IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 161 of 2018 (NSJ)

IN THE MATTER SECTION 94 OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

Appearances:	Vernon Flynn Q.C. and Jern-Fei Ng Q.C. of counsel and James Eldridge and Adrian Davey of Maples and Calder for the Company
	Thomas Lowe Q.C. of counsel and Gemma Lardner and Sam Keogh of Ogier for Tianrui
Heard:	17 December 2020
Draft judgment circulated:	21 January 2021
Judgment delivered:	27 January 2021

JUDGMENT FOLLOWING HEARING OF
THE RE-AMENDED SUMMONS FOR DIRECTIONS

Contributory's winding up petition on the just and equitable ground – summons for directions - orders to be made under CWR O.3, r.12(1) (a) and (b) – joinder of shareholders as respondents to the petition – application for substituted service

Introduction

1. This is my judgment following a hearing on 17 December 2020 dealing with the re-amended summons for directions (the ***Re-Amended Summons for Directions***) filed by Tianrui (International) Holding Company Limited (***Tianrui***) in connection with its contributory's winding up petition filed against China Shanshui Cement Group Limited (the ***Company***). In accordance with CWR O.3, r.11(1), the Petitioner originally filed a summons for directions at the same time as presenting the winding up petition.

2. Tianrui has presented the winding up petition and commenced proceedings (by writ) against the Company. The winding up petition was originally dated 30 August 2018 (and issued on 4 September 2018). The writ was issued in May 2019.

3. The procedural history is set out and explained in my judgment dated 6 April, 2020 (the Judgment). Prior to the applications made by the Company which were disposed of by the Judgment, there had been a number of applications relating to and arising out of the petition. In particular, the Company had already unsuccessfully applied to have the petition struck out (the Court of Appeal had allowed an appeal from the judgment of Mangatal J and held that if the allegations set out in the petition were true, they were capable of establishing that it would be just and equitable to wind up the Company). The Company then made four further applications which were dealt with in the Judgment (for an order that the petition be struck out as an abuse of process; in the alternative, an order that Tianrui's writ be struck out on the basis that it was an abuse for Tianrui to pursue both the writ and the petition simultaneously; further, or in the alternative, an order that the writ be struck out on the basis that it was not properly constituted as a personal claim and for an order that the petition and/or the writ be stayed on case management grounds until the Hong Kong court had delivered judgment at trial in certain outstanding proceedings in Hong Kong). I dismissed all of these applications.

4. Prior to the hearing of the Company's four further applications, no directions had been given for the further conduct of the petition (as required by CWR O.3, r.12(1)) save for directions for the filing of a defence. During the hearing Tianrui invited me to give directions in the terms set out in the original summons for directions in the event that the Company's applications were dismissed. But I declined to do so. I explained my reasons as follows (see [142(c)] of the Judgment) (underlining added):

> *"Tianrui has also proposed in the Draft Order that if the Court dismissed the Company's applications, the Court should make, without the need for a further hearing, the procedural orders required by the CWRs (and previously covered by the Summons For Direction) to provide for the future conduct of the Amended Petition. To date, as I have explained, such mandatory directions have not been given. <u>However, the Summons For Directions had not been listed to be heard at the hearing and no submissions were made by the Company as to the appropriate orders to be made. The Summons For Directions raises at least two important substantive issues, namely whether the Company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding and whether the proceeding should be treated as a proceeding against the Company or as an inter partes proceeding between Tianrui on the one hand and CNBM/ACC on the other as respondents (the Substantive Issues). Based on the Draft Order it appears that Tianrui and CNBM/ACC agree that the Company is properly able to participate in the proceeding and that the Amended Petition should be treated as a proceeding against the Company. However, during the hearing, Mr. Lowe indicated, in response</u>*

to my suggestion that it was at least arguable that this should be a case in which the proceedings be treated as a dispute between shareholders with CNBM/ACC as respondents, that Tianrui's position may not be settled and they might wish to seek to adopt that approach. In my view, even in the absence of such equivocation, it would be wrong for the Court simply to accept the parties' position on the Substantive Issues without hearing the parties' submissions and the justification for the proposed approach. In a case where the parties' position is not clear, the Court should not assume that the proper order will be that the Company is properly able to participate in the proceeding and that the Amended Petition should be treated as a proceeding against the Company. The issue is complicated by the fact that the Company has already filed the Defence to the Petition and consideration needs to be given to the impact and effect of that. In my view, submissions need to be made and consideration needs to be given to the further procedural directions to be given for the conduct of the Amended Petition. The question of what orders should be made falls to be considered after the Court has disposed of the Company's applications, as Tianrui acknowledged, and I do not consider it would be appropriate to give directions without requiring the parties to provide further submissions (it may be acceptable for the matter to be dealt with without the need for a further hearing but that will also be a question to be considered in light of the parties' submissions). For the purpose of the Company's applications I must take into account the fact that the Substantive Issues remain to be decided and that it is at least possible that CNBM/ACC could be joined as respondents to the Amended Petition."

5. As can be seen, I decided that I should deal with the summons for directions only after receiving further submissions from both parties addressing in particular the directions to be given pursuant to CWR O.3, r.12(1) (a) and (b) (whether the Company was properly able to participate in the winding up proceeding and whether the proceeding should be treated as a proceeding against the Company or as an *inter partes* proceeding between Tianrui and other shareholders of the Company). I wished to see whether the parties remained in agreement that the Company was properly able to participate in the proceeding and that the petition should be treated as a proceeding against the Company and if they did, to understand the basis for giving such a direction (and if Tianrui sought different directions, what directions were sought and the basis on which it did so).

The Re-Amended Summons for Directions

6. On 5 June 2020, Tianrui's attorneys provided to the Company's attorneys a draft of the Re-Amended Summons for Directions and a draft of an amended writ and statement of claim (making amendments to the writ and statement of claim resulting from and to give effect to the Judgment). On 30 July 2020, Tianrui's attorneys provided to the Company's attorneys a draft re-amended petition. Following discussions between the parties, Tianrui filed the Re-Amended Summons for Directions on 20 August 2020.

7. In the Re-Amended Summons for Directions, Tianrui seeks the following orders (with the amendments from the original draft summons for directions in bold):

1. that the Company may participate in defending the petition if so advised.

1A. **that Tianrui be given leave to amend the petition in accordance with the draft amended petition (the *Re-Amended Petition*) filed with the Re-Amended Summons for Directions (which *inter alia* added China National Building Materials Company Limited (*CNBM*) and Asia Cement Corporation (*ACC*) as respondents).**

2. **that the petition be treated as an inter partes proceeding between Tianrui and the Company, CNBM and ACC as respondents** [previously Tianrui had sought an order that the petition be treated as a proceeding against the Company].

3. **that Tianrui be granted leave pursuant to GCR O. 64, r. 4 to serve the petition on CNBM and ACC by way of email to Maples and/or to CNBM's and ACC's nominees on the board of the Company or by such other means as the Court shall direct** [previously Tianrui had sought an order that the petition be served on the Company].

4. **that the petition be heard together with the writ.**

4A. **that Tianrui be given leave to amend the writ and statement of claim in accordance with the drafts which were attached to the Re-Amended Summons for Directions.**

5. that in the event that there is no appearance by the Company, **CNBM or ACC** at the directions hearing, that the Court make the winding up order sought.

6. **that in the event that CNBM and ACC seek to defend the petition, they shall serve Points of Defence to the petition within 28 days of service of the petition on them** [in the original draft of the summons for directions Tianrui sought an order that the Company serve Points of Defence].

6A. that Tianrui serve any Points of Reply on CNBM or ACC within 14 days of service of the last such Points of Defence [the drafting of this paragraph in the Re-Amended Summons for Directions is not entirely clear but this is what I take it to mean].

7. that discovery is to be made by the exchange of lists of documents within 42 days of service of the **last of** the Company's, **CNBM's and ACC's** Points of Defence, with inspection to take place within 7 days thereafter.

8. that all evidence on the petition be given by affidavit with liberty to apply for leave to cross-examine any deponent.

8A. that evidence on the petition shall stand as evidence in the writ proceedings and the evidence in the writ proceedings stand as evidence in the petition proceeding.

9. that Tianrui file and serve the affidavit evidence upon which it intends to rely on the Company, **CNBM and ACC** within **42** days of completion of discovery.

10. that the Company, **CNBM and ACC** shall file and serve the affidavit evidence upon which **they** intend to rely within **42** days thereafter.

11. that Tianrui file and serve any reply evidence **28** days thereafter.

12. that the petition be listed for a hearing on the first available date thereafter with a time estimate **to be agreed between the parties.**

13. that Tianrui and the Company have liberty to apply for further directions.

14. that the costs of the Re-Amended Summons for Directions be reserved.

15. that the Court gives such further or other directions as it sees fit.

8. It is convenient at this point to set out the relevant provisions of CWR O.3, r.11 and r.12(1):

> ***"Presentation and Service of a Contributory's Petition (O. 3, r. 11)***
>
> *11(1) Upon the presentation of a contributory's petition, the petitioner must at the same time issue a summons for directions in respect of the matters contained in Rule 12.*
>
> ……..
>
> *(3) Every contributory's petition and the summons for directions relating to it shall be served immediately after having been presented/issued upon –*
> *(a) the company, by delivering it to the company's registered office; and*
> *(b). every member of the company whom the petitioner has named or intends to name as a respondent to the petition, who may be served out of the jurisdiction without the leave of the Court.*

Summons for Directions (O. 3, r. 12)

12(1) Upon hearing the summons for directions, the Court shall give such directions as it thinks appropriate in respect of the followings matters –

(a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding;

(b). whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;

(c). service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule);

(d). whether, and if so by what means, the petition is to be advertised;

(e). whether the petitioner should serve any further particulars of his claim;

(f). service of a defence by the company or the respondents (as may be appropriate in the light of the directions given under paragraphs (a) and (b) of this Rule);

(g). the manner in which evidence is to be given;

(h). if evidence is directed to be given by affidavit, directions relating to cross-examination of the deponents;

(i). discovery and inspection of documents;

(j). oral discovery; and

(k). such other procedural matters as the Court thinks fit."

The draft Re-Amended Petition

9. The draft Re-Amended Petition makes a number of significant further changes to the (amended) petition (in addition to joining CNMB and ACC as respondents). The account of the activities of CNBM and ACC is supplemented and reorganised and the draft Re-Amended Petition now includes a clear averment (in a new [27A]) that CNBM and ACC (from about May 2015) were parties to an agreement (defined as the Takeover Agreement) "*to compete against [Tianrui] in taking over the Company and/or to cooperate in order to acquire as many shares in the Company as they could to consolidate and/or increase their holdings in the Company and/or to act together to prevent [Tianrui] from controlling the Company or consolidating and increasing its own ownership of shares in the Company.*" The draft Re-

Amended Petition has a relatively narrow focus – it asserts that CNBM and ACC were parties to the Takeover Agreement, that on 23 May 2018 they arranged for some of their directors or officers to be appointed to the Company's board and that from that time and subsequently those directors and officers have, acting as the agents of and in conjunction with CNBM and ACC, acted so as to implement and give effect to the Takeover Agreement by arranging for the issue of convertible bonds and the issue of shares pursuant to the conversion rights contained in the bonds to parties with whom CNBM and ACC were associated or otherwise connected (see [36]). Tianrui also alleges that it is to be inferred that the subscribers to the bond issues were associated with or otherwise connected to CNBM and ACC or had an agreement or understanding about how the rights attached to the shares to be issued to them would be exercised such that the bond issues were not at arm's length.

10. The allegation that "*since 2014 CNBM and ACC have exercised their rights as shareholder at Extraordinary General Meetings ("EGMs") and through their representatives appointed as directors taken control of the Company and caused loss to the Company*" (my underlining) has been deleted. Furthermore, there is no longer any reliance on the actions of officers of CNBM and ACC after 1 December 2015 in relation to Shandong Shanshui, a subsidiary of the Company. The (amended) petition incorporated allegations that there had been an agreement and conspiracy between the former directors of Shandong Shanshui and officers of CNBM and ACC (to which CNBM and ACC were also parties) to damage the Company by preventing the Company's board, appointed on 1 December 2015 at Tianrui's instigation, from regaining control of Shandong Shanshui (the former directors would take action in return for CNBM and ACC agreeing to support their subsequent re-appointment to the Shandong Shanshui board). The action complained of had been said to have taken place after 1 December 2015 and to include arrangements between ACC and the former Shandong Shanshui directors pursuant to which ACC would be able to increase its influence in the Company by purchasing shares in China Shanshui Investments Co, Ltd on 23 March 2017.

11. The draft Re-Amended Petition:

(a). sets out the facts from which the Takeover Agreement can be inferred (in a new [27B]); which establish how and when CNBM and ACC are said to have obtained control of the Company's affairs (in [28] to [35]) and which establish that the Company (controlled by CNBM and ACC) purported to issue the convertible bonds on uncommercial terms to parties associated with or otherwise connected to CNBM and/or ACC with a view to bringing Tianrui's shareholding below 25% and/or promoting the Takeover Agreement (in [36] to [51]).

(b). avers (in [51]) that "*in the respects aforesaid ACC and/or CNBM have acted unfairly and/or oppressively towards [Tianrui] and/or the affairs of the Company have been conducted with a lack of probity and [Tianrui] has justifiably lost confidence in the management of the Company*." This paragraph was included in the earlier version of the (amended) petition, both, as now, in and at the end of the section dealing with the improper share issue (pursuant to the issue of the convertible bonds) but also in and at the end of the section dealing with the control of Shandong Shanshui (the allegations relating to Shandong Shanshui have been deleted and the relevant section of the draft Re-Amended Petition has been amended to cover how and when CNMB and ACC are said to have obtained control of the Company's affairs). It appears and I assume that the removal of the earlier paragraph containing the same averment (in the old [39]) was done simply to avoid unnecessary repetition so that [51] is based on and relates to *all* the facts and matters relating to conduct of CNMB and ACC which are referred to in the previous paragraphs of the draft Re-Amended Petition.

(c). also avers that there is a need for an independent insolvency practitioner to be appointed to investigate the availability of claims against current and former directors of the Company (including in existing proceedings in Hong Kong); the current financial circumstances of the Company and transactions including but not limited to the issue of shares on 30 October 2018 pursuant to the conversion agreements.

12. [34] and [35] of the Re-Amended Petition now state as follows (underlining added):

> *"34. At all material times since 23 May 2018 CNBM exercised influence on the Board through Mr Chang and, [Tianrui] will say, Mr Chang acted as CNBM's agent and/or ACC exercised influence on the Board through Ms Wu and, [Tianrui] will say, Ms Wu acted as ACC's agent.*
>
> *35. Accordingly, since 23 May 2018, ACC and CNBM have conducted the affairs of the Company:*
>
> *(a) through Mr Chang and Mr Wu causing the Board to exercise powers to further the Takeover Agreement as set out below.*
>
> *(b). by ACC and CNBM having advance notice of actions of the Board and by themselves as shareholders ratifying and approving the exercise of its powers."*

13. [36] and [37] of the draft Re-Amended Petition state as follows:

> *"36. The Company purported to issue convertible bonds (the "Bonds") on uncommercial terms and otherwise than at arms' length to parties associated with or otherwise connected to ACC and/or CNBM as set out below thereby diluting the shares of [Tianrui] (upon the Bonds' conversion to shares), and purported to modify the conversion of the Bonds to issue further shares and then issued the same.*
>
> *37. The Company purported to issue the Bonds and said shares with a view to: (a) bringing [Tianrui's] shareholding below 25% so that [Tianrui] cannot oppose special resolutions such as resolutions to restructure the Company or to operate the compulsory acquisition procedure in Part XVI of the Companies Law; and/or (b) promoting the Takeover Agreement.*

The issues

14. At the hearing, the Company did not oppose Tianrui's application for leave to amend the writ and statement of claim or the other directions sought in the Re-Amended Summons for Directions in relation to the conduct of the writ proceedings. However, the Company did oppose the directions sought in the Re-Amended Summons for Directions in relation to the petition. For that reason and because, as I have explained, the Court needs to consider what directions under CWR O.3, r.12 are appropriate in relation to the petition, this judgment deals with the directions to be given in relation to the petition. These include the directions to be given for service of the Re-Amended Petition on CNBM and ACC, if such service is ordered, and consideration of Tianrui's application that substituted service be permitted. I also consider the question of costs.

15. As can be seen from paragraphs 1, 1A and 2 of the Re-Amended Summons for Directions, Tianrui now seeks (a) to amend the petition to add CNBM and ACC as respondents (although the draft of the amended petition did not include them in the heading as respondents) and (b) directions pursuant to CWR O.3, r.12(1) (a) and (b) to the effect that the Company is properly able to participate in the winding up proceeding *and* that the petition should be treated as an *inter partes* proceeding between Tianrui, *the Company* and CNBM and ACC. There are therefore two main issues – first, joinder of CNBM and ACC as respondents and second, the characterisation of the winding up proceedings for the purpose of CWR O.3, r.12(1) (a) and (b).

Tianrui's submissions

16. On the joinder issue, Tianrui's counsel, Mr. Lowe Q.C., argued that shareholders could be joined as respondents to a petition where their involvement in the dispute made that appropriate. He cited four cases in support of that proposition: *Baird v Lees* [1924] SC 83; *Loch v John Blackwood* [1924] AC 783; *Ebrahimi v Westbourne Galleries Limited and others* [1973] AC 360 and *Re A&BC Chewing Gum* [1975] 1 WLR 579. He submitted that it was accepted practice to join those shareholders alleged to be implicated in the matters of which the petitioner complains (citing an extract from *Joffe et al* Minority Shareholders, 6th ed., OUP 2018 at [5.97]). He argued that it was clear from the authorities that members of the Company whose interests might be affected by the relief sought should be joined as respondents whether or not allegations were made against them, citing *Re a Company (No 007281 of 1986)* [1987] BCLC 593 at 599 (***Re a Company***). Mr. Lowe Q.C. argued that Vinelott J had in that case properly explained the nature of a winding up petition on the just and equitable ground (even though the case involved an unfair prejudice petition under section 459 of the Companies Act 1985) and set out the proper test to be applied when deciding who should be joined as a respondent to the petition (there was a dispute in the case as to whether and when members - or directors - should be joined as respondents to the petition). The following extract from the judgment (at 598-599) explains the issues arising and Vinelott J's decision (underlining added by me):

> *"Counsel for 3i (Mr Martineau) submitted that no member or director of a company should be made a respondent to a petition under s 459 unless some clear allegation is made against him, or some relief is sought against him, or unless it is necessary to join him so that he can be bound by the order of the court. He submitted that it is unnecessary in this case to join 3i as a respondent in order that it should be bound because the company is a respondent, and an order binding the company would bind all its members. Counsel for the petitioner (Miss Newman) submitted that it was proper to join 3i as a respondent because facts may emerge in the course of the preparations for trial, or at the hearing, which would found an allegation against 3i or justify a claim that, for example, 3i should contribute to the purchase of the petitioner's shares. She relied particularly on the fact that under the original agreement for the provision of working capital by 3i, the company covenanted to keep 3i informed of the progress of its business to the extent that 3i should reasonably require, that 3i is alleged to be a shareholder in GL Ltd, and that it was aware of the reorganisation outlined in the business plan. None of these matters, in my judgment, forms an adequate or, indeed, a proper ground for joining 3i as a respondent. But I think the alternative submission of counsel for the petitioner is well-founded. A petition under s 459 is not analogous to litigation in which the issues raised affect only those against whom allegations are made by the plaintiff. A closer analogy is an administration action, where all beneficiaries having an interest in the relief sought should be made parties or represented. The practice that has so far been followed in the Companies Court is to require that all members of the company whose interests would have been affected by the misconduct alleged or who would be affected by an*

order made by the court under the very wide powers conferred by s 461 are to be made respondents to a petition or served with it.
In practice, this means that in the case of a small, private company every member ought to be joined. If, as is usually the case, the relief sought is the purchase of the petitioner's shares by the respondents against whom allegations of unfairly prejudicial conduct are made, or the purchase of their shares by the petitioner, other shareholders would be affected if the articles contain pre-emption provisions which would be overridden by the purchase, or if the balance of the voting rights might be affected to the detriment of other members. If the relief sought is the purchase of the petitioner's shares, or of the shares of those members against whom allegations of unfairly prejudicial conduct are made, by the company, the balance of voting rights would, again, almost inevitably be affected. Clearly, if a winding-up order is sought or an order regulating the conduct of the company's affairs in the future, those entitled to vote on a resolution for the winding up of the company or the appointment of directors, are entitled to be heard. There may be occasions where it is unnecessary to join all the members of a company, for instance if the articles contain no pre-emption provisions and if some of the members are mere investors who have taken no part in the formation or management of the company, a situation which might arise, for instance, in the case of a public listed company, the affairs of which are under the de facto control of a small group of shareholders. It may be that in such a case it would be unnecessary to make all the members respondents, or to serve the petition on all of them, and that it would be sufficient that they be given notice of the petition so that they may apply to be joined if they so wish. Under the Companies (Unfair Prejudice Applications) Proceedings Rules 1986, SI 1986/2000, on the first hearing of a petition the court is required to give directions as to the service of a petition on any person who has not been made a respondent. If there is any doubt as to whether a member or director ought to be made a respondent to, or served with a petition or given notice of the petition, that doubt can be resolved at an early stage."

17. In the present case, the joinder of CNBM and ACC was clearly desirable so that the real issues raised could be fully litigated:

(a). Tianrui says that the petition was originally commenced with the Company as sole respondent. However, in light of the scope of the allegations raised in the petition against CNBM and ACC, the Court's observations at the hearing in November and the issues raised in the Judgment, Tianrui's position now was that the Re-Amended Petition ought to be treated as *inter partes* proceedings between Tianrui on the one hand and the Company, CNBM and ACC on the other hand.

(b). Tianrui argues that its case in the Re-Amended Petition is that it is just and equitable that the Company be wound up, essentially on the grounds of oppression resulting from a course of conduct by which CNBM and ACC, the Company's other major shareholders, acting in concert and the Company's management, have sought to take over the Company by diluting Tianrui's shareholding to a level where it can no longer resist special resolutions and can be squeezed out as shareholder. In particular, the Re-Amended Petition focuses on CNBM and ACC establishing a concert party of

connected or associated co-investors and acting through nominees on the Company's board with a view to buying up new shares which they planned for the Company to issue, thereby diluting Tianrui; successive steps taken by management in conjunction with CNBM and ACC to dilute Tianrui's shareholding in the Company, by the issue and conversion of convertible bonds to connected parties and the lack of transparency or even handedness of management which has continuously had opaque dealings with the new shareholders and excluded Tianrui from receiving information at all or promptly.

(c). the allegations against CNBM and ACC were made against them in their capacity either as beneficial members or as parties associated with Company directors at varying times. The Re-Amended Petition alleges that CNBM and/or ACC had conspired and acted unfairly and/or oppressively towards Tianrui. Their involvement in the critical events was obvious. Ms Wu, who had made several affirmations, was not only a director of the Company but executive vice president and chief financial officer of ACC. Mr Chang who is chairman of the Company's board was also the deputy general manager and a nonexecutive director of CNBM. The Court's findings against CNBM and/or ACC will be critical to the determination of whether it is just and equitable to wind up the Company.

(d). in order for the Court fairly and conveniently to dispose of these issues, both CNBM and ACC must be made parties to the proceedings, enabling them to answer the case made against them. The joinder of CNBM and ACC was also appropriate from the perspective of disclosure since the Re-Amended Petition alleged that they had been acting as concert parties and issuing convertible bonds and shares to their suspected nominees or associates with whom they had an understanding and/or voting arrangements. Disclosure in respect of these issues was likely to be significant, and the necessary disclosure will only be obtained in the event that CNBM and ACC are joined. In addition, in a brief reference in Tianrui's skeleton argument and elaborated on during his oral submissions at the hearing, Mr. Lowe Q.C. argued that joinder of CNBM and ACC would also be appropriate since it was at least possible (at one point in his submissions Mr. Lowe Q.C. said that it would be very likely) that relief would be sought against CNBM and ACC. While Tianrui's primary case was that a winding up order should be made, if the grounds in the Amended Petition were made out, the Court would be able to consider and if appropriate grant alternative relief pursuant to section 95(3) of the Companies Law. Accordingly, alternative remedies might be granted. These could include an order that CNBM and ACC (or the Company)

purchase Tianrui's shares. Mr. Lowe Q.C. accepted that Tianrui had not sought or provided particulars of such relief in the Re-Amended Petition but said that there was no practice requiring a petitioner in the petition to seek or provide particulars of the alternative relief that it sought or might be granted. Tianrui was not seeking an alternative order – it sought a winding up order – but since the question of possible alternative relief had now been raised it would have no objection to providing particulars of the relief that it would seek if consideration was to be given by the Court to alternative relief.

18. Mr. Lowe Q.C. argued that the Court had jurisdiction to join shareholders as additional respondents even after service of the petition on the Company. Although CWR O.3, r.12 did not in terms deal with or refer to joinder, it should be understood and interpreted as permitting joinder. It was plainly directed at ensuring that the parties in interest could not hide behind the Company to avoid the consequences of direct involvement in the petition and CWR O.3, r.12(1) cannot simply have been intended as an early reminder at the stage of a summons for directions to those in charge of the Company about costs. Participation of shareholders in a just and equitable petition in the Cayman Islands was necessary to enable the Court to give effect to its broad remedial jurisdiction under section 95(3) of the Companies Law (e.g. to regulate the conduct of companies or to make buy-out orders).

19. As regards the proper characterisation issue, Mr. Lowe Q.C. argued that it was permissible and in this case appropriate for the Court to order both that the petition be treated as an *inter partes* proceeding to which shareholders were parties (with the Company) and that the Company be permitted to participate in and defend the proceeding. Mr. Lowe Q.C. submitted that it was well established that in just and equitable winding up proceedings, the Company is frequently the object of a dispute between rival shareholders and should take a back seat and adopt a neutral approach. He referred to the discussion of the applicable principles as applied in English law in the judgment of Harman J in *Re a Company No 004502 of 1988 ex. p. Johnson* [1991] BCC 234 (***Johnson***). In that case, a shareholder had filed an unfair prejudice petition (under section 459 of the Companies Act 1985) - possibly together with a winding up petition - against a company. There were eight respondents to the petition, including the company and the other shareholders. The petitioner applied for an injunction restraining the other shareholders from causing or procuring the company to be represented on the hearing of the petition or of any application therein. Harman J said as follows at 235-236 (underlining added by me):

"That application is based upon a line of authority which has been becoming evident in recent years. The principle was drawn to the profession's attention by the decision of Hoffmann J in Re Crossmore Electrical and Civil Engineering Ltd (1989) 5 BCC 37, where at p. 38G the judge said:

> *"The company is a nominal party to the sec. 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between the shareholders ... "*

That reminder of the classic view was based by Hoffmann J on Pickering v Stephenson (1872) LR 14 Eq 322, so nobody can suggest that it is a new development in the law.

It was exemplified as a proposition of law in the decision of Plowman J in Re A & BC Chewing Gum Ltd [1975] 1 WLR579, where a petition for the just and equitable winding up of the company A & BC Chewing Gum had been brought against the two directors and shareholders by the other shareholder, the company being a nominal respondent to that just and equitable petition as well. The petition succeeded and a just and equitable winding-up order was made, as appears from the report.

That petition was immediately followed before Plowman J by a separate, Chancery action in which the petitioner as an oppressed minority, under the rule in Foss v Harbottle (1843) 2 Hare 461, sued in his own name, joining the other two shareholders and directors and the company as defendants, for an order for the two shareholders and directors to repay to the company all moneys paid by the company with a view to financing the defence or opposition to the just and equitable petition. The relief sought in the action was primarily a declaration that using the company's money to resist the petition was a breach of duty or, one could say, a misfeasance by the directors and that the consequence must be that they repay to the company the moneys wrongly spent. Plowman J made that declaration of misfeasance, and also made consequential recovery orders following upon inquiries which the judge directed. Thus the principle has been clearly represented in the reports for a very long time.

However, Crossmore seems to have brought it to the profession's attention that on sec. 459 petitions, in particular, where a company is a necessary respondent, the company may be affected by the petition in two particular ways: it may have to give discovery of documents on what is sometimes called a pure sec. 459 petition, that is a petition simply seeking a buy-out by one section of the members of the other section of the members or some of them; further, it may be that the company itself might be ordered to buy back the shares which are in issue, Such an order plainly involves the company's interest and requires its representations for two reasons; first, the interests of creditors may be affected and, secondly, the interests of members as a whole may be affected in that the company should have sufficient moneys to carry on its business in a proper way after it has spent moneys on buying in shares. Apart from those interests, the company has no business whatever to be involved in the sec. 459 petition on the principle that, as was said in Pickering v Stephenson, the company's moneys should not be expended on disputes between shareholders.

A just and equitable winding up is frequently, although, following the recent practice direction [1990] BCC 292, not so frequently as formerly, joined with a sec. 459 petition. In A & BC Chewing Gum, to which I have already referred, winding up on the just and equitable ground was the only relief sought on the petition, and yet in that case the judge held that the company was no more than a nominal respondent to

that winding-up petition. The petition was based on misconduct and breach of fiduciary duty many times by the respondent shareholders and directors. Plowman J, finding the misconduct proved, concluded that that warranted the dissolution of the company and a putting an end to all relationships between the members, the company being undoubtedly extremely solvent.

…….

In my judgment, it seems to me quite clear that, if it is shown that directors of a company have been causing the company's money to be spent on financing the resistance either to a "pure" sec. 459 petition or, according to Plowman J in Re A & BC Chewing Gum and myself in Re Hydrosan, in financing the company's resistance to a member's winding-up petition based on the just and equitable ground, the court should prevent such expenditure. Such expenditure is a misfeasance, there is no excuse for it in law and it is not a question."

20. Mr. Lowe Q.C. argued that the English law practice had been incorporated into the CWR which contemplated that the proceedings on a just and equitable petition may proceed with the company as a nominal defendant, where the real dispute was between the members (but the company had to remain at least as a nominal defendant). He referred to the judgment of Foster J in *In the matter of Freerider Limited* [2009] CILR 604 (***Freerider***) at [26]:

> *"The claim on a contributory's petition for a just and equitable winding up is not in truth hostile litigation by a shareholder against a company. It is in truth a claim by a shareholder based upon wrongful acts by other shareholders or directors which have amounted to some equitable wrongdoing …… It is quite true that if a winding-up order is made on a contributory's petition the company will suffer what I usually refer to as death, that is, its coming to an end and eventual dissolution, but the wrongs claimed and the nature of the allegations are of wrongs by those in control of the company against a shareholder rather than by the company itself in any real sense."*

21. In the present case, the real and key dispute was between Tianrui, CNBM and ACC. The Re-Amended Petition was based on the improper takeover pact entered into and implemented by CNBM and ACC. Mr. Lowe Q.C. referred to and relied in particular on paragraphs 27A, 35, 37, 41 and 45 of the Re-Amended Petition.

22. However, CWR O.3, r.12(1) (a) and (b) should not be understood as meaning that the Company could not *participate* in such a case (that is a case involving in substance a dispute between the shareholders). Even as a nominal party, there may be occasions on which the company must participate, such as in cases where it is required to give discovery. Tianrui did not intend to join CNBM and ACC in substitution for or in lieu of the Company. Tianrui's object was not to replace the Company as a party to the proceedings but to ensure that (a) the Company was not unfairly required to incur costs which would more properly be incurred by its shareholders who were the parties against whom Tianrui made its allegations of acting

together as a concert party and (b) the parties who would be affected by the relief sought in the petition were put on notice of the claims and given an opportunity to be heard if they so chose. Assuming that Tianrui's joinder application was granted so that CNBM and ACC were joined as respondents to the petition, the Company would be able to take some part in the proceedings. But it was important that the the petition be treated as *inter partes*, since if it was not the costs of the successful petitioner will, pursuant to the general rule under CWR O.24 r.8(2), be paid out of the Company's assets. It was inappropriate for the costs of defending this petition to be borne by the Company.

23. Tianrui did not elaborate on or indicate what role it envisaged the Company would have. It appears that Tianrui's position was that if the orders it sought were made, so that the Company, CNBM and ACC were the respondents to the Re-Amended Petition and it was ordered that the Company be permitted to participate in defending the petition if so advised and that the petition be treated as an *inter partes* proceeding between Tianrui and the Company, CNBM and ACC as respondents, it would be a matter for the Company, CNBM and ACC to decide between themselves as to who was play what role in defending the petition, subject to the need for the Company to respect the company law principle that the company's money should not be expended on disputes between the shareholders.

24. The Company was wrong to suggest that if CNBM and ACC chose not to participate, then the Company would be unable to defend the Re-Amended Petition. That was an unreal suggestion from the management of the Company (which includes executives of CNBM and ACC). Whether or not CNBM and ACC elected to participate was a matter for them, but if they choose not to do so they could not subsequently object to or otherwise seek to overturn any findings or orders made in the proceeding in their absence. The Company was also wrong to suggest that an order that the petition be treated as an *inter partes* proceeding between shareholders could not be made in the case of a petition relating to a public company and was limited to quasi-partnerships or small private companies.

25. Mr. Lowe Q.C. submitted that if the Court was not minded to join CNBM and ACC as parties to the Re-Amended Petition, the Court should order that the petition be served on them. It was well established that parties against whom relief was not being sought may be served in order to put them on notice and provide them with an opportunity to appear on an application which may affect their rights. This would be an appropriate alternative to the primary order sought in this case.

The Company's submissions

26. The Company's counsel, Mr. Flynn Q.C., argued that under CWR O.3, r.12(1) (a) and (b) the Court may not order both that the Company may participate and that the petition is treated as an *inter partes* proceeding between shareholders. He submitted that the choice for the Court is binary. Either the Company is (a) properly able to participate in and defend the proceeding so that the proceeding is treated as a proceeding against the Company or (b) the Company is treated merely as the subject-matter of the proceeding so that the proceeding is treated as an *inter partes* proceeding about the Company between relevant shareholders. Mr. Flynn Q.C. submitted that under the plain terms of CWR O.3, r.12 the Court did not have jurisdiction to make the "*hotchpotch direction*" belatedly sought by Tianrui, whereby the Company and some (but not all) of its members are joined to the Re-Amended Petition. Where the terms of the CWR are clear – as they are in this case – the Court had no inherent jurisdiction to dispense with or to disregard the application of those rules. Mr. Flynn Q.C. further submitted that since Tianrui had always agreed, and since paragraph 1 of the Re-Amended Summons for Directions continued to state, that the Company may participate in defending the Re-Amended Petition, it followed that Tianrui must be taken to have accepted that the proceeding could not be, and the Court could not order that the proceeding was, treated as an *inter partes* proceeding to which CNBM and ACC were parties. Mr. Flynn Q.C. submitted that a direction pursuant to CWR O.3, r.12(1) (b) that the winding up proceeding be treated as an *inter partes* proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents was designed and only suitable for closely held companies (including but not limited to quasi partnerships). He referred to the judgment of Jones J in *Re Wyser-Pratte Eurovalue Fund Limited* [2010] (2) CILR 233 (underlining added):

> *"Different policy considerations apply when the court makes a direction pursuant to CWR, O.3, r.11(2) [as the rule then was] that a contributory's petition should be treated as an inter partes proceeding between the petitioning shareholder(s) as applicant and the other shareholder(s) as respondent. Typically, the court will give a direction to this effect if the petition pleads that the company is a 'quasi-partnership.'"*

27. Mr. Flynn Q.C also referred to the following extract from the judgment of Foster J in *Freerider* (underlining added):

> *"[41] The argument, in my view, does not reflect the true position here in which it is argued that the real protagonists are Mr. Heinen and Mr. Le Comte, not Mr. Heinen and the company. If that is a correct analysis of the situation, the court is only being asked to determine at this stage whether the company*

should actively participate in the proceedings or whether it is simply the subject-matter of the dispute.

……

[43] *Accordingly, it now falls for me to give such directions as I think appropriate in the circumstances of this petition in respect of whether or not the company is properly able to participate in the proceedings or should be treated merely as the subject-matter of the proceedings and whether the proceedings should be treated as proceedings against the company or as inter partes proceedings between Mr. Heinen as petitioner and Mr. Le Comte, the other principal member of the company, as respondent.*

……

[45] *In the present case, the company does not have any independent interest in the dispute between its two principal shareholders. It was argued that the company has an interest inasmuch as if the petition is successful it will be wound up and ultimately cease to exist. However, I do not consider that to be an interest, if it is properly described as an interest, which in the circumstances of this case is, on analysis, that of the company itself. This company is, as I have said, in reality a quasi-partnership, and an integral part of a quasi-partnership, between Mr. Heinen and Mr. Le Comte."*

28. Mr. Flynn Q.C. said that in the present case the Company was clearly not a closely held company and the circumstances justifying an order that the proceeding be treated as an *inter partes* proceeding between members did not exist. The Company is a widely held listed company, with many shareholders beyond Tianrui, CNBM and ACC. Tianrui holds approximately 21.85 % of the shares of the Company; CNBM and ACC (and their affiliates) hold approximately 20.74% and 12.94%, respectively; China Shanshui Investment Company Limited holds approximately 19.47% and the remaining 25% of the Company's shares are held by third parties including holders of the disputed the convertible bonds (but he acknowledged that if the shares issued pursuant to the convertible bonds were disregarded, Tianrui would hold approximately 28.16 % of the shares of the Company; CNBM and ACC (and their affiliates) would hold approximately 26.72% and 16.67% respectively; China Shanshui Investment Company Limited would hold approximately 25.09% and only 2.61% of the Company's shares would be held by third parties). Permitting the present proceedings to continue as between specific sets of shareholders to the exclusion of the Company would effectively disenfranchise a significant part of the Company's stakeholders, who were entitled to assume (and who should assume) that the board will act in the Company's best interests. The authorities cited by Tianrui were unilluminating on this point as none of them was based on a rule similar to CWR O.3, r.12(1) (b) or appeared to deal with a case in which a shareholder was forced to defend (Mr. Flynn Q.C.'s term was "*dragged into*") a winding up

proceeding (although it was not clear from these authorities, it seemed likely that the parties were involved in the proceedings because they sought to be heard, which was entirely different from the present case).

29. On the joinder issue, Mr. Flynn Q.C. said that while the Company considered that joinder of CNBM and ACC as respondents to the Re-Amended Petition was not justified, ultimately it had no objection provided that the Company was permitted to defend the Re-Amended Petition (and the proceeding was treated as a proceeding against the Company). If they were joined as respondents to the Re-Amended Petition at the same time as the Court ordered that the Company was unable to participate in the proceedings and the Re-Amended Petition be treated as an *inter partes* proceeding between shareholders, CNBM and ACC would be joined to an action as the only active defendants before they had indicated that they wished to participate and defend the proceedings. Even if, as Tianrui sought, CNBM and ACC were joined and the Company was permitted to defend the Re-Amended Petition a number of difficulties would result. What would happen if CNBM and ACC elected not to participate but were content to leave the Company to defend the Re-Amended Petition? Neither CNBM nor ACC were Cayman Islands companies and could not be compelled to participate. No relief was sought against them in the Re-Amended Petition (or at all). There could be no default judgment against them. They were also not parties to the writ action. How, Mr. Flynn Q.C. asked, can they be made to participate, and what would happen if they do not do so? Mr. Flynn Q.C. also argued that Tianrui's reliance on the need for discovery against CNBM and ACC was inadequate to support the claim for joinder. He submitted that the need for discovery was generally not a proper ground for joinder, citing *Gould v National Provincial Bank* [1960] 1 Ch. 337 and *Douichech v Findlay* [1990] 1 WLR 269 (where Judge Dobry applied the principle that "*the right to discovery or inspection must have a foundation and must depend on some other right*" and held that the party could not be joined as a defendant solely for the purpose of obtaining inspection of documents). In addition, Tianrui could not rely on the asserted need for CNBM and ACC to be able to answer the case made against them in the Re-Amended Petition as a basis and justification for *compelling* joinder. If CNBM or ACC wished to be heard, and to be made a party to respond to the allegations against them, they could themselves apply to be joined – which they have not done.

30. In addition, Tianrui could also not rely on the further argument that it had belatedly deployed that CNBM and ACC needed to be joined since orders could or would be sought against them. Mr. Flynn Q.C. noted that Tianrui had made reference to this point in correspondence before the hearing and in Mr. Lowe Q.C.'s oral submissions but not clearly relied on the

argument in its skeleton argument filed for the hearing. In their letter of 11 August 2020, in seeking to explain the joinder application, Tianrui's attorneys (Ogier) had said:

> *"Joining ACC and/or CNBM means that relief which affects them can be granted under Section 95(3) [of the Companies Law], and their appointed nominees (who are senior executives) have clearly been responsible for instructing [Maples]."*

Mr. Flynn Q.C. said that the Company had been concerned for some time that Tianrui's real goal was to force a buy-out, as part of Tianrui's efforts to takeover of the Company. Ogier's letter had been the first time that Tianrui had admitted that it would be seeking relief under section 95(3). However, the Re-Amended Petition did not seek any relief under section 95(3) – it only sought a winding up order. No relief of any kind was sought against CNBM or ACC either in the Re-Amended Petition or in the writ (to which they were not parties).

Discussion and decision

The Financial Services Division Guide and CWR O.24, r.8(2)

31. As I indicated to the parties during the hearing, the construction of and the approach that the Court should take when making orders under CWR O.3, r.12(1) (a) and (b) is also discussed in the Financial Services Division Guide (second edition) (the ***User Guide***) at section C6 (dealing with contributories petitions) (underlining added):

"C6.1 Presentation of petition and summons for directions

> *When presenting a contributory's petition on the just and equitable ground, the petitioner must file the petition, a verifying affidavit(s), the supporting affidavit sworn by the qualified insolvency practitioner nominated for appointment as official liquidator and a summons for directions in CWR Form No.5. The Registrar will assign the matter to a Judge and fix a date for hearing the summons for directions. A date for hearing the petition will be fixed by the Judge as part of the order for directions.*

C6.2 Characterisation of the proceeding

> *At the hearing of the summons for directions the Judge will consider all the matters set out in CWR 0.3, r.[12]. In particular, the Judge must always determine whether the proceeding should be treated as (a) a proceeding against the company, in which case it will be treated as the respondent or (b) an inter partes proceeding between one shareholder(s) as petitioner and another shareholder(s) as respondent. The way in which the proceeding is characterized determines the manner of its future conduct.*

C6.3 Directions — proceeding against the company

> *If the company is treated as the respondent to the petition, it follows that the Judge must always consider how the petition will be drawn to the attention of the shareholders (other than the petitioner) who are entitled to be heard. The Court may*

direct that the other shareholders be served and/or that the petition be advertised. In the case of a mutual fund, the Court will normally direct that its administrator send copies of the petition and affidavits to the registered shareholders by whatever method of communication is normally used in the ordinary course of business. The Court will fix a date for hearing the petition and set a timetable for the exchange of affidavit evidence.

C6.4 Directions — inter partes proceeding between shareholders

If the company is treated as the subject-matter of the petition (as it will be in any case in which the petitioner alleges that its management is deadlocked, for example), the opposing shareholders will be treated as the respondents and the Court will direct that they be individually served. In these circumstances, it will not be appropriate for the petition to be advertised. The Court will give directions for trial and will consider directing service of pleadings, exchange of affidavit evidence and attendance for cross-examination. Any application for a pre-emptive costs order should be made at the summons for directions."

32. As I also indicated to the parties during the hearing, it seems to me that CWR O.24, r.8(2) needs to be kept clearly in mind when considering the purpose of the, and the proper, characterisation of the proceeding and the orders to be made pursuant to CWR O.3, r.12(1)(a) and (b). CWR O.24, r.8(2) states as follows (the drafting of r.8(2)(b) appears to have gone wrong by mis-transcribing the references to CWR O.3, r.12(1)(b) and I have made suitable corrections in square brackets below, with additions in bold):

> *"In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that –*
>
> *(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or*
>
> *(b). if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of [**the company as petitioner(s) and**] the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed."*

The core analysis – joinder and characterisation of the proceedings

33. In my view, the proper analysis is as follows:

(a). CWR O.3, r.11 makes it clear that it is open to the petitioner (at least initially) to identify and select the respondents to the petition ("*Every contributory's petition ….. shall be served immediately after having been presented/issued upon…… every*

member of the company whom the petitioner has named or intends to name as a respondent to the petition").

(b). as *Joffe et al* note in Minority Shareholders (at [5.97]) under the heading "*Parties to the petition*":

> *"The company must always be joined as a respondent to the petition. In the case of a small company, it is usual to join all the members as respondents. In the case of a larger company, it is usually only those members alleged to be implicated in the matters of which the petitioner makes complaint who are joined."*

(c). the company must at least be a formal (or nominal) party and respondent to the proceedings (see *Freerider* at [24]).

(d). in the ordinary course, where the petitioner wishes and considers it appropriate to join other shareholders, it will do so when the petition is presented so that those shareholders will be served, even if they are outside the jurisdiction (pursuant to CWR O.3, r.11(3)(b)). They will therefore be able to appear at the hearing of the summons for directions and explain their position to the Court. They will also be able to make submissions as to the proper characterisation of the proceeding and the orders to be made pursuant to CWR O.3, r.12(1)(a) and (b). The conundrum to which Mr. Lowe Q.C. referred, of the Court being required to make a decision on the characterisation issue before knowing whether the other shareholders involved in the dispute intended to defend the petition, would therefore be avoided.

(e). if on presentation of the petition, the petitioner fails to join other shareholders, that will, presumably, usually be the result of a decision that no shareholder needs to be joined and that the case should be conducted as a proceeding against the company (which the company may defend). In that event, the Court is required at the directions hearing (as the User Guide puts it) to consider how the petition will be drawn to the attention of shareholders and may direct that shareholders be served and/or that the petition be advertised to ensure that shareholders are notified and given the opportunity to take appropriate action (CWR O.3, r.12(1)(c) states that the Court may order "*service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule).*"). If the company, when served with the petition, is of the view that shareholders should be joined and that the petition should be treated as an *inter partes* proceeding, it has the opportunity to, and presumably will, notify relevant

shareholders of the presentation of the petition in advance of the hearing of the summons for directions so that they can, if they wish to do so, appear and apply to be joined as respondents.

(f). in the present case, Tianrui did not name CNBM and ACC as respondents when the petition was presented and issued. However, Tianrui now seeks leave to amend the petition to add CNBM and ACC as respondents.

(g). Tianrui also initially sought an order that the petition be treated as a proceeding against the Company. However, it now seeks a direction that the petition be treated as an *inter partes* proceeding between Tianrui and the Company, CNBM and ACC and that the Company may participate in defending the petition if so advised (but not an *inter partes* proceeding between Tianrui and CNBM and ACC).

(h). the Company considers that Tianrui's initial approach was correct and that the petition should be treated as a proceeding against the Company so that the Company can defend it. The Company considers that there is no need to join or proper basis for joining CNBM and ACC but ultimately does not object to joinder provided that the Company is able to defend the petition.

(i). as a result, neither CNBM and ACC has yet been served with the application to join them as parties to the petition or has been able to make submissions on the directions to be given as to the proper characterisation and future conduct of the proceedings.

(j). the issues of joinder and characterisation are connected. Joinder of a shareholder may be sought because the petitioner considers that a shareholder needs to be made a party to the petition even if the petitioner seeks an order that the petition be treated as a proceeding against the Company. This might be, as I discuss further below, because the petitioner seeks alternative relief and an order that its shares be purchased by other shareholders. But joinder may also be sought because the petitioner considers that the petition should be treated as an *inter partes* proceeding between shareholders so that relevant shareholders need to be made parties to defend the petition.

(k). Tianrui's joinder application arises both pursuant to its application to amend the petition and for directions under CWR O.3, r.12 (both such applications of course being included in the Re-Amended Summons for Directions). Its submissions relate

both (i) to the need to join CNBM and ACC, whatever directions are given as to how the proceeding is to be characterised and (ii) to the requirement for joinder consequential upon an order that the proceeding be treated as an *inter partes* proceeding between Tianrui and the Company and CNBM/ACC.

(l). two initial questions arise. First, on what basis can the Court order joinder in the current circumstances and secondly, assuming that the Court has jurisdiction to order joinder of CNBM and ACC and considers that joinder is appropriate independently of and before considering the directions to be given as to how the proceeding is to be characterised, should the Court consider and give such directions before CNBM and ACC have been served with the Re-Amended Petition and the Re-Amended Summons for Directions and been given an opportunity to appear and make submissions as to the directions to be given?

(m). it seems to me that the Court can give leave to amend the petition in the manner sought by Tianrui and for service of the Re-Amended Petition (with the Re-Amended Summons for Directions) on CNBM and ACC (and for service of the Re-Amended Petition on the Company) on the hearing of the Re-Amended Summons for Directions. The hearing of the Re-Amended Summons for Directions could, after making orders for joinder discussed below, then be adjourned to a later date so that CNBM and ACC could appear and make representations as to the further directions to be made. There is a power to amend the petition, as acknowledged by CWR O.3, r.2(3) (which states that "*A winding up petition that has been served may be amended only with the leave of the Court*.") and it seems to me (as currently advised - this point was not the subject of submissions or debate at the hearing) that the power to amend should be taken to include an amendment to the parties by joining an additional respondent (even though the power to join additional parties contained in GCR O.15, r.6 does not apply to winding up petitions). CWR O.3, r.12(1)(k) is also of assistance. It states that the Court may give directions with respect to "*such other procedural matters as the Court thinks fit*."

(n). it also seems to me that the Court has jurisdiction to order the joinder of shareholders when hearing a summons for directions. This can be done whether or not the Court also gives directions under CWR O.3, r.12(1)(a) and (b). CWR O.3, r.12(1)(k) is once again of assistance. Where the Court makes an order under CWR O.3, r.12(1)(b), that the petition is to be treated as an *inter partes* proceeding between members as

petitioners and other members as respondents, in a case where the relevant respondent shareholders were not joined by the petitioner, a necessary and consequential procedural order would be for the joinder of those shareholders (CWR O.3, r.12(1)(b) states that the petition is to be *treated as* an *inter partes* proceeding between members but I do not consider that this language is intended to preclude or obviate the need for the making of an order for joinder of the relevant shareholders). But even if the Court makes an order that the petition is to be treated as a proceeding against the company, the Court may still make an order for joinder of shareholders as respondents where the circumstances justify joinder. CWR O.3, r.12(1)(k) gives the Court a broad discretion to make orders with respect to procedural matters and in my view permits joinder even in a case where the petition is being defended by the company. In such a case, the Court will need to consider whether joinder is justified even though the petition is to be defended by the company and the shareholders do not need to be parties for the purpose of conducting the defence. Joinder (as additional respondents) would, for example, be justified where alternative relief including an order that shareholders purchase the petitioner's shares is sought so as to ensure that such shareholders were bound by the Court's order. It may also be justified where the petitioner claims that shareholders are implicated in the misconduct alleged in the petition. Such shareholders would have a proper interest in participating in the proceedings as a party to respond to or defend themselves against such allegations. But joinder may also be appropriate before the Court determines whether to give a direction that the petition be treated as a proceeding against the Company or an *inter partes* proceeding between shareholders. If joinder is justified in either case and the Court considers that the relevant shareholders should be joined and given an opportunity to make submissions on the characterisation issue, the Court can make an order for joinder and for service of the petition and summons for directions and adjourn the hearing to a later date to allow that to happen.

(o). as I have noted above, Tianrui relies on a number of reasons in support of its application that CNBM and ACC be joined as parties to the Re-Amended Petition. Tianrui submits that CNBM and ACC must be made parties first, to enable them to answer the case that is made against them in the Re-Amended Petition; secondly, that joinder of CNBM and ACC was also appropriate because they will need to give discovery with respect to the allegations against them and thirdly that joinder would also be appropriate since it was at least possible or likely that alternative relief would be sought and granted against CNBM and ACC.

(p). Tianrui has yet to plead a claim for alternative orders but has said that it is now willing to provide to the Company (and CNBM and ACC) details of the claims for alternative relief that it intends to make. Mr Lowe Q.C., as I have noted, submitted that the practice in this jurisdiction is for the petitioner not to plead a claim for alternative relief in the petition and so Tianrui was not to be criticised for failing to do so at this stage. He did not cite any authority or materials in support of this submission. In the absence of such citation I would simply say at this stage, that this seems to me to be a surprising and unsatisfactory approach. I note that, for example, in *Camulos Partners Offshore Limited v Kathrein* [2010] (1) CILR 303, the petitioner in the prayer for relief in the petition sought and set out, in addition to the primary relief of a winding up order, the orders it sought by away alternative relief under section 95(3) of the Companies Law (see [35] and [36] of the judgment). While, as Chadwick P pointed out in *Camulos*, the gateway to an order under section 95(3) is that the court is satisfied that (but for that order) it would be just and equitable to wind up the company (see [38]). But the fact that the Court must be satisfied that the grounds for making a winding up order are made out before considering whether to make an alternative order does not mean that the petitioner does not need to make it clear and plead whether it seeks alternative relief and precisely what relief is claimed. The respondent(s) to the petition, and the Court, need to see whether alternative relief is claimed. So in my view, before Tianrui can rely on claims for alternative relief as a ground for joinder (on the basis that CNBM and ACC need to be joined so as to be bound by the Court's order) it must identify the alternative orders it seeks and at least apply for permission to amend the petition so as to plead and include them.

(q). the Company, as I have noted, submitted that the other two grounds relied on by Tianrui were insufficient. Joinder was not justified by the alleged need to obtain discovery from CNBM and ACC or, if they did not apply themselves to be joined, to enable them to answer the case made against them in the Re-Amended Petition. But I do not accept the latter argument. A shareholder whose conduct is relied on and criticised in the petition and whose conduct is said to be the basis on which a winding up order is justified should be a party for reasons of procedural fairness, to ensure that they have the rights and benefits of being a party and are able to defend the allegations made against them and to ensure that Court can make appropriate findings with respect to such allegations. It will, of course, be a matter for the shareholder to decide whether to take an active role in the proceedings but the fact that it does not intend or wish to do so does not preclude the Court from making an order for joinder (where the relevant shareholder has had an opportunity to apply to be joined but has

not done so, the Court will need to be satisfied that it is appropriate to compel them to become a party, although if joined pursuant to an interlocutory application which was not served on them and on which they were not heard, they would always have the opportunity subsequently to apply to be removed as a party).

(r). Vinelott J in *Re a Company* makes it clear that there are, having regard to the nature of a winding up petition on the just and equitable ground (which for these purposes is similar to an unfair prejudice petition under section 994 of the UK Companies Act 2006), various grounds on which a shareholder may properly be joined as a respondent to such a petition. As he said in the passage quoted above (with my underlining):

> *"A petition under s 459 is not analogous to litigation in which the issues raised affect only those against whom allegations are made by the plaintiff. A closer analogy is an administration action, where all beneficiaries having an interest in the relief sought should be made parties or represented. The practice that has so far been followed in the Companies Court is to require that all members of the company whose interests would have been affected by the misconduct alleged or who would be affected by an order made by the court under the very wide powers conferred by s 461 are to be made respondents to a petition or served with it."*

(s). the second basis for joinder referred to by Vinelott J refers to how shareholders may directly be affected by relief that may be sought and granted by the court when satisfied that an unfair prejudice petition is well founded (formerly under section 461 of the Companies Act 1985 but now under section 996 of the Companies Act 2006). Section 996(1) provides that the court may make such order as it thinks fit for giving relief in respect of the matters complained of and section 996(2) permits the court, without limiting its wide powers under sub-section (1), to make orders equivalent to those permitted by section 95(3) of the Companies Law. In the present case, I have decided that for the purpose of the current application, Tianrui cannot rely on possible alternative relief directed against CNBM and ACC which it has not yet sought or pleaded in the Re-Amended Petition. But the first basis for joinder is not affected by that decision. It seems to me that the fact that a clear allegation is made against a shareholder and the petition claims that the shareholder is a party to the misconduct on which the petition is based is an adequate and proper ground for joining the shareholder as a respondent (I note that this proposition was accepted by counsel for 3i in *Re a Company* – see the extract from the judgment quoted above).

(t). the fact that the company in question is a public company and that there are some or indeed a large number of other shareholders who will not be joined does not prevent joinder of a shareholder who has been active and whose conduct is impugned and challenged. As Vinelott J explained in *Re a Company*, different approaches may be adopted according to the nature of the company and the number and type of shareholders. In the case of a small, private company (including a quasi-partnership) every member will usually be joined. But in the case of a large public company whose affairs are under the de facto control of a small group of shareholders and other shareholders are mere investors who have taken no part in the management of the company, it may be unnecessary to make all the members respondents, or to serve the petition on all of them - it would be sufficient that they be given notice of the petition so that they may apply to be joined if they so wish.

(u). Tianrui is clearly right that CNBM and ACC's conduct is central to the Re-Amended Petition. As I have noted, Tianrui argues that the Re-Amended Petition is based on the oppressive conduct of CNBM and ACC, acting together and with the Company's management, and directed against Tianrui's position as shareholder. Paragraph 51 contains the critical averment which supports the claim that it would be just and equitable to wind up the Company:

> "*in the respects aforesaid ACC and/or CNBM have acted unfairly and/or oppressively towards [Tianrui] and/or the affairs of the Company have been conducted with a lack of probity and [Tianrui] has justifiably lost confidence in the management of the Company*."

(v). this paragraph appears to assert and rely on two grounds - cumulatively and in the alternative - first, on the oppressive conduct of CNBM and ACC, and secondly on the improper conduct of the affairs of the Company leading to a loss of confidence in the Company's management. But they are clearly connected since Tianrui avers, in [35] of the Re-Amended Petition, that *"since 23 May 2018, ACC and CNBM have conducted the affairs of the Company"* (with the assistance of and through Mr. Chang and Mr. Wu, who it is alleged were acting as agents for CNBM and ACC). The conduct on which the Re-Amended Petition is based is therefore conduct of CNBM and ACC as shareholders and the conduct of its agents, and not conduct of the Company. The challenged conduct involved concerted action undertaken with a view to improperly obtaining control of the Company and prejudicing Tianrui and its rights as a shareholder.

(w). the Re-Amended Petition relies on the bond and share issues as evidence of such oppressive conduct. As the Court of Appeal said in the Court of Appeal's Judgment (as defined in the Judgment at [6]) (underlining added):

> *"33. The judge can be forgiven for having understood that the dilution of its shareholding was Tianrui's sole complaint: even on appeal, Tianrui's skeleton argument said that its "complaint is, in summary, that the Board, aided by ACC and CNBM, have taken successive steps to dilute [Tianrui's] shareholding in the Company and issued shares to parties with whom ACC and CNBM has voting arrangements." It is plain, however, that the case made in the petition goes further than this: it comprises serious allegations of conspiracy by covert agreements and arrangements designed to damage Tianrui, the steps taken to dilute its shareholding being merely the latest stage in the conspiracy.*
>
> ……
>
> *36. If the allegations set out in the petition are true, it seems to us clear that they are capable of establishing that it would be just and equitable to wind up the Company. Put simply, Tianrui's position as evinced by its petition is that it cannot be expected to remain in association with CNBM and ACC in light of their conduct towards it…."*

(x). the form of the petition that was before the Court of Appeal will be amended by the Re-Amended Petition but the Company has not argued nor do I consider that the proposed amendments undermine or require a revision to the Court of Appeal's analysis and conclusions. The proposed amendments, as I have noted, remove references to and reliance on the actions of officers of CNBM and ACC after 1 December 2015 in relation to Shandong Shanshui and remove the allegation that "*since 2014 CNBM and ACC have exercised their rights as shareholder at Extraordinary General Meetings ("EGMs") and through their representatives appointed as directors taken control of the Company and caused loss to the Company*." Nonetheless, reliance is still placed on CNBM's and ACC's conduct after May 2015 when they are alleged to have entered into the Takeover Agreement for the purpose of acting "*together to prevent [Tianrui] from controlling the Company or consolidating and increasing its own ownership of shares in the Company*."

(y). in my view, having regard to the grounds on which the Re-Amended Petition is based and the allegations of misconduct on which the Re-Amended Petition is based, the Court is able to join and in the exercise of my discretion I consider that an order should be made for the joinder of CNBM and ACC. As I have said, CNBM and ACC's alleged misconduct is central to the Re-Amended Petition and in my view, in

the circumstances I have described, Tianrui is entitled to join them and it is appropriate that they be made parties to the petition proceedings.

(z). I have considered whether the delay in making and the timing of Tianrui's joinder application are grounds for dismissing the application. Tianrui has completely changed its position and done so after the Company has filed a lengthy defence and following a number of heavy interlocutory applications, including appeals to the Court of Appeal. The joinder of CNBM and ACC at this stage will result in further significant delays and expense. However, having regard to the overriding objective and all the circumstances, I have concluded that I should give greatest weight to the need to ensure that these proceedings are properly constituted with all those who should properly be parties joined to the proceedings and that it would be disproportionate to preclude Tianrui from the relief it seeks, when at least the adverse cost impact on the Company could be dealt with by a suitable order as to costs (which I discuss below).

(aa). I do not consider that the Company's defence to the petition, as presented to date, changes that conclusion. Indeed, it suggests that unless and until CNBM and ACC are joined Tianrui's core complaints will not be directly addressed. The Company's defence dated 27 September 2019 (the Company has obviously not yet served a defence to the Re-Amended Petition) is based on a denial of misconduct by the Company (and its board) and a denial that Tianrui ever placed trust and confidence in the Company's management. The Company says that the issue of the bonds and shares, and the other action taken by the board, was a proper and necessary response to financial and other problems (including to raise the public float) faced by the Company which were the result of Tianrui's misconduct (which action was approved by the executive and independent non-executive directors). The Company also asserts that notwithstanding Tianrui's knowledge of the alleged battle between CNBM, ACC and Tianrui it nevertheless chose to become a shareholder in February to April 2015 and must be taken to have invested solely with a view to executing its plan to launch a hostile takeover of the Company. But the defence does not directly address or respond to the complaints made about the conduct of CNBM and ACC (although it does deny that that Mr. Chang and Ms. Wu were on the board as representatives of CNBM and ACC). Rather the defence provides an indirect response by asserting that the action taken by the Company, which Tianrui asserts was done when the Company's affairs were controlled by CNBM and ACC and for their benefit, was in fact done for sound and proper commercial reasons, for the benefit of all the

Company's shareholders. But the Company does not aver facts relating to the conduct of CNBM and ACC, and perhaps feels constrained for various reasons from itself pleading facts relating to the actions of third – and non – parties. While the Company could, if CNBM and ACC are not joined as parties, file and rely on evidence from CNBM and ACC, joining CNBM and ACC may well result in (at least some) direct responses to Tianrui's core complaints.

(ab). I did not take the Company to be disputing the Court's jurisdiction to join CNBM and ACC as additional parties as respondents to the petition. The thrust of the Company's opposition to Tianrui's application was instead that the Court could not both order that the Company could participate in the proceedings and that the petition should be treated as an *inter partes* proceeding between Tianrui and CNBM and ACC (and the Company), and that this was not a proper case for giving such an *inter partes* direction.

(ac). in my view, while Tianrui is entitled to have CNBM and ACC joined as parties, and an order for joinder can properly be made on the hearing of the Re-Amended Summons for Directions, it would not be right to give further directions, and in particular to decide and reach a concluded view on whether the Company is properly able to participate in the proceeding or whether the proceeding should be treated as a proceeding against the Company or as an *inter partes* proceeding between the shareholders, before CNBM and ACC have been served and given an opportunity to make submissions as to what further directions are appropriate. It would be wrong in principle to make an order for joinder of new parties and at the same time make consequential orders which directly affect their position without them having the chance to appear before the Court and make submissions.

(ad). accordingly, I shall grant Tianrui's application for permission to amend the petition and make an order for the joinder of CNBM and ACC as respondents to the Re-Amended Petition. The Re-Amended Petition (with the Re-Amended Summons for Directions) will then need to be served on CNBM and ACC (and I shall shortly deal with the manner in which that is to be done) and on the Company (and notice will need to be given to the other shareholders) and the Re-Amended Summons will again need to be listed for a further hearing.

(ae). the further delay to the progress of these proceedings resulting from such an approach is less than satisfactory. But this is the result of the way in which Tianrui has chosen

(or, as it would say, been forced) to plead and formulate its case and for the reasons I have given cannot be avoided.

The characterisation issue

34. As I have said, I shall not at this stage decide or offer a concluded view on the dispute between Tianrui and the Company as to the proper characterisation of the petition proceedings. However, since the issues were argued at some length and since it may narrow the areas for further argument after CNBM and ACC are joined, I set out below my views on the purpose, interpretation and operation of CWR O.3, r.12(1)(a) and (b) (which views remain subject to revision in light of any submissions that CNBM and ACC may wish to make).

35. The decision as to which orders should be made pursuant to CWR O.3, r.12(1)(a) and (b) has a direct effect on (and CWR O.3, r.12(1)(a) and (b) are linked to) the costs orders to be made following the conclusion of the proceeding. The drafting of CWR O.24, r.8(2)(a) and (b) strongly suggests that it was intended and understood by the draftsman of the CWR that the Court has a choice between two alternatives – either the Court directs that the company itself is properly able to participate in the proceeding or that the petition be treated as an *inter partes* proceeding between shareholders. The implication of the reference to only two possibilities is that where the Court directs that the company is properly able to participate in the proceeding, the proceeding is characterised and treated as a proceeding against the Company. This interpretation is supported by the explanation provided in the User Guide. As I have noted, at C6.2, the User Guide states that "*the Judge must always determine whether the proceeding should be treated as (a) a proceeding against the company, in which case it will be treated as the respondent or (b) an inter partes proceeding between one shareholder(s) as petitioner and another shareholder(s) as respondent...*"

36. CWR O.24, r.8(2) links the Court's decision on characterisation to the costs issue. CWR O.24, r.8(2) ensures that where the proceeding is characterised as a proceeding against the company, the costs of the successful petitioner are to be paid by the company out of its assets (as a general rule). Where the proceeding is characterised as an *inter partes* proceeding between shareholders then none of the costs should be paid out of the assets of the company and the unsuccessful shareholders must pay the costs of the successful shareholder (again, as a general rule). This approach reflects the general principle of company law (the ***Principle***), which was referred to and held to apply to just and equitable petitions in *Freerider* and was discussed in the other cases referred to by Mr. Lowe Q.C. and Mr. Flynn Q.C., that a company's money should not be spent on disputes between its shareholders. In such a case,

authorisation by the directors of the payment by the company of the cost of opposition to the petition constitutes a breach of the directors' duties and the company will not be required to pay the costs of the petitioner either.

37. Even though the directions which the Court must give pursuant to CWR O.3, r.12(a) and (b) have an impact on, and are informed by an assessment of whether the company should be liable for, costs, the Court's decision on the summons for directions (made at an interlocutory and early stage in the proceeding) does not involve a final determination of which party should ultimately bear the costs of the petition. As Foster J noted in *Freerider* at [41] (underlining added):

> *"There is no application before the court at this time for any order as to costs or for determination as to which party should bear the costs of any order on the petition …..… this stage. Order 3, r.11(2) and O.24, r.8 do not envisage that the court should give directions in that regard on the hearing of this summons for directions. As would be expected, O.24, r.8 of the Companies Winding Up Rules makes provision in relation to the determination of costs on a contributory's winding-up petition only once the petition has been determined. Even then, O.24, r.8(2) only purports to state the general rules, which presumably means that there may be exceptions to those general rules in appropriate circumstances.... [In] the line of English authorities to which I have already made reference … at least insofar as made clear in the reports, the actual determination of final liability for costs was not made in advance of the hearing of the petition proceedings. It was simply determined whether or not the relevant company should participate in the proceedings and/or meet the actual cost of defending the proceedings out of its own resources……. it is argued that the real protagonists are Mr. Heinen and Mr. Le Comte, not Mr. Heinen and the company. If that is a correct analysis of the situation, the court is only being asked to determine at this stage whether the company should actively participate in the proceedings or whether it is simply the subject-matter of the dispute.*

38. So the Court needs to make an assessment, at an interlocutory stage before the petition has been heard and the facts determined, whether, having regard to the nature of the petitioner's claims, the company's funds should be spent on the costs of the proceedings. Since the assessment has to be made at an early stage in the proceedings, usually before a defence has been filed (although with the benefit of an account of the nature of the dispute and the position of the company and other shareholders in some cases, as in *Freerider*, by reference to affidavit evidence), the Court will usually focus on the nature of the dispute as set out in the petition (but where a defence has been filed, as in this case, or evidence is filed on the summons for directions in connection with the characterisation issue, the Court can and should have regard to the defence and evidence).

39. The Principle applies whenever the reality is that the dispute is between shareholders and not a dispute with the company itself (see *Freerider* at [37] and [38]). The dispute will be treated as one between shareholders and a not a dispute with the company itself where the Company cannot be said, or to the extent that it cannot be considered, to have an interest of its own which requires protection and justifies its participation in the proceedings and the use of its own funds to pay the cost of such participation. A critical question is whether the company can show that it has a real interest independent of its shareholders in defending the petition (does the company have a separate interest to protect?). As Foster J said in *Freerider* at [45], the Court must decide whether the company has any independent interest in the dispute.

40. In this context, I note the five propositions formulated and points made by Lindsay J in *Re a Company No. 001126 of 1992* [1993] BCC 325 at 332-333, in particular that the test of whether participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole; that in considering that test, the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency although there is no rule that necessarily and in all cases active participation and expenditure is improper. This was a case involving a section 459 unfair prejudice petition but the principles and approach apply in the case of a just and equitable petition based on misconduct and oppression by other shareholders.

41. In its skeleton argument (at [8]), the Company quoted [45] in *Freerider* and Foster J's reference to the need for the company to establish an independent interest in the dispute but did not then seek to explain the real nature of the dispute and identify the Company's independent interest in this case. Mr. Flynn Q.C. focussed his submissions on the nature of the Company (as a public company) and the existence and number of additional shareholders beyond CNBM and ACC. The Company's point was if the petition proceedings were to be conducted only between Tianrui, CNBM and ACC and without the active participation of the Company, a significant number of shareholders, whose interests are affected by the petition, would disenfranchised. I would note at this stage that there is an issue as to whether the other shareholders are truly independent of CNBM and ACC and that in any event they will have the opportunity to come forward and explain their position if they consider that to be important.

42. By contrast, Tianrui did rely on the nature of the underlying dispute. Mr. Lowe Q.C. in his oral submissions, as I have noted above, stated that the Re-Amended Petition was based on the improper takeover pact entered into and implemented by CNBM and ACC and he relied in particular on paragraphs 27A, 35, 37, 41 and 45 of the draft Re-Amended Petition. These

are the parts of the Re-Amended Petition in which Tianrui alleges that since 2014, CNBM, ACC and Tianrui have been involved in a takeover battle for ownership and control of the Company; that from about May 2015 CNBM and ACC were parties to the Takeover Agreement with a view to preventing Tianrui from controlling the Company or consolidating and increasing its own ownership of shares in the Company; that since 23 May 2018, CNBM and ACC had conducted the Company's affairs; that the Company's purpose in issuing the bonds and shares was to bring Tianrui's shareholding below 25% and/or to promote the Takeover Agreement and that the holders and ultimate owners of the bonds and shares issued by the Company are or were associated with or otherwise connected to CNBM and/or ACC and had an agreement or understanding about how the rights attached to the shares would be exercised.

43. I have summarised above the basis of the Re-Amended Petition and nature of the dispute as it appears from the Re-Amended Petition and the Company's defence. It seems to me that the petition is based on the misconduct of CNBM and ACC as shareholders (and also on a breach of fiduciary duty by the directors appointed by them who it is alleged acted as their agents and on their behalf). As Harman J noted in *Johnson* (underlining added):

> *"In A & BC Chewing Gum, to which I have already referred, winding up on the just and equitable ground was the only relief sought on the petition, and yet in that case the judge held that the company was no more than a nominal respondent to that winding-up petition. The petition was based on misconduct and breach of fiduciary duty many times by the respondent shareholders and directors."*

44. In my view, the issues raised in the Re-Amended Petition show that the real dispute in this case is between Tianrui and CNBM/ACC. The dispute concerns the hotly contested battle between these parties for control of the Company. Tianrui wishes to have a corporate divorce because of the conduct of CNBM and ACC, either directly or indirectly through their nominated directors (who are claimed by Tianrui to have been acting for and doing the bidding of CNBM and ACC). If Tianrui succeeds in establishing the allegations made in the Re-Amended Petition so that a winding up on the just and equitable ground is justified by reason of CNBM's and ACC's oppressive and unfair conduct towards Tianrui, and the improper conduct of management, acting on behalf of or at the instigation of CNBM and ACC, then it would, arguably, be wrong for CNBM and ACC to have the costs of the defence of the Re-Amended Petition paid out of the assets of the Company. At present, I do not see that the Company can properly be said to have a separate and independent position or interest from CNBM and ACC on the matters raised in the Re-Amended Petition. I appreciate that the Company has argued that it can properly defend the Re-Amended Petition because the action

complained of by Tianrui relates (primarily) to the conduct of its board, and the defence of the Re-Amended Petition involves establishing that the directors behaved properly, in accordance with their duties to act in the best interests of the Company and independently of CNBM and ACC – and that since there are a significant number of other shareholders, in addition to Tianrui, CNBM and ACC, the interests of the Company cannot be treated as the same as or confined to the interest of Tianrui, CNBM and ACC, who are just a sub-set of shareholders. But the real dispute set out in the Re-Amended Petition remains as to the manner in which CNBM and ACC conducted the defence of what they perceived to be Tianrui's damaging and wrongful takeover strategy, as to the action that they and those on the Company's board who are alleged to be acting for or in combination with them took against or with respect to Tianrui and whether that conduct justifies a winding up on the just and equitable ground. The extent to which there are any independent shareholders, whose interests the Company might need to protect, is an issue in the proceedings. If Tianrui is right, the Company's other shareholders are not independent but are associated with, acting pursuant to an agreement with or otherwise supporting CNBM and ACC. At this stage I do not consider that, on the basis of the materials before the Court, the existence of these other shareholders is a sufficient basis for concluding that the Company has a separate and independent interest justifying its active participation in and defence of the Re-Amended Petition. The formulation of the Company's defence could be said to represent a justification of CNBM's and ACC's action through the eyes of the Company. It has to be through the eyes of the Company since CNBM and ACC are not parties and so are not required or able to defend themselves.

45. In these circumstances, it seems to me to be at least strongly arguable that the proper order in this case is that the proceeding be characterised as an *inter partes* proceeding between Tianrui as petitioner and CNBM and ACC as respondents. In agreement with the Company, I do not consider that it is permissible under CWR O.3, r.12 for the Court to order that the the Re-Amended Petition be treated as an *inter partes* proceeding between Tianrui and the Company, CNBM and ACC as respondents and that the Company may participate in defending the Re-Amended Petition if so advised. The reference in CWR O.3, r.12(1)(a) to a company being able to "*participate in the proceeding*" is made by way of contrast with being "*the subject-matter of the proceeding.*" It is a reference to the Company being able and permitted to be the principal and active respondent to the petition. Even though set out in two sub-paragraphs, CWR O.3, r.12(1)(a) and (b) address the same question and issue and for the purpose of establishing the proper procedural framework for the defence of the petition require the Court to choose between the company or shareholders as respondents.

46. If the proceeding is characterised as an *inter partes* proceeding between Tianrui as petitioner and CNBM and ACC as respondents the main defence of the petition will then be for CNBM and ACC and the Company will be treated as the subject matter of the petition. But the Company will remain a respondent and an order under CWR O.3, r.12(1)(a) and (b) will not definitively determine the question of whether and the extent to which the Company will ultimately be liable for the costs of Tianrui, if successful, or of CNBM and ACC. But it will establish the framework for a decision on these costs issues. Furthermore, such an order will not mean that the Company is unable to take any steps in the proceedings at its own expense, where those steps are required to ensure that the proceedings are properly conducted (for example, by providing discovery of documents) or to protect an interest of its own (if in the course of the proceedings such an interest exists and needs action by the Company to protect it).

47. I have considered whether, in light of the fact that Tianrui has continued to seek an order that the Company be permitted to participate in the defence of the petition proceedings (and that the petition be treated as an *inter partes* proceeding to which the Company would be an active respondent), the right order at this stage would be that the petition be treated as a proceeding against the Company, with CNBM and ACC joined as respondents. However, on balance, I do not consider this to be appropriate. Tianrui maintained that the real dispute in this case was between itself and CNBM and ACC and the implications and consequences in my view of its submissions was that the proper characterisation of the proceeding is as an *inter partes* proceeding between the shareholders involved in the dispute. The fact that Tianrui impermissibly sought to give the Company an active role in the defence of the petition with CNBM and ACC on the basis of a misreading of CWR O.3, r.12(1)(a) and (b) does not justify making an order inconsistent with Tianrui's core submissions and the approach which, on the basis of the materials and submissions currently before me, seems to me to be the proper one to adopt.

Service

48. Tianrui seeks an order for substituted service on CNBM and ACC under GCR O. 65 r.4. CNBM is incorporated in the PRC and ACC is incorporated in Taiwan. Paragraph 3 of the Re-Amended Summons seeks an order in the following terms:

> *"Leave be granted to the Petitioner pursuant to GCR O. 64, r.4 to serve the Petition on CNBM and ACC by way of email to Maples and/or to CNBM's and ACC's nominees on the board of the Company or by such other means as the Court shall direct."*

49. GCR O.65, r.4 is in the following terms:

> *"(1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.*
>
> *(2). An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.*
>
> *(3). Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served."*

50. GCR O.65, r.4 applies to the service of the Re-Amended Petition by reason of CWR O.1, r.4(1):

> *"Every petition, summons, order or other document required to be served by these Rules, shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules. Where any such petition, summons, order or other document is required to be served out of the jurisdiction then GCR O. 11 shall apply to these Rules."*

51. CWR Order 3 Rule 11(3)(b), as I have noted, requires every contributory's petition and the summons for directions to be served on members named as respondents and states that leave to serve out is not required. GCR O.65, r.4 is applicable even where the respondent to be served is out of the jurisdiction by reason of GCR O.11, r.5(1). In the case of service out, GCR O.11, r.5(2) applies. It states that:

> *"Nothing in this rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country."*

52. Mr. Lowe Q.C. submitted that the petitioner must show that personal service is impracticable or practically impossible at the time of the application, whether or not it might become possible at some future date. He relied on the statement of the applicable principles in the judgment of Mangatal J in *Bush v Baines, Taylor and Attorney General* [2016] (2) CILR 274 at [96] (which the learned judge said that she had derived from the Grand Court Rules, the case law and the Hague Convention):

> *"(1) The purpose of service of proceedings is to bring the proceedings to the notice of a defendant. It is not about playing technical games...*

(2) *A writ for service within the jurisdiction in the Cayman Islands must be served personally on the defendant unless an order for substituted service is made...*

(3). *A writ for service out of the jurisdiction need not be served personally if it is served by a method that accords with the law of the country in which service is to be effected...These Rules are not dealing with substituted service orders. Affidavit evidence of service and as to the law of the relevant country would be required after service. For example, in England, the CPR allows for service by post. Therefore, if a writ from the Cayman Islands is to be served out of the jurisdiction in England, it may be served by post without an order for substituted service.*

(4) *Where a writ is to be served on a defendant in any country which is party to the Hague Convention, the writ may be served through the authority designated under the Convention in respect of that country, or if the law of the country permits, through the judicial authorities of that country—O.11, r.5, O.11, r.6(3).*

(5). *Where the Hague Convention applies, and service can be effected by one of the means provided for under the Convention, then service should ordinarily be effected in that manner. However, an order for substituted service can nevertheless be made in the Cayman Islands on the grounds that it is impracticable to serve the writ personally. In England, an order for service by an alternative means can be made for good reason.*

(6). *An order for substituted service may be made in relation to a writ for service out of the jurisdiction. However, the Rules do not authorize, and the court must not order, the doing of anything in a country that is contrary to the law of that country...*

(7). *The words "contrary to the law of that country" in O.11, r.5(2) mean expressly or positively prohibited by the laws of the other country.... An alternative method of service may be ordered even if it is not expressly permitted by the foreign jurisdiction. It is not required to be a method permitted by the other country's laws. What must not happen is that the method must not be one prohibited by the law of the foreign jurisdiction. There is no reason to equate the situation where the method of service is not provided for by the law of the state with the different question of whether the law of the state concerned prohibits the acts in question...*

(8). *Substituted service of a writ may be ordered where it is impracticable for any reason to serve the writ personally on that person.*

(9). *"Impracticable" means a practical impossibility of actual personal service. It means that personal service cannot be done, or carried out, it is practically impossible.*

(10). *The terms of O.65, r.4 are of very wide application, and give a wide discretion to the court—and mere technicalities have been disregarded....*

(11) *Service through diplomatic channels may be impractical...."*

53. Mr Lowe Q.C. argued that the requirements for an order for substituted service were satisfied in this case because of the impact of the Covid-19 pandemic on the practicability of effecting service by the routes that would usually be used and are permitted for service on companies incorporated in the PRC and Taiwan. He relied on the evidence of Ms Kohler-Kruner, a paralegal at Tianrui's Cayman attorneys, Ogier. In her First Affirmation she said as follows:

> *"13. It is public knowledge that on or about 30 January 2020, the World Health Organisation declared the outbreak of coronavirus disease 2019 ("COVID-19") a public health emergency, and on 11 March 2020 it was declared a pandemic. As a result of COVID-19, many countries have instituted various containment measures, including and not limited to closing their borders and imposing shelter-in-place orders.*
>
> *14. On 20 April 2020, Ogier sent an email to the Governor's Office to inquire as to whether the Governor was processing requests for service of documents outside of the jurisdiction. By email dated 22 April 2020, Gillian Skinner, the Corporate Services Manager and Policy Officer in the Governor's Office, advised that "At the moment, the diplomatic bag service is not operative so, if you send these documents to the Governor's office, they will just sit here. Probably better if you hang on to them and check back in a few weeks".....*
>
> *15. On 20 May 2020, Ogier sent a further email to the Governor's Office enquiring as to whether the Governor was processing requests for service of documents outside of the jurisdiction. Ms Skinner responded to Ogier on 21 May 2020 and confirmed that the Governor's Office are still unable to accept or forward any new service requests at this time. By email dated 18 June 2020, Ms Skinner confirmed that while the Foreign Process Section was accepting documents, they were not able to serve them....*
>
> *16. I also understand from their website that the Foreign Process Section of the Royal Courts of Justice (which I understand is the designated authority in the United Kingdom for the service of foreign proceedings) has noted on its Hague website as at the date of this affidavit...:*
>
> > *Please note the following information received from [sic] the Authority for England and Wales: "The COVID-19 outbreak has inevitably led to delays in the service of documents from other Contracting States. For the moment service of judicial and extra-judicial documents is suspended, but as soon as we are able to do so, staff in the England and Wales Central Authority will work to complete requests for service as promptly as they can.""*

54. In these circumstances, Tianrui proposed an alternative method of substituted service, as explained by Ms Kohler-Kruner in paragraph 17 of her First Affirmation:

> *"Accordingly, the Petitioner proposes the following methods of substituted service:*
>
> *(a) Sending copies of the documents by email to Maples, using the email address: James.Eldridge@maples.com. Maples are the attorneys instructed on behalf of the Company, and I understand that Mr Eldridge is the partner at Maples with conduct of these proceedings. Senior executives of CNBM and*

ACC (namely Mr Chang and Ms Wu respectively) currently sit as ACC and CNBM's respective nominees on the Company's board of directors; and/or

(b) Sending copies by way of email to Mr Chang and Ms Wu using the following email addresses: (i) czl@cnbm.com.cn; and (ii) doris.wu@acc.com.tw."

55. Mr Lowe Q.C. submitted that:

(a). in reliance on the First Affirmation of Charlotte Wu (***Ms Wu***) as to Taiwanese law and the First Affirmation of Junxiao Yang (***Mr Yang***) as to PRC law, the proposed methods of substituted service were not contrary to the laws of the PRC or Taiwan and were therefore prima facie permissible.

(b). the proposed methods of service will, in all reasonable probability if not certainty, bring the contents of the Re-Amended Petition to the attention of CNBM and ACC. In devising a method of service the Court was entitled to take account of the fact that CNBM and ACC had been closely involved in these proceedings already. Ms Wu and Mr Chang had been defending the proceeding but were also senior executives of CNBM and ACC respectively. In those circumstances there could be no prejudice to CNBM and ACC in making an order for substituted service in the term proposed.

56. The Company stated that it took no position on Tianrui's substituted service application, save in one limited respect. The Company submitted that it was misconceived to suggest that service ought to be effected through the Company's Cayman Islands attorneys, Maples. Maples had confirmed to Ogier, quite properly, that they do not act in any capacity for CNBM or ACC and it would be wrong to order that service be effected on a law firm in respect of parties for whom the firm does not act. The Company submitted that Tianrui had presented the Court with a false dichotomy. Tianrui said that Hague Convention service was long and arduous, so it must be appropriate to serve CNBM and ACC through the Company's lawyers. But the conclusion did not follow from the premise. Furthermore, it was wrong to suggest (if and to the extent that Tianrui made the point) that the Company (on the one hand) and CNBM/ACC (on the other hand) were one and the same so that it was justifiable to serve CNBM/ACC by communicating with the Company's legal advisers.

57. The Company noted that Tianrui had not explained what other attempts it might have made to contact CNBM or ACC directly, including as to whether and if so how they might be willing to accept service. These are large organizations, and their contact details are not a secret. It was also noteworthy that, notwithstanding their duty of full and frank disclosure, Tianrui had failed to mention that both CNBM and ACC (or its parent company) have offices in Hong

Kong and that CNBM has a representative office at Level 54 Office in Hong Kong Hopewell Centre 183 Queen's Road East Hong Kong. Furthermore, the parent company of ACC, Asia Cement (China) Holdings Corporation, has a principal place of business in Hong Kong at Portion of Unit B, 11th Floor Lippo Leighton Tower 103 Leighton Road Causeway Bay Hong Kong and it also has its registered office in the Cayman Islands at Cricket Square, Hutchins Drive PO Box 2681, Grand Cayman KY1-1111 Cayman Islands (all of this being publicly available information, which was found through straightforward internet searches). In addition, both CNBM and ACC have engaged attorneys in Hong Kong, who are representing those companies in connection with ongoing litigation involving Tianrui and a search of the Register of Writs of the shows that ACC recently engaged attorneys in the Cayman Islands. ACC filed a writ of summons and statement of claim on 15 August 2017 and were represented by Conyers Dill & Pearman. Tianrui (and the Company) were named as defendants to those proceedings.

58. Tianrui submitted that if the Court was minded to grant the joinder application (and then grant substituted service), then the Re-Amended Petition should be served using an alternative method rather than via the Hague Convention, to the extent the Court is satisfied that it would be appropriate to so order. On this point, the Company pointed out that there were a number of authorities which counselled against such an approach given that the methods of service set out in the Hague Convention were applicable as a matter of treaty law (and the Company cited, in a footnote to its skeleton argument, *Société Generale v Goldas* [2019] 1 WLR 346 at [31]-[34]).

59. In that case, Popplewell J, with whom the English Court of Appeal agreed, said that on an application for an order for alternative service under CPR r.6.15 it was relevant whether the method of service which the court was being asked to sanction was one which was not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with the UK, comity required the English Court to take account of and give weight to those objections. In such cases he said, substituted service should only be permitted in exceptional circumstances.

60. Ms Wu was asked to consider the validity under Taiwanese law of three different methods of substituted service: leaving copies of the documents at ACC's registered office; sending the documents by email to ACC's "*legal representatives in the Cayman Proceedings*" (the reference to the Cayman Proceedings is not, I believe, defined but appears to be the winding

up proceedings), by email to "*ACC's nominees*" on the Company's board (*doris.wu@acc.com.tw*) or by email to Maples "*who act for the [Company's] board of which Doris Wu is a member (and with whom they communicate in that regard).*" She says, in her conclusions (see [4(1)] and [4(2)] of the Taiwan Service Opinion) that none of these proposed methods of service is "expressly or positively prohibited" by Taiwanese law but they are subject to certain "*restrictions.*" According to these restrictions, if the documents are to be served not on a legal representative of ACC but instead on a third party such as ACC's Cayman legal advisers (acting in the Cayman proceedings) or ACC's representative on the Company's board, then ACC must "state expressly to the court that the third party is the appointed/authorised "person to be served"". The receiving party must also confirm that they have equipment which will enable the documents to be received. Ms. Wu also qualifies her statement that none of the proposed methods of service is expressly or positively prohibited by Taiwanese law in footnote 4 of the Taiwan Service Opinion where she says that:

> "*However, in practice there is a general consensus amongst the legal community that the service of legal process shall be carried out in a way that is positively provided for or stipulated in the Civil Code of Procedures. Otherwise the service of process may be deemed defected [sic] or invalid...*"

61. Mr Yan was asked to opine on whether similar methods of service on CNBM would be expressly or positively prohibited by PRC law or subject to restrictions. He concluded that:

(a). limb 3 of article 277 of the PRC Civil Procedure Law (***Limb 3***) expressly and positively prohibits any foreign organisation or individual from serving foreign court documents on a Chinese entity or individual in China without obtaining the approval of the relevant PRC competent authority, save for the formal methods stipulated in international treaties or through diplomatic channels. Article 277 states that a request for providing judicial assistance shall be conducted through channels stipulated in international treaties and in the absence of such a treaty a request may be made through diplomatic channels. The Hague Service Convention has been incorporated into PRC law.

(b). the first method, which involved leaving copies of the documents at CNBM's registered office in the PRC was prohibited by Limb 3.

(c). the second method, which involved sending the documents by email to Mr Chang, a CNBM executive who sits on the Company's board, it was "*arguable whether service via email on a Chinese individual from abroad may effectively constitute as serving a*

judicial document within China." It was not possible to confirm whether if Mr Chang "*locates and receives the email outside China*" service would be positively prohibited by Limb 3.

(d). the third method, which involved service by email to Maples in the Cayman Islands, was not prohibited or restricted by the PRC Civil Procedure Law.

62. The following are the key issues for the Court to consider in deciding whether to exercise the power to make an order for substituted service: (a) is personal service is impracticable? (b) are the steps which are to be taken to effect service and bring the document to the notice of the person to be served contrary to the general law of the country in which they are to be taken? and (c) are those steps reasonably likely to bring the document to the notice of the person to be served and otherwise appropriate, having regard to the overriding objective (and recognising that if the document is not likely to reach the person to be served nor come to his knowledge if service is so substituted, then as a general rule substituted service should not be ordered (see the 1999 White Book at 65/4/8). I consider each issue in turn.

63. Tianrui relies not on the delays to the process for service through the consular channels used pursuant to the Hague Service Convention but on their suspension (as at the date of Ms Kohler-Kruner's First Affirmation, being 10 November 2020). The statements from the Governor's Office referred to in [14] and [15] of Ms Kohler-Kruner's First Affirmation were to the effect that the relevant process was "*not operative*" and that the Foreign Process Section was "*unable*" to serve documents. In addition, in [16], Ms Kohler-Kruner refers to "*the service of judicial and extra-judicial documents [being] suspended*." These circumstances seem to me to satisfy the requirement of impracticability. As Mangatal J said in *Bush v Baines*: *"Impracticable" means a practical impossibility of actual personal service. It means that personal service cannot be done, or carried out, it is practically impossible.*" In the circumstances described by Ms Kohler-Kruner, the mechanism for effecting personal service is not available. It might be said that the suspension is only temporary and that the practical impossibility of using the normal Hague Service Convention or other consular channels for service will in due course disappear. But there is no evidence before the Court as to when normal service will be resumed and it seems to me that the Court is entitled to have regard to the available evidence and the position as at the relevant date, in this case probably the date of Tianrui's application for joinder and an order for substituted service. I have considered whether I should require further evidence to update Ms Kohler-Kruner's First Affirmation and to see whether there is any indication of when normal service will be

resumed, but I have concluded that doing so would not be consistent with the overriding objective.

64. In *Bush v Baines*, Mangatal J held that "*impracticable*" should be treated as covering that which was legally impossible or prohibited – if it was legally prohibited to serve personally, the consequence was that personal service could not be done or carried out. But, as I have noted, she accepted that "*impracticable*" had a wider meaning and could cover a case in which personal service was a practical impossibility. She also noted the statement in the 1999 White Book, note 65/4/17, which deals with substituted service of a writ issued for service out of the jurisdiction, and states that an application may be made "*after efforts to serve have failed*." She went on to say that: "*However, these words are there, in my view, because in most situations it is legally possible to serve personally and therefore one should in an ordinary case first demonstrate efforts to serve personally. However, this cannot mean that one should try to serve personally first, if that would be legally impossible*." The same reasoning and approach apply, in my view, in a case of practical impossibility. There would be no point, and it would be wholly inconsistent with the overriding objective, to require Tianrui to attempt to serve using a method that is at the relevant time unavailable. This is also the reason why the usual rule (also mentioned by Mangatal J that where the Hague Convention applies, and service can be effected by one of the means provided for under the Convention, then service should ordinarily be effected in that manner) does not apply in the circumstances of this case.

65. The key question when considering the second issue is, as Mangatal J noted in *Bush v Baines*, "*whether the law of the state concerned prohibits the acts in question*." An alternative method of service may be ordered even if it is not expressly permitted by the foreign jurisdiction. But the method must not be one prohibited by the law of the foreign jurisdiction. As Field J said in *Habib Bank v Central Bank of Sudan* [2007] 1 W.L.R. 470 (a case which considered the equivalent to GCR O.11, r.5(2) in the CPR) the prohibition is on authorising anything which is *against* the law of the foreign country:

> "30 *[GCR O.11, r.5(2)] does not require service abroad "by any method … permitted by the law of the country in which it is to be served". On the contrary, it is implicit ... that the court may permit any alternative method of service abroad.... so long as it does not contravene the law of the country where service is to be effected. In Shiblaq v Sadikoglu, at para 27, Colman J found that the method of service adopted in Turkey was not simply not permitted by Turkish law for the service of foreign proceedings but "was a method expressly excluded by reason of the Turkish objection registered under the Hague Convention and could not therefore be within the scope of CPR r 6.24(a)". The decision is therefore not authority for the proposition*

that service abroad must be expressly permitted by the foreign jurisdiction in order for it to be good service within [GCR O.11, r.5(2)].”

66. Tianrui argued, as I have noted, that the evidence of Ms. Wu and Mr. Yang demonstrated that the proposed methods of substituted service were not contrary to the laws of Taiwan or the PRC respectively. However, as my summary of their evidence makes clear, such an unqualified conclusion is not justified or supported by the evidence:

(a). there is a question as to whether the restrictions to which Ms. Wu refers should be treated as prohibitions, such that service without complying with the restrictions would be contrary to Taiwanese law. These restrictions include the requirement that documents may only be served on ACC’s Cayman legal advisers (acting in the Cayman proceedings) or ACC’s representative on the Company’s board, if ACC states expressly to the court that the third party is the appointed/authorised person to be served. Footnote 4 can be read as confirming a requirement (“*service of legal process **shall** be carried out in a way that is positively provided for or stipulated in the Civil Code of Procedures*”) to observe the relevant procedural rules, including the restrictions. However, Ms. Wu’s conclusion that none of the proposed methods of service is expressly or positively prohibited by Taiwanese law combined with the statement in footnote 4 that “*Otherwise the service of process may be deemed defected [sic] or invalid...*” indicates that Ms. Wu considers that the restrictions apply to the manner in which a permitted method of service is to be effected (and are conditions for ensuring that the permitted method is valid) so that a failure to obtain ACC’s confirmation that Maples or Ms. Doris Wu were authorised persons would not result in a breach of Taiwanese law but only ineffective service (perhaps pending ACC issuing such a confirmation). While the point is not beyond argument based on the Taiwan Service Opinion, I am prepared to adopt this construction and approach for the purpose of this application.

(b). Mr. Yan was unable to confirm that sending the documents by email to Mr Chang, whether he was in or outside China was not prohibited. His opinion was qualified. The evidence therefore indicates that there is a risk that service by this method would be positively prohibited by Limb 3 and PRC law.

(c). but Mr. Yan was able to confirm that service by email to Maples in the Cayman Islands was not prohibited.

(d). the evidence of Ms. Wu and Mr. Yan does not show that Taiwan or the PRC object to service otherwise than through its designated authority.

(e). accordingly, it appears that the evidence shows that service by email to Maples in the Cayman Islands will not be contrary to Taiwanese or PRC law and that service by email on Ms. Doris Wu (qua officer of the Company and of ACC) will not be contrary to Taiwanese law.

67. As regards the third issue, as Mangatal J noted in *Bush v Baines*, "*The purpose of service of proceedings is to bring the proceedings to the notice of a defendant.*" In *Bush v Baines* Mangatal J held that in interpreting and applying GCR O.65, r.4 the Court was required to have regard to the overriding objective, which required that the Court seeks to deal with the case before it justly, expeditiously and economically. In the present case, two issues arise. First, will service by email to Maples or Ms. Doris Wu be reasonably likely to bring the documents to the notice of CNBM and ACC? Secondly, is service on Maples, who are only the Company's attorneys and not instructed by CNBM or ACC appropriate?

68. In my view, service by email to Ms. Doris Wu will be reasonably likely to bring the documents to the notice of ACC. The evidence indicates that she is and has been closely involved with the dispute giving rise to the petition and remains an officer of ACC. It is therefore to be expected that she will ensure that the documents served on her will promptly be sent to the relevant directors and advisers of ACC. However, I agree with the Company that it is inappropriate at this stage at least to permit substituted service on Maples. There is authority that the Court may in certain circumstances order substituted service on the defendant's solicitors even where they have no authority to accept service (see *Hallam Estates v Baker* [2012] EWHC 11046 (QB) at [30]) and on third parties but there needs to be a strong and clear justification for doing so. In the present case, as the Company has pointed out, details appear to be available confirming that law firms in Hong Kong are acting for CNBM (and ACC) in proceedings arising out of the wider dispute between CNBM, ACC and Tianrui (and that Conyers in the Cayman Islands have relatively recently acted for ACC in proceedings to which Tianrui were a party). In my view, service on legal advisers to CNBM (and ACC) is to be preferred to service on the Company's attorneys. I appreciate that there may be an issue as to whether substituted service on the Hong Kong law firms by email to their Hong Kong office is contrary to Hong Kong law but it seems to me to be at least possible that it will not be. If it was, consideration could be given to substituted service on their Cayman Islands offices or, if an additional method of substituted service on ACC were required, on Conyers. But I would also hope that now that the Court has ordered that CNBM

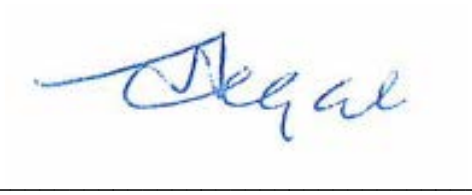
and ACC be joined as respondents, they will co-operate with Tianrui and make arrangements rapidly to accept service, despite the hotly contested nature of these proceedings and the difficulties which Tianrui claims to have had in securing co-operation from the Company in relation to service issues (which the Company strongly denies).

Costs

69. The issue of costs was dealt with briefly at the end of the hearing. Mr. Flynn Q.C., as I understood it, sought an order for costs in favour of the Company to cover the costs of the hearing of the Re-Amended Summons for Directions and, the event that the Court ordered that the proceeding be treated as an *inter partes* hearing between Tianrui and CNBM and ACC, the Company's costs consequential on such an order.

70. It seems to me that the Company should have its costs of the hearing of the Re-Amended Summons for Directions, which dealt with applications resulting from Tianrui's change of mind and approach.

71. As regards further costs, including the costs of a further hearing of the Re-Amended Summons for Directions and other costs consequential upon orders that might be made at that hearing, including the Company's costs of preparing its defence if an order is made that the proceeding is to be treated as an *inter partes* hearing between Tianrui and CNBM/ACC, I shall require submissions to be made at the further hearing.



Mr. Justice Segal
Judge of the Grand Court, Cayman Islands
27 January, 2021