the Court should exercise its discretion to make a winding-up order even if the Petition Debt was found to be a *bona fide* disputed debt;

(f) insofar as the Chief Justice had regard to these matters in his assessment of the *bona fides* of the dispute he was wrong to do so when neither party had asked him to do so.

(g) if it was permissible for the Chief Justice to embark on an assessment of these allegations it was incumbent on him to make a finding as to whether the allegations had been proved on the balance of probabilities. A conclusion that there was "*persuasive*" evidence that Titan was insolvent at the hearing of the Petition and "*was likely*" to have been so at the time of its presentation did not amount to such a finding. It merely represented an indication that although his view tended in a particular direction he was not actually in a position to make any finding. It was not, therefore, a conclusion on which the Chief Justice could properly place the reliance which he appeared to have placed on it.

117. I do not regard it as wrong for the Chief Justice to have taken into account evidence as to the apparent insolvency of the Company in determining whether the debt was *bona fide* disputed on substantial grounds. If the Company was in fact insolvent that was potentially relevant to the *bona fides* of the dispute and the exercise of the judicial discretion to wind the company up if the debt was not *bona fide* disputed. Nor does it seem to me that the Chief Justice was merely expressing a view as to where the evidence tended. When he said that the evidence of insolvency was persuasive he must have meant that it persuaded him, at least on a *prima facie* basis, not that it tended to do so. That view was necessarily based on the evidence as it then stood; and could, of course, alter in the light of other evidence. It is, however, necessary always to bear in mind that the critical question in the present case is whether the debt is *bona fide* disputed on substantial grounds or, to put it another way, whether the dispute is real and not frivolous.

The post-Petition transactions

118. The Chief Justice characterised the transactions referred to in Mr Zhou's Seventh Affirmation (dated **2 July 2021** i.e. 10 days before the hearing) as "*a number of questionable transactions to entities **potentially** related to either Mr Zhang and/or his father, including the **apparent** disposal of assets at an undervalue*" [70]. Mr Potts points out that there is nothing in the judgment which suggests that the Chief Justice looked at any evidence beyond Zhou 7. In particular, there is no recognition in the judgment of the following:

(a) At the time of each of the transactions (and the announcements referred to below) the Titan Board included:(i) Messrs Lai and Arab of RSM, the liquidators of Fame Dragon and Docile Bright[24], who were professional and experienced accountants; and (ii) Cheung Hok Fung Alexander, a practising barrister in Hong Kong (and a certified accountant), and a former holder of various PRC government positions, of the integrity of both of whom there was no basis for doubt;

(b) Sino Charm had not presented or referred to any evidence to corroborate the alleged connection between the counter-parties and Mr Zhang or his father; the highest that it gets

[24] Mr Lai was one of the court appointed liquidators of Docile Bright and had day-to-day conduct of the liquidation work for Fame Dragon,

is at [7] of Zhou 7 where he says that the "*believes*" that Titan Fujian's debts were due to a company "*closely related to Zhang Qiandong*".

(c) In relation to each of the transactions Titan Group had publicly announced, either in a separate announcement or in annual accounts. that the counterparties were independent third parties (the announcements are in the papers); the announcements in relation to Surplus Full and Asia Pacific Aluminium declared that the terms of the Disposal Agreements were determined after arm's length negotiations and that the Directors were of the view that their terms were fair and reasonable and on normal commercial terms and that the disposal was in the interest and commercial benefit of the Group and the Shareholders as a whole.

119. There is in fact considerable significant information buried in the papers in relation to each of these "suspicious" transactions. I deal with them in chronological order.

Surplus Full

120. The Titan Group had lost control of Pacific Ocean a subsidiary of Surplus Full in relation to which it was unable to obtain any financial information. As a result, its fair value was written off as of 31 December 2018. The Titan Group Board therefore decided that Pacific Ocean should be disposed of (by selling Surplus Full) in order to mitigate losses: see Titan Group's 2018 (note 18) and 2019 (note 27) annual reports. Yunnan Yuntou, a subsidiary of Surplus Full, had no operations and received no revenue, it recorded a loss in the 2018 financial year. Disposal of it would mitigate Titan Group's losses: see the annual reports of 2017 (note 17), 2018 (note 17) and 2019 (note 26).

121. The terms of the sale and purchase agreement for the disposal of Surplus Full required the purchaser (Sunlight Century) to account to Create Treasure Ltd ("**Create Treasure**"), a wholly owned subsidiary of Titan Group and the owner of Surplus Full, for half of the proceeds arising from certain "*commercial and/or legal actions*" which it contemplated taking in the name of Surplus Full. The Titan Group would receive 50% of the monetary benefits (defined as cash or disposable capital in bank accounts), after deducting relevant expenses: D3/56/3197.

Asia Pacific Aluminium

122. On 15 December 2019 Create Treasure sold the only two ordinary shares of Asia Pacific Aluminium to Prime Wealth Capital Ltd. Under the Disposal Agreement the purchaser could take certain commercial and legal actions on behalf of Asia Pacific Aluminium and Create Treasure would get 50% of the monetary benefits (net of expenses) thus derived: see the announcement.

New Gold Union

123. The sale of the New Gold group (i.e. New Gold Union and its subsidiaries) resulted in a gain of over HK 140.3 million, having regard to the net liabilities disposed of: see the 2019 accounts, note 50. (b).

Titan Oil

124. The events in relation to Titan Oil are referred to at [77] above. New Gold Union and Titan Oil were the two subsidiaries through which Titan Group owned 60% of Sinozing Shipyard) and New Gold Union and Titan Oil were disposed of in order to mitigate Titan Group's losses: see notes 26 and 50 (b) and (c) to the 2019 Accounts of Titan Group. The loss on the disposal of Titan Oil was put in the accounts at HK 3,000.

Brilliance Glory

125. The 2019 accounts record (note 50) a loss on disposal of HK 7.9 million.

Titan Fujian

126. Mr Zhou said that Sino Charm was "*deeply suspicious"* of the sale of Titan Fujian, and that it was "*wholly unclear commercially*" why Titan Group would have entered into the transaction on the terms that it did. These suspicions, Mr Potts submitted, ignored, as did the Chief Justice, the following:

    (a) the disposal constituted a Major Transaction under Chapter 14 of the HKSE Listing Rules and was subject to the strict announcement, circular and shareholders' approval requirements under Chapter 14: see the Titan Circular (D3/56/3148-3160) at page 15.

    (b) The Titan Group Circular dated 22 February 2021 set out the detailed reasoning of Titan's Board in making the decision to effect the disposal. In particular, it said the following:

        (i) based on the audited financial information of Titan Fujian as of 30 September 2020, the external debts and accounts payable by it amounted to approximately RMB 156.92m, which was due on or before 30 September 2020. Further, as of 30 September 2020, the net liabilities of Titan Fujian amounted to approximately RMB 665.95m. It was therefore important that the Titan Group disposed of Titan Fujian as soon as practically possible;

        (ii) the consideration for the disposal of Titan Fujian i.e., RMB 1, was determined with reference to the financial position of Titan Fujian as set out above and was arrived at after arm's length negotiations between the parties to the sale and purchase agreement. Based on the audited management accounts of Titan Fujian, it was estimated that the Titan Group would record a gain of approximately RMB 20m from the disposal of Titan Fujian;

(iii) several potential purchasers approached the directors of Titan in August 2020 and expressed their interest in acquiring the land at Quanzhou City held by Titan Fujian, which had been pledged to Industry Bank Co. Ltd in the PRC. However, none of the potential purchasers were willing to repay the entire outstanding amount of the bank loan to Titan Fujian (of about HK 160 million) for the release of the pledge over the land;

(iv) in contrast, the eventual purchaser of Titan Fujian (Fujian Jinqian), not only expressed an intention to purchase Titan Fujian, but was also willing to settle the bank loan;

(v) the land in question was subject a limitation of building type, namely "*Office, ancillary living*" instead of residential, which posed a "*policy risk*" for construction work on the land, which work would be vastly expensive. Titan Group decided that it would be better if it focused its resources to reinforcing its principal business of shipbuilding and steel structure manufacturing;

(vi) the board of Titan Group decided to sell Titan Fujian to Fujian Jinqian having considered various factors, including but not limited to the costly interest expense to be paid with regard to the bank loan; the remaining outstanding principal amount of the bank loan; the unfavourable financial position and the indebtedness of Titan Fujian, and the fact that except for Fujian Jinqian, none of the other potential purchasers were willing to repay the bank loan for Titan Fujian;

(vii) the directors of Titan Group, including its independent non-executive directors, considered the terms of the disposal to be fair and reasonable and on normal commercial terms and to be in the interests of Titan Group and its shareholders as a whole.

127. In the light of the matters set out in the previous paragraphs Mr Potts submits that the Chief Justice's summary acceptance of Sino Charm's allegations of wrongdoing, was wholly unjustified and stands in stark contrast with his approach to the issue of the common control of Titan Group and Sino Charm at the time of the Bond issue. The Zhou allegations, bereft of any supporting evidence or proper analysis, appear to have been taken as established; the detailed evidence and analysis in support of the Titan Group's allegations was not engaged with.

128. Mr White, who appears for **Sino Charm**, draws attention to the fact that Mr Zhang is his first affirmation of **22 October 2019** had indicated that Titan Fujian had expected to start the sale of office buildings on 20,000 of the total 75,000 square meters' site for RMB $ 8,000 per square meter at the end of that year, which would produce, if effected, RMB 160 million for only a portion of the site. Thus a sale of the company for only that figure (the RMB 1 plus the repayment of the loan") would be a gross undervalue. We do not, however, know what sales, if any, were, in fact, achieved, and the reasoning of the Board in February 2021 appears to indicate understandable reasons for the disposal.

129. When one looks at the totality of the evidence in relation to the post-petition transactions it does not, in my view, produce significant support to the proposition that the transactions were improper and certainly not enough to support the proposition, or lead to the conclusion, that the debt under the Bonds was not *bona fide* disputed for substantial reasons.

130. Reference was made by the Respondent to section 166 of the *Companies Act 19*81 which invalidates post-petition disposals subject to the Court's power to order to the contrary. That cannot be for consideration now. If the winding up order should not have been made, the section is not applicable. If it was properly made, it will be for the Court to decide whether the disposal should be validated.

131. Accordingly, in my judgment, the debt which forms the basis of the Statutory Demand is one that is *bona fide* disputed on substantial grounds and crosses, comfortably in my view, the low threshold provided by that test. The several factors referred to by the Chief Justice do not negate *bona*, or establish *mala, fides* or lack of substance, in the defence. The dispute is not grabbed at or dredged up, nor do I regard the extensiveness and complexity of the evidence as a mask to hide the absence of any real defence, to use the expressions used in some of the cases.

132. The determination of this issue was not a matter of judicial discretion; and involved, to a large extent, the making of a value judgment, with which the Court of Appeal will not intervene unless persuaded, as I am, that the decision is wrong: see *in re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911. Further, whilst the Chief Justice set out clearly the several matters which had led him to his conclusion, he did not in his judgment address what, as can now be seen, was of fundamental importance, namely the analysis made by Mr Lai[25] as well as a number of other matters to which I have referred above. He thus "*failed to analyse properly the <u>entirety</u> of the evidence"*, to use the criterion approved as a basis for appellate intervention in *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21. per Lord Hodge at [12] (citing with approval *Choo Beng v Choo Kok Hong* [1984] 2 MLJ 165 per Lord Roskill at 168-9)[26]. The absence of reasoning for what was in effect a finding that Lai 2 was without material significance meant that a "*building block of the reasoned judicial process*" was missing, to use the phraseology of Henry LJ in *Glicksmam v Redbridge Healthcare NHS Trust* [2001] EWCA Civ 1097 at [6].

Views of creditors and contributories

133. There was, before the Chief Justice, a difference of view as to what action should be taken in the event that he concluded that the Petition debt was not disputed on *bona fide* and substantial grounds. In those circumstances the views of the creditors and contributories were of importance.

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[25] The Chief Justice confirmed during day 1 of the hearing that he had read Lai 2.

[26] I readily accept that *"the task facing a judge is not to pass an examination or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard*" and "*there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions as if he were "a pilot going through the pre-flight checklist"*: per Sir James Munby in *Re F* [2016] EWCA Civ 546 at [22].

If there is no defence to the debt, the petitioning creditor is, as between himself and the debtor, entitled, *ex debito justitiae* to a winding-up order: *Re LAEP Investments Ltd* [2014] Bda L.R.35. But the right which the petitioning creditor is invoking is a class right, In exceptional circumstances the Court may make some other order, and, in reaching its decision as to how to exercise its discretion, the Court will look at the views of the creditors on each side of the disagreement and will incline, probably strongly, to favour the views of a sizeable majority of creditors in debt value terms (provided that they give good reasons and are not influenced by irrelevant considerations e.g. antipathy or affection toward the debtor): see Snowden J in *Maud (No 3)* [2020] EWHC 974 (Ch) at [78]. In *Re Demaglass Holdings Ltd* [2001] BCLC 613, 639b-c Neuberger J, as he then was, took the view that, if the majority of creditors supported the making of a winding up order it would require wholly exceptional circumstances to refuse it; but also expressed the view that the fact that the majority of creditors in value supported the making of a winding-up order was not necessarily decisive of the issue in every case: 639F.

134. In addition, Sino Charm relied on the following propositions:

(1) The Court may discount the views of creditors who are connected to the management of the company. It may also discount the views of shareholders (including creditors who are also shareholders), and may discount their views entirely if the company is insolvent: see *Re Palmer Marine Surveys Ltd* [1986] 1 BCC 99, 557 per Hoffman J at p.562, *Re Demaglass Holdings* per Neuberger J at p.639e-f, R*e Opus Offshore* per Hellman J at 10 and Re *Lummus Agricultural Services Ltd* [2001] 1 BCLC 137 at p.143b-c.

(2) The Court is entitled to take into account "*general principles of fairness and morality which underlie the details of insolvency law*": *Re Palmer Marine Surveys (above)* per Hoffmann J at p.562 and see also *Re Gordon & Breach Science Publishers Ltd* [1995] BCC 261 per Robert Walker J at p.269. As Hoffmann J observed in *Palmer Marine* (at p.562), "*A judicial exercise of discretion should not leave substantial independent creditors with a strong and legitimate sense of grievance*". The case for liquidation will therefore always be stronger where there are circumstances (e.g. suspicion of antecedent transactions) which call for an impartial investigation of the debtor's affairs.

(3) Where a restructuring is urged in the alternative to a winding-up, the Court must consider whether there is "*a reasonable prospect of the petition debt being paid in full within a reasonable time*" and should not adjourn a petition on the basis of a speculative assertion that a restructuring will occur which would make a winding-up unnecessary: see *Re North Mining Shares Company Ltd* [2020] Bda LR 8, per Subair Williams J at 18-19 (in which case the key elements of the restructuring plan had been set out in detail in the evidence and was shown to be clearly well advanced), and also *Re Evergreen International Holdings Limited* (FSD 349 of 2021 (MRHJ), unreported, 11 January 2022).[27]

[27] In a case with a broadly analogous fact pattern, it was held that the company's application was a last-minute attempt to avoid a winding up order as: (i) Evergreen had not put forward proper evidence of a viable restructuring plan; (ii) Evergreen was unable to produce any recent audited accounts, and the documentary evidence before the Court suggested its financial position had deteriorated; and (iii) it did not appear to the Court that the appointment

135. However, given that I conclude that the debt is *bona fide* disputed, the significance of the views of creditors and contributories is very much diminished.

Fame Dragon

136. Mr Robinson, counsel for Fame Dragon and Docile Bright, submitted that, if there was no *bona fide* dispute on substantial grounds the appropriate order to make was to adjourn the Petition for the purpose of allowing the Company to raise capital to meet the Petition debt under the control of the present management. Alternatively, it was said that the Court should allow the company to select and appoint provisional liquidators for restructuring purposes only in order to supervise the efforts of the current management to raise capital to meet the Petition debt.

137. The Chief Justice described Fame Dragon as a 66.46% shareholder of The Company, holding 20,358,629,484 ordinary shares. The 66.46% figure came from Mr Robinson's skeleton argument; but in his oral submissions to the Chief Justice, he accepted that the figure was 48.35%, being, as to 25.89% shares registered in the name of Fame Dragon or other companies, in respect of some of which shares the Fame Dragon liquidators were in the process of gaining control, and as to 22.55% shares transferred from Fame Dragon after the presentation of the Petition to which Fame Dragon was said to be entitled. Mr Zhang's holding was c 18%; so, between them, they held 66%.

Docile Bright

138. The position of Docile Bright is, as the judge expressed it," *more complicated and controversial".* The relevant shares were non-voting convertible redeemable preferred shares, 550,000,000 of which were issued in 2007 to a company called Saturn Petrochemical Holdings Ltd **("Saturn").** These shares were, in September 2017, the subject of a share consolidation process. They are said to have passed to Docile Bright on **10 October 2013**, and then in 2017 to Marine Bright.

139. The Chief Justice described the position as follows:

> *" 75 ..... 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"[28]). 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*

of provisional liquidators would enable Evergreen to comply with the listing resumption requirements imposed by the HKSE.

[28] The third party was Saturn.

FYE 2019, the balance due but unpaid as at 31 December 2019 is approximately Hong Kong $423,000,000.

140. On or about **15 July 2019** the DBIL Convertible Shares matured and the full balance became due and payable as an unsecured liability of the Company. Thus, at the time of the presentation of the Petition, the membership rights attaching to the shares had been replaced by an obligation on the part of Titan Group to pay the capital sum together with arrears of unpaid dividends. Marine Bright claims that it is owed at least HK $ 423,000,000 on the redemption of the preferred shares.

141. Mr Lai's Third Affirmation records that the transfer of the preferred shares to Docile Bright took place on **10 October 2013**[29], and that at a special general meeting of the Company on **22 June 2015** the shareholders passed an ordinary resolution to approve the "Listco Preferred Shares Modification Deed" and all transactions contemplated thereunder including the transfer from Saturn to Docile Bright,

142. Docile Bright appeared to have sold and transferred the preferred shares to Marine Bright at a consideration of about US $ 20 million on **9 February 2017**. However, for the reasons set out below, the position is unclear.

143. We have in the papers before us the following documents, exhibited to Lai 2 and the first affirmation of Li Yanwei, the director of Toprise Global Limited, said by Mr Li in his affirmation of 23 December 2020 to be the sole shareholder of Marine Bright[30]:

(a) purchase and sale notes, which record the payment and receipt of the consideration of US $ 20 million, together with the instrument of transfer executed by Docile Bright and Marine Bright, all in respect of 550,000,000 shares, all dated **9 February 2017**;

(b) a letter dated **9 February 2017** from Marine Bright to the Board of Titan Group by which Marine Bright confirmed that it was an affiliate of GZE.

(c) a certificate (No 3) identifying Marine Bright as the holder of the preferred shares, dated **20 September 2017**, which, by section 52 of the *Companies Act 198,* is *prima facie* evidence of title to the shares; and

(d) a copy of the register, also dated **20 September 2017** which records Marine Bright as the owner (under Certificate No 3) of 69,375,000 convertible redeemable preferred shares (being the quantity to which the 555,000,000 was adjusted upon the effective date of the share

[29] The 2016 accounts of the Company state (Note 28) that on 10 October 2013 Saturn Power executed an instrument of transfer, a declaration of trust and an irrevocable power of attorney in favour of Docile Bright whereby Docile Bright became entitled to the benefit of all interests arising under or in connection with the preferred shares. The note also refers to the Modification Deed and a number of subsequent amendments to it, which extended the long stop date for the redemption of the preferred shares.

[30] The transfer of ownership from Si Bo to Toprise Global means that those who now own Marine Bright were not involved in the transaction by which Marine Bright is said to have acquired its interest in the preferred shares.

consolidation of 5 September 2017). It records Docile Bright as having been the owner (under Certificate No 2) of 555,000,000 shares transferred to Marine Bright on 9 February 2017; and Saturn as the holder (under Certificate No 1) of the 555,000,000 shares transferred to Docile Bright on 10 October 2013. The Member Entry date in respect of Saturn is 6 February 2007 and in respect of the Docile Bright and Marine Bright it is 20 September 2017, i.e. in the case of Docile Bright the entry is nearly 4 years after the transfer from Saturn to it and in the case of Marine Bright the entry is some 7 months after the transfer to it. In the case of all the holdings the price is recorded as *"100% paid*".

No application has been made by the Company or Docile Bright, at any time since 2017, to rectify the register, which is *prima facie* evidence of its contents

144. The items in (a) and (b) were exhibited to Lai 2 and those in (c) and (d) to Mr Li's affirmation. There is not within the papers any bank account or payment slip showing the transfer of US $ 20,000,000 by Marine Bright to Docile Bright. Mr Lai's evidence is that the Company has no written records in relation to the transfer from Docile Bright to Marine Bright and that it appeared that on or around September 2017 the Company was informed of the transfer *"by [an] unknown person through an unknown channel*".

145. But, as he attests, on 20 September 2017 the then Board of the Company[31] passed resolutions confirming (i) the transfer from Saturn to Docile Bright and (ii) the transfer from Docile Bright to Marine Bright and that, in each case, any director of the Company should be authorised to sign and issue the relevant share certificate. Mr Lai says (Lai 3 [14]) that these resolutions were not made after any enquiry as to the source and authenticity of the transfer to Marine Bright. A copy of the resolutions is not before us and is, apparently, missing.

146. In the register to which I refer at 142 (d) above, the transfer of 550,000 000 shares to Docile Bright is recorded as being on **10 October 2013** (with a Member Entry date of **6 February 2017**) and the transfer of those shares from Docile Bright to Marine Bright as being on **9 February 2017** with a Member Entry Date of **20 September 2017** for Docile Bright's 555,000,000 shares and the same date for Marine Bright as the owner of 69,375,000 shares.

147. In a letter dated **10 July 2019** written by Conyers BVI acting on behalf of the joint liquidators of Docile Bright to Marine Bright, Conyers referred to the sale of the 555 million preference shares at a consideration of US $ 20 million by Docile Bright to Marine Bright and said:

> *"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."*

[31] Not the Company itself, as stated in [22] of Marine' Bright's submission.

148. The Chief Justice, applying the rule set out in *Re Opus Offshore Limited* [2017] Bda LR 14 at [22] that *"it is sufficient that there is prima facie case that they are a creditor or contributory, even if their claim to be so is disputed*" held that Marine Bright should be considered as a creditor of the Company for the purposes of the hearing, given that:

(a) the transfer of the shares from Docile Bright to Marine Bright was approved by the directors of the Company: see Lai 3 [14];

(b) a copy of the Register of members of the Company dated 20 September 2017 (D3/2673) showed Marine Bright as the registered shareholder of the Company and that Marine Bright had been issued Share Certificate No 3 by the Company certifying that it was the registered owner of 69,375,000 convertible shares issued by the company: see 142(d) above.

149. Ms George, who appeared for Marine Bright before the Chief Justice, supported the immediate winding up of the Company and the appointment of Provisional Liquidators with full powers.

150. Thus, as the Chief Justice held, it would appear that the majority of the creditors of the Company (i.e. Sino Charm and Marine Bright) requested the Court to make an order for the immediate winding up of the Company. In those circumstances he took the view that, given that the Company appeared to be insolvent, the wishes of the contributories had to take a subsidiary position to the wishes of the majority of the creditors. Further, in relation to Mr Robinson's suggested alternative methods of proceeding, there was no objective basis on which the Court could conclude that the Company had the ability to raise the funds to pay the debt and to achieve an effective restructuring. It was only in exceptional circumstances that the Court should not accept the wishes of the creditors for an immediate order of winding up, particularly where the company appeared to be insolvent.

151. And there were, he held, good reasons why the Court should make such an order. The Company had failed to publish its annual results by the end of March 2021 and trading in its shares on the Hong Kong Stock Exchange had been suspended since April 2021; the Company's auditors had resigned with a disclaimer of their previous opinion, highlighting their significant doubt about the Company's ability to continue as a going concern. The winding up proceedings had been outstanding since 20 September 2019 for an exceptionally long period of nearly 2 years. It was, he held, contrary to the legislative scheme and the interest of the creditors that they should endure a further period of uncertainty; it was in the interests of the general body of creditors and the wider public interest that the post-petition disposals be investigated by independent investigators appointed by the court. Lastly the Court was 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 or his father. It was 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 the Court.

152. Accordingly, the Chief Justice was satisfied that the appropriate order to make was that the Company should be wound up, and he so ordered appointing three accountants as joint liquidators.

153. Mr Potts submits that this approach was erroneous, and not only because the alleged debt to Sino Charm was *bona fide* disputed. The purported transfer of the shares from Docile Bright to Marine Bright was, itself, ineffective, he submitted, because Marine Bright was, and is, ineligible to hold shares in Titan Group, as explained below.

154. On **22 June 2015**, at a special general meeting of the Company, the shareholders, as I have said, passed an ordinary resolution to approve, confirm and ratify the "Listco Preferred Shares Modification Deed" and all transactions contemplated thereunder including the transfer in October 2013 of shares to Docile Bright. At the same meeting a special resolution was passed by which the Company adopted new bye-laws. Under these the preferred shares ceased to be non-transferable, as they had been before, but became transferable to GZE or its affiliates only. "*Affiliates"* was defined to mean "*with respect to any person/company, any other person/company that, directly or indirectly controls, is controlled by, or is under common control with such person/company*".

155. In his third affirmation Mr Lai had contended that Marine Bright is not the registered or beneficial owner of shares in Titan Group, for the following reasons:

    (a) there is significant evidence which suggests that title of the shares did not pass from Saturn to Docile Bright in 2013 or from Docile Bright to Marine Bright in 2017; and

    (b) Marine Bright was not eligible to be a shareholder in Titan Group

    (c) Marine Bright never paid the price of the shares.

156. As to (a) reliance was placed on the following:

    (i) whilst "*the available information may support a view that [Docile Bright] may have acquired the beneficial interests of the Preferred Shares on 10 October 2013*" Docile Bright never made a request for the issuance of a share certificate to itself.

    (ii) as at 20 September 2017 Conyers was the registrar of the preferred shares. Mr Lai exhibits to his third affirmation [D3/3601] a copy of the register, dated 20 September 2017, said to have been attached to an email dated 21 September 2017 (11:08))from Miranda Ho of Conyers to Anne You of Titan which only shows Saturn to be the registered holder of the preferred shares with a Member Entry date on the register of 06/22/2007[32]. This document is not the same as the version to which I refer at [142 (d)] above, but without certificates nos 2 and 3. The date of the [142 (d)] register is expressed to be "*20 September 2017*", with a par value of 0.08 (increased as a result of the share consolidation exercise), and a Member Entry date for certificate 1 of "*06/02/07*." The date of the other register is "*09/20/2017*", the

[32] The register is in the exhibit to Law 3 but not the email referred to.

par value is 0.01 and the Member Entry date is "*06/22/2007*". Clearly some register updating occurred, tallying with the resolutions of 29 September 2017 to which I refer in [144] above; but exactly by whom and in what circumstances is unclear.

(iii) it is claimed that Vistra Corporate Services ("**Vistra**") was appointed in place of Conyers as the registrar of the preferred shares. But **Vistra** confirms that it never took up such appointment;

(iv) based on Titan Group's books and records there is no record to suggest that **Vistra** updated the register of the preferred shares; or of the issuance of the alleged share certificate relied upon by Marine Bright;

(v) based on Docile Bright and Titan Group's records, Docile Bright never requested that the register be updated or that the preferred shares be issued under its name and it has never been registered as the owner of the shares: cp the register produced by Mr Li;

(vi) Titan Group never published any announcement in relation to the alleged transfer from Docile Bright to Marine Bright. On the contrary page 102 of Titan Group's 2017 Annual Report issued on 29 March 2018 (i.e. more than 6 months after Marine Bright's alleged registration as shareholder), showed that Docile Bright was still the beneficial owner of the preferred shares. It referred to Saturn having executed an instrument of transfer, declaration of trust and irrevocable power of attorney in favour of Docile Bright. The Chairman's Statement in the Report was signed by Mr Tang, as was the Consolidated Statement of Financial Position with its accompanying notes;

(vii) Marine Bright has never filed any form of disclosure of interest to the Hong Kong Stock Exchange in respect of its purported ownership of the preferred shares;

(viii) Marine Bright did not make any usual business contact with Titan Group or demand redemption or any payment until 3 September 2020 i.e. more than 3.5 years after its purported purchase of the Preferred Shares in February 2017.

157. As to (vii) there is no evidence before us that disclosure was required.

158. As to (viii) the point does not appear entirely valid (depending on what is meant by "*usual business contact*"). Exhibited to Lai 2 is the letter dated 9 February 2017, to which I refer at 142 (b) above, from Marine Bright signed by Si Bo, addressed to the Titan Group Board, which states that Marine Bright was the transferee of the 550,000,000 convertible preferred shares and which confirms that Marine Bright was an affiliate of GEZ. At the same time there does not appear to have been any demand for payment when the preferred shares matured in mid-2019.

159. The matters set out in [156] – [158] above paragraph prompt a number of doubts as to whether valid transfers to Docile Bright and from Docile Bright to Marine Bright ever took place. At the

same time, the company resolution approving the transfer to Docile Bright and the suite of documents to which I have referred at [140] and [142] and the resolutions at [144] above undoubtedly produce a *prima facie* case that valid transfers from Saturn to Docile Bright and from Docile Bright to Marine Bright did take place, even though some of the points in [155] remain unexplained.

160. As to (b) Mr Lai says that Marine Bright was not an affiliate of GZE. At all material terms the sole shareholder and sole director of Marine Bright was Si Bo, Dr WeiBing's personal assistant. It would not, in any event, he suggests, make sense for Si Bo to acquire the preferred shares because of the restrictions on their transfer. However, in Lai 2 [22] he records that Si Bo claimed that the shares of Marine Bright were held in trust for GZE; and the letter from her of 9 February 2017 (see [142 (b)] above) confirmed that Marine Bright was an affiliate of GZE. We have, however, no evidence from Si Bo; nor have we been shown any declaration of trust. If Marine Bright was not an affiliate of GZE, it could not be a shareholder of the Company and the Board (as opposed to company) resolutions would not cure the problem.

161. As to (c) Mr Lai says (i) that there is no evidence in the records of the liquidator of Docile Bright which verifies that Marine Bright actually paid the US 20 million consideration, and (ii) that the $ 20 million would have been a significant undervalue and the transaction would therefore have been voidable. I note that in Lai 2 he said that it was "*questionable*" whether US $ 20 million (approximately HK $ 156 million) was an undervalue because it represented only about 39%[33] of the value of the preferred shares of about HK$ 380 million in 2017. If no payment was made, and Marine Bright was an affiliate of GZE, its legal title would not be immediately affected but the title would be potentially rescindable[34]; and the value of its assets much reduced.

162. As I have said, on 10 July 2019 Conyers, acting for the joint liquidators of Docile Bright, wrote to Marine Bright pointing out that there was no information to show that the purported consideration of US $ 20 million was received by Docile Bright and asking for the return of the shares on the footing that according to the letter of 9 February 2017 from Marine Bright to Titan Group, Marine Bright was an affiliate of GZE, in which case Marine Bright and Titan Group were "*connected persons"* within the meaning of sections 5 and 246 (4) of the BVI Insolvency Act 2003, which relates to the setting aside of transactions at an undervalue, failing which the liquidators would apply to the BVI Court under the Act for an order setting aside the transaction and requiring the return of the preferred shares. It is not without significance that no reply to this letter was received.

[33] By my mathematics it is about 41%.

[34] On the basis that the contract had been repudiated by non-payment or, possibly, if Marine Bright and Docile Bright were connected persons, on the ground that, there being no payment, the transfer of the shares in Titan Group was voidable under the relevant BVI litigation because it took place (for nothing) on 9 February 2017, less than two years prior to the liquidation of Docile Bright on 4 February 2019. We do not, however, have evidence as to the relevant law of the BVI in this respect.

163. At the same time, until very recently Docile Bright had not taken any action to enforce this demand against Marine Bright, or to lay claim to the redemption payment in relation to the Preferred Shares. But, on the second day of the hearing before us we were told by Mr Mason, for Marine Bright, that Docile Bright, by its liquidator, had issued proceedings a fortnight before in the BVI seeking to set aside the transfer from Docile Bright to Marine Bright on the basis that the transaction was at an undervalue. We have not seen these proceedings.

164. In his written submissions Mr Potts submitted (i) that whatever may be the position when the issue is whether X is a creditor, a different approach is needed when the question is which of X and Y is the creditor, when the Court must decide between the competing claims; and (ii) that there was inadequate evidence to substantiate Marine Bright's claim to be a creditor. Accordingly, the Chief Justice should have found that there was no creditor supporting the Petition.

165. In a case where (a) the views of the creditors are potentially relevant; (b) a debt is undoubtedly owed to either X or Y (but not both;) and (c) X and Y take different views as to what order should be made, the Court, as it seems to me, needs to take a view, if it can, as to which of X and Y has *prima facie* the better claim to the debt and by what sort of margin. If the two claims are both *prima facie* valid (as could, for instance be the case where the issue as to who was the creditor depended on oral communications upon which no satisfactory view could be reached without hearing evidence), the court may derive little assistance from the existence of rival views, which will cancel each other out.

166. In the present case, for the reasons that I have indicated I am of the view that there is quite a strong *prima facie* case that Marine Bright is the creditor in respect of the debt arising from the preferred shares, but that there is, absent evidence of how actual payment of US $ 20,000,000 was made or any document establishing the declaration of trust that is said to exist, an almost equally strong case that Docile Bright is the creditor, the case for the former being that there was an actual payment (which led to the sale and purchase notes and the instrument of transfer) and a declaration of trust; and the case for the latter being that the documents which could readily vouch for what is said (sic) to be the case have not been produced.

167. In those circumstances, if I had held that the debt to Sino Charm was not *bona fide* disputed, I would not have treated Marine Bright alone as the creditor of Titan Group for the purposes of the petition[35] nor its view as entitled to preference over that of Docile Bright or regarded it as clear that the majority of creditors favoured liquidation. In short I would not have gained much assistance from the rival views, by which the Court is not, in any event, bound.[36]

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[35] In the course of his submissions, and immediately after telling the Court that he had no instructions to seek to have Marine Bright substituted as the Petitioner (a course that had never been suggested below or in any Respondent's' notice or in any skeleton argument), Mr Mason acquired such instructions from his solicitor. But if there was an arguable case that Marine Bright was not the creditor, as there seems to me to be, Marine Bright has, like Sino Charm, no *locus* to secure a winding up order.

[36] If, on the date on which the redemption was to be effected (15 July 2019), there were reasonable grounds to believe that the company was, or after redemption would be, unable to pay its liabilities as they fell due, as seems to be the

What approach is the Court to take if there is a bona fide dispute about the debt?

168. There is useful authority on the question of approach from the Cayman Court of Appeal in Re *GFN Corporation Ltd* [2009] CILR 650, where the company disputed the indebtedness, claiming that the debts were owed by another company within the group. The (*obiter*) judgment of Vos JA, with which Chadwick P and Mottley JA agreed, contains an impressive review of a line of authorities, with conclusions which I would accept.

169. The Court held as follows:

(a) a person with a good arguable case that a debt is due and owing to him from a company may present a petition as a "*creditor*" under s 96 of the Cayman *Companies Law*, which is, so far as material, in similar terms to section 163(1) of the Bermuda *Companies Act 1981*;

(b) the normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a *bona fide* and substantial dispute as to the existence of the debt upon which the petition is based[37];

(c) in an appropriate case, however, the winding-up court can refuse to dismiss or stay the petition and can determine the question of a disputed debt in the petition itself;

(d) appropriate cases include these where the court doubts that the debit is actually disputed *bona fide* on substantial grounds, or where the creditor, if he established his debt would otherwise lose his remedy altogether, or where other injustice might result;

(e) where the winding-up court decides to hear a petition based on a disputed debt, it will only make a winding-up order on the grounds that the company is unable to pay its debts or that it is just and equitable to winding up, or that it is insolvent (see paragraph [102]), having determined that the petitioner is, on the balance of probabilities, a creditor of the company.

170. If the court finds, as I do, that the debt asserted is *bona fide* disputed on substantial grounds it has, nevertheless the power to adjourn or stay the petition: *Re Z-OBEE Holdings Limited* [2017] Bda LR 19 at [10]; as may be appropriate if there is a risk that creditors might be prejudiced by the loss of the commencement date of the petition: *Bicoastal Corporation v Shinwa Co Ltd* [1994] 1 HKLR per Litton JA, p.7.

Conclusion

position, no redemption could be effected: section 42 (2) of the *Companies Act 1981*. In such circumstances the views of Marine Bright would be of even lesser weight.

[37] See, to similar effect, the *ex tempore* judgment of Kawaley J, as he then was, in Al *Ayed v Mitchell & Alloy Aircraft Company Ltd* [2005] Bda LR 70 at [7-8].

171. In my view the correct approach for the Court to take, in the exercise of its broad discretion under section 164 of the *Companies Act 1981,* is to stay the Petition until further order of the Court in order to permit the Hong Kong action to continue.

172. I have reached that view for the following reasons:

(a) the debt upon which the petition is based is, I doubt not, *bona fide* disputed;

(b) in those circumstances the court will not normally make a winding up order;

(c) there are no sufficient grounds for departing from this rule;

(d) it is preferable that the complex question of whether the debt exists at all should be determined by a judge in Hong Kong, the law of which will govern much of the dispute, in proceedings in which Sino Charm has taken no steps to set aside the order giving leave to serve out of the jurisdiction. These proceedings will involve relevant parties other than Sino Charm, who have no link to Bermuda. They will be conducted by those familiar with the underlying issues and having an economic stake in the outcome, rather than by office holders, who lack these qualities, the introduction of whom would add another very significant layer of avoidable expense and yet further delay. Hong Kong or the PRC is, also, the location of the most important witnesses and Hong Kong is the court entitled to (non-exclusive) jurisdiction under the Bonds, which are governed by Hong Kong law. Determination of the dispute in Hong Kong will involve the parties giving disclosure, which is potentially of great importance;

(e) if this step is taken Sino Charm will not be left without a remedy since they can counterclaim in the Hong Kong proceedings;

(f) the proof of debt procedure could not give Titan Group all the relief that it seeks in the Hong Kong action, for which separate proceedings would be needed in any event.

(g) a stay:

(i) would avoid the risk that creditors might be prejudiced by the loss of the commencement date of the petition, e.g. under section 166 (1) of the *Companies Act 1981* which renders void dispositions of property made by the company after the commencement of the winding-up unless approved by the court;

(ii) is a flexible remedy in that it can be lifted or varied at any time if circumstances change;

(iii) affords the opportunity to secure a restructuring which would meet any potential liability to Sino Charm, although I recognize that an extant, albeit stayed petition, may make raising finance more difficult[38] ;

(iv) will enable the Company to retain its listing on the Hong Kong Stock Exchange of which a winding up order would deprive it.

173. In the light of the fact that Sino Charm is not presently shown to be a creditor entitled to payment of the disputed debt, and whether or not it is such a creditor, will not be determined as part of the hearing of the petition, I regard it as inappropriate to make any winding up order even if the Company is insolvent. Until Sino Charm is established, indisputably, to be a creditor it has no standing to obtain relief under the Petition. The same applies to Marine Bright,

174. I also bear in mind that, according to Lai 2 [26], supplemented as to items (c) and (d) by what is said in the annex to Mr Potts' Supplemental Reply submissions Titan Group's only liabilities appear to be the following:

(a) the debt of around HK 100 million said to be due under the Bonds, which may not in fact exist;

(b) the debt due in respect of the converted Preference Shares of around HK $ 440 million which, if owed at all (having regard to section 42 (2) of the *Companies Act 1981*), is owed to one or other of two rival claimants, one of which seeks, and the other of which opposes, liquidation;

(c) a shareholder's loan granted by Mr Zhang, who opposes liquidation, of around HK $ 12 million;

(d) loans of around HK $ 12 million made by three strategic investors, who also oppose liquidation;

(e) some minimal operational debt.

175. The total of the liabilities specified in the previous paragraph is circa HK $ 564 million. That is almost identical to the figure for net current liabilities of HK $563.5 million in the statement of the (unconsolidated) financial position of the Company contained in the first report to creditors by the joint provisional liquidators of the company dated 4 October 2021. The figures in it revealed that the company was balance sheet insolvent in 2019 and 2020.

[38] The prospect of an effective restructuring appears to me speculative in any event. Mr Lai indicated that a convertible bond might be issued and that a shareholder or creditor (unidentified in each case) might provide support. Fame Dragon and Docile Bright certainly cannot since they are both in liquidation. No capital has been raised since Mr Lai's evidence in March 2020. At the same time, the existence of an unstayed winding-up proceedings, followed by a winding-up order must have been a major disincentive to anyone minded to invest in the Company.

176. The Court has power to wind up a company of its own motion: *PLT Anti-Marketing Ltd* [37]. But that power should only be exercised in "*thoroughly exceptional circumstances*", as the decided cases indicate. No application for the court to do so was made below or in any respondent's notice or skeleton argument.

177. Mr White, for Sino Charm, suggested that we should do so now. He relied on the fact, as he claimed, that the company was insolvent since 2019, and that trading in its shares had been suspended by the Hong Kong Stock Exchange since April 2921 because it had not filed audited accounts. Its business was conducted through operating subsidiaries, who could continue operating if it was wound up. It has no working capital and has been funded solely during those proceedings by Mr Zhang. Marine Bright with a debt of about HK $ 423 million is supporting the winding-up. The winding up proceedings have been pending for over 2 ½ years during which its financial position has deteriorated and there has been a wholesale disposal of assets for apparently nominal value. Some HK $ 8 million was raised in March 2020 through convertible bonds on the Hong Kong Stock Exchange to fund this litigation. There can be no benefit to the general body of creditors in deferring a winding up order. If no order is made its only effect, from the Company's point of view is to enable the disposition of more assets and the continuation of the Hong Kong proceedings. He accepted that the cases that have previously come before the courts, where the Court has made a winding-up order of its own motion, have not involved significant opposition to that course. There is opposition here from Fame Dragon and the Company. But Fame Dragon is a shareholder and is not going to benefit from any surplus for distribution to it. Docile Bright is not a registered shareholder. Any money recovered in the Hong Kong action would "*barely touch the sides" in terms of the company's indebtedness.*

178. I am not persuaded that the circumstances of this case are of such thorough exceptionality that the court should order a winding up of its own motion. Mr White's points assume, not surprisingly, that all his contentions are right. Whether there is a debt owed to Marine Bright is in issue. The winding-up proceedings have been long delayed (partly for Covid related reasons), which has no doubt impeded any attempt at restructuring. But they were begun by a petitioner with no indisputable debt. That the disposal of assets was, in some way, improper is hotly in dispute. The matters set out in [173] above cast a quite different light on the question as to what should be done.

179. Accordingly, I would:

    (a) allow the appeal;

    (b) set aside the order for the winding up of Titan Group and the appointment of joint and several provisional liquidators;

    (c) stay the petition until further order of the Supreme Court.

180. The parties should produce, within 21 days of the handing down of this judgment, (a) a draft order and (b) submissions as to the appropriate order for costs.

181. I should like to express my gratitude for the quality of the submissions made to us. My gratitude would have been greater if the transcript of the hearing which we asked for had been produced within a reasonable time. As it was, it was produced shortly before the June session (one transcriber having, apparently, had difficulty making the transcription, having regard to the quality of the recording). The delay in producing the transcript is the reason why this judgment has only been able to be handed down in August. My gratitude would have been greater still if the parties had put together a core bundle or bundles. As it is we have had to find out way through a morass of material, with lever arch files, some of which were far too large to be handled (physically as well as mentally) with any ease.

BELL, JA:

182. I have read My Lord's judgment in draft, with which I agree.

SMELLIE, JA:

183. I also agree.

APPENDIX 1

Appendix I

Transaction Ref.: PT20170001

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Uni-Loyal	Titan HK	23-Feb-17	01-Mar-17	US$ (8,183,976.56)	Fuel Oil 380 CST (25,000MT)	1 working day after B/L
Titan HK	Top Win	23-Feb-17	10-Mar-17	US$ 8,172,017.32	Fuel Oil 380 CST (25,000MT)	5 working day after B/L
Titan HK	Top Win	23-Feb-17	18-Apr-17	US$ 20,000.00	Fuel Oil 380 CST (25,000MT)	5 working day after B/L
		Turnover Day:	9 - 48	Profit:	$ 8,038.45	
				Return Rate:	0.10%	
				Annualised Return:	4.02%	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 329 to 346.

Transaction Ref.: PT20170002

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Sino Champion	Titan HK	02-Mar-17	13-Mar-17	US$ (10,000,000.00)	PI (24,000Kg)	before 15.03.2017
Sino Champion	Titan HK	02-Mar-17	14-Mar-17	US$ (792,867.86)	PI (24,000Kg)	before 15.03.2017
Titan HK	Top Win	02-Mar-17	23-Mar-17	US$ 7,905,000.00	PI (24,000Kg)	before 28.03.2017
Titan HK	Top Win	02-Mar-17	23-May-17	US$ 2,898,902.76	PI (24,000Kg)	before 28.03.2017
		Turnover Day:	10 - 71	Profit:	$ 10,792.87	
				Return Rate:	0.10%	
				Annualised Return:	1.43%	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 347 to 354.

Transaction Ref.: PT20170003

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Wing King	Titan HK	23-Feb-17	20-Mar-17	US$ (4,800,000.00)	Bitumen Mixture (85,000MT)	before 2017.03.29
Wing King	Titan HK	23-Feb-17	22-Mar-17	US$ (4,800,000.00)	Bitumen Mixture (85,000MT)	before 2017.03.29
Wing King	Titan HK	23-Feb-17	23-Mar-17	US$ (4,800,000.00)	Bitumen Mixture (85,000MT)	before 2017.03.29
Wing King	Titan HK	23-Feb-17	24-Mar-17	US$ (8,000,000.00)	Bitumen Mixture (85,000MT)	before 2017.03.29
Wing King	Titan HK	23-Feb-17	27-Mar-17	US$ (4,668,288.60)	Bitumen Mixture (85,000MT)	before 2017.03.29
Titan HK	Ruiyonghe	23-Feb-17	21-Mar-17	US$ 4,804,800.00	Bitumen Mixture (85,000MT)	before 2017.03.31
Titan HK	Ruiyonghe	23-Feb-17	22-Mar-17	US$ 4,804,800.00	Bitumen Mixture (85,000MT)	before 2017.03.31
Titan HK	Ruiyonghe	23-Feb-17	23-Mar-17	US$ 4,804,800.00	Bitumen Mixture (85,000MT)	before 2017.03.31
Titan HK	Ruiyonghe	23-Feb-17	24-Mar-17	US$ 8,008,000.00	Bitumen Mixture (85,000MT)	before 2017.03.31
Titan HK	Ruiyonghe	23-Feb-17	27-Mar-17	US$ 4,672,956.89	Bitumen Mixture (85,000MT)	before 2017.03.31
		Turnover Day:	0 - 1	Profit:	US$ 27,068.29	
				Return Rate:	0.10%	
				Annualised Return	658%	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 355 to 365.

Transaction Ref.: PT20170004

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Max Joy	Titan HK	18-Apr-17	20-Apr-17	US$ (6,700,000.00)	Bitumen Mixture (20,000MT)	within 5 days after handing over goods title
Titan HK	Grand Treasure	18-Apr-17	15-Dec-17	US$ 3,950,000.00	Bitumen Mixture (20,000MT)	within 92 days after handing over goods title
Titan HK	Grand Treasure	18-Apr-17	27-Dec-17	US$ 2,817,000.00	Bitumen Mixture (20,000MT)	within 92 daysafter handing over goods title
		Turnover Day:	239 - 251	Profit:	$ 67,000.00	
				Return Rate:	1.00%	
				Annualised Return:	1.50%	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 366 to 380.

Transaction Ref.: PT20170005

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Max Joy	Titan HK	24-Feb-17	26-May-17	US$ (5,040,000.00)	Light Cycle Oil (16,000MT)	within 90days after B/L
Max Joy	Titan HK	24-Feb-17	30-Jun-17	US$ (2,900,000.00)	Light Cycle Oil (16,000MT)	within 90days after B/L
Max Joy	Titan HK	24-Feb-17	Outstanding	US$ (422,384.59)	Light Cycle Oil (16,000MT)	within 90days after B/L
Titan HK	Top Win	24-Feb-17	27-Dec-17	US$ 4,397,435.90	Light Cycle Oil (16,000MT)	before 2017.11.30
Titan HK	Top Win	24-Feb-17	29-Dec-17	US$ 3,999,080.87	Light Cycle Oil (16,000MT)	before 2017.11.30
		Turnover Day:	180-217	Profit:	$ 456,516.77	
				Return Rate:	Not Completed	
				Annualised Return:	Not Completed	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 381 to 393.

Transaction Ref.: PT20170006

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Max Joy	Titan HK	18-Sep-17	21-Dec-17	US$ (3,205,128.21)	Bitumen Mixture (30,000MT)	before 30.03.2018
Max Joy	Titan HK	18-Sep-17	27-Dec-17	US$ (4,010,256.41)	Bitumen Mixture (30,000MT)	before 30.03.2018
Max Joy	Titan HK	18-Sep-17	28-Dec-17	US$ (4,367,392.64)	Bitumen Mixture (30,000MT)	before 30.03.2018
Titan HK	Top Win	18-Sep-17	29-Dec-17	US$ 366,674.08	Bitumen Mixture (30,000MT)	before 30.03.2018
Titan HK	Top Win	18-Sep-17	Outstanding	US$ 11,218,649.15	Bitumen Mixture (30,000MT)	before 30.03.2018
		Turnover Day:	> 8	Profit:	US$ (11,216,103)	
				Return Rate:	Not Completed	
				Annualised Return	Not Completed	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 394 to 408.

Transaction Ref.: BG20170001

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Mercuria Energy	BG	29-Dec-16	11-Jan-17	US$ (1,500,000.00)	Mixed Aromatics (144,722 BBLS)	within 90 days after B/L
Mercuria Energy	BG	29-Dec-16	13-Jan-17	US$ (13,024,738.80)	Mixed Aromatics (144,722 BBLS)	within 90 days after B/L
Mercuria Energy	BG	29-Dec-16	13-Feb-17	US$ 2,300,000.00	Mixed Aromatics (144,722 BBLS)	within 90 days after B/L
Mercuria Energy	BG	29-Dec-16	19-Apr-17	US$ 1,118,846.43	Mixed Aromatics (144,722 BBLS)	within 90 days after B/L
Mercuria Energy	BG	29-Dec-16	21-Apr-17	US$ 4,976.00	Mixed Aromatics (144,722 BBLS)	within 90 days after B/L
BG	Wing King	16-Dec-16	21-Dec-16	US$ 7,246,376.81	Mixed Aromatics (144,722 BBLS)	20% of deposit before 19.12.2016; remaining with 85 days after B/L
BG	Wing King	16-Dec-16	23-Dec-16	US$ 3,623,188.41	Mixed Aromatics (144,722 BBLS)	20% of deposit before 19.12.2016; remaining with 85 days after B/L
BG	Wing King	16-Dec-16	Outstanding	US$ 221,114.22	Mixed Aromatics (144,722 BBLS)	20% of deposit before 19.12.2016; remaining with 85 days after B/L
		Turnover Day:	-121 to -19	Profit:	US$ (231,351.15)	
				Return Rate:	Not Completed	
				Annualised Return	Not Completed	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 409 to 460.

Transaction Ref.: BG20170002 (Purportedly Cancelled)

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Top Win	BG	16-Dec-16	28-Dec-16	US$ (9,150,000.00)	Bitumen Mixture (78,749.950MT)	deposit of 9.15 million before 30.12.2017 ; remaining 3 working days after B/L
Top Win	BG	16-Dec-16	23-May-17	US$ (3,495,000.00)	Bitumen Mixture (78,749.950MT)	deposit of 9.15 million before 30.12.2017 ; remaining 3 working days after B/L
BG	Uni-Loyal	16-Dec-16	13-Jan-17	US$ 13,024,982.00	Bitumen Mixture (78,749.950MT)	within 85working days after B/L
BG	Uni-Loyal	16-Dec-16	Outstanding Refund	US$ (379,982.00)	Bitumen Mixture (78,749.950MT)	within 85working days after B/L
		Turnover Day:	-130 to 16	Profit:	US$ 379,982.00	
				Return Rate:	Not Completed	
				Annualised Return	Not Completed	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 461 to 486.

Transaction Ref.: BG20170004

Vendor	Purchaser	Date of Contract	Date of Payment / Receipt	Payment / Receipt Amount (in USD)	Commodity	Payment Term
Max Joy	Titan HK	20-Apr-17	20-Apr-17	US$ (3,346,668.38)	Mixed Aromatics (5,600MT)	within 5 days after handing over goods title
Titan HK	Grand Treasure	20-Apr-17	30-Jun-17	US$ 2,900,000.00	Mixed Aromatics (5,600MT)	within 92 days after handing over goods title
Titan HK	Grand Treasure	20-Apr-17	29-Nov-17	US$ 453,000.08	Mixed Aromatics (5,600MT)	within 92 days after handing over goods title
		Turnover Day:	152 - 223	Profit:	US$ 6,331.70	
				Return Rate:	0.19%	
				Annualised Return	0.76%	

Copies of the trading contracts and the bank statements/documents evidencing the payments referred to above can be found at pages 487 to 499.

AFFIRMED at)
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)
This 13th day of March 2020)
Before me,)
)

Lai Wing Lun

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