HCCW 150/2019

[2020] HKCFI 2032

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 150 OF 2019

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

and

IN THE MATTER of EUREKA Manufacturing Company Limited (金源製造有限公司)

Before: Hon Linda Chan J in Court

Date of Hearing: 5 August 2020

Date of Judgment: 17 August 2020

J U D G M E N T

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1. By a petition presented on 20 May 2019 (as amended on 23 July 2019) the petitioner, Tak Shun Industrial Company Limited (德迅實業有限公司) ("**Petitioner**"), seeks a winding up order against EUREKA Manufacturing Company Limited (金源製造有限公司) ("**Company**") on the ground that the Company has failed to satisfy the statutory demand dated 26 March 2019[1] ("**SD**") and, therefore, is deemed to be unable to pay its debts by virtue of section 178(1)(a) of the Companies (Winding-up and Miscellaneous Provisions) Ordinance (Cap 32) ("**Ordinance**").

2. In the SD, the Petitioner demanded the Company to pay RMB 443,532.30 (or its HK dollar equivalent) ("**Debt**") said to be the aggregate amount due under the following 5 invoices (collectively "**Invoices**"):

When incurred	Description of debt	Amount due as at the date of SD
26/3/2018	Invoice No TS-Eureka-18002	RMB 5,120.0
19/6/2018	Invoice No TS-Eureka-18003	RMB 7,680.0
19/6/2018	Invoice No TS-Eureka-18004	RMB 16,000.0
20/6/2018	Invoice No TS-Eureka-18005	RMB 394,248.0
22/6/2018	Invoice No TS-Eureka-18006	RMB 20,484.3
		RMB 443,532.3

3. In the petition, the Petitioner states that:

(1) the Debt is "the outstanding moulds charges and purchase prices of goods sold and delivered by the Company to the Petitioner[2] pursuant to various orders placed by the Petitioner[3] in or around March 2018 as evidenced by various invoices issued by the Petitioner to the Company between March 2018 to *[sic]* June 2018", and the Debt is immediately due and payable (§6); and

(2) in an attempt to pay the Debt, on 19 June 2018, the Company issued a cheque, no 928954, post-dated to 19 July 2018 in favour of the Petitioner, which was subsequently dishonoured on 3 occasions. Despite notices of dishonour given to the Company and the demand letter dated 29 January 2019, the Company refused to pay the Debt (§7).

A. Background fact

4. The following fact is not in dispute.

5. At the relevant time in 2018, the sole shareholder and director of the Company was Mr Tam Sze On Johnny Woody ("**Tam**") who was (and still is) the sole proprietor of EUREKA Product Development (金源產品開發公司) ("**EPD**"). Ms Cheng Wing Yee ("**Cheng**") was the person who dealt with the Petitioner.

6. Mr Chan Tak Yee ("**Chan**") is a director of the Petitioner and has acted on behalf of the Petitioner in dealing with Tam and Cheng.

7. By a purchase order dated 8 March 2018 issued by EPD ("**PO**"), EPD offered to purchase from the Petitioner 3 models of grills and accessories, viz., 2,000 pieces of 半鋁半石電烤架("**RC58**"), 500 pieces of 石板電烤架 ("**RC48**"), 500 pieces of 全鋁烤盤電烤架("**RC38**") together with 3,400 pieces of spare parts (collectively "**Grills**"), at an aggregate price of RMB 546,225. The PO was accepted and countersigned by the Petitioner.

8. It was stated in the PO, *inter alia*, that:

(1) "ETD 裝運: 裝柜時間2018 年4月30日";

(2) "In case of non-delivery with *[sic]* contract time the sellers agree to be responsible for any consequence arising therefrom and the buyer has the right to cancel this order" (clause (2)); and

(3) "所有送貨單或發票必需註明訂單號碼，對帳及結帳事宜由金源產品開發公司一概處理" (clause (3)).

9. By an invoice dated 17 March 2018 issued by the Petitioner to EPD, the Petitioner referred to the PO and required payment of 10% deposit in the amount of RMB 54,622.50 ("**Deposit**"). On 27 March 2018, the Company issued a cheque in favour of the Petitioner for HK$66,612.80 and deposited the same into the Company's bank account .

10. As early as 4 November 2017, EPD delivered 51 sets of moulds to the Petitioner for manufacturing the Grills, which was counter-signed by the Petitioner on 9 November 2017 ("**1st List**"). On 30 March 2018, EPD provided 3 more sets of moulds to the Petitioner for the same purpose and the Petitioner counter-signed a list dated 28 March 2018 ("**2nd List**"). The following statements appeared on the 1st and 2nd Lists:

> "以上 … 套模具屬於 '金源產品開發公司' 資產, 在 [11月4日/2018年3月28日] 到達'德迅實業有限公司'作為生產用途,完成訂單後必須交還給 '金源產品開發公司'"

11. On 6 April 2018, 16 April 2018 and 30 April 2018, the Petitioner provided 1st, 2nd and 3rd batches of sample grills to Cheng. The assessment reports on the samples were sent to the Petitioner on 6 April 2018, 23 April 2018 and 25 May 2018.

12. On 28 May 2018, Cheng provided the Petitioner with details of 2 suppliers of accessories required to manufacture the Grills, and stated that the estimated dates for supplying the accessories were 31 May 2018 and 1 June 2018.

13. On 8 June 2018, Cheng provided the Petitioner with documents relating to the shipment of 500 pieces of RC48, 2,000 pieces of RC58 and 1,300 pieces of spare parts, which were the same as Item No 1, 2, 7, 8 and 9 in the PO (collectively "**Manufactured Grills**"). These documents stated the "ETD" and "ETA" (which appears to be the abbreviations of "estimated time of departure" and "estimated time of arrival") as 19 June 2018 and 18 July 2018 respectively. In the shipping order, the Company was listed as the shipper.

14. On 14 June 2018, Cheng informed the Petitioner that the Manufactured Grills would be shipped, and RC38 could not be manufactured given that all the moulds for manufacturing RC38 had cracks. The Manufactured Grills were shipped on 19 June 2018.

15. The Petitioner issued the Invoices to EPD which bore the dates stated at §2 above. Amongst the Invoices, the one dated 20 June 2018 covered the Manufactured Grills. The other invoices covered miscellaneous charges such as the cost for producing various moulds, packing expenses and transportation fees.

16. Following the Petitioner's requests for payment, EPD procured the Company to issue a cheque in favour of the Petitioner, no 928954, post-dated to 19 July 2018, for HK$443,291.76 ("**Cheque**"). According to the Company, the amount represented the price of the Manufactured Grills (RMB 431,420), less the Deposit (RMB 54,622.50) and used 0.85 as exchange rate.

17. The Petitioner presented the Cheque for payment on 20 July 2018, 25 July 2018 and 4 September 2018 but the same was dishonoured on each occasion. Notices of dishonour were given by the Petitioner to the Company.

18. By letter dated 29 January 2019 issued by the Petitioner's former solicitors, the Petitioner stated that pursuant to the purchase order placed by the Company, the goods were manufactured and delivered to the Company. After the Invoices had been sent to the Company, Cheng gave the Cheque to the Petitioner, which the Petitioner took as settlement of the invoice for the Manufactured Grills. The Company was requested to honour the Cheque and settle the remaining 4 invoices failing which legal proceedings would be commenced against the Company. The Company did not respond to the request.

B. Applicable principles

19. The principles are well established. A winding-up petition should only be presented if the creditor is owed a liquidated sum and the debtor company does not have any valid ground for refusing payment. Where the company disputes the debt in question, it bears the burden to show that there is a *bona fide* dispute on substantial grounds and, for this purpose, must adduce sufficiently precise factual evidence to substantiate its allegations. The Companies Court is not precluded from examining the evidence and taking a view on whether the debt is disputed on substantial grounds, but the Court does not try the dispute on affidavits (*Re Yueshou Environmental Holdings Ltd*, HCCW 142/2013, 16 July 2014, §8, per Harris J). The usual practice of the Court is to dismiss the petition, leaving the petitioner to establish itself by judgment to be obtained in the civil court (*Hollmet AG & anor v Meridian Success Metal Supplies Ltd* [1997] HKLRD 828 at 830J, per Rogers J (as he then was).

20. It would be an abuse of process for the petitioner to present a winding-up petition if it is aware of matters that constitute a *bona fide* defence on substantial grounds to the debt. As Harris J put it in *Re Alpha Building Construction Ltd*, HCCW 283/2014, 20 May 2015, at §7:

> "The winding up jurisdiction, and the procedure for prosecuting winding-up petitions, exist to ensure that insolvent companies are put into liquidation and that this is done promptly in order to protect the interests of creditors. It is not a means of asserting pressure on a company, which the creditor knows is probably solvent, for payment of a disputed debt. The procedure should be reserved for use when at the time of presentation of a petition a petitioner, and his advisers, can fairly say that on the information available to them any asserted defence is fairly obviously insubstantial and unmeritorious"

21. Where, as here, the petitioner relies on a statutory demand, the demand should give the correct basis of liability for the debt as it is "the straight and narrow gateway" through which a creditor must pass in order to establish insolvency pursuant to section 178(1)(a) of the Ordinance. If a statutory demand is defective, the Court will be alert to see whether those mistakes have caused or will cause any prejudice to the debtor (*TSB Bank plc v Platts (No* 2) [1998] BPIR 284 at 288D-H; *Re Leung Cherng Jiunn* [2016] 1 HKLRD 850 (CA) at §§13, 15).

22. If there is a debt above the statutory minimum which is indisputable, a petition can be validly presented even if the debt as claimed in the petition is for a larger sum, part of which is *bona fide* disputed (*Re Hong Kong Construction (Works) Ltd* unrep. HCCW 670/2002,7 January 2003, Kwan J (as she then was) at §6). If the company contends that the statutory demand has been overstated, the correct procedure for the company to follow, to avoid the presumption of insolvency, is to comply with the demand as to the amount which is not *bona fide* disputed and then contest the remainder (*Asahi Iwasawa Associates Management Consultants Ltd v SEC (Hong Kong) Co Ltd*, HCCW 215/2013, 21 March 2014, §27, per Ng J).

C. Discussion

23. As stated in §3 above, the Petitioner relies on the Debt in the petition. At the hearing, Mr Ernest Ng, counsel for the Petitioner, places heavy reliance on the Cheque which was mentioned in the SD and the petition. He submits that the obligation to honour the Cheque was separate from and independent of the contract, and the failure on the part of the Company in paying the amount represented by the Cheque provides a basis for the Court to conclude that the Company was insolvent.

24. The Company opposes the petition on 4 main grounds:

(1) the Company was not the contracting party with the Petitioner under the purchase order which gave rise to the Debt (Contracting Party point);

(2) the Petitioner acted in breach of its duties under the PO in that it failed to deliver the Grills in accordance with the agreed date and failed to deliver all the Grills ordered and, as such, is not entitled to payment of the Debt and is subject to a counterclaim for loss and damage (Breach of Contract point);

(3) the Petitioner is still holding onto the "tools and moulds" which belong to the Company and worth over HK$1.5 million. The Company has a *bona fide* substantial cross claim against the Petitioner for their return, and the Petitioner knows that the Company is solvent (Retention of Moulds point); and

(4) the Cheque was not the basis upon which the SD was issued. The Cheque was given to the Petitioner as "conditional cheque", given that Tam expressly told the Petitioner that before it could present the Cheque for payment on 19 July 2018, "the Petitioner must have completed all the outstanding manufacturing and production and delivery of the goods"[4] (Dishonoured Cheque point).

25. I deal with the above points in turn.

C1. Contracting Party point

26. Mr Ng submits that the Court should focus on the evidence as to who actually *performed* the contract. He relies on the fact that (1) the Company paid the Deposit, (2) the Company was named as the shipper in the shipping order, (3) the Cheque was collected at the Company's registered office, and (4) the Cheque was issued by the Company, and contends that the Company was the party to the contract.

27. The submission misses the point. In determining whether a contract was made and who were the parties to such contract, the starting point is to identify what constituted the offer and whether there was an unequivocal acceptance of such offer. As evidence now stands, it is indisputable that the PO was the offer and the same was accepted by the Petitioner. It is clear from the PO that the offer was made by EPD and accepted by the Petitioner on that basis. There was nothing in the PO (or, indeed, any documents) to suggest that the PO was issued by the Company, as suggested in §6 of the petition. On this ground alone, there is a *bona fide* dispute on substantial ground as to whether the Company was a party to the contract. This is fortified by the fact that there are other contemporaneous documents which suggest that the contract was made between the Petitioner and EPD. These include the invoice issued by the Petitioner to EPD demanding payment of the Deposit and the Invoices issued by the Petitioner to EPD.

C2. Breach of Contract point

28. It is the Company's case that the contract was made between the Petitioner and EPD. It follows that if, as the Company alleges, the Petitioner acted in breach of the contract, the *only* party which is entitled to seek damages against the Petitioner is EPD. The Company, as a non-party to the contract, has no basis to assert any claim against the Petitioner.

29. Even if the contract was made between the Petitioner and the Company (which has not been established), I am not satisfied that there is a *bona fide* dispute on substantial ground that the Petitioner acted in breach of the contract. This is because, as the fact described in §§7 to 14 above shows:

(1) In the PO, the estimated time of departure was stated to be 30 April 2018, the parties took time to produce and test the moulds until the same was approved by the Company or EPD. It was only after obtaining the requisite approval that the Petitioner produced the Manufactured Grills and the parties agreed to ship the same by 19 June 2018, which the Petitioner did. Indeed, the shipping date was stated by Cheng in the shipping documents provided to the Petitioner. Throughout their dealings, there was no suggestion, let alone complaint, by the Company or EPD that the Petitioner must deliver the Manufactured Grills by 30 April 2018. The first time the Company alleged that there was delay in delivering the Manufactured Grills was *after* the Petitioner had complained about the Cheque having been dishonoured.

(2) Similarly, the alleged failure to deliver the 500 pieces of RC38 was only made, for the first time, after the Cheque had been dishonoured. Prior to that, the parties were contented with the Petitioner not having to produce any RC38, after Cheng had informed the Petitioner that all the moulds for RC38 had cracks. In light of the undisputed fact that all the moulds supplied by EPD had cracks, it is difficult to see how the Company can allege that the Petitioner was in breach of contract in failing to produce any RC38.

(3) In any event, clause (2) of the PO provides that "the sellers agree to be responsible for any consequence arising" from the "non-delivery" within the "contract time". As the Company has not adduced any evidence to show it had suffered any loss as a consequence of the Petitioner's delay in delivering the Manufactured Grills and the failure to deliver any RC38, there is no basis to suggest that the Company has a *bona fide* cross claim against the Petitioner for the alleged delay or non-delivery.

C3. Retention of Moulds point

30. The point can be disposed of shortly.

31. As stated in the 1st and 2nd Lists, the moulds were delivered to and accepted by the Petitioner on the basis that they were EPD's assets. *Prima facie*, this constituted a separate contract between the Petitioner and EPD as the PO did not refer to the moulds. Thus, even if the Petitioner has wrongfully retained the moulds and refused to return them, only EPD has the *locus* to make a claim against the Petitioner. The Company attempts to overcome this hurdle by asserting that the moulds have all been assigned by EPD to the Company. I am unable to accept this assertion. The Company has failed to provide any particulars of the alleged assignment or produce any document in support of the assertion. In any event, there is no suggestion that the Petitioner has ever been notified of, still less agreed to, the alleged assignment. It is questionable if the alleged assignment is valid or effective.

32. Further, it is not in dispute that the Petitioner through its former solicitors' letter of 12 August 2019 stated that some of the moulds had already been returned to EPD on 24 December 2017 and, despite the Petitioner's repeated requests, the Company and EPD failed to retrieve the remaining moulds from the Petitioner. The Petitioner requested the Company and EPD to remove the remaining moulds within 7 days. For reason never explained by the Company, no step was taken by the Company or EPD to remove the moulds from the Petitioner. It does not lie in the Company's mouth to allege that the Petitioner has refused to return the moulds or that it is liable to compensate the Company for any loss and damage when it chose not to retrieve the moulds from the Petitioner.

C4. Dishonoured Cheque point

33. Section 3 of the Bills of Exchange Ordinance (Cap 19) ("**BEO**") provides that "[a] bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer".

34. The nature of a bill of exchange has been sufficiently stated in *Li Yu v Hui Yan Sui William*, HCA 993/2009, 12 October 2009, at §§21-23, per Marlene Ng J, as follows:

> "21. A bill of exchange is to be treated as cash and honoured unless there is some good reason to the contrary. Only in exceptional circumstances will a court deprive a claimant of judgment on a claim based on a cheque (*Fielding and Platt, Ltd v Najjar* [1969] 2 All ER 150, 152 and *Sun Wah Aluminium Windows & Curtain Wall Company Limited v Panyu Fantasy Film City Limited operated as Sammyland* HCA3119/2002, Sakhrani J (unreported, 17 October 2003)).
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> 22. In *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 … Lord Russell of Killowen said at pp.479-480 that: '… The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiate instrument; it is to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded on some allegation of failure in some respect by the vendor under the underlying contract, unless it be total … failure of consideration …' (followed in Hong Kong in *C A Pacific Forex Limited v Lei Kuan Ieong* CACV126/98 (unreported, 14 January 1999)).
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> 23. In *S Y Chan Ltd v Choy Wai Bor* [2001] 3 HKLRD 145, 149 … Mr Recorder Kwok SC said as follows:
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> > 'A cheque is an unconditional order in writing, drawn and signed by the drawer, requiring the banker to pay on demand a sum certain in money to, or to the order of, a specified person or to bear: ss.3 and 73 of the Bills of Exchange Ordinance (Cap.19). The drawer of a cheque, by drawing it, engages that, on due presentment, it shall be paid according to its tenor, and that if it is dishonoured he will compensate the holder, provided that the requisite proceedings on dishonour are duly taken, s.55(1)(a). Extrinsic evidence is, in general, inadmissible to prove that the terms of the contract differed from those expressed in writing on the cheque: *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (15th ed.) para.384'."

35. The drawer may contend that the bill of exchange has not been delivered. This is enshrined in section 21 of the BEO, which provides:

> "(1) Every contract on a bill, whether it is the drawer's, the acceptor's or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto …
>
> (2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—
>
> …
>
> > (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill;"

36. A defence based on section 21(2)(b) is a limited defence. It does not permit the drawer to adduce extrinsic evidence to vary the conditions of payment. This was explained by Mayo VP in *Lin Hsien Tseng v So Sin Mui Bonnie* [2002] 4 HKC 532 at 535 as follows:

> "11. As we understand the position a defendant who is attempting to make use of section 21 has to establish that what was contemplated by the parties was that it was intended that the 'cheque' should be held in escrow by the payee such that the document did not have the qualities of a cheque at all as it had not been delivered.
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> 12. Certainly it is not enough to refer to oral testimony of conditions which have allegedly been imposed before the cheque can be presented for payment.
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> 13. The question which has to be determined in this action is whether the cheque in question was delivered in escrow or whether an attempt was being made to orally attach conditions to the payment of the cheque."

37. Further, while it is open to the drawer to dispute liability on the bill of exchange on the basis that there was a total failure of consideration, it has to be shown that the party against whom liability is sought to be enforced received no part of the benefit for which he bargained in the transaction which led to him becoming a party to the bill (*Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes,* 18th ed, §4-008).

38. Mr Ng submits that the Cheque provides an independent basis upon which the Debt can be identified. The Cheque meets all the requirements of a bill of exchange in that (1) it was in the possession of the Petitioner, (2) unconditional delivery is presumed until the contrary is shown (section 21(3) of BEO), and (3) consideration is presumed until the contrary is proved (section 30 of BEO).

39. I agree that the Cheque constitutes a contract separate from the underlying contract of sale and purchase of the Grills (*Li Yu v Hui Yan Sui William*, §22). I also agree that by virtue of sections 21(3) and 30 of BEO, the burden is on the Company to displace the presumption that there was unconditional delivery of the Cheque and that there was total failure of consideration for the Cheque.

40. In the skeleton argument of Mr Billy Ma, counsel for the Company, he contends that the Company is not liable to honour the Cheque for the following reasons:

(1) The Cheque was given to the Petitioner as "conditional cheque" in that Tam expressly told Chan that *before* the Petitioner could present the Cheque for payment on 19 July 2018, the Petitioner must have completed *all* the outstanding manufacturing, production and delivery of the Grills. As the Petitioner had not delivered the 500 pieces of RC38 under the PO, the Petitioner was not entitled to present the Cheque for payment.

(2) There was a total failure of consideration of the Cheque, given the non-delivery of 500 pieces of RC38.

(3) The Cheque is not the basis of the SD.

41. I do not think that the Company has adduced sufficiently precise factual evidence in support of its assertion that the Cheque was delivered to the Company on the alleged "condition". Other than the bare assertion of Tam, there is not a shred of evidence in support of the alleged condition said to have been imposed by the Company when the Cheque was given to the Petitioner. This was despite the Petitioner's repeated requests for payment made to the Company including the demand letter dated 29 January 2019 (see §§16-18 above). Indeed, the very fact that the Cheque only covers the amount payable for the Manufactured Grills (as opposed to the price of all the Grills under the PO) militates against the existence of the alleged condition.

42. In any event, it is not open to the Company to rely on Tam's affirmation and contends that the alleged "condition" was imposed before the Petitioner could present the Cheque for payment, which was precisely what the Court of Appeal held in *Lin Hsien Tseng v So Sin Mui Bonnie* to be impermissible.

43. As for "total failure of consideration", at the hearing, Mr Ma (rightly) does not maintain the point. The point is plainly unsustainable. It is the Company's own evidence that as the Petitioner had only shipped the Manufactured Grills and taking into account the Deposit paid, the cheque should cover the amount stated in the Cheque "for the time being"[5] and the Cheque was issued to the Petitioner "for the time being as an incentive"[6].

44. It follows that I do not think that the Company has demonstrated that there is a *bona fide* dispute on substantial ground in respect of the liability to honour the Cheque. The only issue I have to consider is whether it is open to the Petitioner to rely on the failure of the Company to honour the *Cheque* as the basis for establishing the insolvency when the subject matter of the SD was the *Debt* and the Cheque was only described as "in purported settlement or partial settlement of the [Invoices]", which was "not sufficient to settle the full amount of the [Invoices] and was dishonoured" in the "Description of Debt" appended to the SD.

45. Mr Ng submits that the Company is well aware of the Petitioner's case that the Company is liable to pay the amount covered by the Cheque. It has in Tam's affirmation filed in opposition to the petition put forward all the grounds as to why the Company should not be liable to honour the Cheque. There is therefore no surprise or prejudice to the Company in allowing the Petitioner to rely on the Cheque. Mr Ma does not suggest otherwise.

46. Despite the misgiving I have about the SD and the petition (as neither of them refers to the amount stated in the Cheque as the basis of the demand), I think the "defect" is one which can be remedied by allowing the Company an opportunity to pay the amount represented by the Cheque within 21 days of this Judgment. This in my view strikes the right balance between the parties and reflects the justice of the case.

(1) On the one hand, the Petitioner succeeds in showing that the Company was liable to pay the amount represented by the Cheque, which is above the statutory minimum. The Cheque itself was referred to in the SD and the petition, and the Company has had the opportunity to file evidence to dispute its liability under the Cheque.

(2) The petition is valid even if the Debt stated in the petition is for a larger sum, and part of which, as I so find, is *bona fide* disputed (*Re Hong Kong Construction (Works) Ltd,* §6).

(3) Despite the Petitioner's repeated requests for payment, the Company has not made any attempt to pay the amount represented by the Cheque and then contest the remainder (*Asahi Iwasawa Associates Management Consultants Ltd*, §27).

47. If the Company fails to pay the amount represented by the Cheque within 21 days of this Judgment (or any further time as may be extended by the Court), the Petitioner's solicitors may inform the Court in writing whereupon a winding up order will be made against the Company, which will be pronounced in Court at the following Monday callover hearing by the Companies Judge.

48. As for costs, I make a costs order *nisi* that:

(1) if the Company pays the amount represented by the Cheque within the time limit, the Petitioner is entitled to 50% of the costs of the petition. This reflects the fact that the Petitioner is not wholly successful in the petition and has relied on the Debt part of which I find to be *bona fide* disputed on substantial ground; and

(2) if the Company fails to pay the amount represented by the Cheque within the time limit and the Court makes a winding up order against the Company, the costs of the Petitioner should be paid out of the assets of the Company. The costs of the Official Receiver will be paid out of the deposit. This is the usual costs order when the Court makes a winding up order against a company in a creditor's petition.

(Linda Chan)
Judge of the Court of First Instance
High Court

Mr Ernest CY Ng, instructed by Alvan Liu & Partners, for the petitioner

Mr Billy NP Ma, instructed by Humphrey & Associates, for the company

Attendance of the Official Receiver was excused

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[1] Served on the Company at its registered office on 26 March 2019 and 6 April 2019

[2] This seems to be a mistake as the goods were sold and delivered by the Petitioner to the Company, not the other way round

[3] The reference to the Petitioner again, seems to be a mistake, as it is the Petitioner's case that the purchase order was placed by the Company

[4] §24(6)(a) of Company's Skeleton

[5] §§34-40 of Tam's Affirmation

[6] §42(c) of Tam's Affirmation