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Re China Power Clean Energy Development Co Ltd

Court of First Instance
Deputy High Court Judge William Wong SC
Decision Date: 27 September 2018

B *Company law — Shares — Extend the time to deliver to the Registrar of Companies a return of allotment of shares — Inadvertence — Companies Ordinance (Cap 622) s 142(4) — Rules of the High Court (Cap 4A) O 102 r 2(1)*

公司法 — 股份 — 延期向公司註冊處處長交付配發申報書 — 疏忽 — 公司條例（第622章）第142(4)條 — 高等法院規則（第4A章）第102號命令第2(1)條規則

C

The Company failed to deliver to the Registrar of Companies a return of allotment within one month of an allotment. The Company now sought for an extension of time to do so pursuant to s 142 of the Companies Ordinance.

Held, granting the extension:

D 1. The failure to file was an inadvertent omission for the purpose of s 142(5) due to the lack of communication, or want of attention, amongst the Company and its advisers. (*Thomas Montgomery & Sons v WB Anderson & Sons Ltd* (1979) SLT 101 referred to.) (See paras 13-14, 16.)

2. It was just and equitable to grant the extension as it would not cause any identifiable prejudice to relevant parties. (*Re Poly Property Group Ltd* [2016] 4 HKC 169; *Confiance Ltd v Timespan Images Ltd* [2005] 2 BCLC 693 referred to.) (See paras 15, 17.)

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[Headnote by Michael Lok, barrister-at-law]

The following cases referred to in this decision:

- *Confiance Ltd v Timespan Images Ltd* [2005] 2 BCLC 693
- F *Hong Kong Asset Management Ltd v Registrar of Companies* [2017] HKCFI 1998, [2017] 11 HKJR 42
- *Re Hong Wei (Asia) Holdings Co Ltd* [2016] HKCFI 1207, [2016] 7 HKJR 117
- *Re Jackson & Co Ltd* [1899] 1 Ch 348
- *Re Poly Property Group Ltd* [2015] HKCFI 2271, [2016] 4 HKC 169
- *Thomas Montgomery & Sons v WB Anderson & Sons Ltd* (1979) SLT 101

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Mr Anthony Chan, instructed by Slaughter & May, for the plaintiff

Ms Sze Wai Shan, of the Companies Registry, for the defendant

Deputy High Court Judge William Wong SC handed down the following decision of the Court of First Instance.

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1. This is an application by originating summons dated 10 August 2018 by China Power Clean Energy Development Company Limited ("the Company"), pursuant to section 142(2) and (5) of the Companies Ordinance, Cap 622, for an order that time to deliver to the Registrar of Companies a

return of allotment in respect of an allotment of shares by the plaintiff on 17 July 2017 ("the Allotment") be extended to 9 August 2018.

Material facts

2. The application is supported by the Affirmation of Fung Chun Nam who is the company secretary. The Company is listed on the Stock Exchange of Hong Kong Limited ("HKSE") under stock code 0735 since 18 July 2017.

3. On 17 July 2017, the Company allotted a total of 1,186,633,408 shares representing an increase of share capital in the amount of HK$6,696,486,045. The Allotment as made pursuant to a scheme of arrangement under section 99 of the Companies Act 1981 (as amended) of Bermuda (the "Scheme") between China Power New Energy Development Company Limited ("CPNE"), a company incorporated in Bermuda with limited liability the shares of which were previously listed on the HKSE (under the same stock code 0735 as the Company's), and its shareholders as at 4:30 pm (Hong Kong time) on 14 July 2017 ("Scheme Shareholders"). The Scheme became effective on 17 July 2017.

4. Under the Scheme:

(1) The Company replaced CPNE as the listed holding company of a group of companies.

(2) The Scheme Shareholders' shares in CPNE were cancelled and the Company, pursuant to the Allotment, allotted one share to them for every one CPNE share held, which resulted in them holding the same proportionate interests in the Company as they did in CPNE.

5. Pursuant to section 142(1) of the Companies Ordinance, Cap 622, the Company was required in respect of the Allotment, to deliver to the Registrar of Companies a return of allotment (ie Form NSC1) (the "Form NSC1") for registration within one month of the Allotment (ie on or before 17 August 2017).

6. However, the Company failed to do so. According to Mr Fung, the Company first became aware of its failure to comply with section 142(1) on 19 July 2018 when the Companies Registry returned the Company's 2018 annual return filling (Form NAR1) and the financial statements delivered for registration on 12 July 2018 citing an inconsistence between the issued share capital as reported on the Form NAR1 and the Companies Registry's records at the time.

7. According to Mr Fung, the failure to comply with section 142(1) was due to inadvertence and accidental omission as a result of a misunderstanding between the Company, its service providers and its legal advisors at the material time.

8. The Company and CPNE have engaged Slaughter and May as its legal advisor (the "Legal Advisor") on implementing the Scheme which formed part of a reorganization proposal within the Company's group of companies ("the Reorganisation Proposal"). In addition, the Company has engaged, respectively, Tricor Tengis Limited as its share registrar and Tricor Services

A Limited to assist in its annual return filings to the Companies Registry (together, the "Service Providers").

9. It is the Company's evidence that upon completion of the Reorganisation Proposal, the Company anticipated or thought that the Legal Advisor would file the Form NSC1 in respect of the Allotment on the Company's behalf. However, the Legal Advisor assumed that the Service
B Providers would assist the Company. As a result, no Form NSC1 was filed by either the Legal Advisor or the Service Providers.

10. It was not until when the Company received the letter of 19 July 2018 from the Companies Registry that it was discovered that in fact neither the Legal Advisor nor the Service Providers had express instructions or was expressly mandated under their respective terms of engagement with the
C Company to handle the filing of Form NSC1 in respect of the Allotment after completion of the Reorganisation Proposal. This is regrettable because one would have thought that such obligation should be covered in the terms of engagement.

11. Upon becoming aware of the omission on 19 July 2018, the Company sought legal advice from the Legal Advisor on 23 July 2018 and the present
D application was taken out on 10 August 2018.

Applicable legal principles

12. Section 142 provides:

> "(1) Within one month after an allotment of shares, a limited
E company must deliver to the Registrar for registration a return of the allotment that complies with subsection (2).
>
> ...
>
> (3) If a limited company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing
F offence, to a further fine of $700 for each day during which the offence continues.
>
> (4) If a limited company fails to deliver a return that complies with subsection (2) within one month after an allotment of shares, the Court may, on application by the company or a responsible person
G of the company, extend the period for delivery of the return by a period determined by the Court.
>
> (5) The Court may extend a period under subsection (4) only if it is satisfied—
>
> (a) that failure to deliver the return was accidental or due to
H inadvertence; or
>
> (b) that it is just and equitable to extend the period.
>
> (6) If the Court extends the period for delivery of a return, any liability already incurred by the company or a responsible person

> of the company for an offence under subsection (3) is extinguished and subsection (1) has effect as if the reference to one month were a reference to the extended period."

13. Accidental means that the failure to comply is the result of a pure accident and not a deliberate act. (See para 6 of *Hong Kong Asset Management Ltd v Registrar of Companies*, unreported, HCMP 2177/2017, 7 November 2017 *per* Deputy High Court Judge Marlene Ng).

14. Inadvertence means heedlessness, carelessness or some want of attention where the circumstances show an absence of good faith. (See *Thomas Montgomery & Sons v WB Anderson & Sons Ltd* (1979) SLT 101 at 103 *per* Lord Ross). Ignorance of the relevant statutory provision falls within the meaning of inadvertence. (See *In re Jackson & Co Ltd* [1899] 1 Ch 348 at 351 *per* Kekewich J and *Re Poly Property Group Co Ltd* [2016] 4 HKC 169 at para 16, *per* L Chan J.)

15. An instance where it is just and equitable to grant an extension of time is where the grant of relief will not cause any identifiable prejudice to any relevant party. (See *Re Poly Property Group Co Ltd* (*supra*) at para 17 and *Confiance Ltd v Timespan Images Ltd* [2005] 2 BCLC 693 at paras 25 – 29, *per* Pumfrey J.)

Analysis

16. Applying the above legal principles to the facts of the present case, first, this court is of the view that the mistaken assumption on the part of the Company, the Legal Advisor and the Service Providers resulted in an inadvertent omission to file Form NSC1. It was clearly not a deliberate act. I agree with Mr Chan's submission that it was an honest mistake due to the lack of communication, or want of attention, amongst the Company and its advisers. It does falls within the meaning of accidental or inadvertence for the purpose of section 142(5).

17. Secondly, it is just and equitable to grant the extension sought as it would not cause any identifiable prejudice to relevant parties. In fact, it is beneficial to give certainty to the Company's shareholders and the investing public given that the Scheme was sanctioned by the Bermudan Court and the Allotment was announced to the Hong Kong market.

18. Thirdly, this Court also notes that the Company has acted promptly and presently no summons has been issued for breach of section 142 of the Companies Ordinance, Cap 622. Miss Sze of the Companies Registry very helpfully drawn to this Court's attention the case of *Re Hong Wei (Asia) Holdings Company Ltd*, unreported, HCMP 1418/2016. In that case, Harris J at paragraph 12 said:

> "Generally speaking by that stage the criminal court has been seized of the matter, and it being likely that the delay having been considerable and, as in the present case, the omission only coming to light and steps being taken to remedy it by the Company after it has received the summons, it will generally be inappropriate for the Companies Court to grant an extension of time."

A 19. In the present case, at this stage, the criminal court has not seized of the matter.

20. This Court further takes note that to prevent similar incidents from happening again, the Company is in the course of preparing an internal reminder to be circulated in respect of the appropriate procedures to be adopted in the event of any future allotment of shares by the Company. B The Company also intends to provide further trainings as necessary to existing and new members of its company secretarial team to prevent miscommunications and/or misunderstanding with external advisors of the Company in the future. It appears to this court that a clear provision in the letters of engagement is also necessary.

C *Disposition*

21. For the reasons set out above, this Court grants an order in terms of paragraph 1 of the Originating Summons dated 10 August 2018:

> "Time to deliver to the Registrar of Companies a return of allotment in respect of an allotment of shares by the Plaintiff on 17 July 2017 be extended to 9 August 2018."

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22. Costs of this application are to be paid by the Company to the Companies Registry in the sum of HK$1,500.00 as requested.

23. Finally, this Court thanks Mr Chan for the Company and Ms Sze for the Companies Registry for their helpful assistance.

E (William Wong SC)
Deputy High Court Judge

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Re Hong Kong Mercantile Exchange Ltd

Court of First Instance
Jonathan Harris J
Decision Date: 24 August 2018

B *Company law — Permanent stay of winding up proceedings — Discharge of liquidators — Scheme of arrangement*

公司法 — 永久擱置清盤程序 — 解除清盤人 — 債務償還安排

The applicant Company, which had been ordered to wind up, sought a permanent stay of the winding up proceedings and a simultaneous discharge C of liquidators, on the ground that the liabilities of the Company had been compromised pursuant to a scheme of arrangement.

Held, granting the permanent stay:

1. The conditions for granting a permanent stay of extant winding up proceedings were normally satisfied where unsecured debts had been D compromised pursuant to a scheme of arrangement.

2. The Court was satisfied that the normal criteria had been met and it was an appropriate case to stay the winding-up proceedings and make the consequential order discharging the liquidators.

3. The costs of the application would be paid out of the assets of the Company.

E *[Headnote by Michael Lok, barrister-at-law]*

The following case referred to in this decision:

- *Re The Grande Holdings Ltd* [2017] HKCFI 1284, [2017] 7 HKJR 80

Mr Michael Lok, instructed by Wilkinson & Grist, for the liquidators

F The attendance of the Official Receiver was excused

Hon Jonathan Harris J handed down the following decision of the Court of First Instance.

1. I have before me a summons dated 14 June 2017 seeking a permanent stay of the winding-up proceedings involving Hong Kong Mercantile G Exchange Limited and a simultaneous discharge of the liquidators. The background to the application is straightforward. The Company's liabilities to unsecured creditors have been compromised pursuant to a scheme of arrangement.

2. The circumstances in which the court will grant a stay of extant winding-up proceedings are summarised in para 2 of my judgment in *Re The Grande Holdings Ltd*, unreported, HCCW 177/2011, 9 May 2016. They are— H

(1) the court has regard to the interests of members, creditors and the liquidator;

(2) the court also considers whether the stay is conducive to commercial morality and the interests of the public at large;

(3) in the circumstances of the case, whether if a stay is granted all creditors and potential outstanding liabilities of the company are provided for.

3. It is normally the case where unsecured debts have been compromised pursuant to a scheme of arrangement that these conditions are readily satisfied.

4. An issue did arise in the present matter as a result of a delay in completion of the scheme but that issue has now been resolved and as a consequence, I am satisfied that the normal criteria have been met and it is an appropriate case to stay the winding-up proceedings and make the consequential order discharging the liquidators.

5. The costs of the application will be paid out of the assets of the Company.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

A

Re Modern Gala (Models) Ltd (No 1)

Court of First Instance
Jonathan Harris J
Decision Date: 16 August 2018

B *Company law — Orders for convening AGM and laying audited financial statements at the AGM — Costs — Companies Ordinance (Cap 622), ss 379, 429, 610 — Rules of the High Court (Cap 4A) O 102 r 2*

公司法 — 命令召開週年股東大會及於大會上提交經審計的財務報表 — 訟費 — 公司條例（第622章）第379、429、610條 — 高等法院規則（第4A章）第102號命令第2條規則

C

The Applicant sought orders for, *inter alia*, the convening of annual general meeting (AGM) and the laying before the 1st respondent Company in AGM the audited financial statements for the relevant accounting period. The parties agreed to orders being entered by consent for substantive relief that was sought in the proceedings. The question before the Court was costs.

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Held,

1. The 1st respondent, who was the sole director of the Company and a relatively newly appointed director, faced difficulties in providing the auditors with all the financial documentation they required in order to complete the audit. In the circumstances, it was inevitable that at some point an application had to be made to extend the time for convening the AGM and laying audited financial statements before the Company at it.

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2. In the circumstances, the most equitable way of dealing with costs was simply to provide the costs of both the applicant and the 1st respondent were paid out of the assets of the Company.

[Headnote by Michael Lok, barrister-at-law]

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Mr James C C Cheng, instructed by Johnnie Yam, Jacky Lee & Co, for the applicant (in both actions)

Mr Toby Brown, instructed by Oldham, Li & Nie, for the 1st and 2nd respondents (in both actions)

G Hon Jonathan Harris J handed down the following decision of the Court of First Instance.

1. I have before me two originating summonses which sought respectively orders for the convening of an annual general meeting and the laying before the Company in annual general meeting of the audited financial statements for the relevant accounting period, and in the case of the later

H in time of the originating summonses, orders setting aside resolutions at an annual general meeting that was convened purportedly to satisfy the request inherent in the earlier of the two originating summons. The parties, after an extended period of time, agreed to orders being entered by consent for the substantive relief that was sought in both originating summonses.

2. The applicant in these circumstances predictably seeks his costs. The underlying issue appears to be this: There is no dispute that the Company was required to convene an annual general meeting and lay before the Company audited financial statements for the periods in respect of which orders were sought. The sole director of the Company, who is the 1st respondent in both sets of proceedings and was a relatively newly appointed director, faced difficulties in providing the auditors with all the financial documentation they required in order to complete the audit, in particular in relation to certain director's loans. It seems to me that in the circumstances that the director faced, it was inevitable if the problems were going to be resolved in accordance with the mechanisms contained in the Companies Ordinance (Cap 622) for the Company at some point to make an application to the court to extend the time for convening the annual general meeting and laying audited financial statements before the Company at it. It seems to me, in these circumstances, that the most equitable way of dealing with costs is simply to provide that the costs of both the applicant and the 1st respondent are paid out of the assets of the 2nd respondent.

3. Whilst one may, if one descends into the facts, be able to find matters which each party might suggest indicate that the other party has some responsibilities for the practical problems that led to the delay in the annual general meeting being convened, it seems to me that essentially all these relate to the affairs of the Company, which would appear not to have been conducted in accordance with the statutory scheme or terribly efficiently, and that in these circumstances it is appropriate that the Company bears the costs that both parties incurred in respect of both originating summonses.

4. I will order that the 2nd respondent in each proceeding pays the applicant and the 1st respondent's costs forthwith with a certificate for counsel. I will make the same order in respect of the hearing before me today.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

A

Re Mongolian Mining Corp (In Provisional Liq in the Cayman Islands)

Court of First Instance
Jonathan Harris J
Decision Date: 7 September 2018

B

Company Law — Scheme of arrangement — Jurisdiction to sanction arrangements or compromises between a company and its creditors — Sufficient connection between the Scheme and Hong Kong — Whether to sanction the arrangements — Companies Ordinance (Cap 622) s 673

C

公司法 — 債務償還安排 — 公司與債權人之間的安排或妥協的司法管轄權 — 安排與香港之間的充分聯繫 — 是否批准安排 — 公司條例（第622章）第673條

The Company, pursuant to s 673 of the Companies Ordinance (Cap 622), presented the petition seeking from the court sanction of a Scheme of Arrangement passed by a group of Creditors at a meeting.

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Held, sanctioning the Scheme:

1. Jurisdiction to sanction arrangements was conferred on the court when majority in number of the class of creditors presented and voting agreed (headcount test) and such majority accounted for 75% in value of the class of creditors (majority-in-value test). The exercise of this jurisdiction was to be justified by a sufficient connection between the Scheme and Hong Kong. (See paras 8-9, 11-12.)

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2. A "creditor" consisted of anyone who had a monetary claim against the company which, when payable, would constitute a debt. Contingent claims were included for this purpose. (See paras 9-10.)

3. The court was satisfied that the Scheme was for a permissible purpose, the Creditors constituted a single class, the meeting was duly convened, sufficient information was given, the requisite majority obtained and that the Scheme was such as an intelligent, honest person acting in respect of his interest might reasonably approve. The Scheme must also be effective in practice. (See paras 13-20.)

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[Headnote by Michael Lok, barrister-at-law]

G

The following cases referred to in this decision:

- *Re Cable & Wireless HKT Ltd* [2000] HKCFI 1352, [2000] 8 HKJR 1, [2001] 1 HKLRD 7
- *Re Cheung Kong Holdings Ltd* [2015] HKCFI 414, [2015] 3 HKJR 2, [2015] 2 HKLRD 512
- *Re China Assets (Holdings) Ltd* [2017] HKCFI 2185, [2017] 11 HKJR 36

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- *Re China Light & Power Co Ltd* [1998] HKCFI 194, [1998] 1 HKJR 14, [1998] 1 HKLRD 158
- *Re Dorman, Long & Co Ltd* [1934] Ch 635
- *Re Enice Holding Co Ltd* [2018] HKCFI 1736

- *Re Lehman Bros International (Europe) (No 2)* [2009] EWCA Civ 1161, [2010] Bus LR 489
- *Re PCCW Ltd* [2009] HKCA 178, [2009] 5 HKJR 2
- *Re Stemcor (SEA) Pte Ltd* [2014] EWHC 1096 (Ch), [2014] 2 BCLC 37
- *Re Wheelock Properties Ltd* [2010] HKCFI 646, [2010] 7 HKJR 3, [2010] 4 HKLRD 587
- *Re Winsway Enterprises Holdings Ltd* [2016] HKCFI 1915, [2016] 5 HKJR 228, [2017] 1 HKLRD 1

Mr José Maurellet SC and Mr Jason Yu, instructed by Davis Polk & Wardwell, for the Company

Hon Jonathan Harris J handed down the following decision of the Court of First Instance.

Introduction

1. On 14 March 2017, under section 670 of the Companies Ordinance, Cap 622 ("**Ordinance**"), I gave leave to Mongolian Mining Corporation ("**Company**") to convene a meeting ("**Scheme Meeting**") of a discrete group of creditors ("**Scheme Creditors**") in order that they could consider and vote on a proposed scheme of arrangement to restructure the debts owed to them ("**Scheme**"). The Scheme Meeting took place on 11 April 2017 and all Scheme Creditors present at the Scheme Meeting voted in favour of the Scheme. On 20 April 2017 the Company issued a petition seeking the court's sanction, which I granted on 25 April 2017. These are my reasons for approving the Scheme.

Background to the Scheme

2. The Company is—

(a) a company incorporated in the Cayman Islands;

(b) registered in Hong Kong as an overseas company since 18 August 2010, with its principal place of business in Hong Kong;

(c) listed on the Hong Kong Stock Exchange since 13 October 2010;

(d) an investment holding company with operating subsidiaries in Mongolia carrying on the business of producing and exporting high quality coking coal;

(e) balance-sheet insolvent; and

(f) in provisional liquidation in the Cayman Islands since 19 July 2016.

3. The Company's financial indebtedness comprises—

(a) US$600,000,000 senior secured notes, governed by New York law, listed in Singapore, and secured by charges over

A shares in the Company's subsidiaries in Hong Kong and Luxembourg ("**Old Notes**");

(b) a secured loan facility of US$150,000,000; and

(c) two promissory notes in the aggregate original principal amount of US$52,500,000.

B 4. In view of its financial difficulties, the Company's debt restructuring is to be achieved—

(a) bilaterally and consensually in respect of the secured loan facility and promissory notes; and

C (b) by means of inter-conditional parallel schemes of arrangement in Hong Kong and the Cayman Islands in respect of the Old Notes.

5. In brief, the effect of the Hong Kong scheme is that debts owed to the Scheme Creditors will be released and discharged; in return, the Scheme Creditors will obtain new notes and shares in the Company. The effectiveness D of the Hong Kong scheme is conditional on the Cayman scheme being sanctioned by the Cayman court and recognised in the United States under Chapter 15 of the Bankruptcy Code.

Jurisdiction — Concept of Creditor

6. As the Old Notes are held in a global form or global restricted form E through the clearing systems, the Scheme Creditors are defined in the Scheme as the beneficial holders of the Old Notes who have a right, upon satisfaction of certain conditions, to be issued with definitive notes in accordance with the terms of the Old Notes.

7. Counsel did not explain why the Scheme Creditors (as opposed to the legal holder of the global note) were proper parties to the Scheme, nor cite F any authority for the court's scheme jurisdiction over the Scheme Creditors. Nevertheless the court has conducted research and I am satisfied that the court has scheme jurisdiction over the Scheme Creditors.

8. Part 13 of the Ordinance confers on the court a jurisdiction to sanction arrangements or compromises between a company and its creditors provided the two pre-conditions set out in section 674(1) are satisfied. First, G a majority in number of the class of creditors present and voting must agree to it ("headcount" test), and secondly, 75% in value of the class of creditors present and voting must agree to it ("majority-in-value" test).

9. There is no statutory definition of "creditor" for the purposes of Part 13. It is established that a "creditor" will consist of anyone who has a monetary claim against the company which, when payable, will constitute a H debt. Contingent claims are included for this purpose. Creditor with security is also a creditor for the purposes of the scheme jurisdiction.[1]

10. In the present case, because the Scheme Creditors are entitled, upon satisfaction of certain conditions, to be issued with definitive notes in accordance with the terms of the Old Notes, they are contingent creditors

for the purposes of the scheme jurisdiction.[2] The Scheme Creditors are therefore proper parties to the Scheme.

Jurisdiction — Sufficient Connection

11. In order to justify the court exercising its jurisdiction to sanction the Scheme, it is necessary for the Company to demonstrate sufficient connection between the Scheme and Hong Kong.[3]

12. In the present case, sufficient connection between the Scheme and Hong Kong exists for these non-exhaustive reasons:

(a) the Company is registered as an overseas company in Hong Kong;

(b) the Company's principal place of business is in Hong Kong;

(c) the Company is listed in Hong Kong;

(d) the Company has multiple bank accounts in Hong Kong;

(e) one key security agreement securing the Old Notes is governed by Hong Kong law;

(f) approximately 30% of the Scheme Creditors are in Hong Kong; and

(g) a significant part of the negotiations with the Scheme Creditors took place in Hong Kong.

Jurisdiction — Sanction Issues

13. The function of the court at the hearing of a petition to sanction a scheme is to consider—

(a) whether the scheme is for a permissible purpose;

(b) whether creditors who were called on to vote as a single class had sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting;

(c) whether the meeting was duly convened in accordance with the court's directions;

(d) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision whether or not to support it;

(e) whether the necessary statutory majorities have been obtained; and

(f) whether the court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme.

A See *Re Dorman, Long & Co Ltd*;[4] *Re China Light & Power Co Ltd*;[5] *Re Cable & Wireless HKT Ltd*;[6] *Re PCCW Ltd*;[7] *Re Wheelock Properties Ltd*;[8] *Re Cheung Kong Holdings Ltd*;[9] *Re China Assets (Holdings) Ltd*;[10] *Re Enice Holding Company Ltd*.[11]

14. First, it is well-established that debt restructuring is a permissible purpose of a scheme of arrangement.

B 15. Secondly, it is appropriate that the Scheme Creditors vote in a single class because—

(a) there is only one class of the Old Notes;

(b) prior to the Scheme Meeting, the Scheme Creditors were given the same right to participate in a restructuring support agreement in return for a consent fee of up to 1% of the

C principal amount of their notes; and

(c) the Scheme Creditors are given the same scheme consideration.

16. Thirdly, the requirements in the Order relating to the convening of the Scheme Meeting have been complied with.

17. Fourthly, the Scheme Creditors were given sufficient information in

D the explanatory statement to exercise their judgment on how to vote at the Scheme Meeting.

18. Fifthly, the requisite statutory majorities of the Scheme Creditors have voted in favour of the Scheme at the Scheme Meeting.

19. Sixthly, I am satisfied that the Scheme is such as an intelligent, honest person acting in respect of his interest might reasonably approve.

E 20. The court will not make an order with no substantive effect and accordingly, to sanction a scheme, the court needs to be satisfied that the scheme will be effective in practice.[12] Here the Old Notes are governed by New York law and the Hong Kong scheme is conditional on the Cayman scheme being recognised under Chapter 15 of the US Bankruptcy Code. The Company has produced evidence to demonstrate that it was likely

F that the US Bankruptcy Court would grant recognition and the ancillary relief necessary to enforce the Cayman scheme. I am satisfied from the evidence filed that such Chapter 15 recognition will probably be granted and what in practice is the principal purpose of the Scheme will be achieved.

21. Accordingly, I am satisfied that the Scheme should be sanctioned.

G (Jonathan Harris)
Judge of the Court of First Instance
High Court

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1 *Re Lehman Bros International (Europe) (No 2)* [2009] EWCA Civ 1161; [2010] Bus LR 489 at [58] and [60].

H 2 *Re Enice Holding Company Ltd* [2018] HKCFI 1736 at [33].
3 *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1 at [23]–[31].
4 [1934] Ch 635 at 655 and 657.
5 [1998] 1 HKLRD 158.
6 [2001] 1 HKLRD 7.
7 [2009] 3 HKC 292 at [113].

8 [2010] 4 HKLRD 587.
9 [2015] 2 HKLRD 512.
10 [2017] HKEC 2641.
11 [2018] HKCFI 1736.
12 *Re Stemcor (SEA) Pte Ltd* [2014] EWHC 1096 (Ch); [2014] 2 BCLC 373 at [42].

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Re The Bank of East Asia Ltd (No 2)

Court of First Instance
Jonathan Harris J
Decision Date: 28 August 2018

B *Company law — Discovery of documents — Rolling discovery — Peruvian Guano test — Relevance of document — Definition of class of documents — Rules of High Court (Cap 4A) O 24 r 3 — Companies Ordinance (Cap 622) s 724*

公司法 — 文件透露 — 持續透露 — *Peruvian Guano*測試 — 文件的關聯性 — 文件類別的定義 — 高等法院規則 (第 4A 章) 第24 號命令第3條 — 公司條例（第622章）第724條

C

The Petitioners (Ps) and Respondents (Rs) both made applications for the discovery of documents under O 24 r 3 of the Rules of High Court (Cap 4A). Ps identified 35 classes of documents of wide scope. The 17 classes identified by Rs were drafted in a seemingly wide manner.

Prior to the substantive hearing of the applications, the Court ordered
D that the parties to give discovery by exchanging in the first instance lists of the documents of which they required discovery. The parties would then give discovery of those documents or categories of documents to which they did not object, and serve a schedule setting out their objections to those that were opposed. There followed what had been referred to as "rolling discovery" in respect of uncontentious requests.

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Held, allowing discovery of only some of the classes:

1. The starting point in such an application was to identify what was relevant to the matters in question in the action. The meaning of relevance in this context had been explained by Brett LJ in *Peruvian Guano* (1882) 1 QBD 55 at 63 that it was reasonable to suppose that a document "*contains information*
F *which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences.*" The test was a wide one. The fact that some of the documents might turn out at the end of the day not to be relevant was not itself material. (See paras 12-13, 18.)

2. There was no general discovery in actions commenced by petition
G pursuant to s 724 of the Companies Ordinance (Cap 622). Generally, the Companies Court allowed applications for discovery in the first instance to be brought under O 24 r 3 for discovery of documents that were relevant to the matters in question and did not require evidence in support to be filed. (See para 15.)

3. Whilst the Court took a broad and flexible approach to applications
H for discovery under r 3 in proceedings commenced in the Companies Court by petition, it was necessary for the applicant to satisfy the court that:

(1) the documents were or had been in the possession, custody or power of the respondent;

(2) they were relevant to the matters in question; and

(3) discovery was necessary either for disposing of the cause or matter or for saving costs. (See para 15.)

4. A class of documents could not be defined by reference to an issue and the class must be defined with adequate precision by its nature. The definition of the class of documents must also be sufficiently specific to allow the party giving discovery to be clear what it was that he was required to disclose. (See para 16.) In considering the definition of classes, regard should be had to the following principles:

(1) A party should not be required to undertake unnecessary or unreasonably onerous discovery.

(2) A class should not be framed (a) on the assumption that the other party could not be trusted correctly to identify and disclose all relevant documents and, (b) consequently framed in wide terms, which would require disclosure of large quantities of documents, some relevant and some irrelevant, in order to ensure that the relevant were disclosed.

(3) A class should be formulated so as to describe a particular type of relevant documents. (See paras 22-23.)

5. The fact that the description of the class might include a few documents that were not relevant was not of itself fatal. It was a matter of degree as to whether a substantial proportion of which it was known in advance would not be relevant. (See para 19.)

6. In order to determine whether or not a class was relevant the court needed to assess on the basis of such evidence as it had before it whether on the balance of probabilities the documents in the class would be relevant in the *Peruvian Guano* sense. Regard needed to be had to the nature of transactions and the parties involved. (See para 25.)

7. It was not the function of the court to reformulate the classes in order to turn what the court considered an impermissible class into a permissible class. If the court could not readily amend the classes to cure the problem, the application for the disclosure for that class of documents would be rejected. If a party chose to formulate a discovery application in a complex and wide way, it ran the risk of the application failing for this reason. (See paras 27, 105.)

[Headnote by Michael Lok, barrister-at-law]

The following cases referred to in this decision:

- *Deek v NM Rothschild* [1981] HKCA 166, [1981] HKC 78
- *Estate of Chiu Yu Fu v Ocean Park Corp* [1995] HKEC 339
- *Jade's Realm Ltd v Director of Lands* [2015] HKCFI 61, [2015] 1 HKLRD 867
- *Ongsip v Pimatronics Ltd* (unreported, 20 September 2012, HCA611/2010)
- *Peruvian Guano* (1882) 1 QBD 55
- *Re Playmates Investments Ltd* [1996] HKCFI 738, [1996] 4 HKC 577
- *Re Zhuang PP Holdings Ltd* [2005] HKCFI 996, [2005] 11 HKJR 7

A • *Tullett Prebon (Hong Kong) Ltd v Chan Yeung Fong* (unreported, 9 June 2011, HCA2197/2009)

Mr Charles Sussex SC, Mr José Maurellet SC and Mr Jason Yu, instructed by Akin Gump Strauss Hauer & Feld, for the 1st to 7th petitioners

Mr Charles Hollander (10 & 11 October 2017) and Mr Byron Chiu, instructed
B by Simmons & Simmons, for the 1st respondent

Mr Benjamin Yu SC and Mr Bernard Man SC, instructed by Linklaters, for the 2nd to 19th respondents

Hon Jonathan Harris J handed down the following decision of the Court of First Instance.

C

Introduction

1. The Petitioners (who I shall refer to as "**Elliott**") and the Respondents have both issued summonses for discovery. The Petitioners' summons dated 26 May 2017 seeks discovery of documents identified in the extensive schedule appended to the summons. The 2nd to 19th Respondents' (who
D I shall refer to collectively as the "**Board**") summons is also dated 26 May 2016. It seeks disclosure of documents, which are divided into 13 classes, which it is apparent from the descriptions of each class are directed to types of documents, which will shed light on Elliott's strategy in respect of their investment in the 1st Respondent, The Bank of East Asia Limited ("**Bank**").[1]

2. The Bank's position in respect of the applications is neutral other
E than in one respect, which I explain in the next paragraph. The Bank has filed evidence informing the court of the extent of the work involved in complying with an order for discovery of the documents sought by Elliott.

3. The Bank has raised the issue of legal professional privilege in respect of a number of the classes of documents sought by Elliott. Counsel agreed at the hearing that the issue contained a number of different components
F and that further evidence would need to be filed before all of them could be disposed of. I took the view that it was better if they were all dealt with together. That question was adjourned for further argument.

4. On 21 September 2016 I made an order for directions, which included a direction that was largely uncontentious, which required the parties to give discovery by exchanging in the first instance lists of the documents of
G which they required discovery. The parties would then give discovery of those documents or categories of documents to which they did not object, and serve a schedule setting out their objections to those that were opposed. There follows what has been referred to as "rolling discovery" in respect of uncontentious requests.

H *Elliott's summons*

5. Elliott's summons seeks an order that the Board and Bank "*serve on the Petitioners a list of the documents which are or have been in [their] possession, custody or power relating to the matters in question, but limited to such documents and classes of documents which come within the documents and classes of documents*

identified or described in the Schedule hereto". The Schedule identifies 35 classes of documents and contains annexes defining various of the terms used in the descriptions used in the classes.

6. Elliott's application is wide, and invites the question: why not start with an order for general discovery and then having seen what is disclosed formulate an application if necessary for specific discovery. Mr Sussex's answer was that it was partly with a view to aiding the Bank and the Board identify relevant documents and partly because of a concern that their view of what was relevant would be narrow. The way in which the application is framed would only require disclosure of documents that fall within the 35 classes if they are relevant "*to the matters in question*".

7. The Board opposes discovery of the various classes on the grounds that the documents are by their nature irrelevant. I shall use the first class to illustrate the principal controversy between the parties:

> "The Criteria Agreements dated on or about 22 June 2009 (as described in BEA's announcement dated 22 June 2009), comprising:
>
> (a) the Strategic Collaboration Agreement;
>
> (b) the Strategic Investment Agreement; and
>
> (c) the Letter of Intent,
>
> including any drafts thereof and any communications under the cover of which such drafts were transmitted by a party (and/or its legal representatives) to the other party (and/or its legal representatives)."

8. In the Petition Elliott seek a declaration in para 1 of the prayer that resolutions passed by the Board in September 2014, February and March 2015 and January 2016 were passed for an improper purpose. The resolutions relate to a placement to SMBC in 2015 and a sale of shares by CaixaBank to Criteria Caixa in December 2015, which had been placed to CaixaBank in 2009.

9. The Board says that drafts of the agreements and associated communications produced for the purposes of the placement to CaixaBank in June 2009 cannot be relevant to the placement to SMBC over five years later nor to the Board's approach to the variation of the undertakings given by CaixaBank in late 2009 in respect of the voting and sale of their shares.

10. Mr Sussex submitted that the draft agreements might contain material, which sheds light on members of the Board's, presumably in particular members of the Li Family, motivation in entering into strategic investments agreements in 2009 between the Bank and Caixabank, which imposed restrictions on, amongst other things, sale of shares held by members of the Criteria Group and required them to vote their shares in favour of capital raising resolutions proposed by the Board. Elliott anticipate that if any of the documents in class 1 do reveal members of the Boards' motivation it is likely that it will show that the resolutions were motivated by a desire to entrench the Li Family's control of the Bank. If this is the case that will

A be consistent with Elliott's case in respect of the placement to SMBC and support it.

11. It may be that documents falling within class 1 do contain material, which sheds light on what motivated the inclusion of restrictions of the sort I have described in the agreements and to that extent the documents may be relevant. I, of course, do not know and at this stage neither the Bank nor the B Board have gone through the documents to check.

12. At the end of the first day of the hearing Mr Sussex said during an exchange with me "*... the big issue is scope, so your Lordship really is going to have to rule on the relevance of the classes as classes to this litigation....*" This is broadly correct. The meaning of relevance in this context is explained by Brett LJ in *Peruvian Guano*,[2] namely, that it is reasonable to suppose that a document C "*contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences.*"

13. The starting point is to identify what is relevant to the matters in question in the Action. Broadly, it is the reasons why the Bank decided to enter the placement to SMBC in 2015 and why it required the restrictions D imposed on SMBC'S exercise of its voting rights and sale of shares. Similarly, in relation to sale by CaixaBank it is the reason why the Bank agreed modification of certain undertaking forming part of the terms on which the placement in 2009 was agreed. Elliott are, presumably, principally interested in documents containing statements that will support its case. Mr Sussex submitted that what was sought went beyond obviously relevant documents, E because Elliott anticipated that the context and process of negotiation commencing with the Criteria Agreements in 2009 (see [1] of the summons quoted above) would shed light on Sir David's motivation in promoting the placement to SMBC and requiring restrictions on the sale of shares to be required on CaixaBank's sale to its associate. Elliott expect that from a study of the documents recording the negotiation and implementation of the placements between 2009 and the end of 2015 will emerge the true reason F why the placements took place and why the terms of which Elliott complain were required of the placees.

14. Elliott say that the decision to break down the documents of which they seek discovery into the classes described in the schedule to the summons was intended to help direct the Bank and the Board to those classes of documents they expected would be relevant rather than simply request G unqualified general discovery. The way in which the argument between the parties has developed, however, assumes that Elliott are entitled to and seek all the documents described in the different classes. However, as [1] of the body of the summons itself recognises by qualifying the documents of which discovery is sought by the normal formula "*relating to the matters in question*", discovery can only be sought of documents which are relevant in the *Peruvian* H *Guano* sense. The discovery application is made pursuant to Rules of the High Court, Cap 4A, O 24, r 3, namely, it is an order for general discovery, which is made necessary as rule 1 does not apply, albeit general discovery limited to relevant documents falling within the classes in the schedule to the summons is what is sought.

15. There is no general discovery in actions commenced by petition pursuant to s 724 of the Companies Ordinance, Cap 622. Generally, the Companies Court allows applications for discovery in the first instance to be brought under O 24, r 3 for discovery of documents that are relevant to the matters in question and does not require evidence in support to be filed.[3] Elliott accept that although the court takes a broad and flexible approach to applications for discovery under r 3 in proceedings commenced in the Companies Court by petition, it is necessary for the applicant to satisfy the court that—

> (1) the documents were or had been in the possession, custody or power of the respondent;
>
> (2) they were relevant to the matters in question; and
>
> (3) discovery was necessary either for disposing of the cause or matter or for saving costs.[4]

16. Sub-rule 3(3) provides that an order under rule 1 may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matters, as may be specified in the order. This is what Elliott seek to do. Mr Yu, however, reminded me that a class of documents cannot be defined by reference to an issue and the class must be defined with adequate precision. In *Deek v NM Rothschild* [5] the Hong Kong Court of Appeal held, in an appeal concerned with O 24 r 7, that a class cannot be defined by reference to a particular issue, but must be defined by its nature. I accept that the definition of the class of documents must also be sufficiently specific to allow the party giving discovery to be clear what it is that he is required to disclose.

17. Mr Yu further argued that the description must not be so wide as to include documents that are not relevant and referred me to the decision of Cheung J (as he then was) in *Estate of Chiu Yu Fu v Ocean Park Corporation*.[6] This was also said in the context of an application under rule 7. This requires two qualifications.

18. First, relevance is assessed by reference to the *Peruvian Guano* test. This is very wide and includes documents that may, not must, lead to a train of inquiry, which assists one party's case or damages that of his opponent. The fact that some of the documents may turn out at the end of the day not to be relevant is not itself material.[7]

19. Secondly, it does not seem to me that the fact that it is possible or even likely that the description of the class may include a few documents that are not relevant is of itself fatal. It is a matter of degree. It may be difficult to define a class so as to avoid the respondent having to look for documents, which on careful consideration it appears even on the wide *Peruvian Guano* test are not relevant. As long as such documents are likely to be small in number and requiring them to be obtained and read for relevance is not onerous, the class will be acceptable. What is not permissible is to define a class in such a way that it necessarily involves the respondent having either to obtain and check documents a substantial proportion of which it is known in advance will not be relevant. It may be objected that this is what a party

A has commonly to do when carrying out general discovery and, therefore, it should not of itself be a ground for rejecting discovery by class so long as it is clear that only the documents that are identified as relevant within the class actually have to be disclosed.

20. If this was what Elliott intended and the classes had been formulated simply as guide to what classes of documents, they thought were likely to B contain relevant documents and should be reviewed I might agree. The order could have been drafted using the standard language in O 24, r 3(1). There would be no need for reference to the classes to be included in the order. It would be sufficient for the solicitors to write identifying what classes of documents it was thought should be reviewed.

21. It is apparent from the way in which Elliott's case has been C advanced before me that this is not what Elliott intend. Their case is that the documents in the classes are relevant and should be disclosed. The inclusion of the words "*relating to the matters in question*" in para 1 of the body of the summons is misleading, because it is clear that Elliott do not intend an order in terms of the summons to permit the Board to respond: "*we have checked all the classes and we have found nothing relevant*". As Mr Sussex's oral submission D quoted in [12] indicates, Elliott want me to determine that the documents in the classes are relevant and order that the Bank and Board disclose them.

22. Before turning to consider the various classes, there are a number of other principles to which regard needs to be had:

> (1) A party should not be required to undertake unnecessary or unreasonably onerous discovery.[3]
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> E
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> (2) As one would expect, a class should not be defined with a view to requiring a party to produce an extensive amount of documents amongst which he anticipates there may be documents that he will consider relevant, but his opponent may not and cannot be trusted to disclose.
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> F
>
> (3) A class should be formulated so as to describe a particular type of relevant documents. It should not be formulated with a view to directing how the respondent should carry out discovery. As will become apparent when I address particular classes of documents sought by Elliott, this is frequently what Elliott's wording seems intended to do, and this has made the application more complicated and time consuming than in my view was necessary.
>
> G

23. In other words, classes cannot be framed (a) on the assumption that the other party cannot be trusted correctly to identify and disclose all relevant documents and, (b) consequently framed in wide terms, which will require disclosure of large quantities of documents, some relevant and some irrelevant, in order to ensure that the relevant are disclosed.

H 24. Elliott's case presents particular difficulties in this regards. Elliott say, not unreasonably in my view, that the motives behind the placements may only be apparent from an assessment of the way in which the Bank dealt with the placements and its relationship with CaixaBank and SMBC over an extended period of time. It may be, the argument goes, that a document

viewed in isolation may seem to have no relevance to the issues, but when read as part of an extended communication it may do, if only because in order to make sense of individual documents it is necessary to read all the correspondence in the chain.

25. In my view in order to determine whether or not a class is relevant the court needs to assess on the basis of such evidence as it has before it whether on the balance of probabilities the documents in the class will be relevant in the *Peruvian Guano* sense. Regard needs to be had to the nature of transactions and the parties involved. In this case both the subject matter and the parties are sophisticated. It is reasonable to proceed on the assumption that an understanding of the Bank's motives will emerge from a nuanced reading of various documents and communications that set out the background to the placements and progress of their negotiation and implementation commencing with the Criteria Agreements referred to in [28] of the Petition.

26. The Board argues that the reason it resolved to place shares to SMBC on the terms that were agreed cannot be discerned from the negotiation and agreement of the Criteria Agreements and the Criteria Undertakings some years earlier. It does not seem to me that this is correct. It is Elliott's case that the placement to SMBC was agreed with the intention of entrenching Li Family's control of the Bank. It is the Bank's case, as I understand it, that the placements to Criteria Group and SMBC were to raise capital and establish strategic partnerships. If the contemporaneous documents demonstrate that in concluding the Criteria Agreements and requiring the Criteria Undertakings the Bank was motivated to some degree by a concern that the Li Family's control of the Bank might be in threat, it would make it more likely that another placement to SMBC five years later (the SMBC memorandum of understanding was entered into in September 2014) was motivated to some degree by a similar concern. Conversely, if the contemporaneous documents evidence only a concern about the adequacy of the Bank's capital in the light of future economic uncertainties as a result of the 2008 financial crisis and potential changes in capital adequacy criteria, this would be consistent with the Bank's explanation that amongst other concerns at the time the SMBC memorandum of understanding was agreed was the impact of the full implementation of the Basel III requirements.[9] In my view the reasons for the Bank entering the Criteria Agreements and requiring the Criteria Undertakings are discoverable, because they are a relevant part of the history of substantial placements to strategic investors, and from that history will emerge the motivation and attitude of members of the Board, in particular members of the Li Family, to the placement to SMBC.

27. As I have already explained there are a large number of classes of documents and the description of each class is lengthy. Although the court may when considering the description of classes make straightforward amendments to the wording, it is not function of the court to reformulate the classes in order to turn what the court considers an impermissible class into a permissible class. If a party chooses to formulate a discovery application in

A the complex way Elliott have done it runs the risk of the application failing for this reason.

28. Such evidence as the parties have served in respect of both applications is of limited probative value. Elliott's application is supported by an affirmation of Matthew Puhar of Akin Gump. Although it provides a detailed commentary on the reasons why it is suggested that the classes are
B relevant, it is for the most part not evidence at all, but rather an explanation by Elliott's solicitors of why a class is sought. The same is true of Winston Lo's 3rd affirmation in support of the Board's application. Elliott filed an affirmation of Daniel Cohen in response to Mr Lo's 3rd affirmation, which for the most part suggests that the description of the classes is too general or vague. Tang Ying Kit of Linklaters provides a critique of Elliott's request
C rather than evidence. Mr Samson Li filed an affirmation on behalf of the Bank addressing primarily the mechanics of the making the discovery sought by Elliott. I have had regard to the evidence, although as I have observed it is more in the nature of argument than proof of facts or matters, which help demonstrate that the classes consist of relevant documents.

D *Class 1: (Quoted above)*

29. I am satisfied that the agreements are relevant and also documents recording the negotiation and agreement of what are defined in [28] of the Petition as the Criteria Undertakings are relevant for the reasons given in [25] above.

30. The final paragraph of the class description refers to
E "communications", which is a term defined in the annex to the schedule to the summons, which reads:

> "means communications, including any attachments or enclosures thereto, which, save as indicated otherwise in items 4, 6, 8, 12, 13, 19, 24, 36 and 37 in the Schedule to this Summons, have been sent or received by any BEA Custodian."

F The definition of "BEA Custodian" is lengthy:

> "'BEA Custodian' means any of the individuals referred to in Appendix I to this Summons and any individual not identified in Appendix I to this Summons who has served in any of the following positions (or its nearest equivalent) over the relevant period:
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> G
>
> 1. 'General Manager and Head of Legal, Tax and Secretarial Division';
>
> 2. 'General Manager and Head of HR & Corporate Communications Division';
>
> H 3. 'Group Chief Financial Officer and General Manager';
>
> 4. 'General Manager and Head of China Division';
>
> 5. 'Company Secretary' and/or

6. 'Head of Investment Operations Section under the Settlement Operations Department',

or, in each case, an equivalent position known by a different title."

31. Annex 1 lists 41 individuals. In addition, as can be seen from the definition it includes employees of the Bank who hold particular senior positions or "in each case, an equivalent position known by a different title." Predictably, this qualification is criticised by the Bank and the Board as being uncertain.

32. The Bank has only identified one person who it believes comes within the definitions, who is not listed in Annex 1: Cheung King Yu, Jenny, who has been the General Manager and Head of Legal, Tax and Secretarial Division, since 1 April 2009. The Bank has proposed that seven people be included in the definition of BEA Custodian, who were involved in the relevant transactions and whose names, if used as search tools, should catch the documents sought by Elliott. This was rejected.

33. The 42 (including Ms Cheung) include 21 who held or hold non-executive roles, four former employees and 10 who had no or not significant role in the transactions. I can see no reason why, if the Bank believes that using the seven names that it has proposed for search purposes will catch all relevant documents they should not proceed on that basis. There is a more general point. As I have already observed, it is not the function of the description of the class to instruct the respondent on how to carry out discovery of the relevant documents. It may be helpful for an applicant to inform his opponent of what he would expect them to do and for the opposing party to take note of this, but that is a different matter. I can see no reason why class 1 needs to do more than identify the documents with precision. The Bank and the Board will then be required to locate them.

34. It also seems to me that the definition of communication is unnecessarily complex. The order will use the term document, which in the context of O24 has an established wide meaning.[10]

35. The class shall read:

"The Criteria Agreements dated on or about 22 June 2009 (as described in BEA's announcement dated 22 June 2009), comprising documents recording the negotiation and agreement of the 'Criteria Undertakings' as defined in paragraph 28 of the Petition."

Class 2:

"With respect to each meeting of the Board between 1 January 2007 and the date of BEA's entry into the Criteria Agreements, during which proposals for and/or the terms of (what eventually became) the Criteria Agreements and/or Criteria Undertakings were discussed:

(a) the Minutes of such meetings;

A (b) any Board Papers; and

(c) any resolutions adopted at such meetings."

36. I accept that documents recording the discussions of members of the Board about the purpose of entering the Criteria Agreements and requiring the Criteria Undertakings are relevant for the reasons given in [25] B above. The Board complains that it is unclear what meetings are covered by the expression "meeting of the board". This complaint stems from the definition in the Annex to the Schedule to the summons. "Meeting of the board" is defined as including a formal convened meeting or an informal gathering, of some or all of the directors of the board.

37. As what is sought are minutes, board papers and resolutions, it C would appear that the class is directed to formal board meetings as informal gatherings would by their nature not generate such documents. The definition I agree is unhelpful. The description of this class, which I shall order should commence: "*With respect to each Board meeting between 1 January 2007....*"

Class 3:

D

"Communications between 1 June 2008 and 22 June 2009 concerning the Criteria Undertakings."

38. At the hearing before me Elliott proffered an alternative formulation of the class. It seems to me that it is clear what the Critiera Undertakings are and having decided they are relevant it follows that documents recording E the negotiation and agreement of those undertakings are relevant and should be disclosed. As with class 1 "communications" will be replaced with "documents".

Class 4:

F "With regard to proposals for and/or the terms of the Criteria Undertakings:

(a) Communications and Solicitor Communications with the SFC, HKMA or FRB; and

(b) Minutes of meetings and/or discussions between any BEA Custodian and the SFC, HKMA or FRB,

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which are dated or which took place between 1 June 2008 and 22 June 2009."

39. I have already discussed the breadth of the defined term "BEA Custodian". Its breadth is a reason the Board opposes this class.

H 40. What this class seeks is documents generated by the Bank's staff or officers or received by them referring to the Criteria Undertakings. If the Criteria Undertakings and the reasons why there are required are relevant, as I have found them to be, it follows that documents recording this process

are relevant in the *Peruvian Guano* sense. However, in my view Elliott's formulation of the class is unnecessarily complicated.

41. I will order that the following class of documents is disclosed:

> "Documents referring to the Criteria Undertakings (1) sent by the Bank, its employees, agents or officers to other employees, agents or officers of the Bank or third parties or (2) received by the Bank, its employees, agents or officers from other employees, agents or officers of the Bank or third parties."

Class 5:

> "With respect to each meeting of the "Steering Committee" established by BEA, Criteria and la Caixa which is allegedly responsible for the "strategic collaboration" between these entitles, as referred to in BEA's announcement dated 22 June 2009:
>
> (a) any Minutes of such meetings;
>
> (b) any meeting papers, including memoranda, recommendations, updates and reports, relating to or prepared for the purpose of such meetings; and
>
> (c) any record of any decision adopted, recommendation made or conclusion reached at such meetings."

42. This class is said to be relevant because it will demonstrate whether or not the "Steering Committee" operated in a way consistent with the stated purpose for the Bank entering into the Criteria Agreements. Even if the documents say very little they will still be relevant, because that will be consistent with Elliott's case that the arrangements with Criteria served no meaningful purpose other than to entrench Family control. The arrangements provided little benefit to the Bank.

43. As well as the general objection that one cannot discern from a past transaction the motive for a later one, the Board also objects that the Steering Committee is not referred to in the Petition. It does not seem to me that this is of itself material if the document is relevant in the *Peruvian Guano* sense.

44. I will order this class of documents be disclosed.

Class 6:

> "Communications sent or copied to any Criteria Person from 1 January 2007 to the date of the Petition, referring to or concerning:
>
> (a) the appointment, re-election or resignation of any director of BEA;
>
> (b) the size of the Criteria Group's shareholding in BEA;
>
> (c) the exercise of shareholder voting rights by the Criteria Group;

A (d) a change of control, or a takeover, of BEA; and/or

(e) an issuance of new shares in BEA to SMBC or any other potential placee, subscriber or investor."

45. This seems to me to be too wide and necessarily will include a material amount of documents, which are not required in order to ascertain B the way Board members and senior Bank staff viewed the purpose of the Criteria Agreements and Criteria Undertakings. I do not think that in the case of this class it is appropriate for the court to try and identify what within the class is relevant and reformulate the class. I will not allow this class.

Class 7:

C

"With respect to each Meeting of the Board between 4 December 2012 and the date of BEA's entry into the SMBC Agreements, during which proposals for and/or the terms of (what eventually became) the SMBC Agreements and/or SMBC Undertakings and/or SMBC Removed Undertakings were discussed:

D (a) any Minutes of such meetings;

(b) any Board Papers;

(c) any resolutions adopted at such meetings."

46. The Board does not dispute the general relevance of the third SMBC subscription.

E 47. I will allow this class, but replace "Meeting of the Board" with Board Meeting and as in the case of class 2 the definition in the Annex shall not apply.

Class 8:

F

"Communications sent or copied to any SMBC Person between 4 December 2012 and 18 March 2015, referring to or concerning:

(a) the size of SMBC's shareholding in BEA;

(b) the SMBC Undertakings; and/or

G (c) the Removed SMBC Undertakings."

48. The Board objects that particularly as the class refers to the size of SMBC's shareholding this class is so widely drafted that it may catch a substantial amount of irrelevant administrative communications relating, for example, to scrip dividends. They also object to the Removed SMBC Undertakings as they are irrelevant to an assessment of the purpose for the H Board passing the March Resolution approving the SMBC Agreements.

49. I will order that the following class be disclosed:

"Documents sent or copied to SMBC between 4 December 2012 and 18 March 2015, referring to or concerning:

(a) The number of shares to be acquired by SMBC in BEA.

(b) The negotiation and agreement of the SMBC Undertakings."

Class 10:

"Minutes of meetings or discussions which took place between 1 January 2014 and 1 September 2014 attended by or involving any BEA Custodian and one or more representatives of SMBC, which record SMBC's interest in raising its stake in BEA."

50. The Board's objections to this class focus largely on its breadth largely because of the definitions of Minutes and BEA Custodian; the latter I have already discussed. "Minutes" is another defined term and goes beyond what would normally be considered to constitute minutes. The definition is:

"'Minutes' refers to any document recording the content of a meeting, including any note or summary of the relevant meeting, whether a formal minute, note or summary prepared for BEA's records, or a personal minute, note or summary prepared by an individual director or other attendee or the meeting, and includes any draft thereof."

51. The definition shall be deleted. This class shall read:

"Minutes or notes of meetings or discussions which took place between 1 January 2014 and 1 September 2014 attended by or involving any member of the Board during this period and any employee, officer or agent of SMBC concerning SMBC raising its stake in BEA."

Class 11:

"All drafts of the SMBC Investment Agreement and Subscription Agreement transmitted between any BEA Custodian and/or their respective advisers, including, without limitation, any drafts transmitted between 25 August 2014 and 6 February 2015 (inclusive), together with all correspondence under cover of which such drafts were transmitted."

52. In its original formulation this class was agreed. The Board objects that as revised it includes documents not only between the Bank and the Board members and SMBC, but between those parties and their advisers, which could include communication with lawyers, which is covered by legal professional privilege. The Board also objects for similar reasons to those discussed above to the inclusion of "BEA Custodian".

53. It would seem to me that what is relevant are the drafts and any correspondence under cover of which they were circulated. So far as legal privilege is concerned that is a matter to be determined later. Privilege can be asserted in the list as is conventional.

54. The class will read:

> "All drafts of the SMBC Investment Agreement and the Subscription Agreement produced between 25 August 2014 and 6 February 2015 inclusive ('drafts').
>
> All documents under cover of which drafts were sent or received other than documents, which contain no comments on the contents of the drafts such as emails to which copies were attached."

Class 12:

> "With regard to proposals for and/or the terms of the SMBC Agreements and/or SMBC Undertakings and/or the Removed SMBC Undertakings:
>
> (a) Communications and Solicitor Communications with the SFC, HKMA or FRB; and
>
> (b) Minutes of meetings and/or discussions between any BEA Custodian and the SFC, HKMA or FRB,
>
> which are dated or which took place between 4 December 2012 and 18 March 2015."

55. The Board's objections to this class focus on the definitions of "Solicitor Communications"[11] and BEA Custodian.

56. I will order:

> "(a) Documents sent to the SFC, the HKMA or the FRB by the Respondents or received by the Respondents from the SFC, the HKMA or the FRB between 4 December 2012 and 18 March 2015 referring to the SMBC Agreements or the SMBC Undertakings.
>
> (b) Minutes or notes of meetings attended by the Respondents, or any of them with the SFC, the HKMA or the FRB between 4 December 2012 and 18 March 2015 referring to the SMBC Agreements or the SMBC Undertakings."

Class 13:

> "Communications sent or copied to any SMBC Person from 1 January 2009 to the date of the Petition, referring to or concerning:
>
> (a) the appointment, re-election or resignation of any director;
>
> (b) the size of SMBC's shareholding in BEA;
>
> (c) the exercise of shareholder voting rights by SMBC;
>
> (d) a change of control, or a takeover, of BEA; and/or

(e) an issuance of new shares in BEA to the Criteria Group or any other potential placee, subscriber or investor."

57. I decline to order this class for the same reasons I declined to order class 6.

Class 14:

"With regard to the Goldman Sachs presentation to the Board on 14 January 2015:

(a) BEA's instructions to Goldman Sachs;

(b) any earlier drafts of the Goldman Sachs presentation circulated to BEA or one or more members of the Board;

(c) documents providing or recording any comments from any BEA Custodian or on behalf of BEA on any of the earlier drafts or the final version of the Goldman Sachs presentation; and

(d) Communications concerning the instructions to Goldman Sachs, the Goldman Sachs presentation and/or any earlier drafts thereof."

58. The Board objects that this class includes documents, which go to the propriety of the process by which Goldman Sachs was instructed and there is no relevant allegation in the Petition. Paragraph 68(7) of the Petition asserts that the Goldman Sachs presentation was flawed and incomplete and failed to take into account the interests of shareholders. It is correct that there is no assertion that this was a consequence of Goldman Sachs being asked to tailor its presentation to support a particular view. However, as I understand it to be the Bank's case that Goldman Sachs's presentation supports it case it seems to me that the instructions that Goldman Sachs were given and any discussions between executives of the Bank and Goldman Sachs prior to the completion of the presentations are relevant in the *Peruvian Guano* sense.

59. That having been said the description of the class needs amendment. Paragraphs (a) to (d) will be replaced with:

"(a) instructions to Goldman Sachs leading to the presentation to the Board on 14 January 2015;

(b) documents received from Goldman Sachs for the purposes of presentation prior to 14 January 2015; and

(c) Documents exchanged with Goldman Sachs concerning the presentation and its subject matter other than the instructions referred to in paragraph (a) above."

A *Class 15:*

> "With respect to:
>
> (a) the 27 December 2007 subscription by Criteria (through Negocio) of 78,700,000 shares in BEA (the 'First Criteria Subscription'); and
>
> B
>
> (b) the 30 December 2009 subscription by Criteria (through Negocio) of 120,837,000 shares in BEA (the 'Second Criteria Subscription'),
>
> (together, the 'Negocio Subscriptions'),
>
> C
>
> the relevant subscription agreement entered into between Negocio and/or its affiliates and BEA, and any related agreement or document entered into by such parties at or around the same time as the subscription agreement (including, without limitation, any heads of terms, memorandum of understanding or strategic investment or business cooperation agreement)."

D 60. The Board repeats its objection that the transactions referred to in this class concern past transactions, which cannot inform the determination of the issues raised in the Petition and in respect of which no relief is sought. I have already decided that the placement to Criteria in 2009 is relevant.

61. The Board again objects to the breadth of the request and in particular the final catchall phrase "*and any related agreement or document… cooperation agreement)*." I agree that this is vague and it is not for the court to E redraft it. This part of the description should be deleted.

62. I note that the Board repeats the same objections in respect of classes 16 to 24. I shall not repeat them when dealing with those classes.

Class 16:

F

> "With respect to each Meeting of the Board between 1 January 2007 and the date of BEA's entry into the Second Criteria Subscription, during which proposals for and/or the terms of (what eventually became) either the First Criteria Subscription or Second Criteria Subscription were discussed:
>
> G
>
> (a) the Minutes of such meetings;
>
> (b) any Board Papers; and
>
> (c) any resolutions adopted at such meetings."

63. I will order this class, but "Meeting of the Board" shall be replaced with "Board Meeting" for the reasons discussed earlier. H

Class 17:

"As regards the First Criteria Subscription, Communications between 1 January 2007 and 27 December 2007, referring to or concerning:

(a) the Criteria Group's interest in increasing the size of its shareholding in BEA and/or the reasons provided by the Criteria Group for that;

(b) BEA's reasons for issuing new shares in BEA to the Criteria Group; and/or

(c) any expected strategic or business cooperation benefits for BEA in connection with the Criteria Group increasing its shareholding in BEA."

64. I will order the following class. The description shall commence: "*As regards the First Criteria Subscription, documents created between 1 January 2007 and 27 December 2007, referring to or concerning: ....*"

Class 18:

"As regards the Second Criteria Subscription, Communications between 1 January 2009 and 30 December 2009, referring to or concerning:

(a) the Criteria Group's interest in increasing the size of its shareholding in BEA and/or the reasons provided by the Criteria Group for that;

(b) BEA's reasons for issuing new shares in BEA to the Criteria Group, and/or

(c) the Guoco Group, and/or

(d) any expected strategic or business cooperation benefits for BEA in connection with the Criteria Group increasing its shareholding in BEA."

65. I will order this class. "Communications" shall be replaced with "documents".

Class 19:

"With regard to proposals for and/or the terms of either of the Negocio Subscriptions:

(a) Communications and Solicitor Communications with the SFC, HKMA or FRB; and

(b) Minutes of meetings and/or discussions between any BEA Custodian and the SFC, HKMA or FRB,

A which are dated or which took place between, between 1 January 2007 and 27 December 2007 (so far as the First Negocio Subscription is concerned) and 1 January 2009 and 30 December 2009 (so far as the Second Negocio Subscription is concerned)."

66. I will order this class. "Communications and Solicitor Communications with" shall be replaced with "Documents sent to or B received from"

67. In (b) "any BEA Custodian" shall be replaced with "the Respondents".

Class 20:

"With respect to:

C

(a) the 30 December 2009 subscription by SMBC for 46,267,200 shares in BEA (the 'First SMBC Subscription'); and

(b) the 4 December 2012 subscription by SMBC for 111,572,600 shares in BEA (the 'Second SMBC Subscription')

D (together, the 'Earlier SMBC Subscription'),

the relevant subscription agreement entered into between SMBC and/or its affiliates and BEA, and any related agreement or document entered into by such parties at or around the same time as the subscription agreement (including, without limitation, any heads of terms, memorandum of understanding or strategic E investment or business cooperation agreement)."

68. I will order this class, but delete the description from "*and any related agreement*...."

Class 21:

F "With respect to each Meeting of the Board between 1 January 2009 and the date of BEA's entry into the Second SMBC Subscription, during which proposals for and/or the terms of (what eventually became) either the First SMBC Subscription or Second SMBC Subscription were discussed:

G (a) the Minutes of such meetings;

(b) any Board Papers; and

(c) any resolutions adopted at such meetings."

69. I will order this class, but "Meeting of the Board" will be replaced with "Board Meeting".

H

Class 22:

"As regards the First SMBC Subscription, Communications between 1 January 2009 and 30 December 2009, referring to or concerning:

(a) SMBC's interest in increasing the size of its shareholding in BEA and/or the reasons provided by SMBC for that;

(b) BEA's reasons for issuing new shares in BEA to SMBC; and/or

(c) any expected strategic or business cooperation benefits for BEA in connection with SMBC increasing its shareholding in BEA."

70. I will order this class, but "Communications" will be replaced with "documents".

Class 23:

"As regards the Second SMBC Subscription, Communications between 1 January 2012 and 4 December 2012, referring to or concerning:

(a) SMBC's interest in increasing the size of its shareholding in BEA and/or the reasons provided by SMBC for that;

(b) BEA's reasons for issuing new shares in BEA to SMBC; and/or

(c) the Guoco Group; and/or

(d) any expected strategic or business cooperation benefits for BEA in connection with SMBC increasing its shareholding in BEA."

71. I will order this class, but again "Communications will be replaced with "documents".

Class 24:

"With regard to proposals for and/or the terms of either of the Earlier SMBC Subscriptions:

(a) Communications and Solicitor Communications with the SFC, HKMA or FRB; and

(b) Minutes of meetings and/or discussions between any BEA Custodian and the SFC, HKMA or FRB,

which are dated or which took place, between 1 January 2009 and 4 December 2012."

72. I will order this class with the following amendments.

73. In (a) "Communications and Solicitor Communications" will be replaced by "Documents sent to or received by....."

74. In (b) "BEA Custodian" will be replaced with "of the Respondents".

Classes 25 to 27

75. The Board accepts in a general sense the relevance of the Board records, which is what these classes concern, to the Proposed CaixaBank Transaction. Their opposition is to the breadth and uncertainty introduced by the inclusion of the definitions I have discussed in relation to earlier classes. I agree. I will order the classes with the following amendments to the descriptions.

76. In class 25 "Meeting of the Board" will be replaced with "Board Meeting".

77. In class 26 "Communications" will be replaced with "Documents generated"

78. In class 27 "communications" shall be replaced with "documents" and add "other than documents that contained no comments on the contents of the drafts such as emails to which the drafts were attached."

Classes 28, 29, 31 to 33 & 35

79. Classes 30 and 34 are not pursued. Subject to the points discussed in the next two paragraphs the Board does not object to the remaining items of which rolling discovery has been given.

80. In classes 29 and 35 "communications" shall be replaced with "documents".

81. These classes refer to a period commencing 1 January 2007 and ending 18 March 2015. The Board argue that this is an unnecessarily long period and that the request is not limited to capital requirements said to be relevant to the past subscriptions. One of the reasons the Bank and the Board advance for the subscriptions by the CaixaBank and SMBC is the capital requirements of the Bank. Elliott dispute this. It seems to me that documents commencing prior to the discussions with the Criteria Group until 2015 recording discussions with the HKMA about capital requirements are relevant because they will demonstrate the extent to which in discussions with the HKMA the subject of the Bank's capital adequacy were raised and the view expressed that it should be improved. Whether or not the views expressed suggest that the Bank had no pressing need to raise further capital through significant subscriptions is relevant to either Elliott's case or the Bank's defence. I will retain the periods referred to in the classes.

Classes 36 to 38

82. Generally the Board objects to these three classes on the grounds that they are disproportionate and unnecessary. I will deal with each in turn.

Class 36:

> "Communications sent or received by any of the 2nd, 3rd, 4th and 5th Respondents and/or by Mr. Samson Li Kai-cheong or Mr. Tong Hon-shing, between 1 January 2007 to the date of the Petition,

concerning or referring to (either in conceptual or hypothetical terms or by reference to an actual or proposed transaction):

(a) a takeover offer for, or change of control transaction relating to, BEA;

(b) a person other than the Criteria Group or SMBC acquiring or subscribing for a block of new shares in BEA; and/or

(c) a disposal of shares by the Criteria Group or SMBC."

83. Elliott's principal complaint is that the placements/subscriptions were intended to put in place friendly shareholders who would vote against resolutions that threatened the Li Family's control of the Bank. The placements were not necessary in order to raise capital and were not intended and did not give the Bank a strategic commercial advantage by virtue of Critieria and SMBC becoming significant shareholders in the Bank.

84. It is suggested that this class is relevant because the documents will show whether there was in the period leading up to the CaixaBank subscription and from then until presentation of the Petition a concern on the part of the relevant board members about a possible takeover and whether the concerns were expressed at a time consistent with the placements being motivated by that concern or otherwise. It seems to me that such document are relevant in the *Peruvian Guano* sense and I will order their production. I would not expect this to be particularly onerous as if the Board's case is correct there will be few documents. I will however replace "Communication" with "Documents."

Class 37:

"Communications sent or received by any of the 2nd, 3rd, 4th and 5th Respondents and/or by Mr. Samson Li Kai-cheong or Mr. Tong Hon-shing, between 1 January 2007 to the date of the Petition, referring to or concerning:

(a) the appointment, re-election, resignation or retirement (including the possibility of the foregoing) of a director of BEA or a potential director candidate; and/or

(b) the appointment, removal or retirement (including the possibility of the foregoing) of a director to or from a Board Committee or as Chairman or Deputy Chairman of a Board Committee."

85. Necessarily this class should be for a materially different type of document to class 36. I have difficulty seeing why documents concerning the constitution of the Board which necessarily do not contain any reference to takeovers are relevant and I will not order this class.

A *Class 38:*

> "With regard to the article published in the Hong Kong Economic Journal on 24 February 2016, titled 'BEA looking for help from China government' concerning BEA's 'scheme to introduce one of the big 4 banks as a strategic shareholder by way of an issue of
B new shares' (the 'Reported Share Placement'), Communications during the period from 18 March 2015 to 8 April 2016, referring to or concerning:
>
> (a) a meeting (whether arranged, proposed or contemplated) between any (i.e. one or more) BEA Custodian and a third party in connection with the possibility of a placement of new
C shares in BEA; or
>
> (b) the Reported Share Placement."

86. It does not seem to me that this class is relevant to the case advanced in the Petition. The matter referred to post-dates the SMBC subscription and is purely speculative.

D

Other practical issues concerning Elliott's application

87. I heard substantial submissions, particularly from Mr Hollander, about the processes by which discovery take place and in particular the searching and retrieval of electronic documents. I have already addressed the use of certain controversial definitions. Another area of debate was the use
E of keywords for electronic searches.

88. The Bank has proposed certain keywords for agreement. Elliott have declined to agree them because it is Elliott's position that they do not know enough about the Bank's documents and electronic records to do so. Elliott say that it is for the Bank to decide how best to carry out an electronic search for such documents as the court orders disclosed.

F 89. Although ideally the parties would agree the search terms, it does not seem to me that this is something that the court should require them to do or in the event of disagreement adjudicate. To do so would simply to be to invite further argument and interlocutory applications. The Bank will have to search for the documents that it is ordered to disclose as it considers best.

90. The other issue is whether or not the Bank should complete
G discovery before the Board is required to do so. The Respondent directors comprise three executive directors (the 2nd to 4th Respondents) who are members of the Li Family and 15 non-executive directors. The 2nd to 4th Respondents were officers of the Bank throughout the period covered by Elliott's discovery requests. However, the 2nd to 4th Respondents only became executive directors on 2 August 2014. Not all the non-executive directors
H were directors during the entire period covered by Elliott's discovery request.

91. It is the Boards evidence, in the form of an affirmation filed by Mr Tang of Linklaters, that the non-executive directors—

> (1) were not involved in the negotiation of the Criteria or SMBC agreements;

(2) did not have Bank email accounts;

(3) did not communicate with each other about Bank business outside Board meetings;

(4) did not take or retain notes about the proposed 3rd SMBC subscription; and

(5) did not retain personal notes relating to Bank Board matters generally.

92. Further, suggests Mr Tang the Bank's secretarial department that circulated documents to the non-executive directors should have copies of those documents and will disclose them.

93. It follows, suggests the Board, that the non-executive directors will disclose nothing between themselves and as between them and the Bank only duplications.

94. So far as the executive directors are concerned, Mr Tang explains that they only use the Bank emails addresses and do not use other instant messaging services. They also do not keep personal hard copies of documents relating to the Bank's affairs. Thus, suggests Mr Tang, nothing will produced if the executive directors are required to make discovery.

95. The upshot of this is that the Board argue they should not be required to make discovery, if at all, until after the Bank has done so and an informed assessment can be made of whether there is any purpose in requiring them to do so.

96. Elliott disagree. Their reason for doing so amounts to this. Any communications between directors about the desirability of finding ways and, in particular, new friendly shareholders to entrench the Li Family control of the Bank may well be kept by the directors and not the Bank. Mr Tang is not in a position to confirm what did or did not take place. None of the directors have deposed to the matters he suggests justify only requiring the Bank to make discovery initially. To wait until the Bank finishes discovery is only likely to cause delay and complicate any future applications for specific discovery, as discovery as between Elliott and the Bank and Elliott and the Board will not by synchronised.

97. Given the substance of their case it seems to me legitimate for Elliott to object to attempts to exclude all the directors from the discovery process. On the other hand I accept that it is quite possible that the non-executive directors will have little if anything to disclose other than communications between themselves and the Bank, which will be disclosed by the Bank.

98. In my view an appropriate way to proceed is to require the 2nd to 4th Respondents to make discovery. One would expect that one or other of them would be a party to any communication to a non-executive director, which is not part of the Bank's documents. I will so order. The position of the non-executive directors can be addressed if necessary when discovery in accordance with my order has been completed.

A *Board's Application*

99. As I explain at the beginning of these reasons the Board also seeks extensive discovery. Appended to its summons is a schedule of 13 classes of documents. It commences with broad definitions of "Associate" and "Interests", which are intended to ensure that the classes cover the documents held by any entity associated or affiliated to the Petitioners concerning any B interest capable of subsisting or being created in shares in the Bank. The definition of "Associate" is as follows:

> "For the purposes of this Schedule, references to Associates shall include, without limitation, any parent, subsidiary, fellow subsidiary, affiliated or associated entitles (which shall include C partnerships) of any of the Petitioners, any entity which is affiliated and/or associated with any such entity, and/or any entity which provides management or advisory services to any of the Petitioners and/or any entities which are affiliated and/or associated with any of the Petitioners and/or any entity which is affiliated and/ or associated with any such entity, and shall include, without D limitation, Elliott Associates, L.P., Elliott Advisors (HK) Limited, Elliott Management Corporation, Elliott International Capital Advisors Inc. and Liverpool Associates Ltd."

100. This seems to me to be unhelpful. Assuming that the Board is entitled to discovery of any of the classes, the documents falling within the class of which discovery has to be made by Elliott are those within Elliott's E possession, custody or power. Any documents falling within the class, whoever generated it is discoverable. A document within the class not in Elliott's possession, custody or power is not discoverable. The definition in my view adds nothing except the potential for argument, and seems to me to be more in the nature of a direction as to how discovery is to be carried out than a meaningful addition to the description of the class. I will not use it and F the classes will refer to "the Petitioners".

101. The definition of interest is also very wide:

> "For the purposes of this Schedule, references to Interests shall include, without limitation, any legal, beneficial and/or equitable interest in shares of The Bank of East Asia, Limited ('BEA'), any short position in BEA shares and any interest in any form of equity G derivative the underlying shares of which are BEA shares (including, for the avoidance of doubt, any contracts for difference relating to shares of BEA settled by payment of cash or otherwise)."

102. This seems to me to be unnecessarily complicated. Where "Interest" appears in any class it will be replaced with "legal or beneficial interest in the shares of BEA or any derivative of shares in BEA". H

103. Mr Yu summarised the Board's case as follows in para 77 of his skeleton argument: "*All of the items in the Respondent Directors' Summons relate to one issue i.e., whether the Petitioners have a collateral purpose in issuing and*

maintaining these proceedings". The alleged collateral purpose is pleaded in [90] of the Points of Defence:

> "This Petition is presented by the Petitioners for the purpose of their own short-term investment strategy, and/or facilitating the preparation or furtherance of a take-over plan, rather than to further their legitimate interest as shareholders of BEA or the interests of BEA."

104. The Board applied, unsuccessfully, to strike out the Petition on the grounds that it was brought for a collateral purpose, but that does not detract from the fact that this is an issue in the case and one in respect of which the Board is entitled to discovery. What is in issue is the scope of discovery. Elliott say that the Board is entitled to discovery of documents which go to their purpose in presenting the Petition. Class 7 which is limited to purpose and objective of presenting the Petition is thus unobjectionable except to the extent that it refers to Associates. I will order that class subject to the deletion of "and/or their Associates". However, the other classes go very considerably further. In practice I would have thought the classes are so widely drawn that they probably cover every piece of paper or electronic data since 15 January 2010 (the date from which documents are sought) that Elliott have in their possession, custody or power in anyway connected with the Bank. An example of the breadth of the classes is class 12:

> "All documents relating to or reflecting the engagement of the Petitioners and/or their Associates with, or use by the Petitioners and/or their Associates of, the media including, without limitation, Newgate Communications, press agencies and media outlets, in relation to BEA, BEA's Board or any one or more directors of BEA."

105. What I assume the Board is looking for are documents exchanged with the media, which show that Elliott have been undertaking a coordinated and concerted campaign to undermine the Board's position with a view to advancing the alleged collateral purpose. It seems to me that the description of the class goes beyond what is relevant because it extends, for example, to the use of media in relation to the Bank. This would seem to include a record of a search on google to find newspaper articles concerning the Bank and arguably local banks generally in Hong Kong. It seems unlikely such documents would generally be relevant and that requiring them to be produced is unnecessarily onerous. It may be that within the class there might be a few individual documents which would be relevant, but it is not the job of the court to reformulate significantly defective classes. As I have already observed the use of such broad and sophisticated descriptions runs the risk of rejection on the grounds that the class includes irrelevant documents and the court cannot readily amend it to cure the problem. I will not order class 12.

106. It does, however, seem to me that documents recording Elliott's strategy at the time of its investment in the Bank in 2010 and the strategy's implementation and change up to the presentation of the Petition are

A generally relevant. Just as the placement to Caixa in 2009 informs an assessment of the reasons why the Board approved SMBC's subscription some years later, Elliott's reasons for investing in the Bank and continuing to hold and increase its shareholding in it will inform an assessment of whether or not the petition was presented to facilitate and further a takeover plan or other, allegedly, impermissible purpose.

B 107. Subject to the amendments referred to in [100] and [102] I will order that the following classes are disclosed in addition to class 7: classes 1, 2, 4, 5 and 6 (subject to the deletion of "other" and the words in the second parenthesis).

108. The remaining classes (7, 8, 9, 11 and 13) are very wide. I will not order classes 8 to 11. I will order that Elliott disclose:

C

> "Documents produced by, on behalf of or at the instigation of the Petitioners concerning:
>
> (1) The constitution of the board of BEA;
>
> (2) resolutions to appoint, re-appoint or remove directors of BEA and how the Petitioners or other shareholders in BEA might, have
>
> D or will vote in respect of such resolutions; and
>
> (3) how shareholders should vote in respect of resolutions to appoint, re-appoint or remove directors of BEA."

109. Class 13 is unnecessarily verbose. I will order:

E

> "Documents concerning the acquisition or disposal by the Petitioners of a legal or beneficial interest in the shares of BEA or any derivative of shares in BEA from 15 July 2010 until the date of trial."

Costs

F 110. I will make a costs order *nisi* in respect of each summons that the Respondents to the summons (other than the Bank) pay the Applicants' costs forthwith with a certificate for two counsel. The Bank's costs shall be costs in the cause with a certificate for two counsel

(Jonathan Harris)
Judge of the Court of First Instance
G High Court

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1 Elliott were represented by Charles Sussex SC, José-Antonio Maurellet SC and Jason Yu; the Board by Benjamin Yu SC and Bernard Man SC; and the Bank by Charles Hollander and Byron Chiu.

H 2 (1882) 1 QBD 55 at 63.

3 *Re Playmates Investments Ltd* [1996] 4 HKC 577, Le Pichon J, 585I–586D.

4 *Re Zhuang PP Holdings Ltd* (unrep, HCCW 56/2005, 3 November 2005), upheld on appeal (unrep, CACV 387/2005, 21 February 2006).

5 [1981] HKC 78, Barker JA, at 82C.

6 [1995] HKEC 339, at [5].

7 *Tullett Prebon (Hong Kong) Ltd v Chan Yeung Fong* (unrep, HCA 2197/2009) (9 June 2011, To J) at [83]–[84].
8 *Ongsip v Pimatronics Ltd* (unrep, HCA 611/2010) (20 September 2012, DHCJ Sakhrani) at [15]; *Jade's Realm Ltd v Director of Lands* (unrep, HCA 1509/2012) (9 January 2015, Ng J) at [20(7)].
9 See [35] of my decision reported at [2015] 4 HKC 137.
10 Hong Kong Civil Procedure 2018, Vol 1, para 24/2/2.
11 Which is defined as "*means communications, including any attachments or enclosures thereto, which have been sent or received by any solicitors instructed by or on behalf of BEA.*"

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