IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 161 of 2018 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

IN CHAMBERS

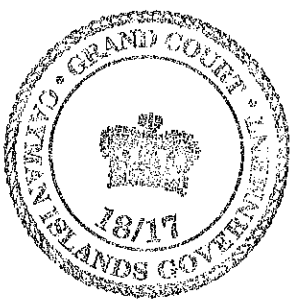
Appearances: Mr. Tom Lowe QC instructed by Ms. Gemma Lardner of Ogier for the Petitioner Tianrui (International) Holding Company Limited
Mr. Vernon Flynn QC instructed by Mr. James Eldridge and Mr. Adrian Davey of Maples and Calder for the Company China Shanshui Cement Group Limited

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **3 and 4 July 2019**

Draft Ruling Circulated: **3 September 2019**

Ruling Delivered: **12 September 2019**



HEADNOTE

Company Law - Contributory's Winding Up Petition on Just and Equitable Basis - section 94(1)(c) of the Companies Law (2018 Revision) - Application to Vary Validation Order entered by Consent, but which contained "liberty to apply" - Whether need for good grounds or change of circumstances or evidence that could not have been obtained at time of consent order - Reporting Obligation - Spending Cap - Relevance of such conditions not being usual in the Cayman Islands but usual in Hong Kong - Listed Company - Listed on Hong Kong Stock Exchange - Legal Fees

RULING

Introduction

1. Tianrui (International) Holding Company Limited ("**Tianrui**") in the latter part of last year, presented a petition to wind up China Shanshui Cement Group Limited (the

"**Company**") on the just and equitable ground (the "**Petition**") pursuant to section 94 (1) (c) of the ***Companies Law (2018 Revision)***.

2. The Company was incorporated in the Cayman Islands and was listed on the Hong Kong Stock Exchange (the "**SEHK**") in July 2008.

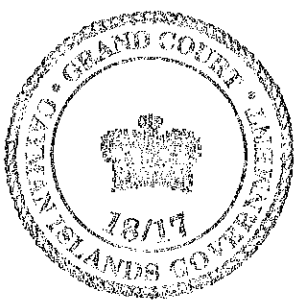
3. On 19 October 2018, I granted an application filed by the Company striking out the Winding Up Petition herein, the unreported judgment was delivered 19 October 2018. An appeal to the Court of Appeal (the "**CICA**") was allowed on 16 January 2019, and the Petition was ordered restored. The CICA's reasons for its decision were delivered 5 April 2019.

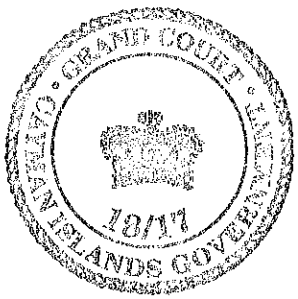
4. On 16 April 2019, the CICA refused the Company's application seeking leave to appeal to the Judicial Committee of the Privy Council. The CICA's reasons for that decision were delivered on 6 May 2019.

5. On 11 June 2019, the Company filed an application with the Privy Council seeking special leave to appeal. I am not aware whether that application has yet been listed for hearing.

6. On 29 March 2019, the Company filed a summons (the "**Validation Variation Summons**") seeking the following orders:

> "*1.Paragraphs 1, 2, 4, 6 and 7 of the Validation Order dated 11 October 2018 made in these proceedings be deleted and replaced as follows:*
>
> *(1) Payments made for the purpose of paying debts of the Company incurred in the ordinary course of its business from the date of the presentation of the Petition until judgment on the trial of the Petition and dispositions of the property of the Company sold in the ordinary course of business to its customers at full market price during such period aforesaid shall not be avoided by the provisions of section 99 of the Companies Law (2018 Revision) in the event of an order for the winding up of the Company being made on the Petition.*





(2) Without prejudice to the generality of paragraph 1 above, the payments set out in Schedules 2 and 3 of the Fourth Affirmation of Doris Wu shall be considered for the purpose of this Order to be dispositions in the ordinary course of the Company's business.

(3) The transfers of the shares in the Company held by the shareholders set out in Schedule 1 to the Fourth Affirmation of Doris Wu to HKSCC Nominees Limited shall not be avoided by the provisions of section 99 of the Companies Law in the event of an order for the winding up of the Company being made on the Petition.

2. *Paragraph 3 of the Original Order be renumbered paragraph 4 and the words "Without prejudice to the generality of paragraph 1 above and subject to paragraph 4 below" be deleted.*

3. *Paragraph 5 of the Original Order be varied and amended to read as follows: "Banks and third parties dealing with the Company shall be under no obligation to verify for themselves whether any transaction through the Company's bank accounts or with the Company is in the ordinary course of business."*

4. *Paragraphs 8 and 9 of the Original Order be renumbered accordingly.*

5. *The Petitioner pay the costs of this summons in any event, on the standard basis.*

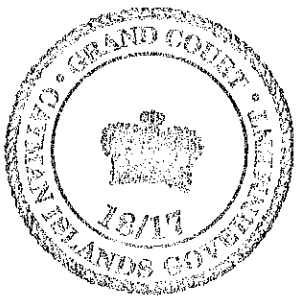
6. *...."*

The Validation Variation Summons

7. The Order that I made on 11 October 2018, was largely made by consent of the parties. The only aspect not agreed upon, and on which I had to rule, was whether certain undertakings which Tianrui had wished the Court to require of the Company should be attached. A draft Order had been handed to me by the parties, and I made the order in those terms, save for the undertakings sought by Tianrui.

8. The Order that I made was in the following terms:

"ORDER



UPON the summons filed 21st day of September 2018

UPON HEARING *Leading Counsel for China Shanshui Cement Group Ltd ("the Company") and Tianrui (International) Holding Company Limited (the "Petitioner")*

And *without prejudice to the Petitioner's position as to the validity of certain subscription agreements entered into by the Company on 31 August 2018 and 6 September 2018*

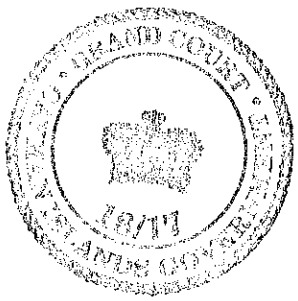
IT IS HEREBY ORDERED that:

1. *Subject to paragraph 4 hereof, notwithstanding the presentation of the Petition unless otherwise ordered by the Court, any payment or other disposition of property made on or after the date of the presentation of the Petition in the ordinary course of the business of the Company provided the total of such payments or dispositions do not exceed US$2 million in each calendar month shall not be void by virtue of section 99 of the Companies Law (2018 Revision).*

2. *Without prejudice to the generality of paragraph 1 above (but subject to the monthly limit stipulated therein and to paragraph 4 below), the following payments be sanctioned:*

    (a) Payments made into or out of the bank accounts of the Company maintained with:

        (i) Bank of China (Hong Kong) Limited (account numbers 012-875-0-039850-9 (HKD) and 012-875-0-801538-9(USD));



(ii) *ICBC Asia (account numbers 861-530-12743-0(USD) and 861-530-12743-0(RMB));*

and

(iii) *Far Eastern International Bank (account numbers 801-007-1000736-8 (HKD), 801-008-1000736-6(RMB), 801-031-1000736-6 (HKD) and 801-031-1000736-6(USD));*

In respect of expenses/payments occurred [sic] *in the ordinary course of business.*

(b) Payment by the Company of any and all legal bills for legal services rendered to the Company after the date of the presentation of the Petition.

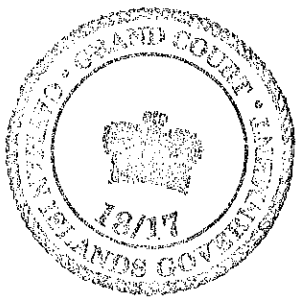
3. *Without prejudice to the generality of paragraph 1 above but subject to paragraph 4 below, the following payments be sanctioned:*

(a) Payment by the Company of any and all legal bills for legal services rendered to the Company prior to the date of presentation of the Petition in the amount of not more than HK$12 million; and

(b) Payment by the Company of the interest due on 10 September 2018 under the US$500 million 7.5% senior notes due in 2020 in the amount of US$18.75 million and future interest payments as they fall due.

4. *The Orders made at paragraphs 1-3 above shall not apply to any payment or disposition made:*

(a) Out of the proceeds received by the Company as a result of the issue of convertible bonds pursuant to the purported subscription agreement dated 30 August 2018 referred to in



*the announcement made by the Company on the website of the Stock Exchange of Hong Kong Limited dated 31 August 2018, which was purportedly completed on 3 September (the **"Disputed Subscription Agreement"**); or*

(b) In respect of any fees, expenses, commissions or other payments arising out of or in relation to the Disputed Subscription Agreement.

5. *Each bank named in paragraph 2(a) above shall be under no obligation to verify for itself whether any transaction through the Company's bank accounts held with it is in the ordinary course of business.*

6. *The Company shall provide to the Petitioner within five (5) clear working days of the end of October 2018 a schedule recording each payment in excess of HK$500,000 made in the ordinary course of its business and validated pursuant hereto from 31 August 2018 to 30 September 2018 and for each calendar month thereafter five (five) clear working days from the end of the calendar month ("**Schedule**").*

7. *The Petitioner be at liberty to inspect the documents supporting or evidencing the payments in the Schedule pursuant to paragraph 6 hereof on 5 clear working days' notice.*

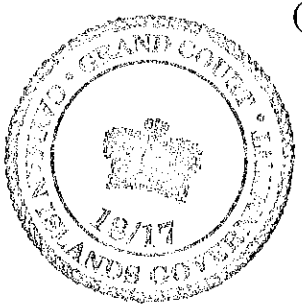
8. *There be liberty to apply.*

9. *The costs of this Summons be in the cause."*

9. I note that the Summons filed on behalf of the Company was in the same terms. In other words, the Order made 11 October 2018 was that which the Company sought.

10. Some of the variations sought by the Company entail the removal of:

(a) The current US$2 million cap on the payments and dispositions that are validated under the Validation Order per month (the "**Spending Cap**"); and



(b) The requirement that the Company provide Tianrui with a schedule every month which records the Company's payments in excess of HK$500,000 made in the ordinary course of business and validated pursuant to the Validation Order, with Tianrui being at liberty to inspect the documents supporting or evidencing the payments in the Schedule (the "**Reporting Obligation**").

11. The Company also seeks that the transfer of the shares in the Company held by the shareholders set out in Schedule 1 to the Fourth Affirmation of Doris Wu ("**Ms. Wu**") to HKSCC Nominees Limited shall not be avoided by the provisions of section 99 of the Companies Law in the event of an order for the winding up of the Company being made on the Petition.

12. Tianrui objects to these three variations. After the oral submissions by Mr. Lowe QC on behalf of Tianrui, I now understood that Tianrui objects in principle to a variation in the circumstances as they are, and also has objections to paragraph 1(2) of the Validation Variation Summons, which concerns legal and other professional fees.

The Company's Arguments

13. Mr. Flynn QC, who appeared for the Company, submitted that although the original Order may have been entered into by consent, that is nothing to the point, and that the Court should consider this as a fresh application. He submits that it is not in dispute that a new application would be made in due course, once the initial urgency of the situation had subsided. He indicated that, whilst Tianrui take the position that the Company must justify the variation, he does not accept that. However, he submits that if justification, for example a change in circumstances must be made out, then there are two changes. One is that the Hong Kong Petition is no longer in place. The other, is that it is the SEHK that has requested that the Company seek validation of the transfers on the CCASS system.

14. Mr. Flynn QC submits that Tianrui's objections are not justified in circumstances where the Company is solvent.

The Reporting Obligation

15. It was submitted that there is no basis for the imposition of the Reporting Obligation. Further, that nothing in section 99 of the ***Companies Law*** which contemplates imposing the Reporting Obligation on any company, let alone a solvent company that is the subject of a contributory's petition. As a matter of practice, the submission continues, the usual form of validation orders made in the Cayman Islands does not contain any Reporting Obligation, and neither do textbook precedents. Reference was made to *Atkins Court Forms, 2nd Edition,* volume 9(3) 2015 issue [305] at p.130-131.

16. It was submitted that the Reporting Obligation is also inconsistent with the rationale behind section 99. The jurisdiction to refuse to validate a disposition (or, in this case, to refuse a validation absent conditions such as the Reporting Condition), is designed to protect creditors and interested parties, including contributories, in the event of an insolvent liquidation.

Tianrui's allegations about the Company's financial position are irrelevant and misleading

17. Li Xuanqi is an authorized representative of the Petitioner. In Li 5 at paragraph [9], Tianrui seek to justify the retention of the Reporting Obligation on two bases: (a) the Company's auditors provided a qualified audit opinion for the financial year ended 31 December 2018; and (b) Tianrui is a "*significant creditor*" of the Company.

18. The Company claims that these allegations are both irrelevant and misleading. It was asserted that section 99 was not intended to afford a petitioner "*oversight*" over a company's finances before the merits of the petition are adjudicated and before a winding up order is even made. It was submitted that Tianrui's attempt to use the Reporting Obligation to obtain this oversight is an abuse of the Court's process.

19. The Company maintains that not only is it solvent, it is unquestionably profitable. It is one of the largest cement manufacturing businesses in Mainland China, with annual revenues in excess of US $2.62 billion. As at 31 December 2018, the Company had net assets of approximately US$1.424 billion and profit attributable to equity shareholders of approximately US$291.56 million.

20. It was submitted that Tianrui's allegations are misleading for a number of reasons. Reference was made to the fact that Tianrui relies on the qualified opinion issued by the Company's auditors for the financial year ended 2018 and claims that it justifies "*oversight*" of the Company's finances through the Reporting Obligation.

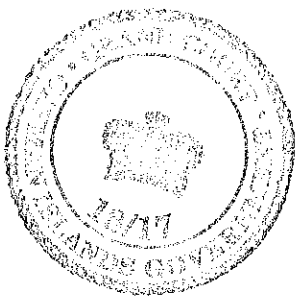
21. However, Mr. Flynn argues that Tianrui has failed to disclose that the qualified opinion for that year was a significant and positive improvement over other recent years, in particular when Tianrui controlled the Company.

The Reporting Obligation Gives Tianrui an Unfair Advantage

22. Another reason the Company advances for wanting the Reporting Obligation to be removed is that it gives Tianrui an unfair advantage in that it is allowed, albeit that it is an adverse party in legal proceedings in Cayman and in Hong Kong, to monitor the Company's legal expenditure in relation to those proceedings.

The Reporting Obligation has and will obstruct the Company's ordinary course of business

23. Mr. Flynn argues that, as a Company listed on the HKSE, the Company has statutory obligations, including obligations to:



(a) Avoid disseminating confidential information that is potentially price sensitive to some shareholders and market participants in preference to others;

(b) Ensure all users of the market have equal and simultaneous access to the same information;

(c) Disclose material price sensitive information promptly, subject to the safe harbor provisions under the listing rules. The safe harbor provisions permit the Company to withhold disclosure of confidential information under specified circumstances, such as where there is an incomplete proposal or negotiation. Learned Counsel opines that such provisions are often used by listed companies in Hong Kong to withhold disclosure of sensitive information regarding ongoing deals and negotiations, to avoid jeopardizing the legitimate commercial and strategic interests in keeping such information confidential until such deals are closer to completion or confirmed.

24. It was submitted that any information disclosed by the Company to Tianrui pursuant to the Reporting Obligation would no longer be confidential. The safe harbour provisions would therefore not apply, and the Company may then be required to disclose the same information in an announcement to the market.

25. Ms Wu is an Executive director of the Company, responsible for day-to-day operations. In oral submissions, reference was made by Mr. Flynn to Ms. Wu's evidence at paragraphs 67-69 of Wu 4, in support of his submissions set out at paragraphs 23 and 24 above.

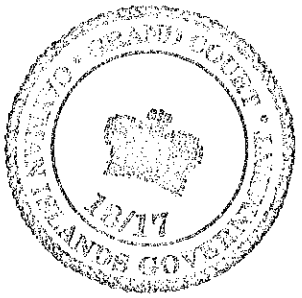
26. Reference was also made to Wu 5, at paragraph 24. It was argued that these are serious concerns for the Company and Tianrui does not deny that the Reporting Obligation has and will create such difficulties for the Company. Mr. Flynn indicates that Tianrui's only response is to ask why the Reporting Obligation is "common practice" in Hong Kong if it is such a burden on Hong Kong-listed companies.

27. Firstly, the Company says that it is not clear that the Reporting Obligation is common practice in Hong Kong insofar as listed companies are concerned. The Company indicates that it has not been able to locate a reported judgment where the Hong Kong courts imposed the Reporting Obligation on a listed company.

28. Secondly, as explained in Wu 4, at the time that the Company agreed to the inclusion of the Reporting Obligation in the Validation Order, the Company was under tremendous commercial pressure. Even though the Company was solvent, it was unable to pay its most basic operating costs, including employee salaries and rent, because its bank accounts were frozen.

29. In Wu 4 at paragraph 9, Ms. Wu refers to a letter written to Tanner De Witt, lawyers in Hong Kong who act for the Petitioner, from Herbert Smith Freehills, lawyers in Hong Kong who act for the Company. The letter is dated 10 September 2018, and it expressly referred to a "*Draft Consent Summons*", and states as follows:

> "*Draft Consent Summons*



As an interim measure to ensure that the Company can run its business without undue disruption, and in order to obtain a validation order crucial to its ability to meet debts as they now fall due, the Company agrees to the terms of your new paragraph 3(a) and (b). However, it reserves the right to apply to court to delete these restrictions in future. The Company will set out its reasons for such application as and when it is made..."

30. At paragraph 38 of Lu 4, Ms. Lu states as follows:

> *"38. The terms of the validation orders that the Company applied for in the Grand Court and the High Court followed the usual form for Hong Kong Winding Up Petitions, and included the Spending Cap and the Reporting Obligation. ...the Company was prepared to agree to the Spending Cap and Reporting Obligation on the basis that the validation orders would only be interim in nature, that these were required as a common practice in Hong Kong, and that the Petition in any event would be struck out shortly."*

31. The Company takes the position that in the circumstances there is nothing to preclude it from now seeking to remove the Reporting Obligation, and for the Court to assess the request afresh.

32. It was also pointed out by the Company that the Reporting Obligation was negotiated in the context of Tianrui seeking the appointment of Joint Provisional Liquidators ("**JPLs**") over the Company. Tianrui withdrew its appeal against my dismissal of that Summons.

The Spending Cap

33. Mr. Flynn submitted that the Spending Cap is an arbitrary limit on the validation of the Company's payments and dispositions in its ordinary course of business. Tianrui avers that the Company is solvent and has not identified any way in which the Company or its shareholders will be prejudiced by the removal of the Spending Cap.

34. Further, Mr. Flynn submitted that in the Cayman Islands, spending caps are not ordinarily included in validation orders involving solvent companies. He argues that the longstanding practice is to validate payments and dispositions made in the ordinary course of a company's business, without any cap.

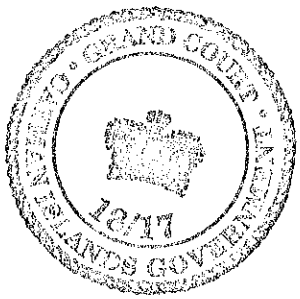
35. It was submitted that the Spending Cap has, and will cause injury to the Company. The Company is the ultimate holding company and the listed company of the Group, with the Company's principal business involving raising capital, either by borrowing money or issuing bonds or shares on behalf of the Group when required from time to time at rates which are more economical than generally available to Mainland Chinese businesses (particularly where there is a need to borrow in US Dollars).

36. It was argued that the Company often has to raise very large amounts of capital on fairly short notice in order to support the Group. Further, the Spending Cap severely restricts the flexibility that the Company requires to operate its business and that it is not feasible for the Company to urgently apply to vary the Validation Order every time the Company needs to incur an expenditure in excess of a rigid Spending Cap set many months earlier.

The Transfer of Legal Title in the Company's Shares to HKSCC Should Be Validated

37. It was submitted that the rationale of section 99 does not apply on the facts. Learned Counsel argues that the purpose of section 99, which is virtually identical to section 127 of the 1986 UK Insolvency Act, is to prevent shareholders from evading liability as contributories by transferring their shares to a man of straw after winding up has commenced. Reference was made to the work of *Armour and Bennett,* ***Vulnerable Transactions in Corporate Insolvency***, paragraph 8.44, where it is stated:

> *"In a compulsory winding up the liquidator has a duty to settle a list of contributories and a power (delegated to him by the court)* ***to make calls on those contributories to the extent of their liability****. By prohibiting any transfer of the company's shares or alteration to the register of members after the commencement of winding up,* ***section 127 eases that task. The liquidator can be confident that members whose names were on the***



register at the commencement of the winding up should be entered on the list of contributories. *If shares are transferred after the commencement of the winding up, as a result of section 127, the transferee is not entitled to be entered on the register of members.* ***The transferor remains liable for any call and is entitled to participate in any surplus assets.*** *However, it appears that a post-petition transfer is only void as regards any effect to be given to it by or against the company with the consequence that the rights and liabilities of the transferor and transferee inter se are not affected."*

(Learned Counsel's emphasis)

38. The Company therefore argued that the mischief that section 99 is intended to address simply does not arise here. Firstly, because it is accepted that there will be a surplus for distribution to the Company's shareholders if it is wound up. Thus, there is no concern that the Definitive Shareholders will seek to evade their liability as contributories by transferring legal title in their shares.

39. Secondly, the entire share capital is fully paid up, including the Definitive Shareholders' shares. Even if the Company was being wound up for insolvency (which it is not) there are no contributions due from shareholders.

40. Reference was made to the speech of Lord Millett in the House of Lord's decision in ***Commissioners of Inland Revenue v Laird Group plc***[2003] 1 W.L.R. 2476 AT [32], where His Lordship explained :

> *"...*[I]*t is only the right to transfer legal title to the shares which is affected;* ***shareholders remain free to deal with the beneficial interest in their shares.*** *The purpose of making the legal title to the shares non-transferable is merely to freeze the company's register of members at the date of the winding up so that the liquidator can safely deal with the shareholders whose names appear on the register at that date."*
>
> (Learned Counsel's emphasis)

41. Mr. Flynn submitted that the point in bold is significant, as it underscores the point that nothing in section 99 prevents shareholders who have **not** deposited their shares in CCASS from transferring their beneficial interest off-CCASS. He submitted that the question before this Court is not whether the Definitive Shareholders may transfer their beneficial interest. They may. The only question is whether they should be permitted to do so on the SEHK, or if they are forced to do so only outside the HKSE-sanctioned system.

42. The submission continues that CCASS is an electronic system which facilitates the clearing and settling of trades on the SEHK.

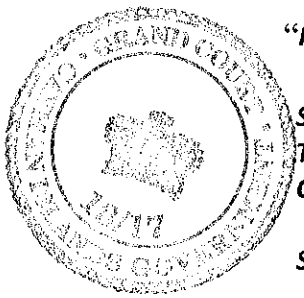
43. Shareholders of SEHK-listed companies can deposit their shares into CCASS by (a) transferring legal title to their shares to HKSCC Nominees Limited, which acts as the common nominee for shares held in CCASS; and (b) delivering their physical share certificates to CCASS. Thereafter, CCASS will permit the beneficial interest in such shares to be bought and sold through its computerized order matching system, which matches the prices of buying and selling orders, with CCASS acting as the central clearing counterparty.

44. It was submitted that section 99 does not affect the trading of shares on the CCASS system-because it does not prevent the transfer of beneficial interest between buyers and sellers. Similarly, it is argued, that notwithstanding the filing of the Petition, nothing in section 99 prevents HKSCC from being registered as legal owner of the Company's shares, and allowing trades on CCASS. Furthermore, it was argued, that the transfer of legal title from a shareholder to HKSCC as nominee does not run afoul of section 99's rationale, since the Company's shares are fully paid up, and so there is no concern that the Definitive Shareholders are seeking to evade liability as contributories by transferring their legal title to HKSCC.

45. Mr. Flynn QC explains in his written submission that here, the only reason why a validation is sought is because CCASS has indicated that it would like the Cayman courts to validate the transfer of legal title in shares held in physical form by shareholders to HKSCC, before it accepts the deposit of share certificates.

46. In oral submissions Mr. Flynn QC took the Court to emails exchanged between Peter Chan, Assistant Vice President/Depository & Nominee Services/Clearing Division of the Hong Kong Stock Exchanges and Clearing Limited, and George Lau of Freshfields, Hong Kong lawyers for the Company, which took place, along with several telephone conversations. After one such conversation, Mr. Lau on 21 March 2019, emailed Mr. Chan to confirm what Mr. Chan had said in a telephone conversation. On 27 March 2019, Mr. Chan then emailed Mr. Lau in response, and inserted his answers into the body of Mr Lau's email, which was resent back to Mr. Lau, with answers inserted.

47. This is the exchange:



"***From:*** *Peter Chan <PeteChan@hkex.com.hk*

Sent: *27 March 2019 10:56*
To: *LAU, George*
Cc: *Angeline Lee; LI, Phillip (PQL); CHAN, Yong Wei; CHOONG, John (JJHC); WONG, Jonathan*
Subject: *RE: Shanshui Cement – Depository of Shares (#691)*

Dear George,

Please find our answers to your questions below but kindly note that we are not in a position to advise on any legal-related issues.

Best regards,

Peter Chan *| Assistance Vice President | Depository & Nominee Services | Clearing Division*
Hong Kong Exchanges and Clearing Limited

D *+852 2211 6267 |* ***W:*** *www.hkexgroup.com | www.hkex.com.hk*
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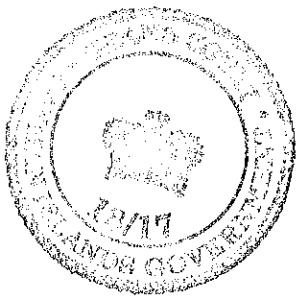
HKEX

From: *George.LAU@freshfields.com [mailto: George.LAU@freshfields.com]*
Sent: *21 March 2019 11:38*
To: *Peter Chan*
Cc: *Angeline Lee; Phillip.LI@freshfields.com; YongWei.Chan@freshfields.com; john.choong@freshfields.com; jonathan.wong@freshfields.com*
Subject: RE: Shanshui Cement – Depository of shares



WARNING: External Email, please exercise caution.

Dear Peter,

Thank you for your time over the call on Tuesday.

As discussed, we understand from you that:

- *As a winding-up petition has been presented in the Cayman Islands against China Shanshui Cement Group Limited (the "Company"), Hong Kong Securities Clearing Company Limited ("HKSCC") has suspended deposits of physical share certificates of the Company into CCASS.* ***[Peter Chan]*** *This is factually correct.*

- *Accordingly, CCASS currently will not allow shareholders of the Company who hold their shares in the form of physical share certificates (the "Physical Shareholders") to deposit their shares with CCASS and to use CCASS' services, including the clearance and settlement of share transfers. These services remain available to the Company's shareholders who deposited their shares into CCASS before the presentation of the winding-up petition, or acquired their shares on the Exchange* ***[Peter Chan].*** *This is factually correct.*

- *While the winding-up petition remains in force, CCASS requires a validation order to be obtained by the company from the Cayman Court, validating deposits of shares by the Physical Shareholders, before it will process deposits of shares held by the Physical Shareholders.* ***[Peter Chan]*** *This is generally correct subject to the content of the validation order.*

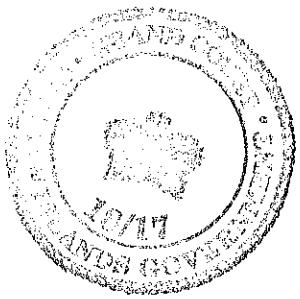
Grateful if you could confirm our understanding.

Kind regards
George"

48. Eighteen shareholders (the Definitive Shareholders) have informed the Company that they wish to have their physical shares deposited into CCASS. The Company informs that these shares represent 42.96% of the Company's issued share capital. After excluding the shares of substantial shareholders, the public float which can be traded on CCASS will increase by 470%, from about 5.86% to about 27.74%.

49. The Company has indicated that the Company's shares are highly illiquid. Evidence was provided by the Affirmation of Philippe Espinasse dated 19 June 2019. Mr. Espinasse

gave expert evidence on behalf of the Company. His instructions were outlined in paragraph 20 of his Affirmation, to be:



> *"... to consider the importance of liquidity to a listed company and to describe how the liquidity of a listed company is assessed. I have also been instructed to assess the liquidity of Shanshui's shares, including by reference to its peer group, and explain any differences between Shanshui's liquidity and that of its peer group. I have also been asked to explain the implications of any lack of liquidity on a listed company such as Shanshui. Lastly, I have been instructed to discuss if and how shareholders whose shares are not deposited in the Central Clearing and Settlement System used by the SEHK ("**CCASS**") may trade their shares, as well as their position relative to shareholders whose shares have been deposited with CCASS, from a financial perspective."*

50. Mr. Espinasse's evidence, at paragraphs 65, 66 68-71, 90-111, was relied upon to make the points that follow in paragraphs 51-56 (inclusive) below.

51. The illiquid nature of the shares is clear from the following:

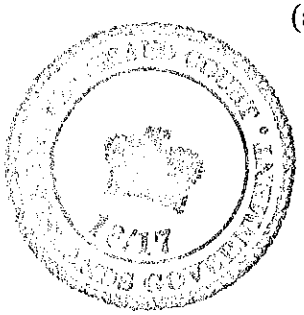
(a) The average daily trading volume (i.e. the average number of shares traded per day) ("**ADTV**") of the Company is US$178,500, which is "*unreasonably illiquid*", bearing in mind the Company's market capitalisation is more than U.S. $1.5 billion.

(b) By way of comparison, the Company's ADTV is 79 times lower than the average cement company listed on the SEHK (and 91 times lower if one excludes Tianrui, whose own shares are relatively illiquid). The ratio of the Company's 30-day ADTV to its market share capitalization is also 19 times less than the average cement company listed on the SEHK (and 22 times less if one excludes Tianrui).

52. The Company's shares were not always illiquid. Between 2014 and early 2015, 20-30 million shares of the Company were traded daily; on some days, more than 60 million shares were traded per day, hitting a peak of 104 million shares traded on 18 July 2014.

53. If the same volume of shares were currently being traded, the Company's ADTV would be 112-168 times higher than it currently is. This shows that the Company has the potential to achieve higher liquidity, if the CCASS-tradable free float is restored.

54. The current illiquidity of the Company's shares is having significant adverse effects on the Company:



(a) First, it has an adverse effect on the Company's share price. The Company's unreasonably low liquidity, induced by the fact that a large proportion of its shares cannot be traded on-exchange, is, at least in part, depressing the Company's share price and, therefore, its market valuation. This is evidenced by the Company's price/earnings ratio being a mere 4.1 times, more than 49% lower than the average for other SEHK-listed cement companies, which is 8.1.

(b) Second, market research analysts are not prepared to cover the Company, unlike its peers. The consequences of limited market research coverage is that this creates a vicious circle and has a compounding effect on trading volume and share prices: under-researched stocks are often hardly or not traded at all. Effectively, over time, they can become 'orphan stocks'.

(c) Third, the illiquidity of the Company's shares will make it difficult for the Company to raise significant capital from the equity markets in the future.

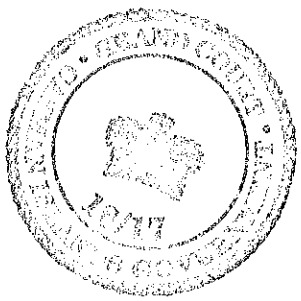
55. The inability of the Definitive Shareholders to deposit their shares with CCASS unfairly shuts them out from the SEHK's own clearing and settlement system.

56. In law and in fact, shareholders who have not deposited their shares in CCASS may still buy and sell the beneficial interest in their shares. However, it effectively obliges them, should they be willing to seek potential buyers for their shares, to do so outside the most established and obvious platform that exists to execute such transactions, that is, the SEHK.

57. The Company submits that validation will assist in addressing the issues of illiquidity and discrimination.

58. Reference is further made by the Company to its repeated refrain that Tianrui is using section 99 to obtain a *de facto* injunction.

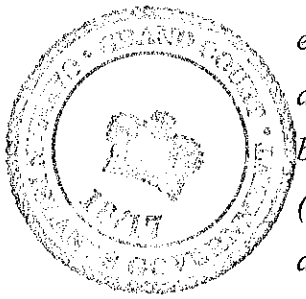
59. Reference was also made to sections 329 (**"Section 329"**) and section 311 (**"Section 311"**) of the Hong Kong Securities and Futures Ordinance. These sections, it is submitted, provide an established procedure for the Company, and for substantial shareholders, to investigate the ultimate beneficial owners of the Company's shares (including shares held on CCASS). Reference was made to Tianrui's own expert Mr. Stephen Birkett where he explains at paragraph 40 of his First Affidavit sworn 5 June 2019, as follows:



> *"A listed issuer does have a statutory right to investigate ownership of interests in its securities, and shareholders holding 10% or more of its voting paid-up capital can require it to exercise that right (s. 331SFO). In summary, s.329 entitles the issuer to require any person whom it knows or has reasonable cause to believe to be-or to have been in the last three years interested in its shares (for example, a broker or its nominee), including subscription rights: (a) to confirm such fact or to indicate whether it is the case; and (b) if so, to give particulars of the person's interest in those shares currently or during the last three years, any other person's concurrent interest (so far as the person knows) at those times, and the identity (so far as is known) of the person who succeeded to that interest so far as is known."*

60. Mr. Flynn QC submitted that section 331 covers shares held both on-and off-CCASS. CCASS registration, he argues, does not blunt the effectiveness of this instrument.

61. It is averred that by a letter dated 21 June 2019, Tianrui sought to use this very mechanism. It wrote to the Company stating that it required the Company to issue an investigation notice as regards the ownership of the shares held by certain members of the Company, including ACC, CNBM and the Definitive Shareholders. The letter stated:



"The grounds for reasonably requiring the section 329 powers to be exercised are that, as a member of the Company, our client is concerned about who are the true owners of the Company (by which we mean the beneficial owners with actual economic interest in the shares) and if the (members in respect of which the investigation notice is to be issued] (or any two or more of them) are connected or controlled by the same entity or group of entities... Please note that if the Company does not comply with a requisition made pursuant to section 331 of the ordinance, the Company and every officer of it who is in default commits an offence."

62. Lastly, the Company argues that the argument that the Court has no jurisdiction to order a section 329 addressee to provide an answer is hopeless. Section 334 of the Securities and Futures Ordinance, which Mr. Birkett refers to in his affidavit, provides that a person who does not comply with a notification to provide information under section 329, or who makes a false, misleading or reckless statement in response to such a notification, commits an offence and is liable to be fined and imprisoned. It was submitted that that is therefore an incentive to comply.

Tianrui's Arguments in Relation to the Validation Variation Summons

63. Mr. Lowe QC, on behalf of Tianrui, makes the point that the relief granted in the original Validation Order was consistent with the relief sought by the Company in its summons for validation relief dated 21 September 2018 (including in respect of the Spending Cap and Reporting Obligation).

64. He indicates in his written submissions that *"Despite the serious deficiencies in the Company's evidence, acknowledging the passage of time since the Original Order was granted and the general principles applicable to the granting of validation orders on a just and equitable winding up petition, the Petitioner does not object to the Validation Order sought, save in respect of three narrow parts.."*

65. These are:

(a) The removal of the Reporting Obligation;

(b) The removal of the Spending Cap; and

(c) The CCASS Validation.

66. It had also been indicated that the Petitioner has no objection to the Court validating the Ordinary Course of Business Payments. Nor is Tianrui objecting to the payments made in respect of the 2020 Notes (Schedule 3 to Wu 4), though it does not consider those repayments to be in the ordinary course of business.

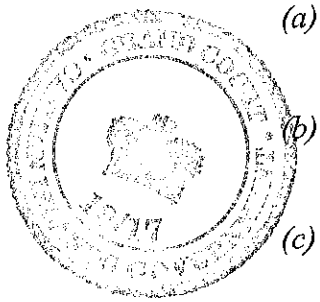
67. However, in oral submissions, Mr. Lowe QC now indicated that, other than the three issues discussed in paragraph 65 above, Tianrui objects to the matters dealt with in Schedule 2, involving legal and other professional fees. He submitted that legal fees are not objectionable per se, but that, when one reads the evidence carefully, one can see that what is being suggested is that these fees are, expressly in part, at least, to pay the costs of defending the Petition and to defend the Company against Tianrui. Mr. Lowe QC reminded me that Tianrui alleges breaches of fiduciary duty in the Petition, and he submitted at one point that these expenses should not be validated for either the past or the future. Learned Counsel submitted that ACC and CNMB should be the ones to pay these costs.

68. Reference was made to two English cases, which it was submitted depart from the decision of Lord Hoffman in ***Re a company (No 005685 of 1988), ex parte Schwarcz and another*** [1989] BCLC 424. The cases referred to were ***Re a Company No. 4502 of 1988, ex parte Johnson*** [1991] BCC 234, and ***Re Hydrosan Ltd*** [1991] BCC 19.

69. Also in oral submissions, Mr. Lowe now submitted that *"Liberty to apply"* in the Validation Order is not a license to re-write the Order. It was submitted by Mr. Lowe that in order for the Court to remove the Reporting Obligation and Spending Cap previously ordered by consent, good grounds have to be shown. Reference was made to the leading case of ***Chanel Ltd. v FW Woolworth & Co. Ltd*** [1981] 1 W.L.R. 485, and to ***John Richardson Computers Ltd. v Flanders & Anor*** [1992] Ch. D. 391.

70. Reference was made in the written submissions to the decision of the Cayman Islands Court of Appeal in ***In the Matter of Torchlight Fund LP*** [2018] 1 CILR 290, at

paragraph 18, where it was confirmed that, in essence an applicant must, in the case of a solvent company, satisfy four requirements before being entitled to a validation order:



(a) *"The proposed disposition must appear to be within the powers of the directors;*

(b) *The evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company;*

(c) *It must appear that in reaching the decision to make the disposition the directors have acted in good faith (the burden of establishing bad faith being on the party opposing the application).*

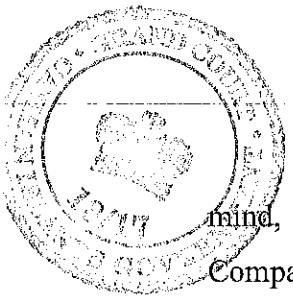
(d) *The reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold."*

71. It was submitted that, in order to satisfy these four elements, *"there must be a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable director, having only the best interest of the company in mind, might endorse." per Henderson J in* ***In the Matter of Fortuna Development Corporation*** [2004-05] CILR 533.

72. Reference was also made to the decision of Smellie CJ in ***In the Matter of Cyberfest Fund*** [2006] CILR 80, at paragraph 29, where a supplementary consideration was proffered as follows:

> *"There is another consideration to add to the list, in the light of the concerns raised in this matter, although arguably it is subsumed within the third and fourth elements. This would be whether the irregularities in the conduct of the affairs of the company can be shown, even if the company is clearly solvent, as is alleged here."*

73. Thus, learned Counsel submits that, notwithstanding that the Company is solvent, it must nevertheless provide the Court with a body of evidence which, viewed objectively, establishes that the decision to make the disposition in question is one which an intelligent and honest reasonable director, having only the best interest of the company in



mind, would in good faith consider is necessary and expedient in the interests of the Company. It was submitted that no such body of evidence has been submitted by the Company in support of the Removal of the Reporting Obligation or Spending Cap.

74. Mr. Lowe also has pointed out a number of pieces of correspondence that led up to the Validation Order being settled in the terms in which it was agreed.

VALIDATION POSITION

Reporting Obligation

75. The Reporting Obligation under the Original Validation Order requires the Company to report payments made in excess of HK$500,000 to the Petitioner, and to provide supporting documents for inspection within 5 working days' notice. This requirement was put in place by this Court with the consent of both parties.

76. It is common ground that the Company is solvent. Nonetheless, there are and have been serious questions as to the financial situation of the Company due to on-going financial irregularities. These, Tianrui contends, warranted the Reporting Obligation in the first instance. Notwithstanding the Company's arguments that these issues are merely historical, they have not been resolved to the satisfaction of the Company's auditors. This is demonstrated by (among other things) the statement at page 109 of the Annual Report, which revealed that the Company's auditors were only able to provide a qualified audit opinion for the financial year ending on 31 December 2018, and continued to hold "s*ignificant doubts regarding the group's ability to continue as a going concern*".

77. Ms. Wu's complaints with the Reporting Obligation to which the Company agreed are based primarily on the proposition that such reporting requirements, while accepted as common practice in Hong Kong, are not common practice in the Cayman Islands. This evidence should be disregarded because it is largely inadmissible, and in relation to certain aspects, scandalous. Mr. Lowe Q.C addressed some of Ms. Wu's arguments without prejudice to that submission.

78. It was submitted that by itself, Ms. Wu's reasons are not a reasonable basis for removal of the Reporting Obligation, particularly where:

(a) the Company consented to the Reporting Obligation and has not demonstrated in its extensive evidence in support of the Validation Order that the reporting requirement has in fact restricted its ability to operate.

(b) the Company is listed on SEHK. On the Company's own evidence, a reporting requirement is common in Hong Kong winding up proceedings and therefore consistent with the expectations of many of the Company's Hong Kong based shareholders. As such, there is no reason why the Court should not, in its discretion, allow the Reporting Obligation to continue, solely on the basis that it is not "common practice" locally.

Spending Cap

79. The Company contends that the Spending Cap is interfering with the conduct of the ordinary course of its business and should therefore be removed entirely. However, based on the concerns and irregularities in the conduct of the affairs of the Company, raised by the Annual Report, Tianrui submits that it would not be rational to allow unlimited spending.

80. Moreover, the Company has already consented to the Spending Cap as a reasonable safeguard to protect the shareholders of the Company, pending determination of the Petition. The current circumstances of the Company warrant retention of this protective measure and the Company should provide concrete reasons for departing from the position reached by consent. It has failed to do so.

81. Mr. Lowe QC indicates that Tianrui has already said it is willing to consider an increase of the Spending Cap to a reasonable operative amount, to alleviate any issues that the Company may be experiencing with the existing Spending Cap of US$2 million. However, to date, the Company has not presented a budget or suggested an alternative workable Spending Cap. Should the Company present such a workable Spending Cap to account for reasonable expenses anticipated in its budget and cash flow forecasts, then the Spending Cap could be increased accordingly.

82. The suggestion from Ms. Wu is that it is impossible for the Company to estimate its monthly expenses is said by Mr. Lowe to be fundamentally inconsistent with the reality of modern listed companies, which are required to prepare and maintain cash flow forecasts and budgets. It is also inconsistent with her evidence elsewhere that expenses such as outstanding coupon payments and advisor fees are due imminently, contrary to her suggestion that future payments were "unpredictable" and incapable of estimation. That evidence of itself should, the argument continues, give this Court concern about lifting the Spending Cap.

CCASS Validation

83. During oral submissions, Mr. Lowe acknowledged that this aspect of the Company's application to do with CCASS properly falls to be dealt with under the "*liberty to apply*" provision in the Validation Order.

84. Tianrui states that by its request for CCASS Validation, the Company seeks validation of the transfer of more than 1.8 billion of its shares to CCASS, by depositing the share certificates with CCASS and transferring the legal ownership from the shareholders listed at Schedule 1 of Wu 4, to HKSCC.

85. Mr. Lowe argues that the Company has failed to establish that the transfer of all those shares to the CCASS system is either necessary or expedient in the interests of the Company, or that the decision is one which a reasonable honest and intelligent director would make. It was submitted that it will cause serious and irreversible consequences if it occurs.

86. Whereas in a creditors' winding up it is payment of funds from the insolvent estate which will prejudice the outcome of the petition, here it would be the impossibility of unwinding the improper and dilutive share issue if the Petition is upheld.

87. In a just and equitable winding up petition, validation of payments is normally granted for solvent companies because there is no prejudice. The payment of debts may still be challenged if those payments were improper notwithstanding validation – reference was made to ***Torchlight.***

88. In contrast, the consequences of the CCASS share deposits are, in practice, irreversible. Reference was made to the First Affidavit of Scott Birkett, a Senior Consultant at Morrison & Foerster based in Hong Kong, sworn on 5 June 2019. He is an Attorney at law who has practiced law in Hong Kong for over 25 years, and specializes in capital markets advisory and transactional matters, including regulatory issues. At paragraph 9 of his affidavit, Mr. Birkett indicates that he was instructed by Ogier, counsel for Tianrui, to provide an independent opinion on matters relating to CCASS.

89. Mr. Lowe QC opines that Birkett 1 provides a detailed analysis of the workings of CCASS but the key point from Mr. Birkett's evidence is in reality a plain one; as soon as dealings take place in CCASS, it is on the footing that in all practical senses a transfer cannot be invalidated. As a result, a transferee of any of the Definitive Shareholders' shares in CCASS would have a defence to any claim by a liquidator to unwind those transfers (to the extent such a transferee could be even identified), and the transactions would be beyond the reach of the liquidators.

90. It was submitted that the Company has failed to challenge Birkett 1 with its own expert evidence. Notably, while the Company instructed its own expert for the hearing, he submits that Espinasse 1 mounts no challenge to Mr. Birkett's evidence whatsoever.

91. Mr. Lowe QC argues that Ms. Wu does try to challenge parts of Mr. Birkett's evidence. He says however, that she has completely misread the law. He submits that this Court should ignore her hearsay legal opinions in their entirety. At paragraphs 68 – 69 of Wu 5, Ms. Wu "*understands*" that section 45 of the Securities and Futures Ordinance ("SFO") will not apply in the present case, because the winding up order the Petitioner seeks is not on the basis of the Company being insolvent. Mr. Lowe says that is simply incorrect.

92. Reference was made to Birkett 1 at paragraph 43. It is contended that Mr. Birkett explains that section 45 of the SFO (through the operation of section 54 of the SFO) appears applicable to a foreign insolvency or winding up, and places CCASS transactions outside the power of a liquidator.

93. At paragraphs 43, 44, and 49-51 (inclusive), Mr. Birkett gives evidence as follows:

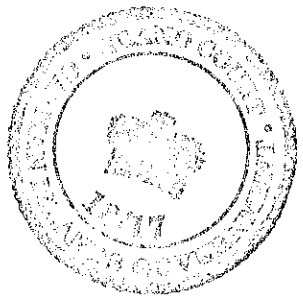
"43. As regards CCASS, section 45 of the SFO expressly overrides the Hong Kong law of winding up and insolvency in relation to certain transactions and proceedings within 'recognised clearing houses', including HKSCC, and section 54 operates to extend this to non-Hong Kong winding up and insolvency statutes. Although the main legislative intent of section 45 of the SFO was to protect the netting and settlement operations of CCASS from insolvency rules that would otherwise apply on the Insolvency of Broker Participants, its drafting appears applicable to the laws relating to distribution of assets on the winding up or insolvency of any person, including a listed issuer of securities deposited in CCASS (A similar provision included in a later Ordinance governing certain money payment systems, including CHATS, is limited to winding up and bankruptcy of participants in those systems, but the SFO contains no such limitation). The section's effect is to exclude such transactions and proceedings from the application of such laws, and from the powers of liquidators, managers and receivers thereunder.

44. Section 45 of the SFO provides as follows:

"45. Proceedings of recognized clearing house take precedence over law of insolvency:

(1) None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to distribution of the assets of a person on insolvency, bankruptcy or winding up, or on the appointment of a receiver over any assets of a person-

(a) a market contract;



(b) the rules of a recognized clearing house relating to the settlement of a market contract;

(c) Any proceedings or other action taken under the rules of a recognized clearing house relating to the settlement of a market contract;

(d) A market change;

(e) the provision of market capital;

(f) the default rules of a recognized clearing house, or

(g) any default proceedings.

(2) The powers of a relevant office-holder in his capacity as such, and the powers of a court acting under the law of insolvency, shall not be exercised in such a way as to prevent or interfere with-

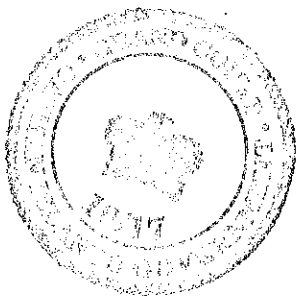
(a) the settlement in accordance with the rules of a recognized clearing house of a market contract; or

(b) any default proceedings.

(3) Subsection (2) shall not operate to prevent a relevant office-holder from recovering an amount under section 51 after the completion of a matter referred to in paragraph (a) or (b) of that subsection."

.....

...CONCLUSION



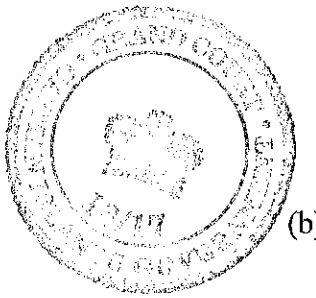
49. *In summary, CCASS is an electronic book-entry clearing and settlement system for the public stock market in Hong Kong, established to permit share settlement in Participants' securities accounts without physical movement of share certificates, to increase efficiency and reduce costs and counterparty risk. The practical effect of depositing Eligible Securities into CCASS is to transfer the legal title to HKSCC or its nominee (HKSCC Nominees Limited), without conferring any proprietary interest. The issuer is not able through CCASS to obtain details of Participants' underlying clients and their interests, nor to trace the path of particular shares through a sequence of dealings in CCASS. HKSCC will disclose to the issuer the amounts of Participants' holdings, but treats them as principals and does not recognize the interests of clients or third parties.*

50. *A listed issuer does have a statutory right to investigate ownership of interests in its securities, and shareholders with sufficient votes can require it to exercise that right. However, this investigation power does not enable the issuer to unwind transactions in its shares, but only to identify interests in them. Moreover, it is time consuming, costly and retrospective, and particularly hard to pursue where owners are outside Hong Kong.*

51. *There are strong statutory finality protections in place for settlement of trades in CCASS. This structure has been established to provide certainty and reduce risk for market participants, and is based on the fungibility of an issuer's securities of the same class, and the interposition of a central counterparty in the clearing mechanics. Together, these elements do appear to be effective in preventing a Participant or issuer, or a liquidator or either of them, from reopening or reversing a sale or purchase of the issuer's shares through CCASS once it has been settled."*

94. It was argued that CCASS Validation therefore strikes at the heart of the dispute between Tianrui and the Company for the following reasons:

(a) CCASS Validation would allow CNBM and ACC and their related parties to play a shell game with the beneficial ownership of their shares in the Company by virtue of the anonymity of the new shareholders and the cloak which CCASS Validation would give to future collusive dealings in the shares.



(b) One of Tianrui's main complaints in the Petition is that ACC and CNBM have (amongst other things) used their control over the Company's board to issue shares to parties with whom they had voting arrangements, including certain of the Definitive Shareholders. That Tianrui has repeatedly sought disclosure of this information for almost a year (along with Ms. Wu's admission that the Company has no intention of ever disclosing this information), must of itself now bolster Tianrui's argument for this Court refusing the CCASS Validation.

95. Consistent with the principles discussed in the case law set out, the Court should only validate transactions if there is a body of evidence to establish that management's decision is being made only in the best interests of the Company, as contemplated in ***Fortuna.*** There is no such body of evidence before the Court that could satisfy it that depositing the Definitive Shareholders' shares into CCASS would be an action that a reasonable director would take, taking into account only the best interests of the Company.

96. Learned Counsel contends that Espinasse 1 does not assist the Company at all. Whilst Mr. Espinasse gives a detailed treatise on the effects of illiquidity, it was submitted that he is fundamentally unable to address the cause of it. By his own admission, Mr. Espinasse is not an expert in the building and construction sector, and he did not conduct a detailed financial analysis of the Company "*in the limited time available.*" Absent any detailed financial analysis and the requisite industry knowledge, Mr. Espinasse cannot now make the impermissible leap to place the blame for the Company's illiquidity at CCASS's door. This is more, Mr Lowe QC argues, given that Mr. Espinasse has completely failed to consider other matters that may impact on liquidity; for example, a

winding up petition against the Company, and a well-publicised battle for control of the Company over several years between major players in the PRC cement industry.

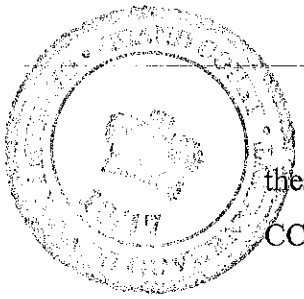
97. Rather than being an attempt to address the Company's liquidity issues, Tianrui submits that the CCASS Validation has been sought for ulterior motives. Beneficial ownership of the Definitive Shareholders' shares and the validity of the Convertible Bond transactions are central issues in the Petition. They will need to be determined in these proceedings. Section 99 of the Companies Law has been put in place to protect stake holders in scenarios such as this. If the Definitive Shareholders were permitted by the Court to transfer their shares into CCASS and trade their shares without transparency, the Court would be facilitating the very acts complained of in these proceedings, (e.g establishing an opaque consortium of voting arrangements).

98. It was submitted that Ms. Wu has not provided in support of her evidence any of the complaints the Company claims to have received from shareholders, which allegedly triggered the need for the CCASS Validation application. Since she knows that the true identity of these shareholders is a central issue, her failure to provide these complaints is, Learned Counsel characterizes, remarkable.

99. In an attempt to suggest that the CCASS Validation is in the best interest of the Company, Ms. Wu has claimed that the CCASS Validation is required to avoid "*discrimination*" amongst shareholders. Mr. Lowe submits that this contention is entirely unsupported by the evidence.

100. Mr. Lowe, however, agreed that the case law such as ***Commissioner of Inland Revenue v Laird Group*** indicates that the shareholders are free to deal with the beneficial interest in their shares. He helpfully referred the Court to the recent decision of the English Supreme Court in ***Akers v Samba Financial Group*** (SC(E)) [2017] AC 424 which confirms that view.

101. As the Company has not established that the CCASS Validation is being sought only in the best interest of the Company, the submission continues, and it is quite conspicuously being brought for ulterior purposes that are incompatible with the just determination of



these proceedings, Tianrui respectfully submits that the Court must decline to approve the CCASS Validation.

DISCUSSION AND ANALYSIS

102. This is a very interesting situation, where essentially all of the terms were agreed between the parties. However, I am of the view that the Company did make it clear that they reserved the right to apply to vary the Order, though the letter referred to in paragraph 29 above, did not expressly refer to the Reporting Obligation or Spending Cap; it references something else.

103. I am not aware of any practice in the Cayman Islands of inserting Reporting Obligations or Spending Caps in relation to solvent, much-less listed companies. However, that cannot be a determinative factor, particularly against the backdrop of a consensual position having been arrived at. In my view, as argued by Mr. Lowe Q.C, the Court should examine the Reporting Obligation, and the Spending Cap, and the rationale behind each of them, to see whether they have utility in the particular circumstances of this case.

104. It seems plain to me that the existence of the Hong Kong Petition and the impending application by Tianrui for the appointment of JPLs did loom large in relation to the agreement to include the Reporting Obligation and Spending Cap. I am also of the view that both parties appeared to be under the misapprehension that Reporting Obligations were generally imposed on solvent listed companies in Hong Kong, or alternatively, gave no particular thought to the fact that the Company is a listed Company.

105. It is in my view obviously not just happenstance that neither Tianrui nor the Company can find any decisions (or indeed, Orders), to do with Listed Companies. Indeed, the only authorities that Tianrui has produced have not been examples in relation to companies listed on the SEHK.

106. However, in the correspondence between the parties, I have taken note of a letter from the Company's lawyers, Herbert Smith Freehills, to Tianrui's lawyers, Tanner de Witt, dated 13 September 2018, where the Company was proposing changes to the Validation Order proposed for Hong Kong, to allow for the restriction on the CB proceeds to be

lifted. That letter does seem to me to suggest that the Company agreed to the Reporting Obligation, indeed, appear to have accepted it as a part of what they needed to do to secure Tianrui having a less adversarial approach, and in order to alleviate the concerns it may have. There was reference to a decision of Harris J in ***Re Emagist*** [2012] 5 HKLRD 703 at [7]. That reference was made in the context of asking Tianrui to agree the proposed amendment, and was obviously not proposing to interfere with the Reporting Obligation contained in the Proposed Validation Order attached to the consent summons which had been endorsed by Tianrui's lawyers.

107. Here is the passage in the letter that I consider relevant:

> "....
>
> ***Amended Validation Order***
>
> *In view of the matters set out above, we propose that the restriction on the CB Proceeds be lifted in respect of the proceeds of the August CBs only and enclose for your review an amended version of the Proposed Validation Order (the "Amended Validation Order").*
>
> *As you know, the August CBs were issued and completed before the presentation of your client's winding up petitions in the Cayman Islands and in Hong Kong. Any argument that a validation order is required in respect of the August CBs must therefore be bound to fail. Accordingly, irrespective of your client's unsubstantiated view that the transaction is "highly questionable", there is no sensible or legal basis on which your client could argue, in the context of an application for a validation order, that the Company should be restricted from using the proceeds of that fund raising.*
>
> *Our client's position is also that no validation order is required in respect of the September CBs. Accordingly, it is not necessary for the purposes of this application to provide the Court, or your client, with the information requested at paragraphs (a) to (c) of page 2 of your first letter dated 7 September 2018.*

We also take this opportunity to remind you of Mr. Justice Harris' comments in Re Emagist [2012] 5 HKLRD 703 at [7]:

> *"In my view a petitioning contributory should not approach an application for a validation order on the basis that there is an adversarial application before the Court. I would expect normally for a petitioning contributory that it is not only normal but necessary for a company to obtain a validation order and that it would only be if the shareholder has specific concerns which he can support by credible evidence that he should actively contest any part of the application. I appreciate that in practice where the relationship between shareholders has reached such a stage that a petition has been issued it is likely that there will be suspicions on the part of a petitioner about the way in which those in charge of the company are conducting its affairs, but such a shareholder needs to be advised that this in itself does not justify trying to turn what should be a straightforward application into something more adversarial and complicated than is necessary. A practical way of alleviating the concerns of a petitioning shareholder may be by doing, as the company has agreed in the present case, to provide a regular summary to the petitioning shareholder of the expenses that are being paid by the company.""*

108. Additionally, I do think that the reasoning in ***Chanel Ltd. v FW Woolworth & Co. Ltd*** and in ***John Richardson Computers Ltd. v Flanders & Anor*** cited by Tianrui, is apposite.

109. ***Chanel*** was a case concerned with an action by the plaintiffs for breach of trademarks and for passing-off. A motion by the plaintiffs for interlocutory relief was stood over until trial by consent on undertakings by the defendants until judgment or further order, amongst other matters, not to deal in goods bearing the plaintiffs' marks which were not the plaintiffs' goods. In October 1979 the Court of Appeal of England and Wales, in deciding a similar case, the ***Revlon*** case, held that every company in a group of multinational companies must be taken to have consented to the use by other companies in the group of a trade mark which had become distinctive of products of the group as a whole.

110. The second defendants applied to be discharged from their undertakings on the basis that the change in the law, based on the Court of Appeal decision, and of recently obtained evidence suggesting the existence of a group structure embracing the plaintiffs and the foreign suppliers of the goods complained of, the plaintiffs had no reasonable prospect of obtaining at the trial the relief in the nature of that afforded by the undertakings.

111. The judge at first instance, Foster J, refused to discharge the undertakings, dismissing the motion. He refused the motion on two grounds: (1) that the order, being a consent order, had contractual effect and could not be set aside unless there were grounds which would justify the setting of it aside as a contract; and (2) that the evidence was insufficient to establish that the case was covered by the Court of Appeal decision. The Court of Appeal refused leave to appeal.

112. At pages 492B - 493B, Buckley L.J. stated:

> *"The defendants have submitted that the consent order, or rather the undertakings associated with it, was only to bind them until judgment or further order in the meantime. The plaintiffs contend that their motion was stood over until the trial in consideration of the undertakings, and that the defendants are contractually bound by it until the trial unless grounds are adduced for rescinding or modifying it which would be effective grounds for rescinding or modifying a contract. I shall assume in the plaintiffs' favour, as I think is probably the case, that the consent order has contractual force between the parties. Nevertheless, it was a term of that contract that the undertakings should only bind the defendants until judgment or further order in the meantime.*
>
> *In my judgment, an order or an undertaking to the court expressed to be until further order by implication gives a right to the party bound by the order or undertaking to apply to the court to have the order or undertaking discharged or modified if good grounds for doing so are shown. Such an application is not an application to set aside or modify any contract implicit in the order or undertaking. It is an application in*

accordance with such contract, being an exercise of a right reserved by the contract to the party bound by the terms of the order or undertaking. Accordingly, with deference to Foster J., I take a different view from that which he took on his first ground for rejecting the defendants' application. When the motion for an injunction came before the judge inter partes, the defendants did not seek any adjournment to permit them to put in evidence in answer to the plaintiffs' evidence. They might then have asked for a sufficiently long adjournment to permit them to make the company searches which they made in May, and possibly to search for corroborative evidence in the form of advertising material and so forth, to build up a case for saying that a relevant group structure existed in this case. They did not do so....

The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."

(My emphasis)

113. In the ***John Richardson Computers*** case, which was a breach of copyright case, the parties reached an agreement that took the form of a consent order containing undertakings to the court by the defendants and a schedule of contractual terms, with "liberty to apply". The defendants applied to be released from the undertakings. Mr. M. Hart Q.C., sitting as a deputy High Court Judge discussed the ***Chanel*** case and the principals involved, in this way:

"Knox J's order was expressed to be until trial or further order and both parties were given liberty to apply. However it is clear on the authorities,

and the defendants concede, that these features do not entitle it to apply to discharge that order on the grounds that it should not have been made in the first place or that their consent to it was based on a miscalculation as to its practical effect. The leading case is ***Chanel****.... which established that an order obtained until trial or further order could be the subject of an application to discharge even though it was made by consent. The contract between the parties was no bar to an application to discharge even though it was made by consent. The contract between the parties was no bar to such an application since the contract itself envisaged the possibility of such an application being made. Nevertheless, the court held that the right to make such an application was conditioned by the need for such an applicant to show "good grounds for doing so.....*

The case [***Chanel***] *is therefore direct authority for the proposition that the possession of evidence which could have been obtained and adduced on the earlier occasion but was not, is not a ground justifying an exercise of the right to apply for discharge. It is also authority, albeit obiter, for the proposition that the only grounds which would justify such an application are either a significant change of circumstances or the possession of evidence which the applicant could not reasonably have had available to him on the earlier occasion. Subsequent authorities have illustrated the effect of the principle and have cast some light on what is meant by "change of circumstances". In Pet Plan Limited v Protect –A-Pet Limited [1988] F.S.R. 34 the Court of Appeal, in rejecting an application to discharge, indicated what might constitute good grounds, and I quote from the judgment of Nicholls L.J. page 40:*

> *"What are good grounds would depend on all the circumstances of the case, including the circumstances in which the undertakings were given or the order was made and the evident purpose for which the undertakings were given and the order was made. " In a later passage he says "I can envisage a case in which, although an undertaking by a defendant is expressed to be given until trial or further order in the meantime, the terms of the undertaking and the circumstances in which it was given are such as to make it evident*

that the undertaking was only intended to be a temporary holding operation until the defendant has an opportunity to prepare his defence with a view to the matter then being restored for full argument.""

114. As indicated in ***Chanel***, in making this application, the Company is exercising a right reserved under the contract represented by the Consent Validation Order where liberty to apply was agreed. However, the Company would have to show good grounds for the Court to discharge the Reporting Obligation or the Spending Obligation.

115. Mr. Flynn referred me to the 1999 ***Supreme Court Practice*** 29/1A/33 where it is stated:

> *"....*
>
> *Where an interlocutory injunction has been granted following an inter partes hearing, there is no jurisdictional bar to the Court hearing an application by the enjoined party to discharge it. Such an application may be made where there is liberty to apply (e.g. Raindrop Data System Limited [1988] F.S.R.354), or where the sole basis of the application for discharge is that there has been a material change of circumstances since the injunction was first granted (i.e. a crucial new factual development), or where it has become apparent that it is founded on an erroneous view of the law (e.g. Regent Oil Co. Ltd. v J.T. Leavesley (Lichfield Ltd [1966] 1 W.L.R.1210;) aliter if the defendant voluntarily gives an undertaking, Chanel Ltd. v F.W. Woolworth & Co. Ltd.... But generally the Court will not hear an application to discharge an injunction made after a full inter partes hearing where it appears that justice between the parties can as readily be achieved by his pursuing the right to appeal (London Underground Ltd. v National Union of Railwaymen (No.2)[1989] I.R.L.R.343)."*

116. Having looked at the matter closely, it does seem to me, that even though proceeding under the *"liberty to apply"* may encompass wider grounds than a change in circumstance in relation to interlocutory injunctions, where one is dealing with a consent

order containing the term "*liberty to apply*", good grounds must be shown. As stated in ***Chanel***, even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position. In my judgment, the discontinuance of the Hong Kong Petition is not a sufficiently significant circumstance or good ground to support the removal of the Reporting Obligation agreed to between the parties, when regard is had to all of the circumstances, including the apparent reasons for agreeing to this condition i.e. to assuage the concerns of Tianrui.

117. The fact that the Company miscalculated the practical effects of the Validation Order are not a sound basis for discharging the aspects of the Validation Order which they seek to have discharged.

118. As regards, the Reporting Obligation, I was initially concerned about the matters that the Company raised regarding disclosure of confidential information and the safe harbour provisions of the Hong Kong Securities and Futures Ordinance. In other words, I was concerned about the reasonableness of the Company's directors asking for the removal of the Reporting Obligation. However, when the terms of the Reporting Obligation are examined closely, it is readily seen that it requires the Company to report to Tianrui after the fact of payments made in excess of HK$500,000.00 in respect of transactions within the ordinary course of business. The Reporting Obligation does not permit Tianrui to know of any confidential information or to stop the Company, without more, from making these payments. Thus, it seems to me that the safe harbour provisions are not engaged, nor is the Company put in any jeopardy in relation to them or other regulatory provisions, by the Reporting Obligation.

119. As regards the Spending Cap, I think that the fact that the Company is a holding Company is important when looking at what really is its ordinary course of business. It is difficult to see without specific and solid evidence, how the Spending Cap which it freely entered into will have the severely adverse effect which has been described in Ms. Wu's

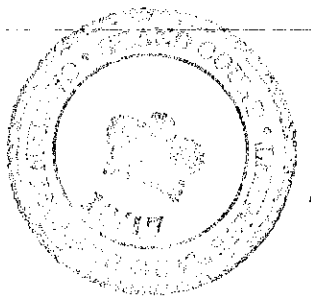
evidence. In addition, I have looked at the Annual Report, and the details of the Qualified Opinion of the Auditors for the financial year ending 31 December 2018. No matter the history, or who was in charge of the Company at any given earlier time, the analysis of the Auditors, including the comment that they hold *"significant doubts regarding the group's ability to continue as a going concern"*, do persuade me to take the view that there would be merit in maintaining the Spending Cap, separate from the fact that good grounds for removing it have not been demonstrated. However, Tainrui had offered to have the Spending Cap increased if a budget or alternative workable Spending Cap could be provided by the Company. I would encourage the parties to agree if at all possible, and in short order, an increased Spending Cap before finalizing the Order arising out of this Ruling.

CCASS

120. Mr. Lowe has indicated that this aspect of the application to vary does in his view fall within the "*liberty to apply*" section of the Validation Order. In that regard it is useful to look at the guiding authorities in relation to Validation Orders.

121. It is useful to look at the analysis conducted by Slade J in ***In re Burton & Deakin Ltd.*** W.L.R.390. At page 397A - 398A, Slade J elucidated the issues in relation to the weight to be attached to the opposition of a contributory to an application for validation in the case of an admittedly solvent company as follows:

> *"As Mr. Stubbs pointed out, the responsibility of managing the business of the company is entrusted in its articles of association to its directors. At least so long as a winding up petition has not been presented, the court will not generally, save in the case of proven bad faith or other exceptional circumstances, interfere with the exercise of the discretion conferred on the directors by a company's articles of association at the instance of a shareholder. Thus, if before the presentation of a petition a shareholder were to come to the court in an attempt to restrain a particular disposition of the company's property contemplated by the*



board of directors and falling within their powers, he would not generally succeed, unless he could prove bad faith or other exceptional circumstances. He would not be able, merely by adducing prima facie grounds for criticizing the wisdom or beneficial nature of a particular transaction, to place upon the company or its board of directors the onus of justifying the proposed disposition by detailed evidence.

I can see no good reason why the rights of interference by a shareholder vis-à-vis the company or its directors should, in this kind of situation, for practical purposes be drastically improved during the interim period, merely because he happens to have presented a winding up petition which is not demurrable and which has not yet been heard. The interim period may be quite a long one. In the present case, from what I have been told, it looks like between three and six months. In a case such as the present, the court, at the time when the application under section 227 comes before it generally has not sufficient evidential material to enable it properly to form even a prima facie view as to whether the petition itself is ultimately likely to succeed or fail. It must therefore necessarily assume that the petition is at least as likely to fail as it is to succeed. Indeed, in the case of many contributories' petitions-of which this is one-the primary relief sought by the petitioners is an order under section 210 that other persons be ordered to purchase their shares at a stated price, a winding up order being sought only as a second alternative-so that, if the primary relief were granted, the petitioner would in any event have had no interest in the intended dispositions at all.

Taking all these considerations into account and in the absence of any authority demonstrating the contrary, I thus reach these conclusions on the question of principle raised by the present application. If on an application under section 227 relating to a solvent company, (a) evidence is placed before the court showing that the directors consider that a particular disposition, falling within their powers under the company's constitution, is necessary or expedient in the interests of the company, and

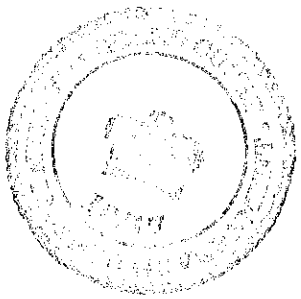
(b) the reasons given for this opinion are reasons which the court considers that an intelligent and honest man could reasonably hold, it will in the exercise of its discretion normally sanction the disposition, notwithstanding the opposition of a contributory, unless the contributory adduces compelling evidence proving that the disposition is in fact likely to injure the company. A fortiori in my judgment the court will be inclined to exercise its discretion in this manner in a case such as the present, where the primary relief sought by the petition is an order under section 210 that the other shareholders be ordered to purchase the shares at a stated price.

While I have attempted to formulate these statements of principle so as to explain the basis upon which I decide this particular case, I should nevertheless make it clear that they are intended merely as broad guidelines. No limits are placed by the sections on the court's discretion to grant or refuse an application under section 227, and such a discretion will of course be exercised in every instance having regard to the particular circumstances of the case." (My emphasis)

122. See also the judgment of McMillan J in ***Torchlight*** quoted at paragraph 49 of the CICA judgment, where McMillan J reminded himself of the interlocutory nature of the proceedings and the role of the Court.

123. I have also turned to one of the leading authorities in this jurisdiction, ***In the Matter of Fortuna Development Corporation*** [2004-05 CILR 533], where Henderson J in his usual concise and illuminating style (at paragraphs 5 – 10) pinpoints the considerations. At paragraph 5, Henderson J stated:

> *"5. Thus, there are four elements which must be established before an applicant is entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Secondly, the evidence must show that the directors believe the disposition is necessary or*



expedient in the interests of the company. There is no dispute here that the directors do have that belief. Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be the ones which an intelligent and honest director could reasonably hold."

124. Then at the continuation hearing, after more evidence had been filed and disclosed by the company in keeping with the Judge's directions discussed above, having examined the supplemental evidence, at paragraphs 16 and 17 of the judgment, Henderson J went on to state:

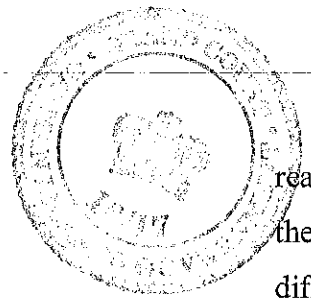
> *"16. I am not called upon here to answer the question "Is this in the best interests of the company?" or even "Is this a reasonable decision?" The question is a narrow one. Might an intelligent and honest director acting reasonably come to such a conclusion? I find for the reasons given in Ms. Tsien's affidavit that he or she might. The decision has been demonstrated to fall within the realm of reasonableness. The applicant will therefore be granted a validation order.*
>
> *17. In opposing the application, Mr. Jones argued that, if the order should go, I should require the company to keep roughly 90% of its cash on hand in a collateral account tied up until further order of the court. In effect, this is a request for a Mareva injunction. Made in the course of a validation proceeding, which throws up entirely different issues for consideration, I must find that it is inappropriate. It would not be right, in my view, to grant what amounts to a Mareva injunction without Dr. Chen having put the company on notice of his application and satisfied the criteria necessary to obtaining that relief. The validation order will issue without any conditions."*

125. In my judgment, it is highly relevant that it is only the right to transfer legal title that is affected by section 99. That is agreed on all sides, and see ***Commissioners of Inland Revenue v Laird Group plc*** and ***Akers***. The shareholders remain free to deal with the beneficial interest in their shares.

126. One of the principles that I derive from the decision in ***Fortuna*** is that the type of solid evidence that the Court needs to see must depend upon the nature and type of transaction in respect of which validation is sought. As ***Burton and Deakin*** reminds, the articles of association of a company entrust the management of the business of a company to its directors. Thus, upon a winding up petition being filed in relation to a solvent company, "*it is not only normal but necessary for a company to obtain a validation order and that it would only be if the shareholder has specific concerns which he can support by credible evidence that he should actively contest any part of the application.*" - see the statement of Harris J in the ***Emagist*** HK decision referred to in paragraph 107 above.

127. In my judgment, it is quite important that it is the SEHK that has sought for the Company to make this application. This is one of the reasons that the Company advanced for making this application, along with requests from the Definitive Shareholders regarding the deposit of their physical shares in CCASS. The Company just as recently as 31 October 2018 was able to have trading in its shares resumed on the SEHK, which both the Company and Tianrui consider a positive development. The Company also advanced that the illiquidity of the Company's shares has had a significant adverse effect on the Company. This is because the illiquidity affects the Company's share price adversely. In addition, it maintains that the illiquidity will make it difficult for the Company to raise significant capital from the equity markets in the future.

128. In my judgment there is an abundance of evidence and reasons (paragraph 127 above) that the Company has provided, which, viewed objectively, indicate that the Directors consider that it is necessary and expedient to seek the validation order. In my judgment the reasons are reasons which an intelligent and honest director could reasonably hold in good faith and obviously have a clear commercial basis. It is rational as well as



reasonable that the Company would wish to bring down the illiquidity of its shares, and the Company being a holding Company, would have good reasons in wanting to reduce difficulties, such as illiquidity, lying in the way of its raising required capital in the equity markets in the future. In my view, it is not possible or necessary for the Court at this stage to delve deeper into what are complicated questions as to precisely what are the causes of this illiquidity; the fact of the matter is that the directors have approached the Court to validate a type of transaction which in my view clears the bar and ought to be validated.

129. The evidence of Tianrui including Mr. Birkett is as to the facility with which changes in beneficial ownership of the shares can be effected and the anonymity of the new shareholders and *"the cloak which CCASS Validation would give to future collusive dealings in the shares"*. However, it is common ground by the experts on both sides that CCASS is a computerized system, which handles the process of matching buyers and sellers, and the Definitive Shareholders cannot choose who their shares are sold to. It is also common ground that section 99 does not affect the ability of shareholders to deal with the beneficial interest in their shares. The shareholders could therefore deal with the beneficial interest off market. As a matter of law, shareholders who have not deposited their shares in CCASS may still sell the beneficial interest in their shares off market. I also accept the Company's submission that the transfer of legal title from a shareholder to HKSCC is as nominee and does not run afoul of the rationale of section 99, since the shares of the Definitive Shareholders are fully paid-up. The burden is on Tianrui to demonstrate and unless it adduces *"compelling evidence proving that the disposition is in fact likely to injure the company"* (***Burton v Deakin*),** the Court will be inclined to exercise its discretion provided the evidence from the Company fulfills the requirements (the bar not being a high one) (My emphasis). Tianrui has not discharged the burden. Its allegations about being unable to trace beneficial ownership relate to its alleged claim, which of course at this point, remains a matter of assertions. In my judgment, Tianrui has not provided any compelling evidence that the transfers to allow for trading on CCASS is detrimental to the Company as a whole.

130. As ***Burton v Deakin*** reminds, in the case of a solvent company, a shareholder should not merely because he happens to have presented a winding up petition which is not

demurrable and which has not yet been heard, get some greatly improved position from which to attack the decisions taken by the directors of the company which they say are taken in good faith and in the best interests of the Company. The consideration discussed in ***Cybervest*** does not arise here, or at least at this stage since the Court is not in a position at this stage to say and has not sufficient evidential material to enable it properly to form even a prima facie view as to whether the petition itself is ultimately likely to succeed or fail. I must therefore necessarily assume that the petition is at least as likely to fail as it is to succeed – ***Burton v Deakin***. In ***Cybervest,*** the facts were, in my view, distinguishable – see paragraphs 32 – 34 of the judgment. In the instant case, I am not, on the state of the evidence before me, able to say that irregularities in the conduct of the Company have been "*shown*".

131. Also as contemplated in ***Burton v Deakin***, the interim period may be quite a long one. Between the different interlocutory applications that are pending in the Financial Services Division and the pending application to the Privy Council for special leave, this Petition is likely to take a long time to come on for hearing.

132. In my judgment, it is appropriate to grant the relief sought by the Company in relation to CCASS - paragraph 1.3 of the Validation Variation Summons.

Legal and Other Professional Fees

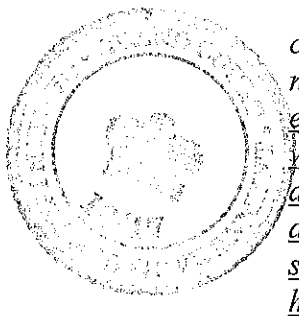
133. In my view, Tianrui has taken a somewhat confusing position on this issue. Firstly, it appears to have agreed it had no objection to the matters stated in Schedule 2 to Wu 4. Indeed, in Li 5, at paragraphs 8 and 9, it was expressly stated that there were only the three issues identified earlier in this judgment and the professional and other fees set out in Schedule 2 were not being objected to. I can understand Mr. Flynn saying that this took the Company by surprise.

134. It is also in my view plain that none of the cases cited by Tianrui assert, much less demonstrate, that Lord Hoffman was wrong in his decision in ***Re a Company, ex parte Schwarcz*** [1989] BCLC 424, and the position as to legal and other fees is fully covered by that case's analysis. In both of the cases cited by Tianrui, i.e. ***Re a Company, ex parte***

Johnson, and ***Re Hydrosan*** the Company was only a nominal Defendant, whereas in this case that is not the approach taken in the instant case by Tianrui.

135. However, even in a case where the company is a nominal defendant, that does not mean that the Company cannot get an order validating the fees spent in defending the Petition. At page 425e - 425d .... Hoffman J discussed the issues as follows:

> "*.....What is said by the petitioning creditors is that this is in substance a dispute between the shareholders and that in principle it is wrong for the company's money to be spent on litigation between the shareholders.*
>
> *I accept that general principle, though the company is and has to be a formal party to the proceedings. An order is sought against the company that it should buy certain shares, and it is of course concerned with the validity of the reregistration resolution.*
>
> *Counsel who appeared for the company and the majority shareholders (Mr Kosmin), asked that the provisos be limited to make it clear that they were excluding only the expenditure of the company's money on the costs of the individuals involved in the litigation or the costs of the proposed management buy-out company, but no so as to exclude the company's own costs. Counsel for the petitioners (Mr Heslop QC) objected that that qualification of the provisos would in effect make them useless. No clarification would be needed on the point to which the provisos would then apply since it would be perfectly plain that it would be wrong for the company to pay other people's costs. What was desired was to make it clear at this stage that the company itself could not spend money on participating in the litigation in any way.*
>
> *The argument is thus about whether it would be a breach of fiduciary duty on the part of the directors of the company to spend the company's money in this way. The jurisdiction under s.127 is designed for the protection of creditors, and I suppose also to some extent contributories in the event of there being an insolvent liquidation so that the 'relation-back' doctrine would apply to disposition of the company's assets. It does not seem to me right that that jurisdiction should be used in a case where there is no question about the company being able in the end to pay all its lawful debts and therefore no such protection is required. What I am being asked to do is to use the s.127 jurisdiction in order to give the petitioners what would amount to an interlocutory injunction restraining the company's board from dealing with its assets in a certain way on the ground that that would be a breach of their fiduciary duty. If an application for such an injunction were made, the basis on which the court would go into the matter would be rather different from the way in which it has been put to me now. It would be concerned with the balance of*



convenience as between the parties and it would also of course be necessary for the petitioners to give a cross-undertaking in damages. The effect of my inserting the proviso which counsel for the petitioners seeks would be that in practice the company's solicitors would not be able to accept the company's cheque in respect of any costs under this litigation, and that would, in my view, pre-empt a question which could more satisfactorily be settled on the order for costs when the motions have been heard. I do not think I am at present in a position to express a clear view that no expenditure of any kind by the company on the costs of these proceedings would be justified, and I do not see that anyone is likely to suffer any harm if that question is deferred until the substantive matters have been gone into on the motions."

(My emphasis)

136. A submission was made that it is ACC and CNBM who should pay or reimburse these sums. However, Tianrui has filed a Writ of Summons against the Company solely, not against those shareholders. Tianrui's reversal on the subject of legal fees, and the position that it now takes, is also inconsistent with what it seeks in its Summons for Directions.

137. At paragraphs 1 and 2 of the Amended Summons For Directions, Tianrui seeks the following Orders:

> *"1. China Shanshui Cement Group Limited ("the "Company") may participate in defending the petition herein if so advised.*
>
> .....
>
> *2. The petition be treated as a proceeding against the Company."*

138. In my judgment, I cannot at this stage and in these circumstances take the view advanced by Tianrui (indeed, also at the eleventh hour), that the expenditure by the Company on these legal and other fees are unjustified or unreasonable.

Disposition

139. As discussed earlier in this Ruling, the Reporting Obligation is to remain as it is in the Validation Order. The Spending Cap is also to remain, but I am willing to enter it for a higher sum, if the parties can agree this within three days of the delivery of the finalized

Ruling. If the parties are unable to arrive at an increased sum, then the Order remains with the Spending Cap as is at a limit of US$2 Million per month. The relief sought at paragraph 1.2 of the Summons (regarding legal fees and repayment of the 2020 Notes) and the relief set out in paragraph 1.3 (CCASS issue), is granted as prayed.

140. Costs are reserved.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT