

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**CICA (CIVIL) 26 of 2018
FSD 161 of 2018 (IMJ)**

BETWEEN

TIANRUI (INTERNATIONAL) HOLDING COMPANY LIMITED

Appellant

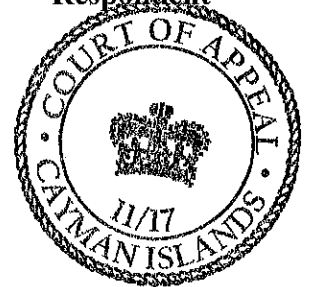
AND

CHINA SHANSHUI CEMENT GROUP LIMITED

Respondent

BEFORE

**The Hon John Martin, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal**



Appearances: Mr. Tom Lowe QC instructed by Ms. Gemma Lardner of Ogier for the Appellant
Mr. Vernon Flynn QC instructed by Mr. James Eldridge of Maples and Calder for the Respondent

Heard: 14, 15 and 16 January 2019

Decision Given: 16 January 2019

Draft Reasons Circulated: 2 April 2019

Reasons Delivered: 5 April 2019

REASONS FOR DECISION

MARTIN JA:

1. This is an appeal against an order of Mangatal J dated 19 October 2018. By that order, she struck out a petition for the winding up of China Shanshui Cement Group Limited (“the Company”) brought on the just and equitable ground by Tianrui (International)

CICA (Civil) 26 of 2018 – Tianrui (International) Holding v China Shanshui Cement Group – Reasons for Decision

Holding Company Limited (“Tianrui”). The main grounds on which the petition was struck out were that there were alternative remedies available to Tianrui that it was unreasonable for it not to pursue, and that the petition was brought for an improper collateral purpose. Tianrui brings the appeal with leave of this court, the judge having refused leave.

2. At the conclusion of the oral hearing, we allowed the appeal and stated that we would give our reasons later. These are the Court’s reasons.

Background

3. The background may be summarised as follows. The Company is a Cayman Islands exempted company. It is the holding company of a corporate group engaged in the production, supply and distribution of cement and related construction products in the People’s Republic of China (“the PRC”). Its principal subsidiary is Shandong Shanshui Cement Group Company (“Shandong Shanshui”), a wholly foreign-owned enterprise established in the PRC. Measured by annual production capacity, the Company (through Shandong Shanshui) is the sixth largest cement company in the PRC. It is listed on the Hong Kong stock exchange, although trading in its shares was suspended between 16 April 2015 and 31 October 2018 because it had insufficient public investors to comply with the listing requirements. The company has four significant shareholders: Tianrui, whose shareholding at the date of presentation of the petition on 4 September 2018 amounted to 28.16% of the issued share capital; Asia Cement Corporation (“ACC”) (26.72%); China Shanshui Investment Company (“CSI”) (25.09%); and China National Building Materials Co Ltd (“CNBM”) (16.67%). CNBM is reputed to be the largest cement producer in the world; it is also the largest cement producer in China, and the PRC has a significant shareholding in it. ACC is a Taiwanese company, and in 2016 was the tenth largest cement company in the PRC. Tianrui is a BVI company that in 2016 was the ninth largest cement company in the PRC. These three companies are competitors of the Company and of each other in the Chinese cement market. The fourth shareholder, CSI, is an informal benefit trust holding its shares in the Company for employees of the Company.

4. In November 2014 the PRC prohibited any expansion of capacity or development of new projects in the cement industry. This meant that cement producers could not expand through the development of new projects; they could only do so by acquiring or merging with other existing producers. This appears to have caused CNBM, ACC and Tianrui to acquire or expand their shareholdings in the Company, and to have been the genesis of a battle for control of the Board of Directors of the Company between Tianrui on the one hand and CNBM and ACC on the other. This battle for control has given rise to what the judge described as “*a complex and voluminous history*” of shareholder disputes and take-over battles. The ability to pass ordinary resolutions to appoint and remove directors, and thus control the board, has depended on obtaining the voting support of CSI. Prior to 1 December 2015 CNBM and ACC had nominees on the board; thereafter until 23 May 2018 Tianrui had nominees on the board; and since then CNBM and ACC have again had nominees on the board.

5. On 4 March 2015, when nominees of CNBM and ACC were on the board, the Company issued US\$500 million in loan notes at an interest rate of 7.5%. These notes (“the 2020 Notes”) were due for repayment in 2020. In August and September 2018, again when nominees of CNBM and ACC were on the board, the Company made two issues of convertible bonds. The first issue, made on 8 August 2018, was in consideration of a payment of US \$210,900,000 at an interest rate of 20%; and on conversion the bondholders would receive shares in the Company, resulting in the dilution of the shareholdings of all the then current shareholders. In Tianrui’s case, the effect of conversion would be that its percentage of shares would drop from 28.16% to 26.13%. The second issue of convertible bonds was made on 3 September 2018, in consideration of payments totalling US \$320,700,000, again at an interest rate of 20%; and the effect of conversion into shares in the Company would be that the percentage of shares held by Tianrui would fall from 26.13% to 23.56%.

6. On 7 October 2018, after service of the petition on 4 September 2018, the Company announced that it had agreed with some of the bondholders to vary the terms so that

conversion would occur immediately at a lower price in return for more shares. The effect of conversion into shares would be that Tianrui's shareholding would fall to 21.40%.

7. On 30 October 2018 an EGM of the Company was held at which the shareholders voted by a majority to authorise the issue of new shares to the bondholders on conversion. The Company claims that the resolution at the EGM is a complete answer to the petition. The shares were issued on the same day. The issue of the shares allowed the Company to represent to the Hong Kong stock exchange that there were enough public investors to satisfy the listing requirements, with the result that the suspension of the Company's listing was revoked and trading in its shares resumed on 31 October 2018.
8. The petition, which is dated 30 August 2018, was issued on 4 September 2018. The complaints made in the petition are identified under three headings: "*Control of Shandong Shanshui*"; "*Improper Share Issue*"; and "*Loss of Listing*". Of these three headings, the last has been overtaken by events, since the Company's listing has been restored. The second heading relates to the first bond issue, neither the second bond issue nor the issue of shares having occurred at the date of the petition.
9. The first heading requires examination in more detail. The central allegation made in it is that in the period between 1 December 2015 and 23 May 2018, when Tianrui was in control of the Company's board of directors, CNBM and ACC conspired to prevent the Company having control of Shandong Shanshui. Paragraph 33 of the petition asserts that the new board appointed in December 2015 discovered that the books and records, electronic data, company stamps and computers belonging to the Company and its major subsidiaries had been removed from the Group's office in Hong Kong; that Shandong Shanshui's chop (an official seal, said to be an absolute requirement for conducting business in the PRC) had also been removed from the group's Hong Kong office; and that Shandong Shanshui's articles of association had been unlawfully altered in a way tantamount to misappropriation of the Company's most valuable asset, namely Shandong Shanshui, and for the improper purpose of entrenching then existing management and

removing financial oversight, thereby causing substantial damage to the Company. Paragraph 35 states that the new board was in consequence unable to take full physical and/or legal control of all of Shandong Shanshui's assets or fully ascertain Shandong Shanshui's financial position. Paragraph 35 of the petition sets out certain steps taken by the Company under the control of the new Board to regain full physical and/or legal control of all of Shandong Shanshui's assets, including the institution of proceedings in Hong Kong against, among others, CNBM and ACC for breach of fiduciary duties and conspiracy to injure the Company. In those proceedings, an injunction was obtained against former directors of the Company requiring them to return books and records of Shandong Shanshui; but the directors failed to comply, and were committed for contempt of court. Also, at the beginning of 2016, new directors were appointed to the board of Shandong Shanshui; but they also failed to cooperate with the Company and were dismissed. When the Company tried to obtain possession of Shandong Shanshui's operational headquarters, the dismissed directors refused to allow entry and barricaded themselves inside. Paragraph 37 of the petition asserts that "*Mr Chang [a director and the vice-president of CNBM] and/or Ms Wu [formerly ACC's chief financial officer, and its executive vice-president] conspired with the dismissed Shandong Shanshui Directors such that the dismissed Shandong Shanshui Directors would oppose the Board appointed on 1 December 2015 and in return Mr Chang and Ms Wu would cause support from ACC and CNBM to become re-elected to the Board and then provide necessary support to the dismissed Shandong Shanshui Directors*". Paragraph 38 of the petition states that, since the change of control of the Board in May 2018, the Company has taken no proper steps to advance the Hong Kong proceedings in which claims are made by the Company to recover unlawful payments. Finally under this heading, paragraph 39 of the Petition is in the following terms:

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

Paragraph 46 of the Petition is in identical terms to paragraph 39, but relates to the complaints made under the heading “*Improper Share Issue*”.

10. On 6 September 2018 Tianrui issued an application for the appointment of provisional liquidators of the Company, and on 11 September 2018 the Company applied by summons to strike out the petition. These applications were heard by Mangatal J on 10 and 11 October 2018, and judgment was reserved. Also on 11 October 2018 the judge made an order under section 99 of the *Companies Law (2018 Revision)* (“*the Law*”) validating dispositions by the Company during the currency of the petition.
11. On 19 October 2018 the judge made the order appealed against, striking out the petition and dismissing the application for the appointment of provisional liquidators. Tianrui no longer pursues an appeal in respect of the judge’s refusal to appoint provisional liquidators.

The statutory framework

12. Before we deal with the judgment and the contentions on appeal, it is convenient to consider the relevant statutory provisions.
13. Section 92 of *the Law* provides that a company may be wound up by the court if “(e) *the Court is of opinion that it is just and equitable that the company should be wound up*”. Section 94(1) provides that an application to the court for the winding up of the company shall be by petition presented by “(c) *any contributory or contributories*”. Section 95(3) is in the following terms:

“If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely –

- (a) *an order regulating the conduct of the company’s affairs in the future;*

- (b) *an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;*
- (c) *an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or*
- (d) *an order providing for the purchase of the shares of any members of the company by other members or by the company itself and in the case of the purchase by the company itself, a reduction of the company's capital accordingly."*

14. As this court has pointed out on a number of previous occasions, section 95(3) is not a direct equivalent of what is now section 994 of the UK Companies Act 2006 (formerly section 459 of the Companies Act 1985). The latter section gives a separate remedy by petition to a member of a company who complains of unfairly prejudicial conduct of the company's affairs. The petition is not a winding-up petition, and is not based on the contention that it would be just and equitable to wind up the company. In the Cayman Islands, however, the only mechanism for complaining of unfairly prejudicial conduct of a company's affairs is a winding-up petition presented on the just and equitable ground. Such a petition is the sole gateway to obtaining the alternative relief set out in section 95(3). The position was stated as follows by Chadwick P in *Asia Pacific Limited v ARC Capital LLC* 2015 (1) CILR 299:

"38. In my judgment in Camulos Partners Offshore Ltd v Kathrein and Company 2010 (1) CILR 303 (with which the other members of the court agreed), I pointed out (2010 (1) CILR 303, at para 36) that the provisions enacted by s. 95(3) of the Companies Law had been introduced into the Law by the Companies (Amendment) Law 2007, following a report of the Law Reform Commission in 2006. I went on to say this (ibid, at paras 37 – 38):

“37. A footnote to the provisions in the draft bill proposed by the Law Reform Commission suggests that –

‘sub-sections (3) to (6) [of clause 95] are equivalent to sections 459-461 of the English Companies Act 1985. The overall effect of the amendment is to codify the decision in **CVC/Opportunity Equity Partners Ltd v Demarco Almeida** 2002 CILR 77’. A note to s. 95 in an introductory ‘Memorandum of Objects and Reasons’ to the bill itself is to the same effect:

‘Subsections (3) to (6) are equivalent to sections 459-461 of the English Companies Act 1985’.

38. If that were the intention or expectation of the draftsman, it was not reflected in the legislation. There is nothing in **the Companies Law** which corresponds to s. 459 of the UK Companies Act 1985. The section in the 1985 Act which corresponds to s. 95(3) of **the Companies Law (2009 Revision)** is s. 461(2). Section 459 of the 1985 Act enables a member of the company to petition for an order under Part XVII ‘on the ground that the company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of... some part of its members (including at least himself)’. It is, of course, correct that, if that ground is made out, the orders which the court may make (under s. 461(2) of the 1985 Act) are similar to the orders which can be made under s. 95(3) of the revised Law. But the gateway to an order under s. 95(3) of **the Law** is that the court is satisfied that (but for that order) it would be ‘just and equitable’ to wind up the company. As Vos JA explained in this court in **In re Strategic Turnaround Partnership Ltd** 2008 CILR 447, at para. 59:

'... [E]ven when the new s. 95(3)... comes into force, it will allow a statutory remedy for minority shareholders by, for example, ordering the purchase of shares, but it will do so in the context of a contributories' "just and equitable" petition; there will, even then, be no free-standing unfair prejudice petition in the Cayman Islands'."

39. *When making a buy-out order under s. 95(3)(d) of the Companies Law, the court does not "dismiss" the winding-up petition for the obvious reason that, if it were to dismiss the petition, it would have no jurisdiction to make the buy-out order. The true analysis is that the court allows the petition, holding that the petitioner has established grounds upon which it would be just and equitable to wind up the company, but it goes on to hold that, in the circumstances, it would be appropriate "as an alternative to a winding-up order" to make an order under s. 95(3)."*

The judgment

15. The essence of the judgment is in paragraphs 120 – 126 and 129, although earlier paragraphs provide context for some of the conclusions expressed by the judge from paragraph 120 onwards. After quoting from a number of cases, in particular *Camulos Partners Offshore Ltd v Kathrein and Company* 2010 (1) CILR 303 and *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821 (which established that an action for rectification of the register will succeed where the directors' primary object for the allotment of shares was to alter a majority shareholding), the judge said this:

"120. Having reviewed these cases, it is very plain to me that there were alternative remedies available to Tianrui. It could have brought a Writ action and sought an injunction in its own right, complaining of the dilution of its shareholding. It could have enjoined the use of the proceeds, or the issue of shares, or restrained meetings to confirm or approve transactions. A more complicated, but possible course is for Tianrui to have brought a derivative action on the

basis of the alleged lack of commerciality of the Bonds and sought an injunction in those proceedings.

121. *Tianrui could also have filed a Writ action and claimed declaratory relief.*
122. *For the Court to examine the question of whether Tianrui has a justifiable loss of trust or lack of confidence in the conduct and management of the Company's affairs in the circumstances of this case would require the kind of trial process (and therefore be more amenable to a Writ action or some process that is not a Just and Equitable Winding Up Petition), carried out in **Howard Smith v Ampol**.*
123. *In addition, in my judgment, just as was the case in **Ctrip** before Kawaley J and in **Torchlight** before Macmillan J, whatever the **Ebbvale** decision signifies in terms of a Petitioner having a range of purposes, it is plain that this Petition was not presented with the purpose of advancing a class remedy on behalf of the shareholders.*
124. *I did not quite follow how Tianrui could say that they are not clear that they would have wanted to restrain the Company from using the proceeds because that might have "killed the goose" (and I know Mr Lowe QC may have just use the term, in the moment, so I take that into account too). Nevertheless, the impression I formed was that it is very odd to not wish, or not be sure one would want to restrain the use of the proceeds from the Bonds, but yet want to take the far more drastic and austere step of winding up the Company. It would seem to me that it is the applying to wind up the Company that amounts to the killing of the goose.*
125. *In my view, not only were there other alternative, less drastic remedies, but it was unreasonable for Tianrui not to have pursued the remedy of Writ action and either injunctive or declaratory relief or both.*

126. *The existence of alternative remedies which Tianrui ought to have pursued, is fatal to a winding up petition on the just and equitable ground and therefore, on this ground alone, the Petition must be struck out.*

...

129. *It seems plain to me that this Petition was also brought for the improper collateral purpose of obtaining a de facto injunction in relation to the Bonds and the Bonds Issue, this without having to satisfy the guidelines for the grant of injunctive relief and without giving a cross-undertaking as to damages. The Petition was brought to put pressure on the Company, placing it under destructive circumstances in the paralyzing condition of having its assets de facto frozen. The matter of Tianrui's handling of the undertaking which it gave in favour of this Court and the Hong Kong Court in 2015 would also have been relevant and come under scrutiny on this issue, and on the question of requiring fortification of an undertaking as to damages. This is also an independent basis upon which this Petition falls to be struck out."*

Summary of arguments on the appeal

16. Tianrui's argument on the appeal may be summarised as follows. (1) The alternative remedies identified by the judge were neither viable nor adequate to address the complaints that founded the petition. (2) The judge did not give any reasons why it was unreasonable for Tianrui not to pursue the remedies she had identified instead of petitioning to wind up the Company. (3) The judge was in no position to determine summarily that Tianrui's purpose was to obtain the equivalent of an injunction without having to give an undertaking in damages.

17. The Company's arguments may be summarised as follows. (1) The sole focus of Tianrui's complaints about the management of the company related to the issue of the convertible bonds and the new shares. (2) A winding up petition on the just and equitable

ground was plainly not the appropriate procedure to challenge the issue of the bonds and shares. That could and should have been done by writ. (3) The failure to pursue the obvious remedy of a writ action was unreasonable, and the issue of a petition instead was an abuse of process. (4) The judge was entitled in all circumstances to conclude that Tianrui's purpose was the improper collateral purpose of obtaining the equivalent of an injunction without satisfying the requirements – such as the giving of an undertaking in damages, and making full and frank disclosure at the ex parte stage – for obtaining an injunction.

18. The Company also sought to affirm the judge's decision on two grounds, set out in its amended Respondent's Notice. The first of these grounds was that: "*The judge could and should have found that the Petitioner systematically misrepresented the position and/or omitted material information from the Petition and the evidence filed in support of its application for the appointment of provisional liquidators, so as to convey a sufficiently misleading and inaccurate impression of the true position, and that by doing so the Petitioner breached its duty not to mislead the Court*". The second ground was that the issue of the convertible bonds, and of the shares, had been approved or ratified by a majority of the Company's shareholders in general meeting, so that the petition was bound to fail.

Discussion

19. We start by making the obvious point that a strike-out application is not the place for resolution of factual issues. The judge implicitly recognised this at paragraph 122 of the judgment when she remarked that for the Court to examine the question of whether Tianrui had a justifiable loss of trust or lack of confidence in the conduct and management of the Company's affairs in the circumstances of the case, would require a trial process.
20. Thus there was no need for the judge, and no need for us, to consider the Company's contention that the petition and the appeal were "*yet another attempt by [Tianrui] to manipulate the courts in pursuit of its cynical, selfish and destructive campaign against* CICA (Civil) 26 of 2018 – Tianrui (International) Holding v China Shanshui Cement Group – Reasons for Decision

the Company”, and that the steps taken by the directors after May 2018 were essential to overcome “*an acute crisis for the Company*” caused by the actions of the Board while under the control of Tianrui and to restore the Company’s listing. The same applies to Tianrui’s contentions that the financial terms of the convertible bonds, the secrecy surrounding their issue, and the absence of due diligence by any of the supposed purchasers at a time when the Company had no published accounts gave rise to an inference that the purchasers were acting in concert with CNBM and ACC. These are matters to be dealt with when the petition is heard.

21. It is important, however, to note that the Company’s challenge to the petition was not based on an assertion that there was no basis on which a court could find that Tianrui had justifiably lost confidence in the Company’s management, even if the matters of fact set out in the petition were true. It was said by Tianrui that the Company had conceded before the judge that the petition raised a sustainable case for a winding up on the just and equitable ground if the facts set out in it were correct. We do not think that such a concession was made in terms, but it seems to us plain that the argument below, and indeed before us, proceeded on that basis.
22. It is well settled that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders: see *Loch v John Blackwood Ltd* [1924] AC 783, 788. The petition invokes this principle.
23. It is also well settled, however, that a petition will not succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. If it is clear at an early stage that the petition will fail on this ground, it may be struck out as an abuse of process. As Chadwick P said in *Camulos*:

“77. *In the light of the judgments in Charles Forte Invs. Ltd. v. Amanda
and the observations of the Privy Council in CVC/Opportunity*

Equity Partners Ltd. v. Demarco Almeida, there can be no doubt that it is relevant, in considering whether to restrain presentation of, or to strike out, a contributory's petition to wind up on the just and equitable ground, to address the questions (i) whether there is an alternative remedy available to the petitioner; and (ii) whether the petitioner is acting unreasonably in not pursuing that alternative remedy. If a court is satisfied that both of those questions should be answered in the affirmative, then it can be expected to take the view that the presentation of the petition is an abuse of its process or, alternatively, that the petition is bound to fail because it would not, in those circumstances, be "just and equitable" that the company should be wound up.

78 In the context of a contributory's petition, the editors of French, Applications to Wind Up Companies (op. cit., at 178) may well be right in their view... that—

"it is very likely that there is no difference between the epithets 'abuse of process' and 'bound to fail': a petition which is bound to fail is an abuse of process and a petition which is an abuse of process is bound to fail." But it is important to appreciate, in that context, that a petition is bound to fail not only because the petitioner is unable to prove his allegations but also because, if he has an alternative remedy which it is unreasonable for him to choose not to pursue, the court will take the view that it would not be "just and equitable" that the company be wound up."

24. The rationale for the principle that a petition may be struck out if an adequate alternative remedy exists that it is unreasonable for the petitioner not to pursue is that the mere presentation of a winding up petition is capable of causing great damage to a company. That damage is often a consequence of a statutory provision – section 99 of *the Law* in the Cayman Islands – invalidating (unless the court otherwise orders) dispositions by the company made after the commencement of the winding up, which in effect means after the presentation of the petition. Unless and until a validation order is obtained, banking

support is likely to be withdrawn. The damage may also be reputational. Thus, as Lord Millett explained in *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002 CILR 77] at [57],

“The special nature of winding-up proceedings and the loss which they may cause the company and its shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondents to yield to the petitioner’s demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition for the making of a winding up order”.

25. At one point in his submissions, Mr Flynn QC for the Company appeared to suggest that there was a public interest in the court striking out winding up petitions in order to deter members from acting so as to cause reputational damage to the company. As we have said, the likelihood of reputational damage provides part of the rationale for the court’s ability to strike out an abusive winding up petition, but it does not itself mean that the petition is an abuse. The statutory purpose in conferring a right to present a petition on the just and equitable ground includes the provision of protection to members against improper conduct by the company. The possibility of damage to the reputation of the company is inherent in the statutory right. This is particularly so, because the fact that in the Cayman Islands the sole gateway to obtaining alternative relief is by bringing a just and equitable petition means that it cannot be an abuse to petition where the primary purpose is to obtain section 95(3) relief rather than the winding up of the company. The adverse consequences that may then be consequential on the presentation of a petition are the result of the structure of the legislation. Since the exercise by the member of the legal right is subject to the court’s inherent jurisdiction to prevent an abuse, there is no basis for qualifying the right by introducing a concept of preventing or deterring damage to the reputation of the company. In any event, as Mr Flynn conceded, the issue by Tianrui of a writ would itself be likely to cause reputational damage; and a strikeout application is no place for an attempt to assess which procedure would produce the lesser damage.

26. The court's ability under section 95(3) to grant alternative relief instead of a winding up order does not have the consequence of removing the court's ability to strike out a petition where an adequate alternative remedy exists. As Chadwick P pointed out in the passage we have quoted from *Camulos*, this may be because the existence of the alternative remedy means either that the pursuit of a petition is an abuse, or that it is clear that the court cannot be satisfied that it is just and equitable to wind up the company. In either case, the gateway to section 95(3) relief will never open.
27. The point was made clearly, again by Chadwick P, in a further passage from *Asia Pacific* concerning buyout offers:

“This court did not hold, in Camulos, that a party whose objective it was to procure a buy-out order had a remedy which it could pursue in the alternative to presenting a petition for winding up on the just and equitable ground. As Lord Millett had explained in CVC/Opportunity Equity Partners Ltd. v. Demarco Almeida—in a passage cited by Vos, J.A., in In re Strategic Turnaround Partnership Ltd. (2008 CILR 447, at para. 58), to which I referred in my judgment in Camulos (2010 (1) CILR 303, at para. 50)—in the absence of a free-standing remedy under the Companies Law in this jurisdiction the only course open to a party whose objective is to procure a buy-out order is to present a petition to have the company wound up. Further, of course, where the remedy which the party presenting the petition seeks is indeed a winding-up order, there is no alternative method of seeking that remedy. My observations in the passage of my judgment in Camulos, as quoted by the judge, are not in point in a case like the present.

44. *At para. 3 of his judgment, the judge had gone on (after his quotation from my judgment in Camulos) to say this:*

“In cases where the petitioner is a minority shareholder who complains about oppression on the part of the majority, it is well established that an offer to purchase his shares at a fair

*value will be regarded as an adequate alternative remedy, the rejection of which will lead the court to strike out the petition: see **CVC/Opportunity Equity Partners Ltd. v. Demarco Almeida . . .***

*In my view, the opinion of the Board delivered by Lord Millett in **CVC/Opportunity v. Almeida** does not support a proposition precisely in the terms set out by the judge. But I accept, first, that a minority shareholder who seeks a buy-out order under the provisions formerly contained in ss. 459 and 461(2) of the English Companies Act 1985 should expect that his petition will be struck out if he refuses an offer to purchase his shares at a fair value; and, secondly, that (notwithstanding the absence of a comparable free-standing jurisdiction in the Cayman Islands under **the Companies Law**) the outcome is likely to be the same where a minority shareholder seeks a winding-up order on the just and equitable ground. The reason, I think, is not that “an offer to purchase his shares at a fair value will be regarded as an adequate alternative remedy,” but rather it is that it is usually obvious that the order most favourable to the petitioner that would be made by the court on a successful petition presented by a minority shareholder who establishes unfair conduct or oppression—whether that petition seeks a buy-out order under the English legislation or a winding-up petition under the Cayman Islands Law—is that his shares are to be bought out at a fair value (on whatever basis a fair value is to be determined in the circumstances), so that continued pursuit of the petition in the face of an offer which matches (or exceeds) such an outcome is a waste of the time and resources of the court and so an abuse of process. The offer is not “an alternative remedy,” but, if accepted, it leads to the same outcome without the need for further litigation. In those circumstances, a minority shareholder is acting unreasonably—and in abuse of process—if he does not accept the offer.*

45. The judge continued (at para. 3 of his judgment) with the following statement:

“The same analysis is capable of being applied to cases such as the present in which the company is characterized as a quasi-partnership between two shareholders (or two groups of shareholders) who each own 50% of the shares.”

I do not think that a proposition in those terms can be supported. It seems to me impossible to say that a shareholder is necessarily acting unreasonably if he refuses an offer for the purchase of his 50% interest. Why should he not take the view that an equitable solution to the breakdown in the relationship of trust and confidence upon which the quasi-partnership was established would be for him to have the opportunity to purchase the other party’s 50% share, or for the company to be sold to a third party, or for the company to be wound up? And why should he not take the view that, if agreement cannot be reached as to an equitable solution, he would prefer to await the judgment of the court after a trial rather than to be forced to agree to a solution which he sees as inequitable?

46 In my view, the judge was plainly correct to decline to strike out the petition at the outset of the hearing in January 2013 on the ground that it was an abuse of the process of the court for the petitioners to pursue the petition in circumstances that they had been offered and refused an adequate alternative remedy. But I reached that conclusion for reasons which differed in some respects from those which attracted the judge:

(i) It was impossible, in advance of hearing the evidence at the trial, for the judge to have taken the view that the likely outcome of the trial—and the outcome most favourable to the petitioners—would be a buy-out order in favour of Asia Pacific, and so it was impossible for him to have taken the view that the petitioners were acting unreasonably in refusing an offer for the purchase of their shares. The potential danger of pre-judging the outcome of the trial is illustrated—with hindsight—by the judge’s conclusion, after hearing the

evidence, that “he did not see how the petitioners could reasonably be expected to take this offer seriously....”

28. The first reason given by Chadwick P at the conclusion of that passage (which is the only one we have felt it necessary to quote) points out the danger of prejudging the outcome of the hearing of the petition. It is only if it can be clearly seen at the outset that the just and equitable ground for winding up cannot be established that it will be appropriate to strike out the petition. That is what happened in *Camulos* itself, where it was clear that the petitioner’s concern was solely to obtain payment of the redemption proceeds of his shares; indeed, he had previously issued an originating summons seeking just that. It happened also in *Charles Forte Investments Ltd v Amanda* [1964] Ch 240, where a minority shareholder threatened to issue a petition unless the board registered transfers of his shares to a third party. Since the shareholder had other more suitable remedies available to him, for example an action for rectification of the register, the threat to wind up the company was an attempt to place pressure on the board to reverse its decision not to register the transfers and was consequently an abuse of the process of the court. A further example is *In re a Company* [1983] 1 WLR 927, where Vinelott J said this at p936:

“At the time when T was first excluded from participation in the affairs of the company he was willing to sell his shares to his co-shareholders if a fair price could be negotiated. Negotiations having proved unfruitful, his co-shareholders now offer to acquire his shares at a value reached by a machinery which, in my judgment, meets all T’s reasonable objections. In insisting on a winding up order he is, in effect, asking that the respondents should either buy out his shares at the price he chooses to place on them, or face the disruption of a winding up order...”

29. As *Asia Pacific* shows, however, even a buyout offer will not in every case amount to a sufficient alternative remedy to make it an abuse to present a winding up petition instead of accepting the offer. In all but a plain and obvious case, it is likely to be necessary for the facts underlying a petition to be established at trial before the adequacy of a suggested alternative remedy, and the reasonableness or otherwise of the petitioner in failing to
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pursue it, can be established. Indeed, the structure of the Cayman legislation indicates that in ordinary circumstances the decision on the suitability of an alternative remedy, at least a remedy specified in section 95(3) of *the Law*, is to be made after the allegations in the petition have been determined by the court and a prima facie case for a just and equitable winding up made out. Unless, therefore an available alternative remedy can be seen, without full examination of the facts, to be capable of satisfying the petitioner's concerns to an extent that would make it clearly impossible for him to persuade the court that it would be just and equitable to wind up the company, the petition should proceed.

30. The principles we have so far discussed overlap to a great extent with the principle that a winding up petition will be restrained or struck out if it is brought for an improper collateral purpose. That can be seen from, for example, *In re Surrey Garden Village Trust Ltd* [1965] 1 WLR 974, where Plowman J considered both principles in preventing a winding up petition designed to force acceptance of a lucrative offer for development land. At 981 B – H he said this:

“In my judgment both these petitions have been brought simply and solely for the purpose of removing an obstacle in the way of the petitioners and others disposing of their holdings at inflated prices, and not for any purpose which is relevant to the interests of the members of the societies as members. It is natural and understandable that the petitioners should wish to exploit the goldmine in the possession of which they find themselves, but I see no reason why the court should assist them to achieve that object at the expense of their fellow-members to whom the continued existence of the societies represents an advantage which they are unwilling to give up. I go further and say that in my judgment it is oppressive and an abuse of the process of the court for shareholders to make use of a winding-up petition for the purpose of seeking to facilitate the achievement of a purely sectional and extraneous object which, as I say, has no relevance to the interests of the members as such.... I approach the matter bearing in mind the following settled principles... (3)

that where other remedies are available, such as calling a general meeting, arbitration under the rules, an action for a declaration or an injunction or an application to rectify the register, a winding-up petition is misconceived”.

31. The overlap of the two principles is also seen in the Australian case of *In re Great Cobar Copper Mining Company* (1902) 2 SR (NSW) 94, where the sole question was whether an unfavourable contract made by the company should be set aside at the suit of minority shareholders or at the suit of a liquidator. Walker J said this (at pp 101-2):

“However that may be, I am not aware of any authority that the mere fact that a minority have lost confidence in the majority of the shareholders, and as a consequence wish for a sale by a liquidator, is in itself a reason for compulsorily winding up the company. The case, as I understand it, really resolves itself into this: Can a dissentient minority, having the right ex hypothesi to set aside the sale, have the company wound up for the sole purpose of setting that sale aside. No doubt certain advantages would accrue to the petitioners if that course were pursued; and I can also see that they would have another advantage with respect to the very great facilities which the Companies Act provides for obtaining discovery in a liquidation. Under that Act the liquidator has a great advantage over the ordinary litigant, because he can summon for examination anyone whom he thinks can give information as to the company’s affairs. If the information extracted suits him he can institute proceedings; if not he leaves matters alone; and in either event the funds of the company would bear the expense. Although the petitioners would undoubtedly have these advantages if the course asked were taken, still the sole question I have to consider is whether, in such a case as the present, the Court has power to wind up the company. In my opinion it has not.... In the circumstances alleged by the petitioners, and which I assume entitle them to relief against the sale, the remedy would be by a suit in Equity. Now, if I were to

make a compulsory order, and a liquidator were to institute proceedings, it seems to me that he could not take any other step than to obtain leave of the Court to bring a suit in Equity. I am not aware that a matter of that kind could, or at all events could properly, be dealt with by any summary method. The suit being the only practicable method, the question is whether the suit should be brought by the petitioners like any other litigants at their own risk, or whether an order should be made to wind up the company compulsorily and an officer of the Court thus be set in motion on their behalf to litigate the matter, partly indeed at their expense; but to a greater degree at the expense of the other side. To put it in another form, the question is, ought the winding up machinery of the Companies Act to be applied to a case where, so far as it appears, there is no real reason for winding up the company, but the order is only sought for a collateral purpose, and when that collateral purpose has served its turn the winding up order will be got rid of either by an order of discharge or by a stay of proceedings. It seems to me that the order asked for is not contemplated by the Act of Parliament, which applies only to cases where the Court sees for some good reason the assets of the company ought, in any event to be realised and distributed. I cannot see that any such case is made here... ”.

32. As we have indicated, the judge thought that both principles applied. It is evident from the reasons she gave, however, that she understood Tianrui’s complaint to relate only to the issue of the convertible bonds and the subsequent issue of shares. Thus the alternative remedies she identified – a writ action complaining of the dilution of Tianrui’s shareholding; injunctions restraining use of the proceeds, or the issue of shares, or the holding of meetings to confirm or approve transactions; a derivative action on the basis of the alleged lack of commerciality of the bonds; and a writ action claiming declaratory relief – were all directed in one way or another at unravelling the issue of the bonds and shares and the consequent dilution of Tianrui’s shareholding.

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.
34. This is not simply a case where a minority is unhappy with the actions of the majority. It goes further than the situation described in the Canadian case of *Re Jury Gold Mine Devs Co* [1928] 4 DL R735 (Ontario Supreme Court), in which Middleton JA said (at 736):

"He is a minority shareholder and must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transactions ultra vires, the majority must govern, and there should be no appeal to the Courts for redress. This is the situation here, and the application for winding up is quite misconceived. If there is any misapplication of the assets the applicant is not without remedy: he can bring an action on behalf of himself and other shareholders, making the company and the directors against whom he charges wrongdoing parties defendant".

35. Similarly, the case goes further than what was contemplated in *Re Kitson & Co Ltd* [1946] 1 All ER 435, where Lord Greene MR said at 441:

"It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order, or indeed of preventing them from misapplying the funds of the company. It may very

well be (I express no opinion) that in cases where directors have complete control of the company and are impossible to control, those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up, although in these days of minority actions it would not seem winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common. But, apart from that, it seems to me that the winding up procedure ought not to be used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and it would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors. They can restrain them by means of an injunction if they are doing anything improper, and, therefore, I do not think it is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation”.

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. None of the remedies identified by the judge deals with that underlying complaint.
37. The Company suggests that, if the underlying complaint is as we have identified, Tianrui can bring its association with CNBM and ACC, and with the Company, to an end by selling its shares on the Hong Kong stock exchange. It accepts that Tianrui could only sell the shareholding it now has, and that a 21.40% shareholding might fetch proportionately less than the 28.16% shareholding that Tianrui originally had, since its former shareholding enabled Tianrui to block special resolutions; but the Company says

that the effect of selling would be to crystallise a claim for damages which could then be pursued by means of an action for conspiracy. In our view, these assertions epitomise what is wrong with the Company's position. If the actions of the Company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the Company, Tianrui has a statutory right to petition for the winding up of the Company on the just and equitable ground. It cannot be deprived of that right merely because the Company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the Company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns. It is entitled to have the circumstances investigated in the context of a winding up petition that it is entitled to bring; and if it succeeds in establishing its complaints it is entitled under the statutory scheme to have the court consider at the end of the investigation whether the appropriate remedy is winding up or another of the remedies set out in section 95(3) of *the Law*. The suggestion that Tianrui need not have all the contents of the petition determined upon evidence because it is obvious that a derivative action, or some other combination of actions, will provide substantial justice to Tianrui is untenable in circumstances where the range of facts, and of inferences from fact, to which the petition gives rise have not been determined.

38. At paragraph 122 of the judgment, the judge said that an examination of Tianrui's complaints would require the kind of trial process carried out in *Howard Smith v Ampol*, and so would be more amenable to an action by writ or some other process that was not a just and equitable winding up petition. This is to put the cart before the horse. If Tianrui is entitled to petition, as we consider it is, the procedures of the court will have to be adapted so that the issues of fact can be resolved in the petition. This is in fact a commonplace in just and equitable petitions and (in England and Wales) in unfair prejudice petitions. It is illogical to say that, because the procedure adopted will be

similar to that adopted in a writ action, therefore the matter should be determined by way of writ instead of by way of petition.

39. At paragraph 123 of the judgment, the judge appears to have concluded, as an additional ground of her decision that the fact that the petition “*was not presented with the purpose of advancing a class remedy on behalf of the shareholders*” meant that it was an abuse. This was based primarily on the following statements from the judgment of Kawaley J in *Ctrip Investment Holdings Limited v EHI Car Services Ltd* (Grand Court, unreported, 29 June 2018):

“The Petitioner cannot properly use a just and equitable winding-up petition to gain leverage for its own merger bid. It can only seek relief designed to vindicate the rights of shareholders generally (or at least shareholders of its class). ... Far from seeking to advance the class remedy on behalf of other shareholders, the Petitioner was seeking to advance its own individual commercial interests”; ... the main purpose of the Petition is quite obviously to advance the rival bid supported by the Petitioner, not to advance the class interests of the shareholders the Petitioner is supposed to be representing”.

40. Although that we accept that in the context of a creditor’s petition the fact that the petitioner is not invoking a class remedy may mean that the petition is an abuse (see *In re a Company (No 1573 of 1983)* [1983] BCLC 492), we are very doubtful whether the principle can apply in the context of a contributory’s petition brought on the just and equitable ground. In such a case, it is likely that the petitioner will complain of matters specific to him that may not necessarily apply to any other shareholder. We do not think that fact alone can be a reason for restraining the petition: at most, it may support an argument that the petition is brought for an improper purpose. On the face of it, that is what Kawaley J’s remarks amount to. We did not understand Mr Flynn to argue that the judgment could be supported on this ground, and the matter was not fully argued before us. In those circumstances, we prefer to express no concluded opinion on the matter. It is,

however, clear that the principle, if applicable, does not justify striking out the petition in this case. That is because, as we understand it, the Company has only one class of shares; and the idea that Tianrui cannot petition in respect of acts of the Company promoted by CNBM and ACC because it is not seeking a class remedy on behalf of (among others) CNBM and ACC is self-evidently wrong.

41. At paragraph 129 of the judgment, the judge dealt with collateral purpose. The collateral purpose identified by her was the obtaining of a de facto injunction in relation to the bonds and the shares. Here again, the focus is too narrow in its concentration on the bonds and the shares rather than the totality of the complaints made in the petition. Moreover, it seems to us impermissible for the judge to have reached her conclusion on the material available to her at an interlocutory stage.
42. For these reasons, we concluded that the judge was wrong to strike out the petition.

Respondent's notice

43. We turn finally to consider whether the judge's decision should be upheld on either of the grounds identified in the amended Respondent's Notice. As we have said, the grounds were that Tianrui had misled the court in its petition and in its application for the appointment of provisional liquidators, and that the issue of the bonds and shares had been approved or ratified by the Company's shareholders in general meeting.
44. The first of these grounds relates to matters which were considered by the judge and rejected by her as reasons for striking out the petition. In summary, the matters of which the Company complains are that Tianrui (a) failed to mention that it had not complied with an undertaking given to the Court in November 2015 to procure the redemption of the 2020 Notes; (b) failed to mention that the court in Hong Kong had discharged receivers appointed on Tianrui's application because material information had been withheld from the court; and (c) failed to disclose that its chairman, Mr Li Liufa, had been invited to join the board in May 2018 but had failed to take up the invitation.

45. The cornerstone of the Company’s argument on this topic was the following passage from the judgment of Flaux J in *Boreh v Republic of Djibouti* at [224]:

“In my judgment it must be right that, although the duty of full and frank disclosure does not apply at the inter partes stage, the court should apply the same principles by analogy when considering the duty not to mislead the court (which applies at any stage) and the consequences of a breach of that duty. It would be very odd if different legal principles applied to a deliberate breach of duty and different consequences followed from that breach depending upon whether the misleading was at the ex parte stage (when the duty to make full and frank disclosure also applies) or at the inter partes stage.... Thus, as I see it, the cases on the effect of a deliberate failure to make full and frank disclosure provide a useful analogy and guide in the present case”.

46. The judge dealt with these matters between paragraphs 133 and 138 of the judgment. In essence, she took the view that although most of the matters were relevant matters that should have been brought to the attention of the court they did not amount to misleading the court. At paragraphs 136 and 137 she said this:

“136. I accept Mr Lowe’s submission that these are adversarial proceedings and therefore each party is expected to put the matters it considers relevant before the Court. I do not think that it is a cause for complaint that Tianrui did not refer to the decision of Lam J [in Hong Kong]. There have been many contentious proceedings involving the main players in this matter and it seems to me that none of the parties are past applying strategic positioning or a tactical approach to litigation. They have been jostling for power and control and engaged in tactical and cynical behaviours for years, even within the Courts of the Cayman Islands, and in Hong Kong.

137. *There is also an important feature that distinguishes this matter from the circumstances in **Boreh** and **Re Yugraneft**, and that is that the Court had not granted any relief before the Company appropriately pointed out the omissions and shortcomings of Tianrui's filed Petition and evidence."*

47. We do not consider that the judge's resolution of this issue can be faulted. The statement in ***Boreh*** must be read in the context of that case, which was concerned with the discretionary remedy of a freezing injunction. The right to petition for a just and equitable winding up is a remedy available as of right by statute. There is no obligation of frankness or accuracy in the petition; although of course a petition may fail if it is based on inaccurate facts, and may fail as a matter of discretion if it is knowingly misleading. It is only at the stage where a court is asked to grant some relief, whether final or interlocutory, on the basis of particular facts that there is a duty not to mislead; and the court will not have been misled if the true picture is put before it by some means before it decides whether or not to grant the relief.
48. We note that, despite rejecting the Company's case on misleading, the judge did consider that it had some relevance. At paragraph [138] of the judgment she said this:

"However, the matters that the Company has raised and to which Tianrui has filed reply evidence, have assisted in another way, and that is in shedding light on Tianrui's motivation and purpose in filing the Petition. Now that the Court is better placed to see the full picture, particularly: (h) regarding Mr Li Liufa's not signing the Consent nor complaining closer to the time of the meeting about his concerns as to the validity of resolutions, yet complaining in the proceedings that Tianrui has been excluded from management of the company and; (b) regarding the Company's pressing obligation to redeem the 2020 Notes, I am bolstered in my view that the Petition was presented for improper collateral purposes, and that it is just to so find. Pitching the case in the way in which Tianrui did originally, is

plainly a form and manifestation of pressurising the Company to yield to Tianrui's demands and positions it advocates. That is also an improper purpose."

49. It seems to us that this goes further than was permissible on a strike out application; but in any event we do not regard it as providing a separate reason for upholding the judgment.
50. The second ground, based on approval or ratification of the bonds and the share issue by the shareholders in general meeting, is founded on the following statement of Smellie J in ***RCB v Thai Asia Fund Ltd*** [1996 CILR 9] at p21:

*"Even if I am wrong on that view of the facts and a rational court could conclude that the directors acted in bad faith, the significance of the decisions taken at the EGM and the AGM remains. At both, the shareholders implicitly endorsed the earlier decisions of the directors and did so in the face of the allegations raised by the petitioners. And notwithstanding these allegations, the petitioners have themselves not sought to have the directors removed. That latter is a recourse open to shareholders who feel aggrieved at perceived misconduct on the part of directors. If the petitioners may not succeed in that recourse because the majority have or would have sanctioned the actions of the directors, then the general principle is that it is for the majority to decide what is best for the company and the court would not intervene: **Foss v Harbottle**. If the petitioners, as minority shareholders, are of the view that the action constitutes a fraud against them, in the sense that it was not taken "bone fide for the benefit of the company as a whole", then they may pursue any remedies available to them under that exception to the rule in **Foss v Harbottle**. The court will not allow them to succeed in a petition to wind up the company – with its attendant consequences of "killing off" in this case a solvent and viable company – because of perceived wrongs said to*

be committed by the directors but nonetheless ratified by the majority as being in the best interest of the company as a whole: see In re Anglo-Greek Steam Co.”

51. *In re Anglo-Greek Steam Co* (1886) LR 2 Eq 1 does not contain anything dealing with ratification. The only passage of any possible relevance is at page 6, where Lord Romilly MR said this:

“The Petition goes on to attack several of the members of the concern, and the directors themselves personally. If it had been simply denied by the company, and if the directors had not personally appeared, I should have simply dismissed the Petition as not having made out a case for the winding up of the company. For although the misconduct of directors may be a reason why the shareholders should have relief against them, it is not a reason for winding up the company”.

The case does not, therefore, provide support for the whole of the proposition for which Smellie J cited it.

52. There is no doubt that a shareholders’ meeting is capable of ratifying an unauthorised act of the directors. In the present case, however, ratification of the issue of the bonds and shares addresses only part of Tianrui’s complaints – just as the alternative remedies propounded by the judge fail to deal with the whole substance of the petition. Tianrui’s complaint is about a course of conduct pursued by the Company at the instance of CNBM and ACC. Ratification by a majority including CNBM and ACC is not an answer to that complaint; it is a further instance of the conduct of which Tianrui complains.

53. For these reasons, we rejected the Respondent’s Notice also.

