IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 178 OF 2015

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

In Chambers

Appearances:	**Mr. Matthew Crawford and Ms. Anna Perry of Maples and Calder for China Shanshui Cement Group Limited** **Mr. Stephen Moverley-Smith Q.C., instructed by Mr. Ulrich Payne and Mr. Oliver Payne of Ogier for Tianrui (International) Holding Company Limited** **Mr. Stephen Moverley-Smith Q.C., instructed by Mr. Marc Kish of Harney Westwood and Riegels for China Shanshui Investment Company Limited** **Mr. Guy Manning and Mr. Guy Cowan of Campbells for Taconic Opportunity Master Fund LP, Claren Road Asset Management LLC and ASM Connaught House Fund LP** **Mr. Neil Lupton and Ms. Fiona MacAdam of Walkers for Asia Cement Corporation** **Mr. Jan Golaszewski and Ms. Ashleigh Dixon of Carey Olsen for Clearwater Capital Partners**
Before:	**Hon. Justice Ingrid Mangatal**
Heard:	**18, 19, 23, 25 November 2015**
Draft Judgment Circulated:	**23 November 2015**
Date of Judgment:	**25 November 2015**

HEADNOTE

Winding up Petition filed by company - Application for appointment of joint provisional liquidators - Application by shareholders to strike out petition on grounds directors not authorised - No ordinary resolution by shareholders in general meeting and no express provision in Articles of Association empowering directors to bring Petition – Approach to decisions of co-ordinate court – Principles of judicial comity and certainty – Second court to follow decision of first court unless convinced it is wrongly decided.

JUDGMENT

1. China Shanshui Cement Group Limited ("the Company") was incorporated in the Cayman Islands on 26 April 2006 as an exempted non-resident company limited by shares under the then revision of the Companies Law, with registered office situate at PO Box 309, Ugland House, South Church Street , George Town, Grand Cayman.

2. The Company's headquarters are situated at Sunnsy Industrial Park, Gushan Town, Changqing District, Jinan, Shandong in the People's Republic of China ("PRC").

3. The authorised share capital of the Company is US$100,000,000 divided into 100,000,000,000 ordinary shares of US$0.01 each.

4. The objects for which the company was established are unrestricted and are more particularly set out in its Memorandum of Association. The Company's principal business activity is acting as the holding company of an international group of companies whose operating subsidiaries are located in the PRC ("the Group"). The Group is one of the leading producers of cement in the PRC with a dominant market position in the Shandong and Liaoning Provinces.

5. The Company's shares are publicly listed on the Stock Exchange of Hong Kong ("SEHK") under the short stock name "Shanshui Cement".

6. The Company's main asset is its shares in a wholly-owned, Hong Kong incorporated subsidiary, China Shanshui Cement Group (Hong Kong) Company Limited ("CSHK"). CSHK is in turn also a holding company, its main asset comprising of its shares in another wholly-owned, Hong Kong incorporated subsidiary, China Pioneer Cement (Hong Kong) Company Limited ("Pioneer"). Pioneer's primary assets are its direct shareholdings in Shandong Shanshui Cement Group Co. Ltd. ("Shandong Shanshui"), American Shanshui Development Inc. and Continental Cement Corporation.

7. The Company claims its principal creditors are the holders ("2020 Noteholders") of its US$500,000,000 7.50% Senior Notes due 2020 ("2020 Notes") issued by it in around March 2015 pursuant to a New York law governed indenture dated 10 March 2015 ("Indenture") between the Company, Citicorp International Limited ("Trustee") and CSHK, Pioneer and Continental Cement Corporation as guarantors.

8. The 2020 Notes were initially allocated to around 300 institutions and are listed on the SEHK. For that reason, the Company states, it does not have details of the current ultimate holders of the 2020 Notes.

THE PETITION AND CLAIMS OF INSOLVENCY

9. On the 10th of November 2015 the Company filed a Winding Up Petition ("the Petition") in which it states that the 2020 Notes are currently repayable on 10th March 2020 with biannual interest payments to be made on 10th March and 10th September of each year. The Company states that it has duly met all such interest payments through to 10

September 2015. However, the Petition pleads that a debt arising under the 2020 Notes is imminent and/or immediately due and payable, which debt the Company is unable to pay within the meaning of section 92(d) of the Companies Law (2013 Revision) ("the Law"). Particulars are set out in paragraph 13 of the Petition.

10. The Company indicates that it has an excess of assets over its liabilities and is seeking, contemporaneously with the Petition, the appointment of joint provisional liquidators ("JPLs") under section 104(3) of the Law. Additionally, that it is otherwise just and equitable for the Company to be wound up. On the Company's evidence, it has a market capitalization of over US$2.7 billion and while the Company is cash flow insolvent, it is considerably balance sheet solvent.

11. The Company states that its board of directors has unanimously resolved to present this Petition.

THE EX PARTE SUMMONS FOR THE APPOINTMENT OF PROVISIONAL LIQUIDATORS

12. The ex parte summons seeks to have David Walker of PwC Corporate Finance & Recovery (Cayman) Limited, Man Chun "Christopher" So of PricewaterhouseCoopers in Hong Kong, and Yat Kit "Victor" Jong of Price Waterhouse Coopers in Shanghai in the PRC appointed JPLs.

13. The summons also seeks for the JPLs to be authorised to develop and propose any compromise or arrangement with the Company's creditors or any class thereof.

THE MAJORITY SHAREHOLDERS

14. China Shanshui Investment Company Limited ("CSI") and Tianrui (International) Holding Company Limited ("Tianrui") (together "the Majority Shareholders"), are shareholders of the Company, holding together 53.27% of its issued share capital.

THE 2020 NOTEHOLDERS WHO HAVE COME FORWARD TO DATE

15. Taconic Opportunity Master Fund LP ("Taconic"), Claren Road Asset Management ("Claren Road"), and ASM Connaught House Fund LP ("ASM") are said to form part of an ad hoc group ("AHG") of beneficial interest 2020 Noteholders. The parties either in, or supporting, the AHG indicate that they hold 21.30% of the Notes.

16. Clearwater Capital Partners ("Clearwater") is another 2020 Noteholder which is said to represent another group of 2020 Noteholders ("Clearwater Group"). On his first appearance on the 18th November 2015, Mr. Golaszewski, who appears for Clearwater, indicated to the Court that the Clearwater Group consisted of a group of 2020 Noteholders, said to hold 18% of the value of the 2020 Notes, but that number was likely to increase. On 19th November 2015, the Court was informed that the Clearwater Group now consists of a 31.66% interest.

17. Asia Cement Corporation ("ACC") holds 3.6% of the 2020 Notes and also holds 20.96% of the Company's total issued shares and controls the voting rights attached to a further 4.22% of the total issued shares. In the aggregate ACC controls the exercise of 25.18% of the voting rights at general meetings of the Company.

THE EX PARTE HEARING OF THE SUMMONS FOR APPOINTMENT OF JPLS

18. The ex parte summons was listed for hearing before me on the morning of the 11th November 2015. Although section 104(3) of the Law permits the Company to make an ex parte application for the appointment of the JPLs on certain grounds, the Rules of the SEHK required that the Company announce the filing of the Winding Up Petition and the application for the appointment of the JPLs. This announcement was made by the Company on the SEHK a matter of hours before the hearing was scheduled to take place.

19. On that morning, Leading Counsel for the Company attended. In addition Counsel for Tianrui, CSI and Taconic attended the hearing, seeking to have the matter heard inter partes and for the matter to be adjourned for that purpose. This application was vehemently opposed by Counsel for the Company, who was insistent that section 104(3) allowed for the application to be made ex parte, that the matter was urgent, and that the Company wished to proceed with the application right away.

20. Having considered the arguments made, I granted a short adjournment until the 18th November 2015, to have a hearing where all interested parties could be heard. The hearing date was announced on the SEHK.

THE SUMMONS FILED BY CSI SEEKING TO STRIKE OUT THE PETITION AND PRELIMINARY POINT TAKEN AS TO JURISDICTION – THE ARGUMENTS OF THE MAJORITY SHAREHOLDERS

21. This matter has, understandably, been unfolding rapidly, with numerous affidavits, submissions and authorities being filed over a matter of hours, and days. On the 17th

November 2015, CSI and Tianrui filed a joint summons seeking to have the Petition struck out as being an abuse of the process of the Court.

22. I wish to thank Counsel for the very high quality of the submissions and preparation. This has been of invaluable assistance to the Court throughout the proceedings.

23. In summary, the Majority Shareholders say that the Law allows for only a limited category of persons to apply to wind up a company, the Company being one of them. However, whilst a company acts through its directors, directors have no authority to present a winding up petition absent:

(a) a resolution of the shareholders of the company resolving that the company present a winding up petition; or

(b) an express provision in the articles of association of the company authorising the directors to present a winding up petition on behalf of the company (a general provision giving the directors all of the powers of the company being insufficient).

24. In the present case, the Directors of the Company ("the Directors") presented the Petition without (a) without having obtained any resolution of the shareholders of the Company, which would not in any event have been obtained (for reasons that I need not go into for this application); or (b) there being any express provision in the articles of association ("the Articles") authorizing such conduct.

25. The argument therefore continued that the Directors accordingly have no standing to present, and the Court accordingly, has no jurisdiction to hear:

(i) the Petition; or

(ii) the Application to appoint JPLs.

26. Queen's Counsel Mr. Moverley-Smith for the Majority Shareholders undertook an admirable tracing of the evolution of the Law in relation to the relevant section, which is section 94(1). Section 94 of the Law reads as follows:

> *"Application for winding up*
> *94(1) An application to the Court for the winding up of a company shall be by petition presented either by-*
> *(a) The company;*
> *(b) Any creditor or creditors (including any contingent or prospective creditor or creditors);*
> *(c) Any contributory or contributories; or*
> *(d) Subject to subsection (4), the Authority pursuant to the regulatory laws.*
> *(2) Where expressly provided for in the articles of association of a company the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting*
> ...."

27. Reference was made to section 224(1) of the English Companies Act 1948, which, leaving aside sub-section (d) (which is of no relevance), is in identical terms, merely paragraphed differently.

28. Section 224(1) was the subject of consideration by Brightman J. in ***Re Emmadart Ltd.*** [1979] 1 Ch. 540. The case involved an application by a receiver to wind up a company on the grounds of insolvency. The receiver contended that he possessed all the powers of the directors of the company and that they had the authority to apply for the winding up of the company on the grounds of insolvency on their own motion, without the sanction of a resolution of the company. At pages 546-547 Brightman J. concluded:

> *"It would be theoretically possible for the articles of association of a company to be drawn in terms which confer power on the board of directors to present a winding up petition, but an article on the lines of article 80 of Table A is not so drawn. The board of directors can resolve to present a petition in the name of the company but such action by the board must be authorised or ratified by the company in general meeting. Clearly the board can cause a petition to be presented in the name of the company if a special resolution has already been passed resolving that the company be wound up by the court, but that is expressly covered by section 222(a). The board can also properly act on an ordinary resolution of the shareholders conferring the requisite authority on the board provided that this does not contravene any provision in the articles.....The practice which seems to have grown up, under which a board of directors of an insolvent company presents a petition in the name of the company where this seems to the board to be the sensible course, but without reference to the shareholders, is in my opinion wrong and ought no longer to be pursued, unless the articles confer the requisite authority, which article 80 of Table A does not. "*

29. It was submitted that the principles in ***Emmadart*** have been applied in the Cayman Islands, notably a decision of Smellie J. (as he then was) in ***Banco Economico SA v Allied Leasing and Finance Corporation*** [1998] CILR 102.

30. Reference was also made to the decision of Jones J. in ***Re China Milk Products Group Ltd.*** [2011] (2) CILR. That decision has become the fulcrum of the discussion and submissions in respect of this application to strike out, and rightly so. This is because in that case Jones J. decided that upon the true interpretation of section 94(1)(a) of the Companies Law (2009 Revision), the directors of an insolvent company are entitled to present a winding up petition on behalf of and in the name of the company without reference to the shareholders and irrespective of the terms of the articles of association. It is to be noted that section 94 of the 2009 Revision is identical to section 94 of the Law. Jones J. further held that sub-section 94(2) only applied to solvent companies.

31. It is the Majority Shareholders' submission that ***China Milk*** has been wrongly decided, and that Jones J has wrongly construed the meaning and effect of subsection 94(1)(a).

32. It was asserted that as sub-section 94(1) has remained unchanged, the issue of agency recognised in ***Emmadart*** by Brightman J., i.e. that the directors do not have the authority to bring the petition has not been addressed in section 94(1) at all. Further, reference was made to the fact that on the face of it, sub-sections 94(1) and (2) do not make any distinction between solvent and insolvent companies.

33. Reference was made to the fact that there has been no amendment to the relevant sub-section such as has occurred in England, where section 124(1) of the Insolvency Act 1986 now empowers an additional category of persons, i.e. directors, to petition for the winding up of the company.

34. It was also further submitted that, even if Jones J.'s reasoning was correct, his logic could not apply where a company is balance sheet solvent, but suffering cash flow difficulties, as is the Company.

35. It was learned Queen's Counsel Mr. Moverley-Smith's position that this point, as to the lack of authority of the Directors to bring the Petition, needs to be decided *in limine.*

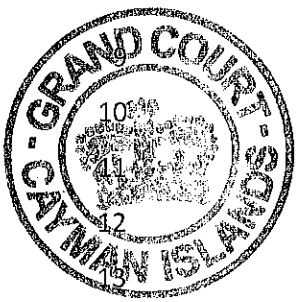
THE ARGUMENTS IN RESPONSE BY THE COMPANY AND BY THE AHG AND ACC

36. Essentially, Mr. Crawford, on behalf of the Company, as would be expected, took the lead in opposing the application to strike out. He submitted that the Court should not entertain the submission that ***China Milk*** was wrongly decided as it was decided by an experienced Judge of the Grand Court with "an unmatched knowledge of this area, including the effect of the 2007 law." Further, that it has not been doubted in any subsequent case. AHG and ACC supported the submission of the Company. Clearwater, on the other hand, who were seeking an adjournment of the summons for appointment of the JPLs, have adopted no position, one way or the other, on the strike out application.

37. Counsel submitted that the decision of Jones J., has been acted upon numerous times since the decision was made, is settled law, and that it is an important part of the corporate insolvency rescue operation landscape. However, no cases were cited to me in this regard. It is also not clear to me whether what Counsel are saying is that Jones J. has continued to apply the same interpretation, or that other Grand Court Judges have, after consideration of the relevant issues, also adopted this position.

38. It is in that context that the Majority Shareholders' Counsel referred me to an article, written by the law firm Maples and Calder, (who incidentally, are Counsel for the Company), critiquing ***China Milk***. It is also in that context that I think it permissible to refer to this article briefly, since I have not had any authorities handed to me to show there is a settled practice since ***China Milk*** endorsing the approach of Jones J. The article, entitled "Litigation and Insolvency Update", was written in the Summer of 2011, and does raise some issues in relation to the reasoning in ***China Milk***. Interestingly, the article states that until the decision in ***China Milk***:

> *"It was generally accepted that while directors could make a recommendation to the shareholders (or the creditors), they could not by themselves cause the company to file a winding up petition unless the company falls squarely within the specific parameters of s. 94(2)."*



Further, the article concludes that:

> *"With all the above in mind, it is not entirely clear whether another Grand Court Judge (or the Court of Appeal) in a future contested proceeding would reach the same conclusion as did Jones J. in* ***China Milk****".*

39. Whilst I appreciate that this article is not evidence, at the same time, the statements by Counsel that ***China Milk*** is settled law, without the accompaniment of authorities, were not of great probative value either. They can both therefore be put side by side for consideration as to whether any settled practice has been established.

40. It was also submitted that the established practice is that a Judge of the Grand Court should follow a decision of another Judge of the Grand Court, unless convinced that the

first decision is wrong. Reference was made to principles of judicial comity and certainty and to Halsbury's Laws, Vol. 11, para 98, and the cases of ***Alibaba.com*** [2012] (1) CILR 272 at [63], ***Re Spectrum Plus*** [2004] 2 WLR 783, at [8] and [9], and ***Lornamead V Kaupthing Bank hf*** [2013] 1 BCLC 73, at [52].

41. It was posited that it would be highly unsatisfactory to have different views at first instance on a point of this sort, which is relied upon by companies seeking relief in the Cayman Islands.

42. In response to questions from me, regarding the principles of co-ordinate jurisdiction, judicial comity and their applicability to the decision in ***Banco Economico***, it was Mr. Crawford's submission that, in the first place, ***Banco Economico,*** was decided when the Law had not yet undergone major reform. His second response was that Smellie J. had in the circumstances of that case, indicated that it was by parity of reasoning, as opposed to it being a central issue in the case before him, that he had come to the view that ***Emmadart*** was applicable in this jurisdiction.

43. It was further Mr. Crawford's submission that even if I were to conclude that the reasoning in ***China Milk*** was wrong, the relevant article in this case (Article 18.1) is broader in terms than the issues covered in ***Emmadart***, and than the terms of Article 80 of Table A.

44. A more far-reaching submission was made to me in the further alternative. It was put forward that even if it were to be found that the reasoning in ***China Milk*** was wrong, this Court should not in any event follow ***Emmadart***. Reference was made to numerous factors, such as the fact that ***Emmadart*** had gone against what had become a practice in England. Further, that by way of the English Insolvency Act 1986 , ***Emmadart*** was put to rest and the earlier prevailing practice revived. But in addition, it was pointed out that there are a number of jurisdictions where ***Emmadart*** has been rejected or not followed.

45. Mr. Crawford argued that ***Emmadart*** has not been followed in Australia, and he referred me to ***In Re Inkerman Grazing Pty Ltd.*** (1972) 1 ACLR 102, ***Re Interchase Management Services Pty Ltd.*** (1992) 9 ACSR 148, and ***Re Trans Pacific Corporation*** (2009) 72 ACSR 327.

46. It was asserted that ***Emmadart*** has been rejected in Malaysia - see ***Miharja Development SDN BHD v Heong*** [1995] , and in Bermuda - see ***Re First Virginia Reinsurance Ltd.*** (2003) 66 WIR 133.

47. Counsel rounded off his submission on this point by saying that in like fashion, ***Emmadart*** should not be followed in the Cayman Islands.

SUBSTITUTION OF A CREDITOR FOR THE COMPANY

48. Mr. Crawford, at the later stages of the submissions being made before me, has submitted that, in the event that the preliminary point succeeds, instead of striking out the Petition

by the Company, the Court should instead allow for substitution of a creditor who wishes to be so substituted.

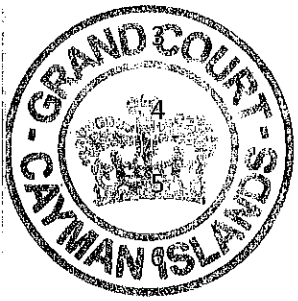
49. Mr. Moverley-Smith's submission in response was that substitution was only possible in relation to a Creditor's Petition, and reference was made to CWR Order 3, rule 10.

50. Mr. Crawford then made further submissions that CWR Order 3, rule 10 is not limited to Creditor's Petitions and he referred to the Winding Up Order made on 11th July 2011, and the Amended Winding Up Petition in ***In Re Xinhua Sports & Entertainment Ltd.***, a decision of Jones J, referred to in paragraph 16 of ***China Milk***. In ***Re Xinhua***, the Order expressly states that the substitution for the Company of a party that Counsel say was a creditor, was being made under CWR O.3, r.10. Counsel asked the Court to read CWR O.3, r.10(1) disjunctively such that any petitioner may be substituted EITHER:

> *"where a creditor petitions and is subsequently found not to have been entitled to do so"*
>
> OR
>
> *"where the petitioner (creditor or not) falls within one of the grounds specified in sub-paragraphs (a) through (e)."*

Reference was also made to the Australian decision in ***Re Fernlake Pty Ltd.*** (1994) 13 ACSR 600, where it was submitted, an individual who was a contributory, director and creditor was substituted as petitioner in relation to a petition originally presented by an insolvent company.

51. It was submitted by Mr. Crawford, that in the alternative, if the Court were to find that no power of substitution exists under CWR O. 3, r.10, the Court retains an inherent power to allow for substitution. Reference was made to a number of cases, including a decision of the Court of Appeal in ***In re Dyxnet Holdings Limited*** (CICA, unreported 20 February 2015, paragraph [35]).



52. I asked Counsel why the Court should be considering the issue of substitution of a creditor when no creditor had to date indicated any interest in being substituted as Petitioner. At this stage, Mr. Manning, on behalf of the AHG indicated that in the event that the Court were to find that the Petition ought to be dismissed, he had prepared a draft application in which one of his clients would be seeking, as creditor, to be substituted as Petitioner. Mr. Manning also made reference to the ***Re Fernlake*** decision at page 609.

53. Mr. Moverley-Smith has indicated that until he has seen any such application he would not be in a position to say much more upon this subject. Learned Queen's Counsel did however foreshadow that there are, in his view, certain contractual bars that exist in relation to the AHG seeking to bring a Petition for the winding up of the Company.

DISCUSSION AND ANALYSIS

54. As previously discussed, the principles enunciated in ***Emmadart*** have been followed and applied in the Cayman Islands at a particular point in time. In ***Banco Economico SA*** a decision which was of course made long before the Companies (Amendment) Law, 2007 that became the Companies Law (2009 Revision), Smellie J. (as he then was) had before

him a case in which a petitioning creditor had obtained the appointment of provisional liquidators over the company. A director of the company, a Mr. Donnelly, sought to discharge that appointment. At that time, by virtue of GCR O.102, the English Insolvency Rules 1986 applied in the Cayman Islands to applications to wind up companies. An application to discharge the appointment of a provisional liquidator could only be made by persons entitled to apply for the provisional liquidator's appointment. Those persons did not include directors but did include the company. The director claimed he was making the application on behalf of the company. Smellie J., having been referred to ***Emmadart***, concluded, at page 108:

> *" ...even if Mr. Donnelly is in fact the sole director of the company and therefore exercises the full powers of the board, in the absence of any express powers in the articles the result must be the same under the current Cayman Islands law: He may not stand to resist the petition without the sanction of the company in general meeting. Having regard to that conclusion, I should specifically note that to the extent that there is disagreement between them, I have accepted as being more persuasive the later decision in In re Emmadart Ltd. I do so for the obvious reason that In Re Emmadart Ltd is more fully researched and reasoned, and also because it had clearly been regarded in the United Kingdom as carrying the day and so necessitating legislation there to reintroduce the earlier prevailing and more convenient but impugned practice evidenced in In Re Union Accident Insurance Co. Ltd.*
>
> *Whatever, against that background, may be the practical strictures of that construction of the present state of the Cayman law and rules governing locus standi, I consider that this court is obliged to apply them in the present state of our legislation. Accordingly, my decision is that Mr. Donnelly has no locus standi (whether he be a director or the sole director) to apply to discharge the provisional liquidators, nor locus*

standi to appear to oppose the petition and therefore the ordinary application must be dismissed as presently framed."

55. I now turn to look at ***China Milk***. At paragraphs 7-9 (inclusive) of the Judgment Jones J. discusses the "Directors' standing to present a winding-up petition prior to March 1st, 2009". In paragraphs 8-9 he specifically acknowledges that ***Emmadart*** has been applied in this jurisdiction and in that regard discusses ***In re Global Opportunity Fund*** 1997 CILR-N-7 as well as ***Banco Economico***. At the last line of paragraph 9 he acknowledges that Smellie J. held that the rule in ***Emmadart*** constituted good law in this jurisdiction. He describes Smellie J., based on his comments in the Judgment, as seeming to have reached that conclusion "somewhat reluctantly".

56. In paragraphs 10-13, Jones J. discusses the Companies (Amendment) Law, 2007, which became the 2009 Revision. He starts with the statement "The Companies Law, Part V, has been the subject of a major policy review lasting over several years." At paragraphs 14-20, Jones J discusses his interpretation of sub-sections 94(1)(a) and 94(2).

57. It is difficult to avoid extensive quotation from the Judgment, in order to discuss the issues at hand. At paragraphs 10-13, Jones J. states the following:

*"**Amendment of Part V of the Companies Law**"*

10. The Companies Law, Part V has been the subject of a major policy review lasting over several years. It was reviewed by the Law Society, whose report was, in large part, adopted by the newly created Law Reform Commission. The ultimate result of this review was the enactment of the Companies (Amendment) Law 2007. The provision establishing the Insolvency Rules Committee came into force immediately and the

remainder of the Law was brought into force on March 1st, 2009, together with the Companies Winding Up Rules 2008 and the Insolvency Practitioners' Regulations 2008. The rule in Re Emmadart Ltd. was one of many matters to which consideration was given as part of this policy review. It was generally agreed that, in principle, the directors of a solvent company should not have the power to present a winding up petition in the name of the company on the just and equitable ground unless authorized to do so either by an express provision in the articles of association or by an ordinary resolution passed by the shareholders in a general meeting. In other words, it was felt that the rule in Re Emmadart Ltd should be restricted to circumstances in which the directors of a solvent company seek to present a winding-up petition on the just and equitable ground, as was the case in Re Global Opportunity Fund Ltd. However, it was generally accepted that different considerations come into play if a company is insolvent or of doubtful insolvency.

11. In my view, there are sound policy reasons why the board of directors of an insolvent company should be allowed to present a winding up petition (either on behalf, and in the name of the company, or in their own right), whether or not they are empowered to do so by the articles of association or an ordinary resolution passed by the shareholders in a general meeting. When a company becomes insolvent, its shareholders cease to have any economic interest and the directors must act in the interests of its creditors. In my view, it is wrong in principle that the directors' ability to commence insolvency proceedings, and seek the protection of the automatic stay imposed by s.97, should be dependent upon the terms of the company's articles of association or the co-operation of shareholders who no longer have any economic interest. For these reasons, it was proposed by the review committee that the rule in In re Emmadart Ltd. should be abolished, at least in so far as it is capable of preventing the directors of an insolvent company from presenting a winding up petition in the name of the company. As Smellie CJ observed in

Banco Economico...., the position in England was subsequently changed by the Insolvency Act 1986, s.124(1), which empowered the directors to present a petition on grounds of insolvency in their own right, which is another way of producing the same result

12. The contrary argument was made by capital market lawyers who pointed out that countless transactions have been conducted through Cayman Islands incorporated companies on the basis that their directors would have no power to present a petition on grounds of insolvency and that the law should not be changed in this regard with retrospective effect. It is relevant to understand that this argument was made in relation to companies incorporated for the sole purpose of entering into conventional off-balance sheet bond issue transactions. Invariably, such companies are owned by a charitable trust, the trustee of which is a licensed trust corporation which specializes in this type of work. In such cases, the power to present a winding –up Petition is vested in (a) the bond holders as creditors (usually acting through a trustee); and (b) the trustee of the special purpose charitable trust as sole shareholder (which will be a licensed trust corporation). In these particular circumstances, there may be sensible commercial reasons for restricting the directors' right to present a winding up petition (or some other form of insolvency proceeding in a foreign jurisdiction) on their own initiative and it was said that the rating agencies took this factor into account when rating Cayman Islands bond issues. However it must be noted that China Milk is not a special purpose bond issuing vehicle of this type.

13. It was proposed by the review committee that these conflicting arguments should be resolved in the following way. First, it would be amended to empower the directors of all the companies then in existence to present a winding up petition on behalf of, and in the name of, the company on the grounds of insolvency, whether or not authorized to do so by their articles of association. Secondly, new companies incorporated after the amendment Law came into force would have the ability to adopt

articles of association which expressly reserve to the shareholders the right to present a winding up petition (or any other kind of insolvency proceeding in any other jurisdiction) on grounds of insolvency. Companies would have no power to amend their articles in this way. Only newly incorporated companies would be able to adopt articles in this form. A review of the memorandum of objects and reasons contained in the Companies (Amendment) Bill suggests that this recommendation was accepted by Government, but the language of what became s.94(2) does not, by itself, come close to enacting the intention stated in the Bill. However, when read with with ss. 91-95, s. 104, and the Companies Winding Up Rules, Part II , Order 4, I think that the overall intention of what was actually enacted becomes clear.

(My emphasis)

58. At paragraph 17 Jones J. conducts a very helpful and useful analysis of all the changes that were brought into the Law after the review process. He then conducted a contextual analysis of the Legislation, comparing what was in the Law previously, with what was now there.

59. At paragraphs 18 and 20, Jones J. sets out his conclusions as follows:

18. Having regard to this overall legislative objective, it is clear that the legislature must have intended to abolish or circumscribe the rule in In re Emmadart Ltd, because it does not distinguish appropriately between solvent and insolvent companies. As I have already said in paragraph 11 above, it is wrong in principle that the ability of the directors of an insolvent company to present a winding up petition on the ground of insolvency should vary according to the language of its articles of association or be dependent upon the cooperation of shareholders whose

economic interest has disappeared. I remind myself of the rule that the court should seek to avoid a construction of [sic] *statute that produces an unworkable or impracticable result, as this is unlikely to have been intended by the legislature. The difficulties that have arisen in this case and in the recent case of In re Xinhua Sports & Entertainment Ltd demonstrate only too clearly how such a result would be unworkable and impracticable. The court should also seek to avoid a construction that causes unjustifiable inconvenience to persons who are subject to the statute, since this is unlikely to have been intended by the legislature. Bearing in mind that the directors of an insolvent company ....owe duties to safeguard the interests of creditors (whereas the shareholders....do not), the legislature cannot have intended to inconvenience their ability to seek the protections which flow from the presentation of the winding up petition. In my judgment, upon the true interpretation of s. 94(1)(a), the directors of an insolvent company .... are entitled to present a winding up petition on behalf of and in the name of the company...without reference to the shareholders....and irrespective of the terms of the articles of association. The directors of China Milk were empowered to present this petition."*

(My emphasis)

APPROACH TO DECISIONS OF CO-ORDINATE COURTS

60. At paragraph 98 of Halsbury's Laws of England, 5th Edition, Volume 11, paragraph 98 (which was cited in ***Alibaba.com)***, and paragraph 99 of that Volume, the following guidance is provided:

*"98. **Decision of co-ordinate courts.** There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge at first instance after consideration has come to a definite decision on a matter arising out of a*

complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if reached after full consideration of earlier decisions.

*99. **Decisions followed for a long time.** A long-standing decision of a judge of first instance ought to be followed by another judge of first instance, at least in a case involving the construction of a statute of some complexity, unless he is fully satisfied that the previous decision is wrong. Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before which the matter arises afterwards might not have given the same decision had the question come before it originally."*

61. In ***Re Spectrum***, at paragraphs [8] and [9], the consideration of certainty is raised as follows by Sir Andrew Morritt V-C:

"8. In some of them the reason why a judge should follow the decision of a judge of coordinate jurisdiction unless convinced that it is wrong has been described as "judicial comity". I do not doubt that comity is one reason for the rule or convention. In my view there is another, more compelling, reason, namely certainty. Unless the second judge is convinced that the first was wrong his, contrary, decision merely creates uncertainty. If, by contrast, he leaves the issue to the Court of Appeal the decision of that

court, which ever way it goes, will (subject to any further appeal to the House of Lords) bind all lower courts as well as the Court of Appeal itself. Thus, in In re Hotchkiss's Trusts (1869) LR 8 Eq 643,647 Sir William James V-C said:

> *"In this case, if the words of the will had been the same as the words in In re Potter's Trust (1869) LR 8 Eq 52, I should, without expressing any opinion of my own, simply have followed the decision of Sir R Malins V-C in that case; because I do not think it seemly that two branches of a court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments, and encouraging as it were a race, by inducing persons who wish one construction to go to one court, and those who wish for another construction to go to another. I should simply have affirmed the Vice-Chancellor's decision, with the intimation of my wish that the whole matter should be brought before a Court of Appeal."*

9. Some might think that statement has a rather dated ring to it, given the extremely high cost of litigation and the present emphasis on case management and expedition. But, in my view, on a point of general importance such as the correctness or otherwise of Siebe Gorman....the approach of Sir William James V-C remains valid because of the overriding need, going beyond the interests of the parties, for certainty....."

62. It is to be noted however, that unlike in the instant case, in ***Re Spectrum*** numerous subsequent cases were cited to the Vice-Chancellor, where the decision of the judge of coordinate jurisdiction, Slade J. in ***Siebe Gorman*** had been applied, accepted without qualification or distinguished - see paragraph 17 of the Judgment. Significantly, Sir Andrew Morritt elected not to follow the decision of Slade J., despite the fact that the decision was said to have stood for 25 years, with little criticism, and was said to be the basis on which contracts had been entered into and the general conduct of affairs had

been ordered - see paragraphs 26 and 27 of the Judgment. Indeed, at paragraph 27, the learned Vice-Chancellor stated:

> *"It is pointed out that Siebe Gorman has stood for 25 years with little criticism. It is suggested that most bank's standard forms are drafted on the assumption that Siebe Gorman was correctly decided and that thousands of liquidations have been conducted on the same assumption. It is emphasised that notwithstanding numerous legislative opportunities the Crown has not sought to reverse its effect until the decision of the Privy Council in Agnew's case."*

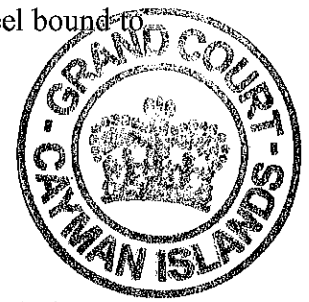
63. Nevertheless, because he felt that the decision in ***Siebe Gorman*** was wrong, Sir Andrew Morritt V-C declined, with the greatest of regret, to follow it. See paragraphs 39-41 of the Judgment.

RESOLUTION OF THE ISSUES

64. I have therefore, the uncommon, unwelcome and uninvited task, of having to look at another Judge's Judgment in order to see what I make of its correctness. This in circumstances where I sit as a Judge of co-ordinate jurisdiction and not as an appellate Judge. I appreciate that, in the interests of judicial comity, and certainty, I would be inclined to follow the judgment, unless I am convinced that it is wrong. I am also on the other hand, cognisant that if I am convinced the decision is wrong, I cannot shy away from not following it.

65. In relation to the issue of certainty, as I indicated earlier in this judgment, no specific cases were cited to me or referred to indicating that the decision of Jones J. has been

applied generally in this jurisdiction. In any event, the ***Spectrum*** decision demonstrates that a Judge may, even in the face of long standing practices and ordering of persons' affairs based upon the decision, if convinced that the decision is wrong, not feel bound to follow the decision of the co-ordinate Court.



THE JUDGMENT IN CHINA MILK

66. It is to be noted that although in ***China Milk*** Jones J. had heard extensive submissions on the issue of standing, there was really no party before the Court, such as the Majority Shareholders are in the case before me, contending for an opposite conclusion, ventilating numerous additional arguments, and testing the position. In other words, it was not a decision arrived at after an opposed argument or application.

67. It is also of passing note, although Jones J. made it clear that this did not form part of his ratio, and that he would have made the decision he did even if no such power was included, that article 162(1) of ***China Milk's*** articles did in fact empower the directors to bring a winding up petition in the name of the company.

68. I appreciate that Jones J. recognised that there were problems with coming to the conclusions that he did in relation to sub-sections 94(1) and (2) if one only had regard to the language of those sub-sections themselves - see in particular paragraph 13 of the Judgment. Hence, he sought, as is perfectly permissible, if I may say so, to analyse the general legislative scheme. Jones J. reached the conclusion that, under section 94(1)(a), directors of an insolvent company or a company of doubtful insolvency can present a

winding up petition on behalf of the company without reference to the shareholders and irrespective of whether the articles of association permitted them so to do.

69. However, the difficulty is that the 2007 Amendments did not make any change of substance to sub-section 94(1)(a) or sub-section 94(1). A materially similar section was in place when it was decided in ***Banco Economico*** that ***Emmadart*** applied in the Cayman Islands. It is therefore in my judgment hard to see why the common law position, being the rule in ***Emmadart,*** would not continue to apply to the materially similarly worded section.

70. Looking to section 94(2) really also does not assist, as I agree with Mr. Moverley-Smith's submission that, whatever the intention of the Legislature may have been, all section 94(2) did was to provide statutory confirmation that, as was previously held in ***Emmadart,*** where the articles of association of a company expressly authorise its directors to present a winding up petition on its behalf, the directors do not also need to obtain the sanction of a resolution passed in general meeting.

71. Jones J. reached the conclusion that sub-paragraph (2) only applied to solvent companies. There is nothing on the face of the section that points to such a conclusion. However, even if sub-section 94(2) only applied to solvent companies, that does not explain why it would follow that directors of an insolvent company have standing to petition, given the lack of change in wording of sub-section 94(1)(a). In any event, for the purposes of the instant case, section 94(2) would be irrelevant to the Company because the Company was

incorporated in 2006 and it also did not have the requisite article in its articles of association.

72. The fact that other material legislative changes were made, cannot in the circumstances, with all due respect, assist in interpreting what are substantially the same clear and unambiguous words in sub-section 94(1)(a). The other legislative changes made could also not themselves, and did not, thereby make the words of sub-section 94(1) ambiguous or render their previous interpretation unworkable or impracticable. Reference has been made by Jones J. to all of the material that the review committee had before it, and which would have been before the legislators, including the English Insolvency Act's way of eliminating ***Emmadart***. Jones J. also recounts in paragraph 12 of his judgment that there were contrary arguments against eliminating ***Emmadart***. All of these are pointers in the opposite direction than was taken. There is on the face of it, in my judgment, no reason to assume that this was not a deliberate decision on the part of the Legislature not to adopt that course. Sub-section 94(2) does not assist either because all it does is confirm the ***Emmadart*** position.

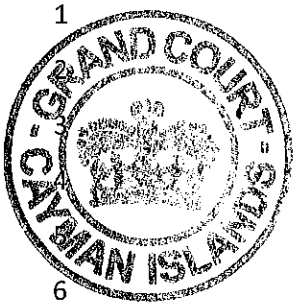
73. Justice Jones was of the view that he should seek to avoid a construction of subsection 94(1)(a) that would produce "an unworkable or impracticable result". However, the interpretation of section 94(1)(a) up to the time of his decision had been producing workable results previously, even if there are persons who did not like those results or considered them impracticable by the application of the ***Emmadart*** rules. It was not unworkable when it was held applicable in ***Banco Economico***. Even if the rule is or was

inconvenient, the point is that it was held to apply in the Cayman Islands. I agree with Mr. Moverley-Smith that ***Emmadart*** was fundamental to the decision in that case, and not just incidental. Smellie J. made that quite clear in the passage quoted at paragraph 54 above.

74. I appreciate that the way in which Jones J decided ***China Milk*** may well have allowed the Court to reach the best commercial result in the circumstances of that particular case. However, this preliminary point in the circumstances of this case involves the construction of statutory provisions where there cannot be said to be any ambiguity. Therefore, in all of the circumstances, it is with great hesitation and reluctance that I disagree with the interpretation of section 94 arrived at by Justice Jones. It is with regret, and with the greatest of respect, that I find myself convinced that his construction of the statutory provisions was wrong and feel obliged to differ.

75. I now turn to deal with Mr. Crawford's submission that, even if I conclude that the reasoning in ***China Milk*** is wrong, Article 18 is in wider terms. I assume that Counsel is saying that this Article therefore permits the Directors to present the Petition. I have examined the terms of Article 18.1. They are as follows:

> *"Subject to any exercise by the Board of the powers conferred by Articles 19.1 to 19.3, the management of the business of the Company shall be vested in the Board which, in addition to the powers and authorities by these Articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done or approved by these Company and are not hereby or by the Law expressly directed or required to be exercised or done by the Company in general meeting, but*



subject nevertheless to the provisions of the Law and of these Articles and to any regulation from time to time made by the Company in general meeting not being inconsistent with such provisions or these Articles, provided that no regulation so made shall invalidate any prior act of the Board which would have been valid if such regulation had not been made."

76. Whilst the wording in Article 18.1 is not identical to the wording considered in ***Emmadart***, i.e. Article 80 of Table A, I agree with Counsel for the Majority Shareholders that it is clear that no significant distinction can be drawn between the operative provisions of Article 18.1, which describes the powers conferred for the purpose of managing the Company's business, and the operative parts of Article 80, to the same effect. The provisions of Article 80 were in ***Emmadart*** held to be insufficient to authorise the directors in that case to present a winding up petition. In my view, the provisions of Article 18.1 are equally insufficient in this case.

77. As his most sweeping submission, Mr. Crawford invited this Court, if it came to the conclusion that the reasoning in ***China Milk*** was wrong, to in any event not follow ***Emmadart***. In that regard numerous authorities have, as discussed earlier, been cited to me from all over the Commonwealth.

78. Whilst it is clear that ***Emmadart*** has been a remarkably unpopular decision, in certain ways and in numerous jurisdictions, I am afraid I must decline to enter that arena. This is not because I have any personal view in relation to the correctness of ***Emmadart***, and nor would that matter. Indeed, one can think of more compelling causes to inspire a

chivalrous defence of the common law. However, I am really quite convinced that in the Cayman Islands, given all the reforms and express discussions that took place not many years ago when the 2007 Amendment came into being, and which, as I have opined have left the common law position with regard to the ruling in ***Emmadart*** intact, it would be wrong of me to now, as a Judge, take it upon myself to sweep all of that away. This is particularly so given that similarly worded sections of the Law that existed in the earlier Revisions of the Companies Law have been judicially considered by a Court of co-ordinate jurisdiction in ***Banco Economico***. This decision in ***Banco Economico*** has not been questioned, and could not be questioned as being correct, given the wording of the legislation in this jurisdiction at the time, and as it remains. Indeed, from the background recounted by Jones J. in ***China Milk*** there are persons who have ordered their commercial and business affairs and contracts on the basis of the existence of the rule in ***Emmadart*** being applied in this jurisdiction.

79. I am bolstered in that view because it is clear from the background described in ***China Milk*** that those reviewing the law as well as the Legislature were well aware of the English legislation that eliminated ***Emmadart*** in England. In England it was plainly felt necessary to override ***Emmadart*** by legislation. The legislature were no doubt aware of ***Emmadart's*** treatment in other parts of the Commonwealth as well. Based upon Justice Jones' description of the contrary arguments put forward by capital market lawyers about countless transactions conducted in reliance on the existence of these Rules, and indeed, even the statement that rating agencies took this factor into account when rating the Cayman Islands, plainly the Legislature had a number of different and inconsistent views

to consider. The important point is that I have to construe the relevant provisions based upon the ordinary principles of statutory construction in relation to the statutory provisions as they do in fact exist.

80. As Michael Fordham Q.C. eloquently describes the position in his well-known work "Judicial Review Handbook", 5th Edition, at paragraph 13.1:

> *".... In constitutional terms, just as judicial vigilance is underpinned by the rule of law, so judicial restraint is underpinned by the separation of powers."*

81. In all of the circumstances, the preliminary point succeeds. My ruling is that the Directors of the Company had no authority or standing to present the winding up petition and nor did they have the power or authority to apply for the appointment of the JPLs.

82. In the circumstances, the Majority Shareholders are in my judgment entitled to the striking out order sought, unless I am persuaded that an order substituting a creditor as petitioner can and should be made.

SUBSTITUTION OF CREDITOR

83. The Company had asked me to consider whether a substitution of a creditor could be made. Having re-read the Companies Winding Up Rules 2008 in their entirety, and specifically Order 3 r. 10, it does appear to me that the Rule really ought not to be read disjunctively, and that substitution is specifically contemplated by the CWR only in relation to creditors and creditors' petitions. However, I am not as presently advised, able to say that definitively. Nor am I able to say that the Court is without inherent power to

substitute a creditor for the Company in this case. The case of ***Re Fernlake*** is helpful on the question of substitution on a Petition commenced by a company. I would in the circumstances wish to hear further argument on this. However, if any such argument is to be made it would have to be in the context of an existing creditor stepping forward and confirming its present and settled intention to apply to be substituted. The proceedings before me have not yet reached that stage so I intend to enquire of Counsel now before proceeding further.

84. In the event, there was no application made for substitution, and thus, the Petition is struck out.

COSTS

85. I will hear submissions from the parties as to costs.

GRAND COURT CAYMAN ISLANDS

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT