THE EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 2008/00385

BETWEEN:

CHINA ALARM HOLDINGS LIMITED

Applicant

and

(1) CHINA ALARM HOLDINGS ACQUISITIONS LLC
(2) POPE INVESTMENTS LLC

Respondents

Appearances:

Mr. Andrew Willins of Appleby for the Applicant
Mr. Richard Evans of Conyers Dill & Pearman for the Respondents

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10th February, 20 April 2009

JUDGMENT

(Insolvency – Application to set aside statutory demand – whether demand is defective – whether injustice has been caused – whether applicant has a good claim for declaratory relief as to the terms of the Demand Note – whether Demand Note governed by Hong Kong law – whether debt disputed on substantial grounds within the meaning of section 157 of the Insolvency Act 2003)

[1] Foster J (Ag.):- On the 26th November 2008, the Respondents served on the Registered Agents of the Applicant in the British Virgin Islands, China Alarm Holdings Limited ("CAHL") a Statutory Demand ("the Demand") dated the 25th November 2008. The Statutory Demand was made in accordance with s. 155 of the Insolvency Act 2003 ("the Act") which provides that a creditor may make a demand on a person for payment of a debt owed by that person to him.

[2] The Demand was for payments of alleged outstanding debts in the sum of US$10,000,000.00 due to the First Respondent, China Alarm Holdings Acquisitions LLC

("CAHA") and US$5,555,561.00 due to the Second Respondent, Pope Investments LLC ("Pope") on the 30th day of September 2008, together ("the Debt"). The Respondents claim the Debt became due by virtue of Subscription Agreements entered into between CAHA and CAHL dated the 8th day of February 2005 and another Subscription Agreement entered into between Pope and CAHL dated the 6th March 2006. Pursuant to the terms of the Subscription Agreements and the corresponding Note Instruments dated 8th February 2005 and 6th March 2006, the Applicant subscribed for the principal amounts of US$10,000,000.00 and US$5,555,561.00 from the Respondents respectively.

[3] On the 9th December 2008 CAHL filed with the High Court an application to set aside the Demand served on it on the 26th November 2008 pursuant to ss156 (1) and (2) of the Act.

[4] The application was supported by two 'Affirmations' made by Tseng Wai Man, the Financial Controller for CAHL and Ing Yim Leung Alexander, the Chief Executive Officer of CAHL. On the 9th February 2009, an affidavit by Stephen Paul Dougherty was filed in support of the Application. That affidavit was filed to put before the court a "second draft Affirmation" which was exhibited to the affidavit of Mr. Dougherty as an unsigned Affirmation in draft of Ing Yim Leung Alexander. The "draft Affirmations" conformed in all respects to the Civil Procedure Rules 2000 Part 30, save an except that it was not signed by the maker and was unsworn. No objections were made to the court's consideration of this evidence.

[5] The grounds relied on by CAHL to set aside the Demand are as follows: -

a. The Debt is disputed on substantial grounds;

b. The Applicant has a good claim for declaratory relief as to the terms of the Note, which would (at the very least) postpone the date upon which the Note becomes due and payable;

c. The Demand is defective an /or a nullity, the Demand is defective and /or it would be unjust not to set aside the Demand (section 157 (i) (c)).

d. The Note is governed by Hong Kong Law and both the relevant Note Instrument and the underlying Subscription Agreements are the subject of the non-exclusive jurisdiction of the Hong Kong Courts.

[6] The Application to set aside this Demand is opposed. This opposition is supported by two affidavits, one made by Angel Liu, a Financial Analyst employed by Pope, filed 6th

February 2009 and the other by William P. Wells, the President of CAHA filed on the 4th February 2009.

[7] Despite the grounds stated in the application the main issues to be determined by the court is whether it is satisfied that: -

(i) there is a "substantial dispute" as to whether the debt is due and payable;

(ii) there is a defect in the demand, including a failure to comply with section 155 (3) of the Act, that the court should exercise its discretion to set aside the demand; and

(iii) the Note is governed by Hong Kong Law and that the Notes and the underlying Subscription Agreements are governed by Hong Kong Law as such rendering the laws in the British Virgin Islands the improper forum for the determination of the disputes between the parties.

[8] Section 155 (3) of the Act provides as follows: -

"(3) If the creditor making the demand under subsection (1) is a secured creditor in respect of the debt, the full amount of the debt shall be specified in the demand, but

(a) the demand shall specify the nature of the security interest, and the value which the creditor places on it at the date of the demand; and

(b) the amount claimed

(i) shall be the full amount of the debt less the amount specified as the value of the security interest; and

(ii) shall equal or exceed the prescribed minimum."

[9] The parties to this action both conceded that the Respondents were not secured creditors and as such this section does not apply and is therefore not a consideration by this court in the determination of the Application.

Background

[11] CAHL is a company incorporated in the British Virgin Islands. It holds 80% of the equity in Beijing Alarm Networks Limited, a sino-foreign joint venture company incorporated in the People's Republic of China. Beijing Alarm specializes in the provision of security services. This matter arises out of two Subscription Agreements entered into between CAHL and

the Respondents:

(i) The first Subscription Agreement is dated 8th February 2005 between CAHL and CAHA and with a corresponding Note Instrument of the same date CAHL subscribed for convertible notes up to a principal amount of US$10,000,000.00 issued in denominations of US$1,000,000.00 each, which would bear interest from the date of issue at the rate of 2% per annum of the principal amount of the notes;

(ii) The second Subscription Agreement dated the 3rd day of March 2006 between CAHL and Pope with a corresponding Note Instrument of the same date, CAHL subscribed for convertible notes up to a principal amount of US$5,555,561, issued in denominations of US$1,000,000.00 each, which would bear interest from the date of issue at the rate of 2% per annum of the principal amount of the Notes.

[12] The maturity dates of the Notes were due in February 2008. By an instrument in writing executed and dated October 2007, the parties to this action executed what has been termed a "Waiver" agreement. The Waiver agreement was granted to Pope, in consideration for Pope waiving the restrictions with respect to the issue of shares, and the option to extend the Maturity Date of the Notes it purchased pursuant to the Subscription Agreements. Clause 2 of the "Waiver" agreement, provided as follows:

"2. Extension of maturity Date

2.1 Pope is hereby granted the option, to be exercised by Pope in its sole and absolute discretion, to extend the maturity date as set forth in the Note Instrument, for any period of time up to three (3) years. Pope may extend such Maturity Date ***by written notice*** [emphasis mine] to the Company delivered in accordance with the notice provisions of the Note Instrument."

[12] CAHL does not contend that the Debt is owing but instead contends that the Debt is not due and payable at this time as CAHA and Pope have agreed not to enforce the Notes before 2012. The essence of this alleged agreement, or representation to forebear until 2012, is contained in conversations the Chief Executive Officer of CAHL claims to have had with the President of Pope sometime in June 2008 and again at a dinner meeting in

July 2008 held in the China Club in Hong Kong.

[13] CAHL contends that CAHA and Pope agreed, or made representations to it to extend the maturity date of the Notes as evidenced by it entering into an agreement with Citadel, a third party to repurchase convertible notes from Citadel in the aggregate amount of US$30,000,000. CAHL claims that this is a transaction it would not have performed if it did not have the agreement of the Respondents to extend the maturity dates to 2012.

[14] CAHL also proffered the supposition that Mr. Ing and Mr. Wells had a very close working relationship and friendship which may have accounted for the lack of any documentation to evidence the alleged agreement to extend the maturity date. Mr. Ing of CAHL contends that because of this close relationship, the precise terms of the agreement to extend the maturity date was to be the subject of later discussions.

Jurisdiction of court to set aside statutory demand

[15] The time for service of an application to set aside a demand is very strict. From the date upon which an application to set aside a demand is made, the time for compliance with the demand ceases to run (See s. 156 (4)).

[16] The jurisdiction of the Court to set aside a demand is provided in section 157 of the Act. The provisions of the Act that concerns this matter are sections 157 (1) (a) (i) (2) (a) (b) (4) (5) and (6).

Analysis of issues

[17] For the Courts consideration is the issue of whether or not the Applicant has established that there is a substantial dispute as to whether the Debt is due and payable at this time. The consideration of what amounts to a substantial dispute in the context of the Act, which if shown, would result in the court setting aside the statutory demand, is well settled in this jurisdiction. The leading and frequently cited authority is Sparkasse Bregenz Bank AG v. Associated Capital Corporation (BVI Civil Appeal No. 10 of 2002).

[18] In that case, the Court of Appeal considered the judgment of Matthew J in the High Court below in which he dismissed a petition to wind up Associated Capital Corporation, the respondent. Mathew J had concluded that under the terms of the contract between the parties, a court in Austria had exclusive jurisdiction to resolve any possible legal dispute arising out of their agreement. Mathew J had ordered that a winding up order could not be made until the court in Austria had resolved the dispute as to whether the debt was due.

[19] Byron C.J. in paragraph 3 of Sparkasse explained: -

> "The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Courts should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the court itself or in an action or by some other proceeding. A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company. If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was creditor and thus would not be entitled to present the petition, accordingly the presentation of the such a petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court."

[18] Where an Applicant can establish that there is a bona fide or substantial dispute as to whether a debt is due, then a statutory demand will be set aside. The evidence relied on by CAHL to establish that it has a substantial dispute as to whether or not the Debt is due is to be found in its affidavit evidence. The documentary evidence in this case is not disputed. Mr. Ing in his First Affirmation at paragraphs 13 and 14 says: -

> "13. Subsequently, the Company, China Alarm and Pope entered into an agreement whereby Pope and China Alarm agreed to waive their respective rights under the said condition 4.2 in return for an option to extend the maturity date for a period of up to 3 years (the "Waiver

Agreement"). Copies of the Waiver Agreement and the waiver letter can be found at pages 332-336.

14. The 2005 Note Instrument was originally due to mature on 8th February 2008. By a letter dated 26th February 2008, Pope exercised the option to extend the maturity date to 30th September 2008. A true copy of that letter appears at page 336 (i)."

[19] It is to be noted that the extension of the maturity date to 30th September 2008 was in keeping with the Waiver Agreement in that it was the option of Pope to so exercise, and that the exercise of the option was in writing. On a closer examination of the "writing" extending the maturity it stated as follows:

> "Pope hereby provides you written notice that it wishes to extend the maturity Date for its convertible Notes to September 30, 2008. Any further notices of extension by Pope will occur before September 30, 2008."

[20] It is uncontested and accepted that there does not exist any writing by any or each of the Respondents extending the maturity date beyond the 30th September 2008. However, CAHL, in its affidavit evidence stated at paragraphs 15 to 19 as follows: -

> "15. In May 2008, Citadel approached the Company proposing to sell back to the Company the convertible notes in the aggregate amount of US$30,000,000. Since the 2005 Note Instrument was due to mature in September 2008, the Company would not have had sufficient cash to redeem the 2005 Note Instrument if US$30,000,000 were applied to repurchase the convertible notes from Citadel. Therefore, the Company would only be in a position to agree to repurchase the notes from Citadel if the maturity of the 2005 Note Instrument could also be extended.
>
> 16. During the following few weeks I negotiated with Citadel on the terms of its proposal for the repurchase. In June 2008, when the Company and Citadel came closer to agreeing on the principal terms of the repurchase, I raised the matter with Mr. Bill Wells, President of Pope who at all times negotiated both for Pope and for China Alarm, with a view to securing an extension of the maturity of the 2005 Note Instrument which would be necessary if the Company were to commit to the repurchase proposed by Citadel. I understand Mr. Wells was also in regular

contact with Mr. Max Liu, an executive director of Citadel, in relation to Citadel's dealings with the Company at this time.

17. I discussed the proposal which I had received from Citadel with Mr. Wells and I told him the Company was not minded to agree because the 2005 Note Instrument was payable in September and we would need to set aside funds for final redemption, but that it would be possible to accommodate Citadel's request if an extension could be negotiated on the 2005 Note Instrument payable to Pope in September 2008. I told him that realistically, the Company would need an extension of the maturity at least to the same maturity date under the Citadel Transaction Documents (i.e. 24 October 2012).

18. In response, Mr. Wells made it clear to me that he was happy to further extend the 2005 Note Instrument to October 2012 and suggested that we leave the minutiae about the terms upon which the 2005 Note Instrument should be extended to be the subject of later agreement. Given Pope/China Alarm's eagerness to extend the maturity just 6 months or so earlier this came as no surprise to me. Mr. Wells made it clear that he was thinking along the lines of an improved interest rate and a lower valuation.

19. I told him that I was happy to agree to terms of that type, so long as they were reasonable and in line with the terms which I had agreed with Citadel. All along Mr. Wells knew the terms of the deal between the Company and Citadel, because that had formed part of our negotiation on the Waiver Agreement. Mr. Wells told me that he was happy to proceed on that basis. He also assured me that it would be in order for me to enter into the repurchasing agreement with Citadel in the meantime."

[21] What is striking about this evidence, is that despite the relatively large sums involved, and despite evidence of email correspondence between the parties before and after the maturity dates there is not a scintilla of documentary evidence to infer, let alone establish that the evidence given by Mr. Ing above that the maturity dates would be or had been extended to 2012. On the contrary, the documentary evidence shows that there was no agreement by the Respondents to extend the Maturity Dates.

[22] A series of email exchanges was exhibited in this matter between Mr. Wells and Mr. Ing

between September 2, 2008 and October 15, 2008. The emails exhibited by CAHL do not speak to any of the conversations referred to by Mr. Ing in his affidavit evidence to support his contention that there was an agreement or a representation to extend the maturity date to 2012. The emails in fact continuously express concerns by the Respondents as to the financial health of CAHL. In the email dated Saturday 4th October 2008 from Bill Wells to Alex Ing, Bill Wells states: -

> "While you are saying you are in control, we are hearing different from China. In addition, it is hard to see how the situation could have deteriorated to this degree without some type of breakdown between CAH and GT.
>
> The bottom line is for us to reach some type of agreement for us to extend our note, Pope will need control so that we can find out the true situation and act accordingly. This may mean we continue on the course you are on but it may require us to take a different action. We have been kept too much in the dark to be able to reach an agreement (as we do not know the situation well). While I know this would likely be a bitter pill for you to swallow (and not a role that I want). I think we have little choice on our end. Please let me know if this would be agreeable to you."

[24] The following series of emails dated October 4, 2008 from Mr. Ing to Mr. Wells speak to the possibility of Pope becoming a 51% shareholder of CAHL with Mr. Wells becoming chairman of CAHL and controlling the Board by replacement and additional directors of the board of CAHL, with Mr. Ing remaining on as CEO. Those emails show the contrary position of the information contained in Mr. Ing's and Ms. Lui's Affirmations.

[25] No where in those emails, does Mr. Ing speak of the conversations, representations or agreements he alleges to have been made to extend the maturity dates that were allegedly made in June and July of 2008. In his email dated October 6 2008 [page 352 of Mr. Ing's exhibit], Mr. Ing says to Trent concerning the offer made by Bill Wells to take over control of CAHL, in return for which Pope would be willing to extend the terms of the maturity of its debt.

> "I am sorry that I cannot accept Bill's offer.
>
> In that case I will put the Company CAH into liquidation and none of the

investors will have anything out of it.

I would like to point out that CAH is a BVI Company, which owned the JV Company in China. Even though CAH is in liquidation, there is no asset in CAH; it will not affect the cooperative JV company in China that means none of the outside investors can touch any assets in China. In another words, Bill will get zero out of the whole deal and the investment.

I hope he can think of consequence of the situation first.

Regards

Alex"

[26] The response is as follows:

> "Alex, I delivered your email to Bill and he wanted me to reply by saying that unfortunately that we will have no other choice but to pursue alternative action.
>
> Regards
> R. Trent Curry."

[27] In a response email by Mr. Ing to Mr. Wells on October 7th 2008, Mr. Ing speaks to the Company not having enough funds to repay Pope and Citadel; that the Company shall have no choice but to "file for bankruptcy."

[28] These undisputed email exchanges evidence a total and complete lack of agreement on any way forward to resolve CAHL's inability to satisfy its indebtedness to CAHA and Pope on the maturity dates for the Notes which had already passed. The evidence in this case extended to exhibits numbering 355 pages to Mr. Ing's 46 paragraph 2nd affidavit.

[29] What the court has to decide is whether there is a substantial dispute as to whether the Debt is due and payable at the time the Statutory Demand was made, and is the evidence put forward by CAHL of such tenure that it would leave the court to the reasonable inference to be drawn that this dispute is of such substance that it could only be resolved by cross examination?

[30] From my review of the evidence, the alleged "disputes" raised by CAHL is that of an unwilling debtor raising a cloud of objections on affidavits and thereby claiming that because of these disputed facts, this 'petition" cannot be decided without cross examination and ought to be determined by some other proceedings. CAHL contend

simply that the veracity of their affirmation evidence surrounding the alleged conversations which took place in June and July of 2008 [paragraphs 17-21 of Ing's Affirmation] has established a substantial dispute as to whether the Debts are due in September 30 2008, or in 2012; that this dispute is substantial and the statutory demand set aside.

[31] In Re Claybridge Shipping Co SA [1997] 1 BCLC 572 Oliver LJ at page 579, at paras. c – g had this to say: -

> "But it ought not, in my judgment, to be an inflexible rule that the Companies Court should *never* take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground, and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings. Whilst I do not in any way, therefore, seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross examination. The court must, I think, reserve to itself the right to determine disputes – even perhaps in some cases substantial disputes – where this can be done without undue inconvenience and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether.
>
> I am in no doubt that the instant case is such a case, although I am bound to say on the evidence before the court that I am very far from being persuaded that the dispute in the instant case in fact warrants the description of 'substantial' – at least as applied to anything but the volume of evidence. In the light of the evidence now before the court and the position of this company, I have no doubt whatever that this petition should be restored and allowed to proceed."

[32] Earlier in his judgment, Oliver LJ stated at page 578 at paras b – d stated: -

> "On an application like this the court necessarily has to take a view whether, on the evidence, there really is substance in the dispute which is raised. In the instant case the argument appears to me to be such a tenuous one that I for my part do not feel that I could identify it as one which appears to me, on the present evidence, to be one of either bona fides or of such substantiality as to warrant the petition being struck out.
>
> I do not wish in the least to cast doubt on the practice of the Companies Court – which is well-established – of staying a petition in circumstances where there is a bona fide and substantial dispute as to the existence of a debt and leaving it to the parties to fight the matter out between them in an action. But that is, at highest, a rule of practice and it must, I think, give way to circumstances which make it desirable that the petition should proceed, although it may be that that would only

apply in very exceptional circumstances. If this petition is struck out, the petitioner is, in the case of this foreign company which is not trading and which has no substantial assets anywhere but here in this country, effectively without remedy."

[33] In Re a company (No. 006685 of 1996) Ch D [1997] 1 BCLC, Chadwick J at page 642 said at paras. b – d stated: -

"It is, in my view, important to re-emphasize that there is no rule of practice in this court that a petition will be struck out or dismissed merely because the company alleges that the debt is disputed. The true rule, which has existed for many years, is that this court will not allow a winding–up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds. It will not do so, as a matter of practice, because the effect of presenting a winding-up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary writ action. The pressure arises from the fact that once the existence of the petition is known amongst those having dealings with company, they are likely to withdraw credit or refuse to continue to trade with the company on that ground that, if the company is wound up on the petition, their dealings with it will be subject to the provisions in s 127 of the Insolvency Act 1986. In those circumstances it may well be commercially necessary for the company to pay a debt which is disputed on substantial grounds rather than to run the risk that the whole of the company's business will be destroyed.

The rule of practice that this court will not allow a winding-up petition to be used for the purpose of exerting that sort of pressure has been recognized for well over 50 years; but in all the statements of the rule over that period it is made clear that it only applies where the court is satisfied that the dispute is founded on substantial grounds."

Chadwick J further stated at page 645 paras h – i: -

"In my view those authorities, and in particular the authorities of the Court of appeal to which I have referred, make it clear that the general rule under which this court refuses to entertain a petition founded on a disputed debt applies only where the dispute is a genuine dispute founded on substantial ground; and does not preclude this court from determining – or entitle this court to decline to determine – the question whether or not there are substantial grounds for dispute. Indeed, in the passage from the judgment of Oliver LJ to which I have just referred, he pointed out that the court necessarily has to take a view whether on the evidence there really is substance in the dispute which is raised by the alleged debtor."

[34] Chadwick J at page 649 at para. b had this to say: -

"I accept that any court, and particularly the Companies Courts, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in the circumstances in which, on a proper understanding of the documents, the evidence asserted in the affidavits on one side is simply

incredible."

[35] Counsel for CAHL in his address before this court argued that the court is faced with a plea of estoppel and a dispute to be resolved with the laws of Hong Kong; that the Court is to determine the bona fides of the dispute. In reliance of his estoppel plea, Counsel argued that the Applicant had acted to its detriment upon the reliance of the undertaking to defer the maturity date; the detriment being the payment to Citadel of the sum of US$30,000,000 which CAHL could have paid to CAHA and Pope.

[36] There is no dispute as to the Debt being owed. However, I find it incredible, to say the very least, that in light of the emails submitted for the court's consideration that the affidavit evidence of Mr. Ing claiming a representation to extend the maturity date of the Notes quite inexplicable. I therefore consider his affidavit evidence incredible.

[37] Mr. Willins on behalf of CAHL referred this court to Doncaster Pharmaceuticals Group Ltd & Ors v The Bolton Pharmaceutical Company 100 Ltd [2006] EWCA Civ 661 in support of his submission that the court when faced with or confronted with conflicting affidavit evidence, that "the decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials" (para 5). He further referred to paras. 17 and 18 which states as follows: -

> "17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact or relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol. 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.
> 18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a further investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case"

[38] I have no quarrel with the submissions made by Mr. Willins in this instance. However during his address, the court specifically asked whether the Applicant needed more time,

to prepare for the matter, and whether if so granted, there would be a likelihood of obtaining further evidence to establish or support the contention of the Respondents agreeing to the extension of the maturity date. No further time was requested of the court.

[39] The court has had to consider a number of decisions either in the context of winding-up proceedings or sometimes in relation to applications for summary judgment allegations that the defendant (or the debtor) has a cross-claim, or counter-claim, equal to the alleged indebtedness, which will operate as a set off and, therefore, a defence to the claim. In Re A Company (No. 006685 of 1996), Chadwick J (as he then was) referred to some earlier remarks by Lord Greene, Master of the Rolls in Re Welsh Brick Industries Ltd. [1946] 2 All ER 197, where he said this:

> "I do not think that there is any difference between the words "bona fide dispute" and the words "disputed on some substantial ground." I cannot accept the proposition that, merely because unconditional leave to defend is given, that of itself must be taken as establishing that there is a bona fide dispute or that there is some substantial ground of defence. The fact that such an order is made is no doubt a matter which the winding-up court will take into consideration and to which the winding-up court will in due course pay respect, but I cannot regard it as in any way precluding a winding-up judge from going into the matter himself on the evidence before him and considering whether or not the dispute is a bona fide dispute, or, putting it another way, whether or not there is some substantial ground for defending the action."

[40] In Portsmouth v Alldays Franchising Ltd and others [2005] BPIR 1394 Patten J said at para. 12: -

> "So far as the evidence is concerned, the mere fact that a party in proceedings not involving oral evidence or cross-examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance. Once the court considers that the evidence is reliable in that sense, and not some attempt to obfuscate the real issues by raising a series of hopeless allegations, then it does, of course become necessary to consider what the legal consequences of it are."

The factual history of this case and the "oral" testimony of CAHL given in its affirmations do not support a real prospect of success in this "summary" judgment sense. The facts in this case clearly do not come close to presenting a substantial dispute as to whether or not the Debt is due. The Affirmations which have been tendered to give evidence of the oral

representations by itself and whether considered against the backdrop of the written evidence in my judgment is an attempt to cloud the issues between the parties. In fact, the written evidence presented is silent as to the allegations of an agreement or representation to extend the maturity date. In my opinion and in considering the evidence in this case, I reach the conclusion that the dispute said to exist is not founded on any substantial or bona fide grounds. CAHL has also submitted that the representations allegedly made amount to an estoppel. For the reasons stated above, I find it incredible that there is put forward these representations, allegedly made in June and July 2008 which supposedly give rise to the estoppels. Yet the email evidence, the Waiver Agreement and the letter granting the extension of the maturity date from February 2008 to September 2008 points to an entirely opposing contention to that of the Applicant. he submissions that there was a representation giving rise to an estoppel fails as there is no credible evidence that any such representation was made. Even if such a representation was made, it would not found an estoppel.

Hong Kong Law

[42] The Applicant has submitted that there exist a substantial dispute on a question of fact which is not appropriately determined on a summary basis, certainly where foreign or Hong Kong Law applies.

[43] The simple answer and the facts and material before this court is to be found in the authority Sparkasse at paragraph 4 where a similar submission was made that the agreement between the parties in that case was subject to Austrian Law. Byron CJ said.

> "The agreement between the parties clearly mandated that the agreement is subject to the law of Austria and that the Court responsible for the bank's headquarters in Vienna has exclusive jurisdiction over any possible legal dispute arising out of the agreement. This provision is unambiguous. Austrian Law would be relevant to resolve the questions that were raised by the parties. It is not necessary to rely on Austrian Law to determine whether there was a dispute. One can conclude that a dispute exists without knowing how the dispute would be resolved. The learned trial Judge concluded that there were disputes of both a factual and legal nature and it is not for this Court to resolve those disputes. He concluded

that the dispute between the parties should be settled in accordance with the terms of the agreement before it could be said that there was debt which could ground a winding up order. The principles outlined above, clearly indicate that it was his duty to determine whether there is a genuine and substantial dispute as to whether there is a debt. None of the jurisprudence indicates that it was his duty to resolve the dispute. I reject the contention that the failure to lead Austrian Law in evidence was an error or impacted on the burden of proof. The questions that the judge was required to answer, and those that he did answer did not require any knowledge of Austrian Law. If he attempted to resolve the dispute he would have been improperly encroaching on, and usurping a jurisdiction which the parties had conferred on the Austrian Court."

[44] I likewise find that it is this court's function to **inquire** whether there is a substantial dispute in this case, in line with the authorities I have referred to above. It is not this court's function at this stage to **resolve** the issue as to whether there was an agreement to extend the maturity date. It is this court's function to inquire whether there is any bona fides in the allegation that an agreement or representation was made to extend the maturity date which would give rise to the finding of there being a substantial dispute as to whether the Debt is due now or at some future date.

Conclusion

[45] The terms of the agreement (Clause 2) clearly provides that any extension of the maturity date must be in writing. There is no evidence in this case in writing for the court to consider whether there was an agreement or undertaking to extend the maturity date. There is also no credible evidence or otherwise as to whether there exist any promise or representation to extend the maturity date. As such, I also find that the argument that the Respondents agreed to an extension to 2012 to forebear, but that: -

"(1) the precise terms would be the subject of later discussion;

(2) the terms would in any event broadly mirror terms of the agreement with Citadel;

(3) both parties would negotiate reasonably, commercially and in good faith"

is also without merit in establishing on the facts of this case a substantial dispute.

[46] The written, evidence reveals an understanding completely at odds with the above arguments. I refer to the Waiver Agreement and further to the emails exchanged by the parties.

[47] After examining the Demand, I have found no defect in it. It conforms to the requirements of the law. I have accepted the submissions of Mr. Richard Evans completely in this regard. I have no doubt whatsoever that the Applicants know exactly what debt is owed. Section 157 (2) of the Act gives the court a discretion in deciding whether to set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused because of a defect in the demand. In so exercising my discretion I have considered whether there exist and whether any prejudice has been suffered by the Applicant that would amount to substantial injustice. I have found none. I would therefore dismiss the application to set aside the Demand with cost to the Respondent to be agreed or otherwise assessed. Under s. 157(5) of the Insolvency Act on dismissing an application such as this the court is required to make an order authorizing CAHA and Pope to make an application for the appointment of a liquidator and I now so order.

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Peter I. Foster
High Court Judge (Ag.)
British Virgin Islands