IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE: FSD 200 OF 2019 (RPJ)

IN THE MATTER OF SECTION 92 OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF ALTAIR ASIA INVESTMENTS LIMITED

IN OPEN COURT

APPEARANCES:	Mr Jeremy Goldring QC of South Square Chambers on behalf of the Petitioner Mr Marc Kish and Ms Marie Skelly of Ogier on behalf of the Petitioner. Mr Tom Smith QC of South Square Chambers on behalf of the Company. Mr Rupert Bell and Mr Peter Kendall of Walkers on behalf of the Company
BEFORE:	THE HON. RAJ PARKER
HEARD:	21 January 2020
Draft Judgment: Circulated	11 March 2020
Judgment: Delivered	16 March 2020

HEADNOTE

Application by petitioner to wind up company on the basis of insolvency and inability to pay debts-sections 92 of the Companies Law-bona fide and substantial dispute- related Hong Kong insolvency proceedings-application to adjourn pending judgment in Hong Kong proceedings-section 95 of the Companies Law -risk of conflicting judgments-discretion.

Introduction

1. The Petitioner, Safe Castle Limited, incorporated in the British Virgin Islands on 13 June 2014 as a BVI company, applies under section 92 of the Companies Law (2018 Revision) (the Companies Law) as a creditor to wind up the respondent company, Altair Asia Investments Limited (the company).

2. The company is an exempted limited company incorporated in the Cayman Islands on 27 August 2012. Its directors are Frank Dominick and Patrick Maloney. Its administrator and cash custodian until recently was a fund administrator called Intertrust Fund Services (Asia) Limited (Intertrust). The company is an investment vehicle organised for the purpose of investing funds as a special limited partner of a Delaware limited partnership.

3. The grounds for the Petition dated 11 October 2019 are that the petitioner is a redemption creditor and the company is insolvent and unable to pay its debts.

4. It is common ground that the petitioner invested HK $200 million in the company in October 2017 (or roughly US $25 million at current exchange rates) and in exchange was allotted HK $200 million of participating shares in the company, with a guaranteed return of 15% per annum payable quarterly on the terms set out in a Subscription Agreement dated 1 October 2017 and a Side Letter dated 10 October 2017, both of which are governed by Cayman Islands law.

5. The investment was secured among other things by guarantees also dated 10 October 2017 of the company's liabilities given by Mr Dominick personally and an entity called China Silver Asset Management (Hong Kong) Ltd (China Silver), which is controlled and managed by Mr Dominick and Mr Maloney.

6. Clause 1 of the Side Letter defined various circumstances in which the petitioner was entitled to redeem its shares in the Company in whole or in part. This included a number of 'Extraordinary Redemption Events' (or ERE) as defined therein. One such event, at clause 1.1.11, would occur if the average of the closing price of shares in a company called RM Group Holding Ltd (listed on the Hong Kong Stock Exchange)fell below a defined floor for any five consecutive trading days (*the closing price triggering event*). This in fact occurred between 27 December 2017 and 3 January 2018.

7. An ERE also would also occur under clause 1.1.12 on the expiry of one year after the date of allotment and issue of shares (*the anniversary triggering event*). The shares were allotted on 18 October 2017 and so the anniversary date was 18 October 2018.

The closing price triggering event

8. Clause 1.2 of the Side Letter provides that, except for redemption requests made pursuant to *the closing price triggering event (clause 1.1.11),* the petitioner must give the company at least 90 days prior written notice. For a request to redeem shares in

relation to *the closing price triggering event (clause 1.1.11)* a lesser period of 21 days written notice has to be given. In this event the redemption proceeds are calculated on the basis of the return of the original amount of the investment plus the guaranteed return.

The anniversary triggering event

9. A redemption under *the anniversary triggering event (clause 1.1.12)* is treated differently in that it requires 90 days written notice (along with all the other defined redemption events) and the calculation to be made is not the original investment plus the guaranteed return, rather it is based upon the company's net asset value (NAV) at the date of redemption. This was to be determined by Intertrust and would be equivalent to the assets less the liabilities of the company at the relevant valuation date.

The petitioner's case

10. The petitioner has sought to redeem its shares having submitted two letters seeking to do so on 5 January 2018 and 2 October 2018.

11. The letter of 5 January makes clear that it is a redemption pursuant to *the closing price triggering event (clause 1.1.11)* and required payment of HK $209,041,089 (being the aggregate consideration of its original investment plus the guaranteed return calculated up to 5 February 2018) within 21 days or by 5 February 2018.

12. Those letters were, according to the petitioner, accepted by the company and the petitioner thereby became a creditor. The petitioner also alleges that the company has failed to pay this debt or any part of it since October 2018. It is further alleged that it is unable to pay its debts which is clear from its inability to pay over a period of many months.

13. The petitioner says that at the relevant times the company did not assert that the redemption requests were invalid or that no sum was due to the petitioner and it is alleged that the company has thereby accepted the redemption requests and in fact has consistently admitted its obligations, but despite many promises and excuses has failed to pay. The petitioner's case is factually explained in the affirmations of Liu Yao a director of the petitioner dated 11 October 2019 and 30 January 2020.

14. The petitioner entered into settlement negotiations with the company and China Silver (as the corporate guarantor of the company) and on 23 January 2018 entered into a Waiver Letter which is also governed by Cayman Islands law.

15. The company relies on this Waiver Letter as a complete answer to the redemption requests made. The petitioner says that the way the letter was expressed is strictly conditional upon the satisfaction or waiver of conditions precedent and those conditions precedent were never satisfied or waived so that the waiver contained in

the letter never became effective and the rights arising as a result of the redemption requests subsist.

16. On the strength of that seemingly straightforward set of facts, on the petitioner's case, it requests that the Court should immediately exercise its power to wind the company up and appoint joint official liquidators to take control of its affairs as Court officers in the interests of all creditors, of which the petitioner is by far the largest. The petitioner also points to the opacity of the administrator's current position and the obscurity of the company's financial information in support of its case.

Hong Kong proceedings

17. The petitioner has sought to enforce various rights available to it seeking distinct relief against different parties through insolvency proceedings in Hong Kong (the High Court of the Hong Kong Special Administrative Region).

18. It presented a winding up petition against China Silver on 17 March 2019 relying on the guarantee China Silver gave on 10 October 2017 and a bankruptcy petition against Mr Dominick, who is domiciled in Hong Kong, relying on the personal guarantee he gave on the same date. This was heard by the Hong Kong Court on 27 September 2019 and judgment was reserved by Mr Justice Harris.

19. It then presented the Petition in this Court against the company some two weeks later on 11 October 2019. The company is not a party to the Hong Kong proceedings. The company says that the risk of conflicting decisions should lead the Court to exercise its discretion to adjourn the Petition.

Submissions of the parties

20. Mr Goldring QC for the petitioner submitted that the Court should determine the Petition immediately and make a winding up order. The company was incorporated in the Cayman Islands and the Court plainly had jurisdiction to make such an order. The grounds were clear-cut. The petitioner is a creditor and the company is insolvent. The petitioner is the entity with the overwhelming financial interest in the company having held 84% of the shares prior to redemption. It is entitled to an immediate order to wind the company up.

21. Mr Goldring put the case in three alternative ways, each of which was said to be freestanding. He submitted as follows.

22. The petitioner is owed a redemption sum because it validly requested redemption of its shares pursuant to the *closing price triggering event* by the first and/or the second request. In the alternative, the petitioner is owed a redemption sum because it validly requested redemption of its shares pursuant to the *anniversary triggering event* by the second request. In the further alternative, the petitioner is owed a redemption sum because the company has accepted and agreed that the petitioner is entitled to a redemption amount calculated by the administrator.

23. There is no *bona fide* or substantial dispute as to the petitioner's status and tellingly there was no hint or suggestion of a challenge to that status until the proceedings were commenced in Hong Kong. In fact, the company for a long period and on many occasions accepted the validity of the redemption requests but in the face of winding up proceedings and the bankruptcy proceedings against Mr Dominick now has performed a *'volte face'*.

24. Additionally, Intertrust, the former administrator of the fund and the cash custodian has resigned and the financial documentation which the company has produced is obscure. The debt has been outstanding for some time and so it is important that the Court's officers are put into place quickly as joint official liquidators.

25. He further submitted that the company has not issued an application for a stay but simply applies for an adjournment pending the handing down of judgment in Hong Kong which the petitioner strongly opposes.

26. The company's strategy should be characterised as a further delaying tactic by an unwilling debtor which is seeking to put off the evil day of its liquidation.

27. Mr Tom Smith QC appears for the company and unsurprisingly submitted that the matter is more complicated than the way in which Mr Goldring QC presented it. His primary submission is that Mr Justice Harris' decision in the Hong Kong Court is going to cover much of the same ground as this Court is being asked to cover on the hearing of this Petition and so this Court should adjourn the Petition pending the handing down of the Hong Kong Court's judgment.

28. In the alternative he submits that if this Court was to proceed, in the sense of producing a substantive judgment on the Petition, it should dismiss the Petition, on the ground that there is a *bona fide* dispute on substantial grounds to the alleged redemption debt.

29. On this latter point he advanced a number of arguments to support the case that there had been no valid redemption and that there were therefore no proceeds presently owing, which meant that the petitioner is not a creditor and lacked standing.

30. He pointed out that whilst redemption under the *closing price triggering event* was for the aggregate consideration of the original amount of the investment, this is not the case for the *anniversary triggering event*. In the latter case the redemption amount would be calculated by reference to the relevant net asset value.

31. He submitted that although the *closing price triggering event* did occur and that by letter dated 5 January 2018 the petitioner submitted a notice of redemption and requested payment of the redemption proceeds pursuant to this event, the matter was compromised on 23 January 2018 by the Waiver Letter.

32. By the terms of the Waiver Letter the petitioner waived its right to request early redemption of a substantial proportion of the redemption proceeds (HK $140million) in relation to the *closing price trigger event* under clause 1.1.11, subject to the satisfaction or waiver of certain conditions precedent. These included the completion of the redemption of participating shares in a principal amount of HK$60million and payment of the redemption proceeds by 21 February 2018 and the payment of the guaranteed return (accrued to 18 January 2018) by 15 February 2018.

33. The sums due pursuant to these conditions were in fact paid by the company on 12 March 2018 (the return for the first quarter in the sum of HK$7.5m), 13 April 2018 (HK $20m) and 8 August 2018 (HK$40m).

34. Therefore the sums were paid, albeit after the dates specified in the Waiver Letter. It is alleged by the company that this was the result of the petitioner's own actions (there is a conflict of evidence on this point[1]). In addition and significantly the stipulation as to timing was waived by the petitioner by accepting the late payments. The argument continues that the conditions precedent set out in the Waiver Letter were satisfied with the effect that the petitioner had waived its right to redemption pursuant to the *closing price triggering event* and it remained a shareholder.

35. On 2 October 2018 a further letter was sent by the petitioner to the company which Mr Smith QC submitted was clearly not intended to be and could not as a matter of law be a redemption request under the *anniversary triggering event* (clause 1.1.12). There were a number of reasons for this. It did not comply with the requirements for such a request. It referred to payment of the guaranteed return of 15% per annum which was only payable pursuant to the *closing price triggering event*. On its face it makes no reference to paragraph 1.1.12. It makes no reference to proceeds calculated by reference to the company's net asset value. The letter was sent on 2 October 2018 before the anniversary of the allotment and issue of the participating shares which occurred on 18 October 2018. Finally, it did not give the company the required 90 days prior written notice as required under 1.1.12. He submits that a better interpretation of it is that it is a reiteration of the earlier redemption notice of 5 January 2018. However, that had been compromised by the Waiver Letter.

36. The petitioner accepts at §25 of the Petition that the second request was not intended as a request pursuant to paragraph 1.1.12 of the Side Letter. On the petitioner's case, this is because its rights under the first redemption request remained in full force and effect by reason of the company's failure to satisfy the conditions precedent in the Waiver Letter. This is due to the fact that the company did not make the payments on the specified dates and both parties proceeded as if the late payments had not waived the petitioner's rights under clause 1.1.11.

37. Mr Goldring QC submits that this second request made objectively clear that the petitioner requested the company to redeem all the remaining shares on or before 18

[1] Dominick 1 § 34 and 36 and Liu 2 § 31-33

October 2018 in the sum of HK$145,250,000 (i.e.HK $140 million principal plus the fourth guaranteed return).

38. He submitted that the *anniversary triggering event* had occurred (albeit after the letter was sent) so that the petitioner had a right against the company to redeem from 18 October 2018 and it was clear from the contemporaneous communications that the company understood that the petitioner required redemption payments in respect of all of its remaining shares. He urged the Court to apply commercial considerations above technical legal arguments in order to uphold the expectations of reasonable commercial parties.

39. Mr Smith QC simply countered this on the basis that the 2 October 2018 letter was not a valid redemption request and so the communications which took place subsequently proceeded on a misconceived understanding and were to no effect.

40. Mr Smith QC put the waiver and affirmation case in the following way:

a) the petitioner waived as a matter of law any failures to satisfy the conditions precedent by the specified deadlines or affirmed the Waiver Letter, because payments from the company were accepted by the petitioner notwithstanding that they were late. This it is submitted is not consistent with the conduct of a party who wishes to rely on a breach to terminate the contract: see the *Brimnes [1975] QB 929 at pp 954 -956;*

b) the evidence shows that after the relevant dates for payment had passed the petitioner continued to press for payment. This demonstrates that the petitioner never gave up on payments being made pursuant to the Waiver Letter and strict compliance with the deadlines were not required. The petitioner then ultimately accepted payment of those amounts; and

c) by established legal principles there was an affirmation by the petitioner of the Waiver Letter. The petitioner cannot 'blow hot and cold' by at the same time accepting late payments due under a contract whilst purporting to retain the ability to terminate it and should be estopped from treating the Waiver Letter as not valid.

The law applicable to determination of the Petition

41. While the Court has a discretion as to whether to make a winding up order under section 95 of the Companies Law, generally an unpaid creditor of an insolvent company is entitled to an order *ex debito justitiae* in the normal course. However, where there is a question as to whether the petitioner is in fact a creditor at all which is genuinely arguable the relief may not be available.

42. Lord Hoffmann summarised the position as follows at §9 in *Parmalat [2008 CILR 202]* on appeal from the Cayman Islands Court of Appeal:

> *"If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor, first, to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order, even though there is a dispute: see, for example, Brinds Ltd. v Offshore Oil N.L.(no 2)."*

43. If the Court decides that the debt is actually disputed *bona fide* on substantial grounds it is still a matter for the Court's discretion as to whether nevertheless it would be in the interests of justice to determine the Petition. In such circumstances, for example where the petitioner would otherwise lose his remedy altogether or where other injustice to the petitioner might result, it could make a winding up order on the grounds that the company is unable to pay its debts and on a balance of probabilities the petitioner is a creditor of the company-see *In re GFN Corporation in the Cayman Islands Court of Appeal [2009 CILR 650] at* §94 per Vos JA.

44. I also bear in mind that an unwilling debtor may raise factual matters which cannot be easily determined without cross-examination in order to assert a defence and in such circumstances the Court should be astute to assess whether the defence put forward is genuine and of substance - see *Re A Company 6685 [1997] BCC 830 at §832 and 835* per Chadwick J as he then was.

Decision

45. It is not necessary for me to form a concluded view on the question of the disputed debt between the parties on this application because I have formed the view that I should accede to the request for an adjournment for the reasons I give below relating to the Hong Kong proceedings. It follows that this Court should not pre-empt with a reasoned decision the judgment of the Hong Kong Court.

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

47. Mr Goldring QC submitted these arguments are taken very late, are technical in nature and have been in some sense 'got up'. He also submitted that the process of redemption involving the administrator of the company has been ongoing for months and it was all too late at this stage to go behind that. There was effectively an agreed

procedure and it is not open to the company to disrupt it and ignore the commercial certainties that parties were entitled to expect.

48. There is however no contractual or other basis shown by the petitioner to prevent Mr Smith QC from raising the arguments he makes and as I have said they raise genuine and substantial issues relating to the petitioner's claimed entitlement to have redeemed its shares.

49. Although Mr Goldring QC made a valiant attempt to counter the company's arguments, in my judgment they remain genuinely arguable and have been properly taken by the company through Mr Smith QC, albeit late in the day. They have both factual and legal substance such that there is therefore a *bona fide* dispute on substantial grounds in relation to the redemption requests and the Waiver Letter.

50. Having formed this view it is not necessary for me to decide upon on Mr Smith QC's freestanding reason as to why the Petition should be dismissed, which concerns the allegation that the petitioner (through its lawyers) improperly wrote to the administrator before the time period had elapsed for advertising the Petition. I should record that the petitioner strongly rejects any suggestion that the letter was written to the company's administrator to put pressure on the company, or of any abuse of process, or indeed that there was any tactical approach designed to use the Hong Kong Court and/or this Court in an oppressive fashion.

The Hong Kong proceedings[2]

51. On 17 March 2019 the petitioner presented a Petition to wind up China Silver in the Hong Kong Court and has also, on 15 May 2019, petitioned for the bankruptcy of Mr Dominick. Both proceedings are based on the alleged liabilities of China Silver and Mr Dominick as guarantors of the company's alleged liability to the petitioner in respect of the claimed redemption proceeds. Both guarantees are governed by Hong Kong law.

52. The Hong Kong petitions were heard by the presiding Companies Court judge Mr Justice Harris on 27 September 2019. The guarantors subsequently have served summonses to strike out the Hong Kong proceeding which are due to be heard by Mr Justice Harris at a one-hour hearing scheduled for 19 March 2020.

53. Judgment has been reserved and one may properly infer that Mr Justice Harris intends to deal with the factual and legal issues in dispute between the parties in some detail in due course.

54. It is not known when Mr Justice Harris will hand down judgment. The hearing concluded almost five months ago.

[2] Described in the first affidavit of Ms Poon of Stephenson Harwood 13 January 2020

55. This Court has power to adjourn the Petition under section 95 (1) (b) of the Companies Law. The question is whether there are clear practical reasons as to why it would be appropriate to do so when balanced against the interests of the petitioner to have the Petition finally determined by this Court.

The law

56. There is a long line of authority expressing support for a litigant's choice to sue a defendant in a particular court or tribunal. In *Reichold [1999] CLC 486*, Moore Bick J held that the court's inherent power could be used to stay proceedings on case management grounds without interfering with the right of the plaintiffs to choose whom to sue or not to sue, stating at §491:

> *'...choosing whom to sue is one thing; choosing in what order to pursue proceedings against different defendants may be another, especially when two related sets of proceedings are being, or could be, pursued concurrently. In such a case the court itself has a greater interest, not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other."*

57. Proceedings were commenced first against the defendant financial institution in England. The plaintiffs then subsequently gave notice to arbitrate pursuant to a sale and purchase agreement governed by Norwegian law against the seller company in Norway. The defendant in England applied to stay the English proceedings until the completion of the arbitration in Norway.

58. Moore Bick J granted the defendant's application for a stay and rejected a submission by the plaintiffs that it would never be appropriate for a court to stay proceedings in England pending the outcome of proceedings against some other person in a foreign arbitration. It was a matter for the court's discretion.

59. In weighing the relevant factors, the judge held that the fact that the plaintiff had commenced proceedings in England as of right was an important factor against granting a stay, but the existence of concurrent proceedings in Norway would ordinarily be a powerful factor in favour of granting a stay. Overall considerations of cost and convenience and the interests of justice generally weighed heavily in favour of the grant of a stay. The English Court of Appeal rejected the appeal and approved the decision including the test that Moore Bick J applied which has subsequently been followed in a number of English cases: *Prifti [2006] Lloyd's Rep I. R. 221; Curtis [2008] 1 CLC 219* and most recently in *Bundeszentralamt [2019] EWHC 705 Ch.*

60. In the latter case Hildyard J granted a stay of an appeal against the rejection of a debt in insolvency proceedings before the English Court to avoid the risk of an inconsistent judgments emanating from associated proceedings in Germany in which a tax liability

underlying the proof of debt was at issue. Commenting upon the *Reichold* case Hildyard J said at §59:

> *"That decision was affirmed on appeal but with the caveat that since a claimant with a bona fide claim not tainted with abuse, oppression or any vexatious quality, is entitled to sue in England any defendant over whom the Court has jurisdiction, that entitlement should not be subject to any restriction greater than the interests of justice can properly justify, so that in the ordinary course stays would only be granted in "rare and compelling circumstances" (per Lord Bingham CJ at [2000]1 WLR 173 at 183H and 186 B-C.)"*

61. Hildyard J held that the risk of conflicting judgments "is *always capable of amounting to a very strong reason for granting a stay"* not just for reasons of judicial consistency but also because of practical difficulties which otherwise arise [§113-114].

62. These principles have also been applied in the Cayman Islands: *Re Sphinx [2009 CILR 28] and Algosaibi Bros. v Saad Investments Company Limited and others [2010(2) CILR 289][at § 104 to 120].*

Decision

63. It was argued by the petitioner that a creditor with various rights can proceed to pursue them as it wishes-see *China South Sea [1990] 1 AC 536 at § 545* per Lord Templeman. There was no package of rights agreed between the parties which placed any restriction as to who should be sued, where and in what order and so it was perfectly entitled to do so.

64. In this case it did so first in Hong Kong and then before receiving judgment, by issuing a Petition in this Court.

65. However, the Court has an interest in avoiding conflicting or undesirable outcomes for the reasons given in *Reichold* and retains control over its own procedure and retains a discretion to adjourn.

66. Mr Goldring QC submitted that a winding up order does not in itself determine a creditor's rights but is instead a mode of collective enforcement. As was made clear in *Parmalat* [2008] B.C.C. at §8, a winding up order put into effect a process of collective execution against the assets of the company for the benefit of all creditors. Therefore Mr Goldring QC submitted that whatever happens in Hong Kong, the question of whether the company should be wound up is a question that will have to be determined by this Court.

67. In my view there is an air of unreality about the distinctions sought to be drawn by Mr Goldring QC between the Hong Kong and Cayman Islands proceedings and their overlap. Even if any order made by the Hong Kong Court would not bind the company or this Court and/or the Petition was to proceed against the company in this Court in due course, it would be undesirable if the parties were faced with conflicting

judgments from different courts in respect of the same underlying issues on the same arguments, with similar evidence and similar law. Comity and cooperation is particularly important in the field of cross-border insolvency and in my view it would not be appropriate for this Court to proceed to a judgment on the disputed debt by determining the Petition before Mr Justice Harris has handed down judgment.

68. I have decided that the right course is to accede to the company's submission to adjourn because there is a risk of conflicting judgments if this Court were to proceed to determine the Petition in advance of the Hong Kong Court.

69. This is because the critical underlying issue as to whether the company is liable to the petitioner for the redemption proceeds as alleged is squarely before both Courts. In particular, questions relating to whether the conditions precedent were satisfied and the effect of the Waiver Letter as well as the effectiveness of the second redemption request are all in issue the Hong Kong proceedings. There is a concrete and identifiable overlap between the matters argued before me and those which were argued in Hong Kong before Mr Justice Harris. The argument of the guarantors relied upon the Waiver Letter which it was asserted remains valid as the conditions precedent were all either satisfied or waived. The argument was also made that the petitioner had waived breaches of the two conditions precedent and affirmed the Waiver Letter because, despite non-compliance with the dates of payment, it had accepted the sums of money paid under the Waiver Letter.

70. The guarantees secured obligations of the liabilities of the company under the subscription documents and the Side Letter. It follows that it is necessary to establish that the company has a liability under the subscription documents and the Side Letter before one can then proceed to the question of enforcing the security. The petitioner in the Hong Kong proceedings therefore relies upon establishing the liability of the company for the redemption proceeds pursuant to these documents. The same underlying factual and legal issues have been raised in the present Petition against the company and there are similar waiver arguments relying on the same documents and evidence. The Hong Kong Court has to deal with the '*bona fide* dispute on substantial grounds' question in relation to the Petition where I note from the written materials in the Hong Kong proceedings that Hong Kong law is not dissimilar to the law in the Cayman Islands.

71. There is of course a notable difference in that the company is the principal debtor in these proceedings, whereas in Hong Kong the proceedings concern the guarantors. As a result, it is true that the petitioner is seeking different relief against different parties in Hong Kong. The only relief sought in this Court is the winding up of the company. That is not sought in Hong Kong where a winding up order against China Silver and a bankruptcy order against Mr Dominick is sought. It is also the case that any order made by the Hong Kong Court would not bind the parties or the Court whether by *res judicata* or issue estoppel.

72. However, the underlying legal and factual questions remain the same with the consequent risk of inconsistent decisions on the main issues.

73. To proceed to determine the Petition in this Court would additionally expend further judicial resources when the same factual and legal questions are the subject of the judgment awaited in Hong Kong and which may as a practical matter dispose of the present proceedings. If this Court were to produce a judgment in advance of Mr Justice Harris, it would be likely that the parties will consider making further submissions to the Hong Kong Court.

74. Moreover, it seems to me to be relevant to consider the prejudice that the company would suffer in relation to parallel proceedings even though it is not a party to the Hong Kong proceedings. It is indirectly at risk of potential indemnity claims from the guarantors arising out of the Hong Kong proceedings. It is also directly subject to claims in this Court for a winding up order to be made.

75. The judgment of Mr Justice Harris is likely to have a bearing on the litigation between the parties both in the Cayman Islands and in Hong Kong and it would not be appropriate for this Court to determine and provide a reasoned judgment on the Petition in circumstances where there is a clear risk of inconsistent findings on the same issues.

76. All these factors point to an exercise of this Court's discretion to adjourn the Petition for what is likely to be a relatively short period of time, during which it is to be expected that the Hong Kong Court will hand down its judgment. Until such time the petition Petition will remain in place. Matters will remain under the control of the current management for a period but I have seen no evidence on this application that that would risk real prejudice to the petitioner.

HON. RAJ PARKER
JUDGE OF THE GRAND COURT