EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2015/0092

IN THE MATTER OF ASIA COAL ENERGY VENTURES LIMITED
AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004 (AS AMENDED)
AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

BETWEEN:

RAIFFEISEN BANK INTERNATIONAL AG

Applicant

and

ASIA COAL ENERGY VENTURES LIMITED

Respondent

Appearances:

David Allison, Q.C., and Mungo Lowe of Harney Westwood & Riegels,
for the Applicant
Matthew Hardwick, Q.C., and Richard Evans and Adam Hinks of Conyers Dill
& Pearman, for the Respondent

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2015: September 16
2016: April 29

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JUDGMENT

Applicant bank sought that Respondent company be wound up and liquidators appointed – Alleged $70 million due and owing, despite demand for payment, pursuant to sale and purchase agreement whereby Applicant agreed to sell to Respondent its interest in loans and related security as part of larger transaction – Agreement governed by English law and English courts have exclusive jurisdiction in connection with disputes – Applicant claimed Respondent "unable to pay its debts as they fall due" and is "insolvent" – Alternatively claimed just and equitable ground asserting Respondent issued debenture to connected company to put assets out of reach of Applicant – Respondent asserted that declined to pay only because Applicant unable to, and did not, transfer to it material security to be transferred to it under agreement.

Fundamental issue whether Respondent met requirement of showing "substantial dispute" as to whether the debt alleged is owing or due; that is, whether debt disputed on genuine and substantial grounds – Court has duty to carry out preliminary investigation to determine whether dispute is on genuine and substantial grounds – Court not required to determine dispute.

Whether substantial dispute turned in part on potential interpretation of provisions of agreement and an overarching agreement respecting overall transaction – Arnold v Britton and others [2015] UKSC 36, paragraphs 14 – 15 cited [When interpreting written contract, court must identify intention of parties by reference to what reasonable person having all background knowledge which would have been available to parties would have understood them to be using language in contract to mean, focussing on meaning of relevant words in their documentary, factual and commercial context, however, subjective evidence of any party's intentions must be disregarded].

Respondent satisfied Court that alleged debt disputed on genuine and substantial grounds – A court determining the dispute could, first, interpret the agreement to find Applicant may have been, and based on what transpired, was required to transfer security of a certain quantity, character and/or quality, and second, security that Applicant was able to and was prepared to transfer was materially deficient from that which it committed to transfer.

Not just or equitable to wind up Respondent based on debenture – shown to have been for bona fide purpose.

Application dismissed.

[1] **LEON J [Ag]** The Applicant, Raiffeisen Bank International AG ("**Bank**"), applied for an order that the Respondent, Asia Coal Energy Ventures Limited ("**Company**"), be wound up and liquidators appointed pursuant to the Insolvency Act, 2003 ("**Insolvency Act**").

OVERVIEW

[2] **POSITION OF THE BANK.** The Bank alleged that the sum of approximately $70 million is due and owing to it by the Company pursuant to a Sale and Purchase Agreement dated 7 May 2015 ("**SPA**") whereby the Bank agreed to sell to the Company its interest in certain loans ("**Loans**") and certain related security for the loans ("**Security**"). The SPA is governed by English law[1] and the English courts have exclusive jurisdiction in connection with any disputes.[2]

[3] The purchase price ("**Purchase Price**") contemplated by the SPA[3] was calculated as $120 million less the sum GBP32,122,390 paid

[1] SPA, clause 23: "This Agreement and any non-contractual obligations arsing out of or in connection with it are governed by and shall be construed in accordance with the laws of England."
[2] SPA, clause 24.1: "Each Party hereto submits to the exclusive jurisdiction of the English courts in connection with any disputes arising out of or in connection with this Agreement including a dispute relating to any non-contractual obligation arising out of or in connection with this Agreement."
[3] SPA, clause 1.1, definition of "Purchase Price".

by the Company for a minority shareholding ("**Shares**")[4] in Asia Resources Minerals Plc ("**ARMS**").

[4] Completion of the SPA occurred on about 1 July 2015 at which time, under the terms of the SPA, the Purchase Price would become due and payable. As payment was not made by the Company, on 9 July 2015 the Bank demanded payment of the Purchase Price pursuant to the provisions of the SPA. The Bank asserts that the Company failed to pay and failed to provide any proper reason for its failure to pay.

[5] The Bank therefore claims that the Company is "unable to pay its debts as they fall due", that the Company is "insolvent" within the meaning of Section 8(1)(c)(ii) of the Insolvency Act, and that a liquidator should be appointed and the Company wound up pursuant to Sections 159(1)(a) and 162(1)(a) of the Insolvency Act.

[6] Further, the Bank asserts that on about 25 June 2015 the Company "purported" to grant fixed and floating charges over all of its assets in favour of a connected company ("**ACE Debenture**") in order to secure its liability under a GBP238 million Loan Facility. Because the Company is a special purpose vehicle for the purpose of entering into the SPA and acquiring the issued share capital of ARMS, the Bank asserts that "there is a serious concern" that the ACE Debenture was for the purposes of putting the Company's assets out of reach of the Bank, and accordingly that it is "just and equitable" that a liquidator should be appointed and the Company

[4] 57,361,411 ordinary shares, as defined in the Framework Agreement (explained and defined below), clause 1.1, "Definitions".

wound up pursuant to Sections 159(1)(a) and 162(1)(b) of the Insolvency Act.

[7] **POSITION OF THE COMPANY.** The position of the Company is that the single alleged debt relied upon by the Bank is the subject of a bona fide dispute on substantial grounds.

[8] In particular, the Company asserts that it declined to pay what is part of the Purchase Price only because the Bank was unable to, and did not, transfer to the Company what the Company asserts was to be encompassed in the Security that the Bank was required to transfer to it under the SPA.

[9] **ISSUES.** The fundamental issue on this application is whether the Company has met the requirement of showing a "substantial dispute" as to whether the debt alleged is owing or due; that is, whether the debt is disputed on genuine and substantial grounds.

[10] As explained below, the Court has a duty to carry out a preliminary investigation to determine whether the dispute that the Company has raised about the alleged debt is on genuine and substantial grounds. The application does not require this Court to determine the dispute.

[11] Whether there is a substantial dispute turns on the potential interpretation of the relevant provisions of the SPA and an overarching agreement respecting the larger transaction of which the SPA was a part. In particular, an important question is whether there is a substantial dispute about the Security the Bank was

required to transfer to the Company – was it just whatever the Bank had by way of security or did the Bank make a commitment pursuant to the SPA as to what might be termed the quantity, character and/or quality of the Security?

[12] The alternative issue is whether in any event it is just and equitable for the Company to be wound up because of its granting of the ACE Debenture.

[13] **CONCLUSION.** For the reasons set out in this Judgment below, the Company has satisfied this Court that the alleged debt is disputed on genuine and substantial grounds.

[14] This Court has concluded that there is a bona fide dispute between the Bank and the Company on substantial grounds such that a court determining the dispute could:

- first, interpret the SPA, the main contractual document between the Bank and the Company, to find that the Bank, based on what transpired between the Bank and the Company prior to the SPA, was required to transfer to the Company not just what the Bank had by way of Security but something more, namely Security of a certain quantity, character and/or quality; and
- second, find that the Security that the Bank was able to and was prepared to transfer to the Company was materially deficient from that which the Bank was committed to transfer.

[15] Further, this Court does not consider on the evidence and submissions before it that it would be just or equitable to wind up the Company because of it having granted the ACE Debenture, which the Company has shown was for a bona fide purpose.

[16] The application will be dismissed.

APPROACH TO DETERMINE WHETHER SUBSTANTIAL DISPUTE

[17] A company that is "unable to pay its debts as they fall due" is "insolvent" within the meaning of Section 8(1)(c)(ii) of the Insolvency Act and a liquidator should be

> appointed and the Company wound up pursuant to Sections 159(1)(a) and 162(1)(a) of the Insolvency Act.

[18] Non-payment of a single, undisputed debt is sufficient to demonstrate that a company is unable to pay its debts as they fall due.

[19] "A winding up order will not, as a matter of discretion, be made on a debt which is subject to a dispute, provided that the dispute is based on some substantial ground".[5] This Court only needs to determine if there is a "substantial dispute" or as it is often put, a bona fide dispute on substantial grounds.[6]

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[5] McPherson's Law of Company Liquidation, Third Edition, 2013, Andrew Keay ("**McPherson**"), 3-067 and 3-068.

[6] Applications to Wind Up Companies, Third Edition, 2015, Derek French, ("**French**"), paragraphs 7.462 – 7.464; Re a Company (No. 003079 of 1990) [1991] BCLC 235 (Ferris J); Commissioners of

[20] As indicated above, ordinarily[7] the court is not required to determine the dispute. The role of the court is to inquire whether there is a substantial dispute. It is not the court's function at this stage to resolve the issue."[8]

[21] To determine whether there is such a dispute, the Court has a duty to carry out a preliminary investigation to determine whether the dispute that the Company has raised about the debt is on genuine and substantial grounds.[9] (For the avoidance

of doubt, that phrase encompasses and defines the statutory phrase, "substantial dispute").

[22] The minimum threshold for a substantial dispute has been set out and discussed in numerous judgments.[10]

[23] It is clear that a mere assertion of a substantial dispute (or in some judgments under slightly differently worded statutes, an alleged

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Customs & Excise v Jack Baars Wholesale [2004] BPIR 543 (Lindley J) at paragraph 22; Abbey National plc v JSF Finance and Currency Exchange Co Ltd. [2006] EWCA Civ 328 (Morritt C) at paragraphs 36 and 46.

[7] It was submitted that there are limited exceptions to the basic principle, established by judgments cited below, that the court on an application such as this is not required to determine the dispute. The point is not one decided by this Judgment.

[8] China Alarm Holding Limited v (1) China Alarm Holdings Acquisition Ltd (2) Pope Investments LLC, BVIHCAV 2008/00385, Foster J, paragraph 44; French, paragraph 7.435.

[9] Jinpeng Group Limited v Peak Hotels and Resorts Limited ("**Peak Hotels**"), BVIHCMAP 2014/0025, Court of Appeal, 8 December 2015, paragraph 27 http://www.eccourts.org/jinpeng-group-ltd-v-peak-hotels-and-resorts-ltd/, paragraph 29.

[10] Integrated Whale Media Investment Inc. v Highlander Management LLC, BVIHC (COM) 2015/0017, 26 February 2016, paragraphs 64 – 69 (in context of an application to set aside a statutory demand).

debt that is "bona fide disputed on substantial grounds") is not sufficient.[11]

[24] To constitute of "substantial dispute", "the debt must be disputed on genuine and substantial grounds"[12]; the dispute must be "real as opposed to frivolous"[13]; the alleged debtor "has to produce some tangible evidence in support"[14]; "[t]here has to be something to suggest that the assertion is sustainable" (which could be a witness statement or document, unless the evidence asserted is "inherently implausible", "contradicted by or not supported by documents" or "not supported by contemporaneous documents"[15]).

[25] The just and equitable ground to appoint a liquidator may be utilized in various situations. There is no closed list of categories, even though five broad situations have been identified.[16] The Court is to consider all of the facts and circumstances. A creditor's lack of confidence in the conduct and management of a company's affairs may be sufficient, as may the need for an investigation of a company's affairs.

DETERMINING WHETHER THERE IS A SUBSTANTIAL DISPUTE IN THIS CASE

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[11] Collier v P & MJ Wright (Holdings) ("**Collier**") [2008] 1 WLR 643, paragraph 38.

[12] Peak Hotels, following Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation, BVIHCVAP 2002/0010, Court of Appeal, 18 June 2003 (per Sir Dennis Byron CJ).

[13] Arena Corporation Ltd. v Schroeder [2004] EWCA Civ 371, paragraph 53.

[14] Collier, paragraph 38.

[15] Bryce Ashworth v Newnote Limited [2007] EWCA Civ 793, paragraphs 33 – 34; Collier, paragraph 21.

[16] McPherson, paragraphs 4-026 – 4-027.

[26] Determining whether there is a substantial dispute in this case involves this Court conducting a preliminary investigation to conclude whether there is a bona fide dispute between the Bank and the Company on substantial grounds such that a court determining the dispute could:

- first, interpret the SPA, the main contractual document between the Bank and the Company, to find that the Bank, based on what transpired between the Bank and the Company prior to the SPA, was required to transfer to the Company, as part of the Purchased Assets, not just what the Bank had by way of Security but something more, namely Security of a certain quantity, character and/or quality; and
- second, whether Security that the Bank was able to and was prepared to transfer to the Company was materially deficient from that which the Bank was committed to transfer.

[27] It appears that the SPA should be interpreted, like any contract governed by English law, on the principles set out by the Supreme Court in 2015 as follows:

> When interpreting a written contract, the court must identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", focussing on the meaning of relevant words in their documentary, factual and commercial context. However, subjective evidence of any party's intentions must be disregarded.[17]

[17] Arnold v Britton and others [2015] UKSC 36, paragraphs 14 – 15.

OVERALL TRANSACTION AND SPA TRANSACTION

[28] A Framework Agreement dated 7 May 2015 ("**Framework Agreement**") among the Bank, the Company, Ravenwood Acquisition Company Limited ("**Ravenwood**") and another outlined the overall transaction among the parties to it and in doing so, provided for the SPA.[18] Like the SPA it is governed by English law and has an exclusive jurisdiction clause in favour of the English courts in connection with any disputes.

[29] The Recitals in the Framework Agreement explained, in part, that the Company was "considering the making of an offer [defined as "**Offer**", to be made in accordance with securities regulatory requirements[19]] … for the acquisition of shares in [Asia Resources Minerals PLC, defined as "**ARMS**"]" and the Company wished to purchase the Shares, which were owned by Ravenwood and secured by it to the Bank, in or through the Offer. ARMS has substantial coal mining interests in Indonesia.

[30] It was explained in the evidence of the Company in opposition to the application[20] that the objective of the overall transaction was for

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[18] Framework Agreement, Recitals (D) and (E) and clause 1.1, definitions of "Loan Acquisition Transaction" and "Loan Sale Agreement".

[19] City Code on Takeovers and Mergers, as defined in Framework Agreement, clause 1.1, "Definitions" and/or the London Stock Exchange.

[20] First Affidavit of Kin Chan sworn 4 September 2015 and Second Affidavit of Kin Chan sworn 8 September 2015 ("**Chan 2**"), and Exhibit KC 1. Mr. Chan's position with the Company is set out below in the discussion of the Company's evidence.

the Company to become the majority shareholder in ARMS with a view to recapitalizing ARMS and enhancing its value.

[31] To deal with the commercial problem that 23.81% of the shares in ARMS were owned by Ravenwood and charged to the Bank, it was agreed that the Bank would release its charge on the Shares and the Company would step into the shoes of Ravenwood in connection with the Loans and obtain the Bank's Security for the Loans.

[32] The Company submits that the quantity, character and/or quality of the Security were material to it from a commercial perspective whereas the Bank submits that the only commercial concern with respect to Security was that the Company would take free of the Bank's Security.

[33] The structure was complicated by a requirement to consult with the UK Takeover Panel in connection with the Offer (to ensure fair treatment of the other ARMS shareholders). In that regard, it was necessary to exclude the Shares from the SPA (which, as explained below, was called the "Loan Sale Agreement" in the Framework Agreement).

[34] The Framework Agreement contemplated a **Loan Acquisition Transaction** that would be documented by a **Loan Sale Agreement** [the SPA].

[35] The Framework agreement defined the "**Loan Acquisition Transaction**" as follows:

> the transaction under which the Bank (in its capacity as lender) sells all of its rights, benefits, title, claims and interests (whether legal or beneficial and whether now or hereafter in existence) under or in respect of certain loans (including under the Ravenwood Facility Agreement), together with any and all of the other rights, benefits, interests and claims (howsoever described or arising) in and under any ancillary guarantee or security relating to such loans, of the Bank (in its capacity as lender) excluding the Shares.

And defined **Loan Sale Agreement** [the SPA], as follows:

> the agreement documenting the Loan Acquisition Transaction [a defined term in section 1.1] to be entered into between the Bank and the [Company] substantially in the form set out in schedule 3."

[36] In the Framework Agreement, Ravenwood agreed and undertook to accept the Company's offer for the Shares and the Bank agreed to release its security interest over the Shares to enable it to do so.

[37] In the SPA, the Bank agreed to sell to the Company the "**Purchased Assets**". The obligation was states as follows:

> On the terms of and subject to the conditions of this Agreement, the [Bank] hereby agrees to sell, assign, transfer and convey in accordance with the provisions of this Agreement all of the Seller's rights, title and interest in, to and under the Purchased Assets free from all and any encumbrances. The consideration for the sale of the Purchased Assets shall be the Purchase Price.[21]

[21] SPA, clause 1.1, definition of "Loan Acquisition Transaction".

[38] The definition of Purchased Assets is central to the dispute between the Company and the Bank. Purchased Assets were defined as follows:

> any and all of the [Bank's] rights, benefits, title, claims and interests (whether legal or beneficial and whether now or hereafter in existence) under or in respect of the Loans, together with any and all of the [Bank's] other rights, benefits, interests and claims (howsoever described or arising) in and under any ancillary guarantee or security relating to the Loans and all Ancillary Rights and Claims, excluding all of the excluded Assets and the Ravenwood Loans to the extent that they are to be repaid or prepaid in accordance with the Framework Agreement.[22]

The key phrase for present purposes is the description of the Security, being "any and all of the [Bank's] other rights, benefits, interests and claims (howsoever described or arising) in and under any ancillary guarantee or security relating to the Loans and all Ancillary Rights and Claims."

[39] The definition of Purchased Assets does not expressly include the term "**Collateral**", which is defined in the SPA as follows:

> all credit support and collateral security provided under or n relation to the Loans howsoever described or arising and including (without limitation) the security referred to in Schedule 1.[23]

[22] SPA, clause 1.1, definition of "Purchased Assets".
[23] SAP, clause 1.1, definition of "Collateral".

Schedule 1 lists four general categories of property, being certain tugs and barges, an interest in a gold mine, a minority shareholding in the owner of a coal mine, and certain land.

[40] The Bank committed in the SPA, among other things, not to make or agree to changes (broadly defined) in relation to the Loans or the Collateral "or any assets forming part of the Collateral" without the Company's consent.[24]

[41] Neither the Framework Agreement nor the SPA contained what is sometimes referred to as an 'entire agreement clause', 'integration clause' or 'merger clause' that declares a written contract to be the complete and final agreement between the parties and seeks to prevent the parties from relying on any preceding agreements, negotiations or discussions that have not been set out in the agreement.

[42] The Framework Agreement contains provisions, headed "Independent Assessment" whereby,

- first, each party acknowledged to the other that:
  (a) it is a sophisticated person with respect to the transactions contemplated by [the Framework Agreement] and the [SPA]; and
  (b) it has such information as it deems appropriate concerning the business and financial condition of the third parties under the relevant documents relating to the

[24] SAP, clause 7.1(a)(iii).

proposed transactions under [the Framework Agreement] and the [SPA] to make an informed decision regarding the transactions contemplated by [the Framework Agreement], and

- second, the Company and the Bank (and another) agreed "that it has made its own independent analysis and decision to enter into the transactions contemplated by [the Framework Agreement], based on such information as it has deemed appropriate under the circumstances."[25]

[43] It may be found by a court determining the dispute that what the above provision does not do – nor does any provision of the Framework agreement or the SPA do – is eliminate or reduce the Bank's responsibility to the Company, even as a "sophisticated person", if material information provided to the Company in the Data Room (described and defined below) or otherwise, which the Company deemed appropriate (arguably on the reasonable assumption of its accuracy) and then used to make its "informed decision", turned out to be inaccurate.

[44] In the Framework Agreement the Bank represented and warranted to the Company that as of that date:

> the information provided by the Bank to [the Company] in respect of the Shares via the Intralinks data site titled "Project Born" does not omit material information regarding those Shares. For the avoidance of doubt this representation and warranty applies to the Shares

[25] Framework Agreement, clause 12.

but does not extend to ARMS or the value of the Shares.

No mention is made one way or the other about the accuracy of the information regarding the Loans and their security. While there may not be an express representation and warranty in the Framework Agreement or the SPA, it may be open for the court trying the dispute to find that there was some other express or implied representation of the accuracy of the information respecting the Security.

[45] The SPA provided that the Bank represented and warranted to the Company that "it has the right to transfer or to procure the transfer of legal and beneficial title to the Purchased Assets on the Completion Date, free from any Encumbrance …". "Encumbrance" appears to be defined in the SPA in a legal (not physical) manner, namely "any mortgage, hak tanggungan, charge, fiducia, pledge, lien … or other

impediment of any kind however and whether created or arising as a matter of law or otherwise".[26]

[46] The Bank makes the point that this provision is not a representation as to the validity, breadth or perfection of security but as to the authority and title of the Bank to procure the transfer of the Purchased Assets, which definition does not specify the extent of

[26] SPA, clause 13.2 and clause 1.1, definition of "Encumbrance".

the Bank's "rights, benefits, interest and claims", as pointed out above.

[47] It seems unlikely but not impossible that a court trying the dispute would conclude that the absence of material physical impediments to the Security was represented as well. More likely, if such were to be found, it would be based on the information in the Data Room.

THE DISPUTE

[48] The main evidence for the Bank was given by Ryan Anthony Gonzales, Director of the Bank. [27] He set out the background, described the documents and their provisions (which are largely described in this Judgment) and set out the Company's position (also described in this Judgment) that the Purchase Price became payable on about 1 July 2015 and was not paid despite the Bank's letter of 9 July 2015 demanding payment (pursuant to clause 10.5 of the SPA)[28].

[49] Mr. Gonzales stated that the Company sought to impose conditions on its payment of the allegedly outstanding Purchase Price (in a letter to the Bank of 13 July 2015) by seeking some 359 "deliverables".[29]

[27] Affirmation of Ryan Anthony Gonzales affirmed 29 July 2015 ("**Gonzales**") and Exhibit RG-1.
[28] Gonzales, Exhibit RG-1, tab 12.
[29] Gonzales, Exhibit RG-1, tab 13.

[50] The Bank's position was, and remained, that neither the Framework Agreement nor the SPA required the Bank to provide any such "deliverables".

[51] The Bank replied to the Company to that effect by letter dated 24 July 2015, and demanded payment of the Purchase Price by 27 July 2015.[30]

[52] The response it received was what Mr. Gonzales described as a "holding response". The response of 28 July 2015 was as follows:

> We are considering your letter … in conjunction with our counsel. We are consciously avoiding an irascible response and are open to mutually acceptable solution to this unfortunate situation.[31]

[53] The Bank commenced this application on 29 July 2015.

[54] As noted above, the evidence of the Company in opposition to the application was given by Kin Chan. Mr. Chan is the Chief Investment Officer of Argyle Management Limited and one of three directors of Adriatic Sea Management Limited (a BVI company), the sole corporate director of the Company. He is one of the beneficial owners of the company that is the sole shareholder of the Company.

[55] The essence of Mr. Chan's evidence for the Company was that the Company "honestly and reasonably believed that all of the

[30] Gonzales, Exhibit RG-1, tab 14.
[31] Gonzales, Exhibit RG-1, tab 15.

collateral in respect of the Loans (1) formed part of the [Security] and (2) could and would be transferred and conveyed to it at the completion of the [SPA]."[32] It turned out, he swears, that there were material deficiencies.

[56] While there is a dispute respecting the Security under the SPA, the Bank was paid approximately $50 million in connection with the acquisition of the Shares, as contemplated.

[57] Mr. Chan swore that the Company is not insolvent (although as pointed out by the Bank, he does not provide enough factual information for the Court to make an assessment regarding either form of insolvency under the Insolvency Act).

[58] Significant is that in mid-March 2015, the Bank provided the Company with access to "an Intralinks virtual data room containing the documents and other information relating to the asset which the Bank was offering for sale" ("**Data Room**"). Mr. Chan exhibited the index of the documents in the Data Room, which appears to consist of several hundred entries. The document included a document titled "**BORN Exposure Information Summary**" that summarised the collateral in respect of the Loans.[33]

[59] The documents showed, according to Mr. Chan, among other things "an on-going process of security perfection" by the Bank. Mr. Chan continued:

[32] Chan 2, paragraph 43.
[33] Chan 2, paragraph 38 and Exhibit KC-1, pages 17 -22.

> This inevitably led [the Company] reasonably to conclude that (a) [the Bank] had a valid but unperfected security interest over the collateral and (b) [the Bank] would have the ability to procure the conveyance and transfer of its interest in all collateral to [the Company] at the completion of the [SPA].[34]

[60] Mr. Chan stated that material deficiencies with the Security began to emerge piecemeal in May 2015, immediately after execution of the SPA. The Company's concerns were discussed with the Bank. N.M. Rothschild, independent financial advisors to ARMS for the purposes of providing a fairness opinion for Offer, began to value each asset which was secured as collateral to the Bank in connection with the Loans. Their focus was not on the adequacy of title or the ability of the Bank to transfer the assets to the Company.

[61] The Bank disclosed, "pursuant to requests made in the context of that [fairness opinion] process, that material deficiencies existed in relation to the underlying assets themselves, the collateral in relation thereto and other material matters."[35]

[62] There were discussions between the Company and the Bank as to a solution from mid-June 2015[36]; the Company obtained an expert legal opinion in relation to the deficiencies in mid-June 2015, and on 13 July 2015 (after the date for payment passed but before this application was commenced) identified what it alleges was missing from the Purchased Assets.

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[34] Chan 2, paragraph 40.
[35] Chan 2, paragraphs 31 – 33.
[36] Chan 2, paragraph 34 – 35.

[63] The conditions of the Offer were satisfied by 1 July 2015 and the Offer became unconditional. Completion of the SPA occurred on about 1 July 2015 at which time, under the terms of the SPA, the Purchase Price became due and payable. On 9 July 2015 the Bank demanded payment of the Purchase Price.[37]

[64] Mr. Chan described in some detail the alleged material deficiencies and the Company's actions in relation to them in May 2015 and following, with supporting documentation.[38] For this application, as stated above, this Court cannot and need not determine the alleged material deficiencies. A court trying the dispute could conclude, after hearing the evidence, that all or a significant part of the "deficiencies" existed and were material.

[65] As stated above, whether there is a substantial dispute turns on the interpretation of the relevant provisions of the SPA, primarily as set out above. In particular, it turns on whether the Security that was required to transferred by the Bank to the Company as part of the Purchased Assets was (a) just what the Bank had by way of security, or (b) something more that the Bank committed to provide pursuant to the SPA as to the quantity, character and/or quality of the Security.

[66] Mr. Chan explained why the Company provided the Bank with a list of "deliverables" which the Bank asserted was an attempt to impose a new precondition and which the Company said was intended to

[37] Gonzales, paragraph 20.
[38] Chan 2, paragraphs 46 – 58 and Exhibit KC-1, pages 56 ff.

materially assist both parties to know what were the Purchased Assets by compiling a comprehensive list of them. In providing his explanation, Mr. Chan succinctly sets out the key factual basis underlying the Company's position on the Purchased Assets and the Security – "the Purchased Assets are not identified in a single list in a single document."[39]

[67] Mr. Chan also dealt with the alternative just and equitable ground for this application, namely the Bank's allegation that there is a serious concern that the grant by the Company of the ACE Debenture on about 25 June 2015, by which the Company "purported" to grant fixed and floating charges over all of its assets in favour of a connected company, was for the purpose of putting the Company's assets out of reach of the Bank.

[68] Mr. Chan explained that given the manner in which shareholders had to be paid under the Offer, it was necessary for the connected company to make funds available to the Company pursuant to the Offer prior to the Company paying the ARMS shareholders who had accepted the Offer, and accordingly the Company was asked to grant the ACE Debenture to ensure that the funds which had been made available to the Company would be subject to a security interest in the event the offer was unsuccessful and the funds not utilised to pay for the shares in ARMS. The only material assets of the Company following a successful Offer would be, and were, the

[39] Chan 2, paragraph 66.

shares acquired in the Offer, and there is no floating charge as the Bank asserted.[40]

CONCLUSION

[69] This Court has carried out a preliminary investigation, as it is required to do on an application such as this, in order to determine whether the dispute raised by the Company about the alleged debt is on genuine and substantial grounds (within the meaning of that phrase discussed above).

[70] For the reasons set out above, the Company has satisfied this Court that it is.

[71] The Company has met the factual and legal requirements of showing a "substantial dispute" as to whether the debt alleged is owing or due.

[72] This Court concludes that there is a bona fide dispute between the Bank and the Company on substantial grounds such that a court determining the dispute, under English law, could:

- first, interpret the SPA, the main contractual document between the Bank and the Company, to find that the Bank, based on what transpired between the Bank and the Company prior to the SPA, was required to transfer to the

[40] Chan 2, paragraphs 82 – 84.

Company, as part of the Purchased Assets, not just what the Bank had by way of Security but something more, namely Security of a certain quantity, character and/or quality; and

- second, find that the Security that the Bank was able to and was prepared to transfer to the Company was materially deficient from that which the Bank was committed to transfer.

[73] Further, this Court does not consider, on the evidence and submissions before it, that it would be just or equitable to wind up the Company because of it having granted the ACE Debenture, which the Company has shown to have been for a bona fide purpose.

[74] The application should be dismissed.

ORDERS

[75] Accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

1. The application is dismissed.

2. The award of costs of the application is reserved to be determined following submissions as to costs which shall be heard either immediately following the handing down of this Judgment, or at a time and place and in a manner to be ordered following submissions in that regard, which

submissions will be heard immediately following the handing down of this Judgment.

Justice Barry Leon

Commercial Court Judge

29 April 2016