

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO.: FSD 138 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

IN THE MATTER OF TRINA SOLAR LIMITED

**Judgment on the Company's summons to Strike out the winding up
petition presented by the Dissenting Shareholders**

IN CHAMBERS

Appearances: Ms. Catherine Newman QC and Katie Pearson of Harney Westwood &
Riegels for the Company.

Mr. Robert Levy QC and Rupert Bell of Walkers for the Dissenting
Shareholders.

Before: The Hon. Justice Segal

Heard: 18 July 2017

**Draft Judgment
Circulated :** 31 July 2017

Judgment Delivered: 25 August 2017

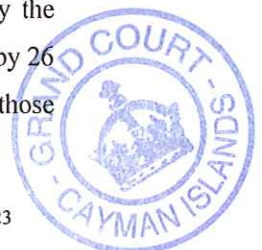


Headnote

Petition under section 238 Companies Law (2016 Revision) for determination by the Court of the fair value of the shares of dissenting shareholders – order by consent for the making of interim payments by the company – presentation by dissenting shareholders of winding up petition following failure by company to make the interim payments – applications by the company to set aside the consent order and to strike out the winding up petition – decision on the strike out application

Introduction

1. This is my judgment on the summons (the *Strike Out Summons*) filed by Trina Solar Limited (the *Company*) on 10 July 2017 to strike out the winding up petition (the *Petition*) presented on 7 July 2017 by Maso Capital Investments Limited (*Maso*) and Blackwell Partners LLC - Series A (*Blackwell*, and together with Maso, the *Dissenting Shareholders*). For the reasons I set out and explain below I have decided that the proper way to dispose of the Strike Out Summons and the Petition is to order that the Petition be dismissed and struck out (since following payment by the Company of the interim payments the Petition is bound to fail) but that since the Dissenting Shareholders were entitled to present the Petition, and their conduct in presenting the Petition was not unreasonable, the Company should be ordered to pay the Dissenting Shareholders' costs of the Petition and the Strike Out Summons on the standard basis, to be taxed if not agreed.
2. The Strike Out Summons was heard on 18 July 2017 following the hearing on 17 July 2017 of a related summons (the *Consent Order Summons*) issued by the Company on 7 July 2017 in which the Company sought a declaration in relation to a consent order dated 21 June 2017 (the *Consent Order*). The Consent Order was made in connection with a petition under section 238 of the Companies Law (2016 Revision) (the *Companies Law*) pursuant to which the Company applied to the Court to determine the fair value of the shares of the Dissenting Shareholders. The Consent Order provided for the Company to make interim payments to the Dissenting Shareholders by a certain date. The Company did not make those payments on the date required by the Consent Order. In the Consent Order Summons the Company sought a declaration that the Consent Order was defective and invalid or, in the alternative, an order granting the Company relief from any sanctions to which it would otherwise be subject to upon a breach of the Consent Order. On the morning of 18 July 2017 I read out in Court and delivered a short judgment (the *Consent Order Judgment*) setting out my decision on the Consent Order Summons. The relevant background and the Company's reasons for failing to make the interim payments are outlined in the Consent Order Judgment.
3. In the Consent Order Judgment I decided against the Company and held that there was no proper basis on which to challenge the Consent Order and that the Company was and remained liable to make the interim payments on the dates set out therein. Immediately following the delivery of the Consent Order Judgment Ms Newman QC, on behalf of the Company, informed the Court that the Company intended (although she did not have instructions to give an undertaking by the Company) to pay the interim payments within seven days (so that payment was to be made by 26 July 2017). The hearing of the Strike Out Summons then went ahead in the context of those developments.



4. At the end of the hearing I reserved judgment and indicated that I anticipated that I should and would wish to see whether the Company made the interim payments as it had confirmed it would. On 19 July 2017 I received, via my assistant in the Financial Services Division of the Court, a draft of an order (approved by Harneys, the attorneys for the Company and Walkers, the attorneys for the Dissenting Shareholders) to be made on the Consent Order Summons and giving effect to the Consent Order Judgment. This provided for the interim payments to be made by 5pm Cayman time on 28 July 2017. Following receipt of the draft order I wrote, once again via my assistant, to the attorneys in the following terms:

"I note that the order as drafted provides for payment of the interim payments to be made by 28 July. I assume that this is agreed.

This has, I believe, the effect of varying the Consent Order (at least from the date of the new order). So the position after the new order is issued is that the Petitioner is not in breach of or default under the Consent Order unless and until it fails to make the payments on 28 July.

On the assumption that both (all) parties wish the order to be in these terms, I am prepared to approve it in the form submitted.

I had formed the preliminary view that it would not be appropriate to deliver my judgment on the strike out summons before 28 July (even if I were ready to do so) since I should take into account or have regard to the Petitioner's post-hearing conduct in complying or not complying with the confirmation it provided to the Court regarding payment. This view is reinforced by the terms of the order. It seems to me to be relevant to the decision on the strike out application whether the Petitioner has complied with the terms of the Consent Order, as varied or supplemented by the subsequent order, and whether the sums owing in respect of interim payments remain owing and unpaid. I therefore intend to defer my judgment in any event until after 28 July and receipt of an update as to whether the interim payments have been paid. If Miss Newman or Mr Levy consider that this course is inappropriate and wish to make brief submissions by email I shall be happy to receive them."

5. On 26 July 2017, Harneys wrote to the Court to confirm that the interim payments had been paid by the Company and requested the Court to order that the Petition be struck out as an abuse of process and that the Dissenting Shareholders be required to pay the Company's costs on an indemnity basis. Harneys provided a draft order and set out their position as follows:

"We therefore respectfully contend where:

- (a). Maso and Blackwell's only evidence of insolvency was the non-compliance by the Company with the Consent Order; and*
- (b). the Company has now paid the amounts outstanding to Maso and Blackwell.*

there is now no basis for the winding up petition to remain on foot against the Company and therefore, the winding up petition be struck out on the grounds it was an abuse of process and that Maso and Blackwell pay the Company's costs on an indemnity basis.

In these circumstances we respectfully request that his Lordship accede to the Company's application in the Strike Out Summons and strike out the winding up petition for the reasons articulated by leading counsel for the Company in her oral submissions on Tuesday, 19 July 2017

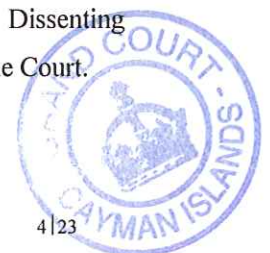


in the form of the draft order attached. The resolution of this matter is now of particular urgency given that the winding up petition has found its way into the public domain (as set out in our Second [first] Letter of 25 [26] July 2017 to the Court) and risks causing damage to an otherwise solvent company.”

6. The other letter sent by Harneys, to which reference is made in the extract from their letter above, informed the Court that despite the order I had made restraining advertisement of the Petition and for the Petition to be removed from the Court’s public binder pending a determination of the Strike Out Summons, details of the Petition had been made public by an online news agency (and expressed the Company’s concerns regarding this and the potential damage which the Company might suffer).
7. Following my direction that, in view of these concerns and risks, the Dissenting Shareholders deliver their written submissions by 2pm London time on 27 July 2017, Walkers filed on 27 July 2017 Brief Supplemental Submissions (the *Dissenting Shareholders’ Supplemental Submissions*) setting out the Dissenting Shareholders’ position and, since these submissions were lengthy and wide ranging, Harneys then filed (also on 27 July 2017) the Company’s Supplemental Submissions in Reply to the Dissenting Shareholders’ Supplemental Submissions (the *Company’s Supplemental Submissions in Reply*).

The Company’s arguments in support of the Strike Out Summons

8. The Company had sought the striking out of the Petition on the basis that (in the alternative):
 - (a). the Petition was fundamentally flawed and should be struck out without regard to the merits and irrespective of the Court’s ruling on the Company’s application to set aside or vary the Consent Order (because the Dissenting Shareholders did not genuinely believe that the Company was unable to pay its debts, were using the Petition as a means of imposing improper pressure on the Company to make the interim payments and in any event had and should have used alternative remedies as a means of enforcing any rights flowing from the Company’s failure to make such payments);
 - (b). the debt on which it was based was disputed on bona fide substantial grounds; and
 - (c). there was no evidence that the Company was insolvent, therefore the Dissenting Shareholders will never be able to establish insolvency to the satisfaction of the Court.



9. Ms Newman QC for the Company referred to and relied on the circumstances leading up to the presentation of the Petition (as set out in Mr Chan's first affidavit sworn in support of the Strike Out Summons) which she summarised as follows:

- (a). on Thursday 6 July 2017 at 4:07am (Cayman Islands time – *CIT* – and using CIT unless otherwise stated), Harneys wrote to Walkers setting out in detail why the Consent Order was defective, and that accordingly the Company would apply to set it aside;
- (b). on Friday 7 July 2017 at 1:24am (2:24pm the same day HKT), Walkers wrote to Harneys denying that the Consent Order was defective, and stating that should the Company fail to reconsider applying to set aside the Consent Order "*it does so entirely at its own risk as to the consequences that may follow*";
- (c). on Friday 7 July 2017 at 12:37pm, the Consent Order Summons and evidence in support were sent to Walkers and the Court by email. The first affidavit of Shuion Chan (*Mr Chan*) dated 7 July 2017 was filed in support of the Consent Order Summons and provided an undertaking to the Court to pay a sum equal to the interim payments into Court on certain terms (set out in the Consent Order Judgment) which the Company argued were reasonable terms (the *Undertaking*);
- (d). at 10:19am on Friday 7 July 2017, Walkers filed the Petition against the Company without notice. The Petition relied on the Company's non-payment under the Consent Order as evidence of the Company being "unable to pay its debts" as they fall due, i.e. insolvency;
- (e). Harneys were first alerted to the Petition by email from Walkers at 6:31pm on Friday 7 July 2017. Walkers had given no explanation as to why they had delayed alerting the Company to the Petition for several hours following its sealing by the Court, ensuring that the business day in Cayman was at an end;
- (f). on Saturday 8 July at 2:28pm, Harneys wrote to Walkers stating that Walkers were on notice before the Petition had been filed that the Company's liability to pay the interim payments was fundamentally disputed. The debt underlying the Petition was therefore the subject of a bona fide and genuine dispute, and the filing of the Petition amounted to an abuse. Harneys said that there was also no evidence or justification for the Dissenting Shareholders' allegation that the Company was "unable to pay its debts". Harneys told Walkers that Mr Chan's affidavit made a mockery of that already flimsy claim. Harneys

invited Walkers to confirm before 10am on 10 July 2017 that the Petition would be withdrawn; and

- (g) Harneys informed Walkers that if they failed to provide confirmation before the requested time that the Petition would be withdrawn, Harneys were instructed immediately to file an application to strike out the Petition as an abuse, and further and in the alternative to restrain advertising of the Petition, along with seeking indemnity costs.

10. Ms Newman QC's submissions in support of the Strike Out Summons can be summarised as follows:

- (a). she noted that the Petition was based both on the Company's asserted inability to pay its debts (by reason of the non-payment of the interim payments) and in the alternative on the just and equitable ground (but, she submitted that the Dissenting Shareholders had failed to specify why and how this ground was satisfied);
- (b). she also noted that the Dissenting Shareholders relied on non-payment of the interim payments and the fact that these sums had been due and payable at the time of the Petition in order to establish that the Company was unable to pay its debts and was therefore insolvent;
- (c). she submitted that the debt whose non-payment was relied on had been bona fide disputed on substantial grounds by reason of the Company's challenge to the Consent Order and the associated challenge to the asserted agreement to pay the interim payments on the dates set out in the Consent Order (as raised in the Consent Order Summons) and as a result the Company was entitled to have the Petition struck out; and
- (d). she further submitted that the Petition should be struck out as an abuse of process since the Dissenting Shareholders did not believe that the Company was insolvent, had used the winding up jurisdiction improperly and for the purpose of applying pressure on the Company to pay the interim payments and had behaved unreasonably in presenting the Petition without adequate notice, by refusing to accept an undertaking offered by the Company for the payment into Court of a sum equal to the interim payments given in connection with the Consent Order Summons, and by failing to exercise alternative remedies.



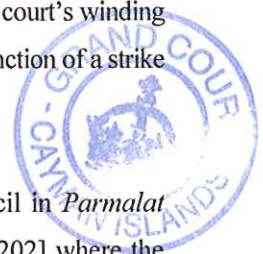
11. Ms Newman QC submitted that in the circumstances the Company had satisfied the test applied when deciding whether a petition debt was bona fide disputed on substantial grounds:

- (a). she referred to the Cayman Islands Court of Appeal decision in *Re Strategic Turnaround Partnership Limited* [2008 CILR 447] where Vos JA explained that the winding up procedure is:

“generally intended to be used in clear cases” [and] “is not for the resolution of disputed debts or other contentious disputes that should properly be resolved by writ actions” or “be used to put inappropriate pressure on a company”.

- (b). she also relied on the judgment of Chadwick P in another decision of the Cayman Islands Court of Appeal, namely *Camulos Partners Offshore Limited v Kathrein and Company* [2010] (1) CILR 303 (*Camulos*), which, she said followed *Strategic Turnaround*. Chadwick P had held that:

- (i). the Court had jurisdiction to restrain the presentation and advertising of a petition, which jurisdiction is a facet of the Court’s inherent jurisdiction to prevent an abuse of the process of the court;
- (ii). the fact that the petition was bound to fail was one, but not the only, basis for striking out a petition on the abuse of process ground;
- (iii). the jurisdiction would be exercised where the presentation of a petition was not in accordance with the legitimate purpose of such process, including when the petitioner’s debt is bona fide disputed on substantial grounds;
- (iv). the Court will have regard to whether an alternative remedy is available to the petitioner and whether the petitioner is acting unreasonably in not pursuing that remedy;
- (v). it is the fact that the petitioner is seeking to make improper use of the court’s winding up jurisdiction to resolve an *inter partes* dispute which attracts the sanction of a strike out; and
- (vi). this position had previously been confirmed by the Privy Council in *Parmalat Capital Finance Limited v Food Holdings Limited* [2008 CILR 202] where the



Board made clear that:

“If a petitioner’s debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use a threat of a Winding-up Petition as a means of forcing the company to pay a bona fide disputed debt.”

- (c). Ms Newman QC submitted that the authorities established that the threshold as to what constitutes a disputed debt was not a high one and she relied on the statement of Etherton LJ in the English Court of Appeal in *Tallington Lakes Limited v South Keveten District Council* [2012] EWCA Civ 443 where he explained that:

“...in this context that it is well established that the threshold for establishing that a debt is disputed on substantial grounds in the context of a Winding-up Petition is not a high one for restraining the presentation of the Winding-up Petition and may be reached even if, on an application for summary judgment, the defence could be regarded “shadowy”.

- (d). Ms Newman QC submitted that the threshold was clearly passed in the present case both at the date of the presentation of the Petition and at the hearing of the Strike Out Summons. As at the date of the presentation of the Petition the Company was challenging the validity of the Consent Order as described above. As at the time of the hearing of the Strike Out Summons, even though the Court had disposed of the Consent Order Summons and ruled that the Consent Order was valid (so that it had been held that the interim payments were due and payable on the dates set out in the Consent Order and it followed that the Company had been in default), at the hearing the Company had confirmed that it would, in light of and as an immediate response to the Court’s Consent Order Judgment, shortly pay the interim payments and had subsequently done so. Once payment was made, the debt on which the Petition was based was discharged and the Petition would then clearly fail when it came to be heard as there were then no proper grounds for a winding-up order;



- (e). furthermore and importantly, the circumstances of the present case meant that the Dissenting Shareholders could not rely on the Company’s failure to make the interim payments as *prima facie* evidence of the Company’s inability to pay its debts. It was not open, Ms Newman QC argued, for the Dissenting Shareholders to rely on *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 (*Cornhill*). The circumstances of that case, in which Harman J had held that that a failure by a company

to pay an indisputable debt was evidence that the company was unable to pay its debts and could therefore form the grounds for a winding up petition, were wholly different. There was no dispute that Cornhill was liable in that case and there had been a serious delay, and a complete and wholly unjustifiable failure by Cornhill in that case to pay a clear liability owed by it. The present case, Ms Newman QC argued, was very different because the Company properly disputed its liability on substantial grounds. She also submitted that the Petition had been presented precipitately (less than thirty six hours after the payment deadline) and without issuing a statutory demand; and

- (f). Ms Newman QC also relied, as establishing that the Company was not insolvent, on the evidence, referred to in and exhibited to Mr Chan's second affidavit, that an amount equal to the interim payments was held on deposit in a bank account in the name of the Company's 100% owned and controlled subsidiary. Mr Chan had confirmed that these funds were unencumbered and under the control of the Company such that the Company had the ability to make the interim payments.

- 12. As regards her submission that the Petition should be struck out as an abuse because the Dissenting Shareholders did not believe that the Company was unable to pay its debts and were simply putting pressure on the Company to drop its challenge to the validity of the Consent Order, Ms Newman QC argued as follows:

- (a). the view that the Dissenting Shareholders had a genuine belief or concern that the Company was unable to pay its debts was inconsistent with the Dissenting Shareholders' position in the section 238 proceedings (where they were taking the position that the Company's shares were very valuable) and the publically available financial information (including the proxy statement issued in connection with the merger). Furthermore, she submitted that the Dissenting Shareholders knew at the relevant time that the Company's reasons for non-payment were nothing to do with financial problems. She challenged the evidence of Mr Jain, the Chief Investment Officer of one of the Dissenting Shareholders who verified the Petition, and submitted that his evidence was obviously untruthful. Ms Newman relied on the chronology of events I have summarised above and the evidence given by Mr Chan (in particular his first affidavit sworn on 7 July 2017 filed in support of the Consent Order Summons) to support her submission that the Company had clearly explained and the Dissenting Shareholders knew or should have understood that the non-payment was caused by factors unrelated to any inability to make payment;



- (b). as to this submission, Ms Newman QC pointed out that the Petition was presented on 7 July 2017 and verified by Mr Jain's first affidavit which was also sworn on 7 July 2017. On 4 July 2017, Harneys had written to Walkers seeking an extension of 14 days for the payment deadline. They had explained that they were instructed *"that due to issues with the internal procedures for making such a large and unusual payment (in the context of the normal business of the Company), the payment deadline at paragraph two of the Consent Order has become unrealistic."* Furthermore, on 6 July 2017, Harneys had written again and informed Walkers that the Company considered that the Consent Order was *"fundamentally defective and therefore invalid"*. Therefore, before the Petition was presented and verified the Dissenting Shareholders knew, or should have concluded, that the reasons for requesting an extension of time and the failure to pay the interim payments were not caused by any financial difficulties of the Company. The Dissenting Shareholders were simply and improperly using the Petition as a means of improperly applying pressure on the Company and as a means of getting paid;
- (c). furthermore, Ms Newman QC submitted, the position became even clearer following the service of Mr Chan's first affidavit in support of the Consent Order Summons (which had been sent to Walkers, according to Mr Chan's evidence filed in support of the Strike Out Summons, shortly before the Petition was presented). In paragraph 6 of this affidavit Mr Chan set out the relevant background to the events surrounding the Company's inability and decision not to make the interim payments. In particular, he had noted that:

- "(o) On 9 June, we first became aware that there was possibly going to be a contested application for an interim payment in another section 238 matter; however, Harneys were unable to provide any details in respect of this application at that time as the information was subject to legal professional privilege.*
- (p) The Consent Order was subsequently agreed under without prejudice privilege on 14 June... At that time we had no further information on the potential contested applications in other section 238 matter.*
- (q) On 15 June 2017 I understand that Harneys sent an email to Walkers raising a concern as to whether the Consent Order was in the proper form for a Consent Order... I am advised that Walkers contacted Harneys and said they were content to wait and see if the Court raised any objection to the form of the Order.*
- (r) The sealed consent order was received by Harneys on 22 June 2017. It had been sealed on 21 June 2017.*
- (s) On 28 June 2017 certain stakeholders in the Company became aware that two companies that are subject to section 238 claims had challenged the jurisdiction of the Court to make interim payment orders in these cases and that in one of these cases, Qunar, the application had been heard and the Judge had reserved her decision. In another case, Eurasia, the application was being heard on 30*



June 2017 (and we were subsequently advised that the decision in that case was also reserved). The stakeholders expressed concern as to how the Company had consented to make an interim payment when the Court may not have power to make the order requiring the Company to do so.

(t) *... I raised the issue with Harneys and we agreed to seek an extension of the time to comply with the interim payment order so that we could try to resolve the concerns that the stakeholders had with the Consent Order. On 4 July 2017 (but 5 July HK time), Harneys sent a letter to Walkers requesting the Dissenting Shareholders' agreement to a 14 day extension. Walkers responded on 4 July 2017 requesting further information.....*

(u) *.... On 5 July 2017: (i) the stakeholders advised that they would not consent to the Company making the interim payment when there was doubt as to whether the Court had jurisdiction to require interim payments to be made in section 238 cases; and (ii) Harneys advised that it would appear that the Consent Order was in fact defective because interim payment orders could not be made by consent. We therefore instructed Harneys to write to Walkers setting out the position and asking for the Dissenting Shareholders' views on the proposal to have the Consent Order set aside and for the funds to be paid into court pending the outcome of the interim payment applications in Qunar and Eurasia..."*

(d). accordingly, before the Petition was presented the Dissenting Shareholders knew or should have been aware that, in Harneys' words, the problems that were delaying payment arose from "... issues [related to] with the internal procedures for making such a large and unusual payment (in the context of the normal business of the Company)", that the real concern arose because stakeholders in the Company had refused to accept that the Company should make interim payments when there were grounds for challenging the Court's jurisdiction to require it to do so and that the Company was disputing its liability to make the interim payments on reasonable grounds.

13. As regards the approach that the Court should take, following the payment of the interim payments by the Company, the Company's position, as I have noted above, was set out initially in Harneys letter of 26 July 2017 in which the Company submitted that based on the submissions made by Ms Newman QC at the hearing of the Strike Out Summons the Company was entitled to have the Petition struck out and that the payment was another reason why the Court should conclude that the Petition could not succeed and should not remain on foot. Harneys reiterated in the Company's Supplemental Submissions in Reply that the Petition was from the outset and even before the interim payments had been made an abuse of process and so should be immediately struck out. Harneys sought an order that Maso and Blackwell pay the Company's costs on an indemnity basis.

The Dissenting Shareholders' arguments in opposition to the Strike Out Summons

14. The submissions of Mr Levy QC for the Dissenting Shareholders can be summarised as follows:



- (a). the Petition was presented by the Dissenting Shareholders as creditors pursuant to section 94(1)(b) of the Companies Law following a demand for payment of the interim payments which was not met;
- (b). the Petition was based on two grounds, namely that the Company was unable to pay its debts (section 92(d) of the Companies Law) and that it was just and equitable that the Company be wound up;
- (c). the first ground relied on the Company's failure to pay the interim payments when due and after demand. Mr Levy QC submitted that the test for inability to pay debts to be applied by the Court at the hearing of the Petition was a cash flow test. He referred to the discussion of this test and the applicable law by the Cayman Islands Court of Appeal in *In the matter of Weaving Macro Fixed Income Fund Limited* (Unreported, Cayman Islands Court of Appeal, Martin, Morrison and Field JJA, 18 November 2016);
- (d). the second ground relied on the Dissenting Shareholders' "apprehension" that the Company's failure to pay (and the circumstances surrounding the Company's failure to pay) the interim payments indicated that the Company would be unable or unwilling to pay the amounts determined to be payable by the Company to the Dissenting Shareholders on the section 238 petition. In particular, Mr Levy QC said that the Dissenting Shareholders were concerned by the fact that the Company did not appear to be managed by its board of directors of the Company but rather a group of unnamed "stakeholders" without fiduciary obligations to the Company (unless it can be said that there are shadow directors) who were apparently able to overrule decisions of the board such that the role of the board may be effectively irrelevant;
- (e). as regards the Company's claim that its liability to pay the interim payments and therefore the debt whose non-payment was relied on in the Petition, was bona fide disputed on substantial grounds, Mr Levy QC argued that there was no basis for setting aside the Consent Order and no substantial, serious or material dispute as to the Company's liability. In any event, since there were no substantial or contested disputes of fact which required cross-examination or a detailed review of the relevant documentation, the Court would be able to and should resolve and deal with the issue before disposing of or within the proceedings on the Strike Out Summons. In fact, of course, as I have explained, the question concerning the validity of the Consent Order was disposed of before the Strike Out Summons came on;



(f). Mr Levy QC relied on the judgment of Harman J in *Cornhill* (see above) for the proposition that it had long been established that a failure by a company to pay an indisputable debt was evidence that the company was unable to pay its debts and that an undisputed debt which the company has chosen not to pay (which, must include a disputed debt *not* on substantial grounds, see *Mann v Goldstein* [1968] 2 All ER 769 at 775), can therefore form the grounds for a winding up petition. *Cornhill* applied in the present case and the Company's failure to pay the interim payments entitled the Court to infer that it was unable to pay such sums and therefore there was sufficient evidence of the Company's inability to pay to justify the presentation of the Petition and in the absence of sufficient evidence at the hearing of the Petition to demonstrate the Company's ability to pay its debt, a winding up order;

(g). the Company's evidence that sufficient funds to pay the interim payments were held by a wholly owned subsidiary and were available to the Company to enable it to pay the interim payments as and when it chose to do so was not without more sufficient to establish that the Company was able to pay the interim payments and its debts as they fell due. Without further details as to the subsidiary's liabilities, when they were to fall due, the subsidiary's resources which were available to pay such liabilities and the basis on which the funds were to be advanced by the subsidiary to the Company, it was not possible to say whether the Company was in fact able to pay its debts or rebut the inference and evidence of inability to pay resulting from the failure to pay the interim payments when they fell due;



(h). as regards the Company's claim that the Dissenting Shareholders had presented the Petition for a collateral purpose or improperly because they did not genuinely believe that the Company was unable to pay its debts, Mr Levy QC submitted that there was no evidence that the Dissenting Shareholders at the time of the presentation of the Petition, or indeed subsequently, had concluded that the reasons for the Company's failure to make the interim payments was unconnected with financial difficulties. Furthermore, the evidence demonstrated that it was reasonable for them to have serious and genuine concerns as to real reasons why the Company was refusing to pay the interim payments. Mr Levy QC pointed out that the explanation provided by Harneys in their letter of 4 July 2017 (which, as I have noted, refers to "*issues with the internal procedures for making such a large and unusual payment*") was at least unclear and consistent with the Company having problems in obtaining the necessary approvals because of a lack of available funds or other financial problems. Mr Levy QC submitted that in

circumstances where the Company had committed in a consent order of the Court to make the interim payments and to do so within a short period after the Consent Order being issued, but then refused and failed to pay what was due based on a sudden change of position by reference to asserted internal problems associated with the approval of large payments, the Dissenting Shareholders were entitled to conclude that the Company was facing financial problems of some kind that justified the use of the winding up jurisdiction. Furthermore, Mr Levy QC submitted, the subsequent explanations given by Mr Chan were not properly particularised and left the Company's true position unclear and did not change the essential fact that the Company had failed and refused to pay a clear liability that was incapable of being properly disputed;

- (i). Mr Levy QC also submitted that there was no other alternative remedy available to the Dissenting Shareholders which they could reasonably be expected to exercise and they had not been acting unreasonably in failing to pursue their alternative remedies. Mr Levy QC said that:

- (i). the Company had already decided to ignore one court order and there was nothing to suggest that it would not ignore another;
- (ii). as the Consent Order had been made, the only order which could be sought from the Court by the Dissenting Shareholders in the fair value proceedings would be for contempt, which would not itself result in payment;
- (iii). any alternative claim, such as a fresh application for interim payments was not available, as the Dissenting Shareholders were bound not to make such an application under the terms of the Consent Order (which they believed and asserted to be binding on both the Company and the Dissenting Shareholders); and
- (iv). a writ action seeking another judgment with respect to the underlying contract to pay, while possible, would be unduly burdensome on the Dissenting Shareholders given that they already had a judgment (being the Consent Order itself).

- (j) Mr Levy QC also submitted that the Dissenting Shareholders were not being unreasonable in refusing to accept the Undertaking. Nor was the Undertaking evidence that the Company was in fact able to pay its debts. The Undertaking was highly conditional and provided insufficient comfort to the Dissenting Shareholders because:



- (i). the Company had made an agreement before (as reflected in the Consent Order) and then resiled from it on spurious grounds, and as a result the Dissenting Shareholders and the Court can have no assurance that the Undertaking will be honoured;
- (ii). the Undertaking required that any funds in Court could only be paid to the Dissenting Shareholders upon an order being made by the Court for interim payments (which can presumably be contested by the Company given that there is provision for appeal), the very reason the Consent Order was agreed in the first place (he also noted that while interim payments would ordinarily be ordered to be paid to the Dissenting Shareholders under Grand Court Rules 1995 (Revised Edition) (*GCR*) Order 29, rule 13, the terms of the Undertaking provide that payment to the Dissenting Shareholders must await any appeal of the order for the making of interim payments); and
- (iii). the Undertaking was seriously disadvantageous to the Dissenting Shareholders since it prevented them from making an application for the payment of interim payments until the two other unrelated matters (and appeals) had been determined. In the absence of the Consent Order, the Dissenters currently had, following *In the matter of Qihoo 360 Technology Co. Ltd.* (Unreported, Quin J, Grand Court of the Cayman Islands, 26 January 2017) and on the face of the GCR, the immediate right to apply for interim payments pursuant to GCR Order 29, rule 10 and it would be unfair to require the Dissenting Shareholders to give up that right in the present circumstances.



(k). as regards the impact of the Company's post-hearing payment of the interim payments, Mr Levy QC said that the fact that the Company had belatedly complied with its obligations under the Consent Order was entirely and obviously irrelevant to the determination of the Strike Out Summons. Mr Levy QC argued that:

- (i). the Strike Out Summons should be determined by reference to the circumstances prevailing at the date of the hearing (the payment of the interim payments after the hearing was not relied on by the Company at the hearing as a basis for ordering the striking out of the Petition);

- (ii). the Strike Out Summons should be dismissed and since costs should follow the event the Company should be ordered to pay the costs of the Dissenting Shareholders;
- (iii). even if the Court did not accept his submission that the post-hearing payment of the interim payments was not to be taken into account by the Court when disposing of the Strike Out Summons, the Strike Out Summons should be regarded as having failed and the Company should still be ordered to pay the costs of the Dissenting Shareholders;
- (iv). there was no basis on which the Court could order that the Dissenting Shareholders pay the Company's costs on the indemnity basis. The Company, as the Court has now held, was liable to the Dissenting Shareholders to make the interim payments; in breach of the Consent Order (and the agreement related thereto) the Company failed to pay these payments, even after a demand and so the Dissenting Shareholders were entitled to present the Petition and to succeed in the opposition to the Strike Out Summons; and
- (v). since the Petition remained before the Court and in the absence of the question of the costs of the Petition being dealt with, the Petition should proceed to a hearing so that the question of costs can be disposed of then. Alternatively if the Company paid the Dissenting Shareholders' costs the Dissenting Shareholders would agree to withdraw the Petition.



Discussion and decision

15. So, in outline, the chronology as appears from the evidence is as follows:

- (a). the interim payments were due to be paid on 5 July 2017;
- (b). Harneys wrote to Walkers on 4 July 2017 (in the terms I have described above) requesting an extension of time for payment;
- (c). also on 4 July 2017, Walkers responded explaining the Dissenting Shareholders could not agree to the requested extension without further information as to the reasons for the delay (and referring in particular to the length of time it had taken to negotiate the agreement for the payment of interim payments);

- (d). on 6 July 2017, Walkers wrote to Harneys noting that no response had been received to their letter of 4 July 2017 and in the circumstances the Dissenting Shareholders demanded payment of the interim payments by 5pm HKT on 7 July 2017, and notifying that if payment was not made the Dissenting Shareholders would take such steps as they considered to be appropriate;
- (e). also on 6 July 2017, Harneys responded to Walkers' letters of 4, 5 and 6 July 2017 and notified the Dissenting Shareholders for the first time of the Company's position that the Consent Order was invalid and provided details of an undertaking in the same terms as the Undertaking that was ultimately set out in Mr Chan's first affidavit;
- (f). various letters and actions were taken on 7 July 2017, in the following order:
- (i). Walkers responded to this letter, denied that the Consent Order was invalid, asserted that the stance being taken by the Company was simply an attempt to avoid paying what was due and that the Dissenting Shareholders had real cause for concern as to whether the Company was able to do so or pay any further sums which the Company was subsequently ordered to pay as part of the Court's determination of the fair value of their shares;
- (ii). the Consent Order Summons and evidence in support, including Mr Chan's first affidavit, were sent to Walkers by email (as noted above apparently at 12.37 pm which would have been early the next morning HKT).
- (iii). shortly after opening of business CIT that morning, Walkers filed the Petition, without having given the Company any further advance notice and Walkers sent an email to Harneys after close of business CIT the day of the presentation of the Petition.
- (g). on 9 July 2017, Harneys wrote to Walkers and stated that the debt on which the Petition was based was bona fide disputed on substantial grounds (as Walkers knew), requested Walkers to withdraw the Petition and confirmed their instructions if the Petition was not so withdrawn to apply for an order to restrain advertisement and for the striking out of the Petition;
- (h). on 10 July 2017, the Strike Out Summons was filed;



- (i). the Strike Out Summons and the Consent Order Summons were listed to be heard together on 17 and 18 July 2017. The Consent Order Summons was heard on 17 July 2017;
 - (j). I gave judgment on and dismissed the Consent Order Summons on 18 July 2017 and then heard the Strike Out Summons, and at the conclusion of the hearing reserved judgment;
 - (k). the order to be made on the Consent Order Summons was drawn up by the parties and provided for payment to be made of the interim payments by 5pm CIT on 28 July 2017; and
 - (l). on 26 July 2017, Harneys confirmed that the interim payments had in fact been made.
16. The Company has now paid the interim payments and the debt whose non-payment was the main foundation of the Petition has been paid. The Petition, as a result of my order restraining advertisement pending the outcome of the Strike Out Summons has not yet been advertised (although it appears that the presentation of the Petition has now been publicised).
17. In these circumstances it seems to me that the appropriate course is for me to dismiss the Petition and to deal with the costs issue at the same time.
18. The first issue is whether in deciding how to dispose of the Strike Out Summons I should take into account the post-hearing payment by the Company of the interim payments. It seems to me that I should do so. The payment is clearly a new development of relevance and significance to the Strike Out Summons and to the extent that permission is required to put in new evidence after the hearing that payment has been made I consider that it should be granted and do so (the requirements of *Ladd v Marshall* [1954] EWCA Civ 1 seem to me to be satisfied although its applicability and application to the Strike Out Summons were not the subject of submissions by leading counsel).
19. Accordingly, I must consider how to dispose of the Strike Out Summons, and how to deal with the Petition, on the basis that the interim payments have been made. Mr Levy QC referred me to the discussion in French (see below) on the law and practice to be applied in cases where a creditor petitioner's debt has been paid before the hearing of the petition. In the Dissenting Shareholders' Supplemental Submissions, Mr Levy QC set out the following quotation from French (at paragraphs 5.192 – 5.193):



"If a creditor petitioner's debt is paid before the hearing and no winding-up order is asked for at the hearing then, provided the petition has been gazetted, the petition will be dismissed and the company will be ordered to pay the petitioner's costs even if the company does not appear. This is so even if only part of the amount demanded was paid, it being conceded that the balance is disputed or that the petition overstated the debt. The petitioner is also entitled to the costs of any interim applications, unless there is good reason to the contrary. If the petition has not been gazetted by the time of the initial hearing, the court will make an order for costs only if the company consents to the petition being dismissed on terms that the costs are paid. Otherwise, the petitioner may ask for an adjournment for gazetting and for filing a certificate of compliance. The court will not waive the requirement for gazetting in these circumstances for fear of encouraging creditors to use the court as a debt collecting service. But in practice the threat of gazetting the petition, and adding the costs of doing that, and of applying for a costs order, to the costs payable, should persuade a company to pay the petitioner's costs as well as the petition debt without requiring an order for costs. The Irish High Court has decided not to make advertising the petition a condition of granting a costs order, on the ground that advertising is an unnecessary cost. But the inability of the company to pay the costs raises the probability that the petition will have to go ahead anyway, possibly with a substituted petitioner, and should, therefore, be gazetted to inform other creditors.

Costs are awarded because the petitioner is regarded as having effectively succeeded. However, the court may make no order as to part or all of the petitioner's costs as a penalty for unreasonable pre-action behaviour or unreasonable rejection of an offer of payment. Such a penalty may be reduced because of the company's own unreasonable behaviour" (emphasis added by Mr Levy QC)."

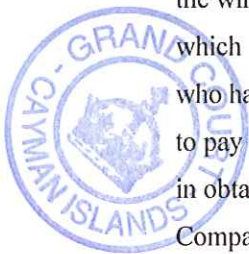
20. As I have noted above, Mr Levy QC submitted that even if I concluded that I should take into account the payment by the Company of the interim payments I should nonetheless dismiss the Strike Out Summons since the Company had failed to establish that it was entitled to the relief sought. Furthermore, Mr Levy QC submitted that the Petition remained before the Court and in the absence of the question of the costs of the Petition being dealt with (or unless the Company agreed to pay the Dissenting Shareholders' costs of the Strike Out application and the Petition) the Petition should proceed to a hearing so that the question of costs can be disposed of then. Mr Levy QC did not, I believe, seriously argue that there was any real prospect that the Court would make a winding up order in these circumstances on the basis of the second ground on which the Petition had been presented, namely the just and equitable ground (as explained above).

21. Ms Newman QC, as I have noted, submitted that in all the circumstances I should grant the relief sought in the Strike Out Summons and strike out the Petition now since *"the ... petition was a wholly unmerited act in circumstances where other remedies were available, proper, practical notice could and should have been given [of the planned presentation of the Petition] and now the [Dissenting Shareholders] seek to rely on an inference of insolvency from their interpretation of the authorities which on anything but a cursory analysis is not available to the Court on the facts of this case."* The surrounding circumstances indicated that the only appropriate inference to be



drawn was that the Dissenting Shareholders had an ulterior motive for the presentation of the Petition rendering it an abuse of process.

22. I agree with Ms Newman QC that as matters now stand the Petition is bound to fail and as a result should be dismissed and struck out. But it seems to me that for the reasons given by Mr Levy QC the Dissenting Shareholders were entitled to present, and did not behave unreasonably in presenting, the Petition (prior to the making of the interim payments). The Company had committed itself to make the interim payments and agreed to formalise that obligation in an order of the Court (that is the Consent Order). The failure to comply with the Consent Order was a serious and clear default. The Company was in breach of a clear and substantial payment obligation. There was no proper basis on which it could be said that the Company was not liable or that a substantial dispute existed as to its liability. In such circumstances an unpaid creditor is in my view entitled to present a winding up petition and require the debtor to show that it is in fact able to pay its debts.
23. Furthermore, the Company's explanation of its position was not completely clear or convincing. Its initial explanation suggested difficulties associated with the size of the payment that needed to be made, thereby raising concerns regarding its ability to fund the payments. It did expand on the reasons why the interim payments had not been made in Mr Chan's first affidavit in support of the Consent Order Summons but it is not clear that this was served in time to allow the Dissenting Shareholders to consider it before issuing the Petition and in any event it did not, in my view, completely remove the legitimate concerns of the Dissenting Shareholders regarding the true reasons for the non-payment of the interim payments or justify the refusal to pay (the Company's evidence was short on detail).
24. While the Court will not be sympathetic to or reward aggressive litigation tactics, and the use of the winding up jurisdiction without giving a debtor proper notice and an opportunity to pay a debt which is not or cannot seriously be disputed will usually be unacceptable, I think that a debtor who has assumed a liability and assented to a consent order cannot expect to be given further time to pay when he defaults, absent some strong reasons which make the default justifiable. Problems in obtaining internal approvals that should have been obtained previously and in time to allow the Company to comply with its obligations on time do not seem to me be sufficient justification so as to make the Dissenting Shareholders' conduct unreasonable. While the Dissenting Shareholders adopted a tough stance by giving the Company no additional time in which resolve its problems (and have not justified the delay in notifying the Company of the presentation of the Petition), I am satisfied that on this occasion they acted reasonably in presenting the Petition. The Company had failed to pay liabilities that could not properly be disputed and had failed to



provide any proper justification for its default. The Company could not justify a failure to make payments pursuant to an order of the court because certain stakeholders, after the Company had committed itself to make the payments, wished it to raise a jurisdictional challenge which it had already decided not to make. It seems to me hardly surprising that the Dissenting Shareholders would treat the Company's behaviour as unreasonable and inconsistent with commercial good conduct.

25. In *Cornhill* (see above) Harman J decided, as is well known, that even where the debtor company was a large and apparently solvent concern a creditor owed a debt that was clearly established was entitled to threaten to and go ahead and present a winding up petition. He said as follows:

"In my view the correct test in approaching these matters is exemplified first by Ungood-Thomas J., who was a great master of equity (and I, it must be remembered, am being asked to exercise the ordinary equitable remedies, not the Companies Court remedies), in Mann v. Goldstein [1968] 1 W.L.R. 1091, 1096 where he said:

"When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt."

That appears to me to be sound reasoning and sound law. I reinforce it by a reference to In re A Company (1950) 94 S.J. 369 where Vaisey J., in a matter in which counsel of the utmost distinction in Chancery at that time, both leading and junior, appeared, said that where a company was well known and wealthy it was the more likely that delay in settlement of its obligations would create some suspicion of financial embarrassment:

"Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them."

In my view those words apply to this case also. This is a case of a rich company which could pay an undoubted debt and has chosen — I think I must use that word — not to do so from 12 June to today. In my view in such circumstances the creditor was entitled to (a) threaten to and (b) in fact if it chose to present a winding up petition, and I was wrong to make the ex parte order which I made on 12 July and I should not accede to this motion to continue that order today."

26. French in *Applications to Wind up Companies* (3rd ed., 2015) at paragraph 7.43 summarises the law as follows:



"Provided there is reasonable pre-action conduct, an unpaid creditor of even a substantial and prosperous company, whose debt is not disputed, is entitled to petition for its winding up, even if owed only a small debt. This is because failure by a company to pay one debt is evidence that the company is unable to pay its debts. Such a petition is not an abuse of process and an application to prevent presentation or continuation of such a petition will be dismissed."

27. French goes on to note that it would seem to follow that a solvent company that persisted in refusing to pay an admitted creditor would be wound up compulsorily on that creditor's petition but that there appeared to be no reported case in which a court had made a winding up order in such circumstances. Of course in the present case that issue does not arise because the Company has now paid the interim payments.
28. Ms Newman QC sought to distinguish *Cornhill* on the basis that the debt in the present case was not undisputed and the Dissenting Shareholders could not establish that their pre-action conduct had been reasonable. In my view, the asserted bases for a declaration that the Consent Order was invalid and that the agreement which it reflected and formalised were not seriously arguable (although I declined to make an order for indemnity costs against the Company in relation to the Consent Order Summons because I was not prepared to conclude that the Company's conduct in bringing the Consent Order Summons was wholly unreasonable and therefore merited penalisation in costs but I noted that I regarded the matter as finely balanced). In such circumstances, the debt on which the Petition was based should, in my view, be treated as within the *Cornhill* principle. I have already explained why I consider the Dissenting Shareholders' pre-action conduct to be reasonable in the circumstances that existed at the time of the presentation of the Petition.
29. Furthermore, in my view the Undertaking is not sufficient to require me to characterise as unreasonable the Dissenting Shareholders' position in refusing to withdraw the Petition and in defending the Strike Out Summons. I agree with the reasons given by Mr Levy QC. The Undertaking was premised on the assumption that it was reasonable for the Company to raise the jurisdictional challenge to the Court's ability to order interim payments, which challenge the Company had decided to forgo when agreeing to make the interim payments in this case and agree to the Consent Order. Once the Company had agreed to make interim payments it was bound to do so and it was not reasonable to change its position or require via the Undertaking the Dissenting Shareholders to accept that they would have to defer their right to receive interim payments until the outcome of other cases in which the jurisdictional challenge was being raised (and to accept the risk of a lengthy appeals process).
30. I also agree for the reasons given by Mr Levy QC that the Dissenting Shareholders did not behave unreasonably by failing to exercise such alternative remedies as were available to them.
31. Nor (once again for the reasons given by Mr Levy QC) was the availability of funds in a bank account of a wholly owned subsidiary sufficient to establish at this stage that the Company was able to pay its debts. Had the interim payments not been made before the hearing of the Petition it



would have been necessary to consider any further evidence filed by the Company to establish and demonstrate that it had sufficient resources to pay its debts as they fell due.

32. As I have said, I do not consider that the presentation of the Petition should be characterised as an abuse in the present case. The Company was liable to make the interim payments and failed to do so without a proper justification. This justified the presentation of a petition. Furthermore, the Dissenting Shareholders could not be sure of the reasons why the Company had reneged on its obligations and were entitled in my opinion to conclude that financial difficulties could not be ruled out. In any event, a creditor owed a debt which cannot properly be said to be disputed is entitled to present a winding up petition and put the debtor to proof as to its solvency. The debtor then has the opportunity to produce evidence to demonstrate that it is able to pay its debts as they fall due. The Company in the present case chose not to produce any such evidence (as Mr Levy QC pointed out the financial information produced at the time of the merger was outdated). Furthermore, while the Consent Order Summons sought to extricate the Company from its difficulties and relied on some ingenious lawyering to find a legal basis for avoiding what appeared to be a clear legal obligation, in my view, as I have noted, the Consent Order Summons was not seriously arguable and as I have held that there was no basis for setting aside the Consent Order or the Company's obligation to make the interim payments.
33. In the present circumstances, following the payment by the Company of the interim payments, the Petition is now, as I have noted, bound to fail. While the payment of the petition debt does not, as I have also noted, mean that the Petition must be dismissed since the issue of costs remains open and, in a case such as the present one where the Petition has not been advertised, consideration needs to be given to whether the Petition should be advertised. However, having received written submissions from counsel on the costs issue I consider myself able to deal with the costs issue. Since I have concluded that the Dissenting Shareholders were entitled to present the Petition and had not behaved unreasonably in doing so or in refusing, prior to payment of the interim payments, and since I did not find that the Company's grounds for striking out the Petition, prior to payment of the interim payments, had been made out, I have concluded that the Company should pay the costs of the Dissenting Shareholders of both the Petition and the Strike Out Summons, on the standard basis, to be taxed if not agreed. I have also concluded that it would not be appropriate in the present circumstances to delay the dismissal and striking out of the Petition and risk further damage to the position of the Company.



THE HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT

