

**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

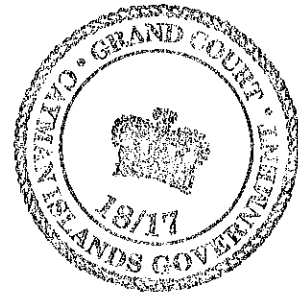
Appearances: Mr. Tom Lowe QC instructed by Ms. Gemma Lardner of Ogier for the
Petitioner Tianrui (International) Holding Company Limited
Mr. Vernon Flynn QC instructed by Mr. James Eldridge and Mr. Adrian
Davey of Maples and Calder for the Company China Shanshui Cement
Group Limited

Before: The Hon. Justice Ingrid Mangatal

Heard: 3 and 4 July 2019

**Draft Ruling
Circulated:** 3 September 2019

Ruling Delivered: 12 September 2019



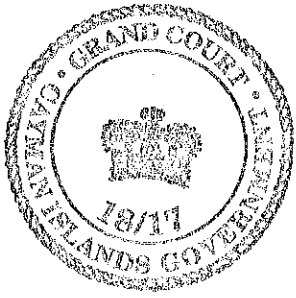
HEADNOTE

Company Law - Date of Presentation of Petition - Stage of Application - Final Declaration sought at interlocutory stage - All relevant and affected parties not before, and could not be before the Court at this stage - Court's Discretion - Justice must not only be done, but must be seen to be done

RULING

Introduction

1. The Petitioner, Tianrui (International) Holding Company Limited (“**Tianrui**”) filed a summons dated 8 April 2019 (the “**Declaratory Summons**”) seeking the following relief:

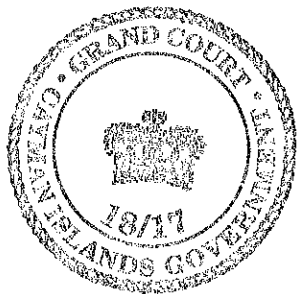


“A declaration that the date of presentation of the winding up petition in these proceedings is 30 August 2018” (the **“Presentation Date Question”**)

2. It is plain that the reason the date of presentation of a winding up petition can sometimes be important is that, when a winding up order has been made, pursuant to s.100(2) of the ***Companies Law (2018 Revision)*** (the **“Law”**) the date of the presentation determines the relation back date for the purposes of s.99 of the ***Law***.
3. Section 99 of the ***Law*** provides that *“When a winding up order has been made, any disposition of the company’s property and any transfer of shares or alteration in the status of the company’s members made after the commencement of the winding up is, unless the court otherwise orders, void.”*
4. Tianrui say that the determination as to the presentation date of the Winding Up Petition (the **“Petition”**) is significant in this case, because the second Convertible Bond issue occurred on 3 September 2018 and China Shanshui Cement Group Limited (the **“Company”**) has declined to seek validation of that Bond issue. (Tianrui suggests this is to avoid having to make full disclosure).
5. Section 100(2) of the ***Law*** provides that the winding up of a company is deemed to commence at the time of the presentation of the petition for winding up. The issue therefore is the meaning of *“presentation”* of the Petition. The ***Law*** does not provide a definition.

Submissions on behalf of Tianrui

6. It is submitted by Mr. Lowe QC on behalf of Tianrui that while the Company first became aware of the Petition on 31 August 2018 as part of the service bundle to the Hong Kong Petition, it has subsequently acknowledged that the Petition was presented on 30 August 2018 as follows:
 - (i) in its first announcement to the Hong Kong Stock Exchange (**“SEHK”**) dated 4 September 2018 disclosing the Petition.

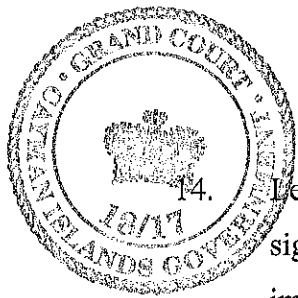


- (ii) at page 13 of a following announcement to the SEHK on 7 October 2018, and
- (iii) in its 2018 Annual Report published on 23 April 2019.

7. Reference was also made to paragraph 7 of this Court's unreported judgment delivered 19 October 2018, where the Petition was referred to as being presented on 30 August 2018.
8. Tianrui asserts that the Company for the first time stated that if a winding-up order is made, the winding up will be deemed to commence on 4 September 2018, in an announcement published on the SEHK on 22 January 2019 in the context of validation, using the language of the "issue" date of the Petition for commencement of the winding up.
9. According to Mr. Lowe the sequence of events relevant to the presentation of the Petition is as follows:
 - (1) the written application and accompanying documents were delivered to the Court on Thursday 30 August 2018;
 - (2) an electronic copy of the covering letter, application, draft assignment order and assignment form were emailed to the Registrar at 3.50 pm on Thursday 30 August 2018;
 - (3) Ms. Shiona Allenger, Clerk of Court, confirmed receipt of the relevant soft copy documents by email at 4.54 pm on Thursday 30 August 2018;
 - (4) the Court applied a seal to the Petition on Tuesday 4 September 2018, and it was served on Maples, Attorneys-at-Law for the Company on the same day.
10. It was submitted that the Petition was presented on the day that it was presented to the Court. Any ambiguity that might arise as to the date of presentation of a petition is at most likely to arise from the procedural requirements in the Cayman Islands applicable only to winding up petitions:



- (a) *CWR* Order 3, rule 11(2) provides that “prior to presenting a contributory petition and issuing the summons for directions in respect of it, the petitioner’s attorney must apply in writing (by letter or email) to the Register to have the proceedings assigned to a Judge and to fix a date for hearing the summons for directions.”
- (b) Practice Direction No. 3/2013 sets out in more detail what must be filed with the letter to the Registrar. The winding up petition and supporting documents must be delivered to the Registrar of the Financial Services Division. The Practice Direction provides that “any winding up petition presented to the Civil Registry must be delivered to the Registrar of the Financial Services Division without being stamped and filed.” (Counsel’s emphasis)
11. Mr. Lowe suggests that *CWR* Order 3 rule 11(2) concerns the application by letter but does not suggest that until the assignment to the Judge has occurred, and a hearing date fixed, the petition is not taken to have been “presented”. The Practice Direction referred to above also expressly states that the petition is presented by being delivered to the Registrar of the Financial Services Division - this is what occurred on 30 August 2018.
12. Mr. Lowe continues with reference to the administrative process in England, and to *Palmer’s Company Law, Volume 4*, which suggests that for a winding up petition to be commenced, the “petition should be presented for filing at court.”
13. Learned Counsel argues that by accepting the Company’s argument that the presentation date of a winding up petition is the date it is sealed by the court, would create great risk and uncertainty for the jurisdiction. If the proper position is that a petition is not presented until it has proceeded through the administration process, the Company may freely dispose of assets until the petition is sealed, using any administrative delay to circumvent the purpose of Section 99. Mr. Lowe makes reference to the case of *Scotiabank (Cayman Islands) Limited v Treasure Islands Resort (Cayman Limited)* [2004-5] CILR 423 at [11] Smellie CJ. who stated “the primary purpose of [s.99] is of course, to preserve the assets of the company in winding up for the protection of its creditors.”



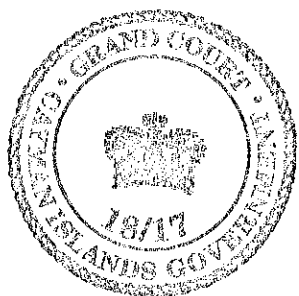
14. Learned Counsel also reasons that the Company's interpretation would also place significant pressure on the court administration to ensure that a winding up petition was immediately signed and sealed. It was submitted that that cannot have been the objective of *CWR* Order 3 Rule 11(2) and the Practice Direction.
15. Tianrui submits therefore that the proper interpretation of "*presentation*" is the date that the Petition is provided to the Grand Court by the Petitioner. This is not the date upon which the Court has completed the filing process but rather the date upon which the Petitioner presented the relevant documents to the Court.

Submissions on behalf of the Company

16. The Company, represented by Mr. Vernon Flynn QC submits that the Petitioner's Declaratory Summons is misconceived for two reasons:
- (1) First and foremost fundamentally the Presentation Date Question is not a matter on which the Court can properly make a declaration at this stage.
17. Mr Flynn argues, it is premature, and deals with a question which is currently hypothetical. The Presentation Date Question is not, and never will be, an issue on the Petition. Rather, it identifies an issue which (a) has not yet arisen (in the circumstances where a winding up order has not been made); (b) might never arise (including if a winding up is not made, or if a liquidator does not seek to challenge any dispositions of property between 30 August 2018 and 4 September 2018); and (c) if it ultimately concerns anybody at all, will concern parties which are not and could not currently be brought before the Court, (including the hypothetical future liquidators, as well as those third parties whose rights would be affected by such a declaration).
18. Any and all of that makes the proposed declaration inappropriate, and the Declaratory summons should be dismissed for that reason alone. This argument is dealt with in some detail first below.

Legal Principles on (1) above

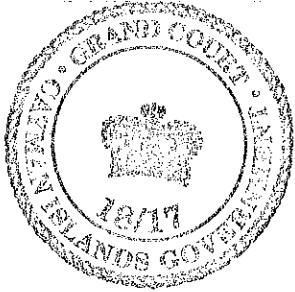
19. Mr. Flynn submits that any declaration made at an interlocutory hearing must necessarily be a final order – interim declarations being unknown to Cayman Islands Law. As such, any declaration made pursuant to the Declaration Summons will be *res judicata* between the Company and the Petitioner (but not as regards anybody else) and could only be challenged by way of an appeal as per Lord Upjohn explained in *International General Electric Company of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784 at 790:



“an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties for ever, subject only, of course, to a right of appeal.”

20. It was argued that when determining whether to make a final order at an interlocutory hearing, the Court should approach the question as if it were being asked to rule on a preliminary issue. The leading case on the approach to be adopted is the decision of the House of Lords in *Tilling v Whiteman* [1980] AC 1, in which Lord Scarman warned in stark terms that *“Preliminary points of law are too often treacherous short cuts. Their price can be [.....]. delay, anxiety, and expense.”*
21. Reference was made to paragraphs 17F – 18A of *Tilling and Whiteman*, where Lord Fraser elucidated matters as follows:

“The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken [...]. So the case has reached this house on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal



issue short and easily decided, cases outside this guiding principle should at least be exceptional.”

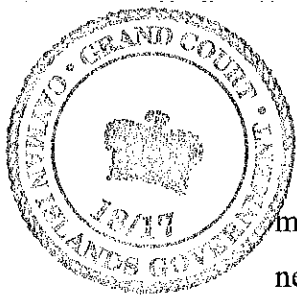
22. In addition, the Chief Justice approved and followed the House of Lords’ approach in *TMSF v Wisteria Bay Ltd* [2007] CILR 210. In that case, the defendants invited the Court to certify for trial by way of preliminary issue the question of whether the claimant had, among other things, a valid title to an asset. Smellie CJ refused to make the certification and explained how the Court should approach such applications:

“The case authorities admonish against seeking to resolve factual allegations by way of trial of preliminary issue, a process designed mainly to resolve discrete or narrow issues, the resolution of which should assist in the more efficient disposal of the case.”

23. Mr. Flynn goes on to submit that whether or not the (necessarily final) declaration is sought at an interlocutory stage, the Court ought not to make declarations in connection with questions which are hypothetical or theoretical – *Zamir & Woolf, The Declaratory Judgment (2011) 4th Edition 4-35 to 4-98*. That will include cases where the relevant dispute has not yet arisen, albeit it might in the future arise depending on later events. The Court will exercise particular caution if all the necessary parties are not before the Court – In *Curtis v Sheffield* (1882) 21 Ch D 1 at 4, Jessel MR said:

“The reason of the rule against declaring future rights depends, and it becomes bare technicality. The reason of the rule is that the Court will not decide on future rights because until the event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties who, when the event happens, may be entitled to succeed, but where they are all of age, and every possible party is represented before the Court ...”

24. Learned Counsel makes the point that all of these points are linked to the (separate and overlapping) requirement that a declaration must have utility. A declaration is, of course,



much less likely to have utility if the circumstances in which it would be relevant may never come to pass, or if the parties it affects are not bound by it.

Application to the Facts of this Case on the Issue (1)

25. The declaration sought on this interlocutory application will not assist the Court to more efficiently dispose of the Petition. The Presentation Date Question simply will not arise during the trial of the Petition. The sole question for the Court on the Petition will be whether or not it is just and equitable to wind up the Company, and he submits therefore that the Presentation Date Question plays no part in that.
26. Mr Flynn goes further to suggest that not only will the Presentation Date Question not arise at the hearing of the Petition, it may well never arise. It would fall for determination only in a narrow set of circumstances, which are (1) the Court makes a winding up order; and (2) there has been a disposition of property or an alteration of status within the window between 30 August 2018 and 4 September 2018; and (3) the Joint Official Liquidators (JOLs) of the Company elect to challenge a disposition of property or an alteration in the status of the Company's members under s.99 of the *Law*; and (4) that a third party seeks to resist the JOLs challenge by raising the Presentation Date Question.
27. He submits that these are a very narrow set of issues, which, if they do happen, the Court can then deal with the question. In that case, not only would the question no longer be hypothetical, but unlike the current position, the necessary parties would be before the Court.
28. Further, it is submitted that the Declaratory Summons has no utility as there is no evidence of any transactions which are actually affected by the Presentation Date. The Petitioner's case is that the second convertible bond transaction takes place on 3 September 2018. But that reflects another misunderstanding according to Mr. Flynn. He submits this was not a "*disposition of the company's property*" or a "*transfer of shares or alteration in the status of the company's members*". Borrowing money on an unsecured basis (which is what the convertible bond issuances essentially were) is not a disposition

of property. The relevant issuances of shares happened after 4 September 2018 and (in issuances of shares do not fall within s.99 in any event).

29. Mr. Flynn concludes that in reality it is a somewhat obscure issue, arising only where a disposition of share transfer has occurred in the window identified by the Petitioner. The fact that it has not troubled the Court before is a good indication of how often the question really arises. Indeed, he submits it has not yet even arisen here. He therefore submits that the Declaratory Summons should be dismissed with costs.



(2) Alternatively, if the Court is nevertheless minded to make a declaration on the Presentation Date Question, Mr. Flynn submits that in fact the Petition was presented on 4 September 2018.

30. The following submissions are made in the alternative to the above.

Legal Principles to Alternative (2)

31. It was submitted that at the heart of The Presentation Date Question is whether the Petition should be deemed to have been presented pursuant to section 110(2) of the *Law* when the Petitioner undertook the “pre-petition” formalities required by the *CWR* on 30 August 2018 or afterwards, when those formalities had been completed and the Petitioner had paid the necessary filing fee on 4 September 2018. The Company submits the latter.

32. Section 101(2) of the *Law* provides that the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up. However, the *Law* does not define when “presentation” occurs. Nor do the *CWRs*, however, the *CWRs* do mandate certain conditions which a prospective petitioner must satisfy before the Court will allow them to present their petition. The operation of this regime in the *CWRs* allows, he submits, an inference as to when a petition must necessarily be considered to be presented.

33. Mr Flynn also refers to *CWR* O. 3 r.11(2) which provides;

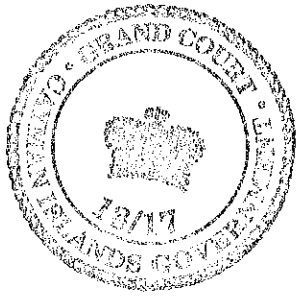
“Prior to presenting a contributory’s petition and issuing the summons for directions in respect of it, the petitioner’s attorney must apply in writing



(by letter of email) to the Registrar to have the proceedings assigned to a Judge and to fix a date for hearing the summons for directions.”

(Emphasis added by Counsel)

34. Learned Counsel goes on to explain **GCR** Practice Direction 3 of 2013 which explains that the **Company Winding Up Amendment Rules 2013** varied the procedure for filing of Contributory Petitions “to ensure that winding up petitions and summonses for directions relating to winding up petitions are served with the hearing dates on the same day that they are filed.”
35. Counsel refers to only one English case which considers the meaning of the phrase “presentation of a petition” in the context of the winding up of companies. In **Re Blights Builders Ltd** [2007] All ER 776 (Ch) Justice Norris QC (as he was then) held that the presentation of a petition for the purposes of the UK Insolvency Act 1986 Schedule B1, paragraph 25 (which prevented the appointment of an administrator if a petition for the winding up of a company has been presented and not disposed of) takes place when it is delivered to the court for issue or filing rather than the sealing of the petition by the court. However, this case Mr. Flynn points out, was not following a contested hearing, so, he submits that its precedential value may be limited.
36. In summary, the Company says that the “pre-presentation” steps required by **CWR** O.3 r.11(2) were taken by the Petitioner, via its attorney Ogier, on 30 August 2018. Those are the steps which were taken and must occur prior to presenting the petition, and cannot properly be understood to amount to the presentation of the Petition.
37. The presentation of a petition must require an active step by the Petitioner. A party cannot present something by doing nothing. He submits in the above process the Petitioner via Ogier only took positive steps by
- (1) The first was the necessary “pre presentation” step on 30 August 2018 which could not amount to presentation as pursuant to **CWR** O.3 r 11(2) those things which must be done pre-presentation.



(2) The second – the only other step taken was the issuing of the cheque. That happened on 4th September 2018.

38. It was therefore he submits, when the Petitioner paid the filing fee on 4 September 20198 and the Court stamped it that the petition was issued, and it was served by Ogier the same day seems consistent with the *CWR* O.3 r, 11(3) to the effect that it must be served “*immediately after having been presented/issued.*” The wording of that rule further implies that presentation and issuance are to be considered the same under the Cayman Islands regime.

39. For these reasons, it is submitted by the Company that the Petition was in fact presented on 4 September 2018.

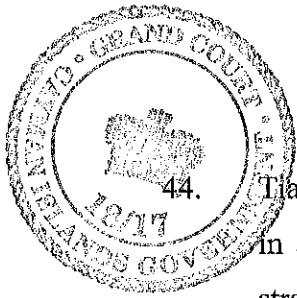
DISCUSSION AND ANALYSIS

40. At the time when I heard the Declaratory Summons, I also heard a Summons filed by the Company seeking the Variation of a Validation Order made on 11 October 2018 and I have made a decision in respect of the Validation Variation Summons, delivered on the same date at this Ruling.

41. It does seem to me that determining the Declaratory Summons will not assist the Court to more efficiently dispose of the Winding Up Petition. As Mr. Flynn has argued, the Question of the Presentation Date will not arise during the trial of the Petition.

42. It also appears to me that the need to determine the Presentation date would arise in the circumstances set out in the Company’s Written Submissions, set out at paragraph 26 above.

43. It is plain that Tianrui take the view that the second convertible bond issue is a transaction which completed on 3 September 2018. However, the Company say that this reflects a misunderstanding of how s.99 operates. The Company’s stance is as set out in paragraph 28 above.



44. Tianrui is asking this Court to make a final declaration upon an interlocutory application, in a manner similar to the determination of a preliminary issue. It is plain that this is a straight question of law and statutory interpretation.
45. In the instant case, while it can be said that a declaration at this stage is not absolutely necessary, it could be convenient and useful. – see paragraph 4-106 of *Zamir & Woolf*.
46. However, on the other hand, it is also true that the Courts will be careful if exercising a jurisdiction to grant what amounts to a final declaration on an interlocutory basis.
47. Further, the fact that this Presentation Date Question would be of relevance to parties not currently before the Court, including the third parties whose rights would be affected by such a declaration, is a very relevant consideration.
48. In my judgment, Tianrui’s case, at some points, seems to be in a state of flux. At first there was only the Petition filed. The Petition was ordered struck out, but was subsequently restored by the Court of Appeal. A Writ action was then filed against the Company (FSD 93 of 2019).
49. It is also the case that in respect of the Variation of Validation Summons, arguments were advanced to the Court in respect of legal and other professional fees. In that application it was argued that such fees should be paid by ACC and CNBM, other major shareholders in the Company. It is with ACC or CNNB that Tianrui suggest, certain Definitive Shareholders have connections. ACC and CNNB are not parties before the Court – see my Variation of Validation Ruling.
50. It is in all these circumstances that I have some reservations as to whether all the parties who could potentially be concerned with the relief sought in the Declaratory Summons, are currently before the Court.
51. Whilst it may be that if this Court were to make a Declaration at this stage it would only be *res judicata* between Tianrui and the Company (and although both sides seem to be of that view, I am not, based upon the authorities before me, and the nature of a declaration

satisfied of that), I do not see the utility of the Court making a Declaration at this time. As is well known, Courts do not give advisory opinions.

52. In my judgment, it is important to bear in mind the oft-quoted principle that “*justice must not only be done, it must also be seen to be done*”. This is particularly relevant to parties who are not before the Court and who could be affected by the Declaration sought.
53. Having weighed all of the considerations carefully, I exercise my discretion by declining to make an order for the declaratory relief sought. That does not, of course, prevent this issue from being revisited at a more appropriate stage, if necessary, and with the appropriate parties making the application, and affected parties being before the Court, so that they can be heard.
54. In all of the circumstances, the Declaratory Summons is dismissed. Costs are reserved.



**THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT**

