August 2021

ONC Corporate Disputes and Insolvency Quarterly

Dear Clients and Friends,

This special newsletter aims to regularly update practitioners on important and noteworthy cases in the areas of corporate disputes and insolvency in Hong Kong, the UK and other common law jurisdictions. In this issue, we have highlighted:

- 8 Corporate Insolvency Cases
- 3 Cross-border Insolvency Cases
- 5 Restructuring Cases
- 3 Corporate Disputes Cases
- 8 Bankruptcy Cases

Our selection of cases and our analysis of them may not be exhaustive. Your comments and suggestions are always most welcome. Please feel free to contact me at ludwig.ng@onc.hk

Best regards,

Ludwig Ng
Partner, Solicitor Advocate
ONC Lawyers

In this Quarterly, unless otherwise stated, the following abbreviations are used:-

- Section numbers refer to those in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32, Laws of Hong Kong);
- Rule numbers refer to those in the Companies (Winding Up) Rules (Cap 32H, Laws of Hong Kong);
- "BO" means the Bankruptcy Ordinance (Cap 6, Laws of Hong Kong);
- "CO" means Companies Ordinance (Cap 622, Laws of Hong Kong);
- "the Company" refers to the company which is the subject matter of the disputes or the winding up petition;
- "PL" means provisional liquidators

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Corporate Insolvency Cases

1. Second petition dismissed where the Petitioner is aware of the earlier petition

Re Grand Peace Group Holdings Ltd [2021] HKCFI 1142

When the Petitioner issued the petition to wind up the Company on 12 January 2021, the Company was already subject to another winding up petition in HCCW 410/2019 and the Petitioner was aware of the first petition.

The Court reiterated that a creditor should not issue a petition if a petition has already been issued against the relevant debtor company. The Petitioner argued that there are exceptional circumstances, which justified the second petition: *Re China Greenfresh Group Co Ltd* [2021] HKCFI 36. It was said that the progress of the first petition was dilatory. The Court held that the correct course was to appear on the first petition as a supporting creditor and apply for substitution.

Accordingly, since the Petitioner was aware of the petition in HCCW 410/2019, as opposed to issuing a subsequent petition ignorant of the first one, the Court held that the appropriate course is to order dismissal. However, if the petition came to be issued as a result of the Petitioner being unaware of an earlier petition, then the Court considered that it would expect to order the petition be removed from the court file.

2. Unfair prejudice petition seeking winding up relief must be instituted under the companies winding up jurisdiction and there should be a separate petition for each company

Khan Khasman Kasidi Mahmood v Lucky Legend Industries Ltd [2021] HKCFI 2004

The Petitioner presented an unfair prejudice petition (the "**Petition**") seeking relief under section 724 of the CO and section 177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32). The 1st and 2nd Respondents are the companies which are the subject of the Petition. The 3rd Respondent is the majority shareholder of the 1st Respondent; the 4th Respondent is neither shareholder nor director of either company and the 5th Respondent was appointed (improperly, it is alleged) as a director of the companies.

The Petition was entered into the Miscellaneous Proceedings list. The Petitioner, accepting that the petition should instead have been instituted under the companies winding up jurisdiction, sought to transfer a winding-up number in the High Court in place of the present miscellaneous proceedings and applied for leave to amend title of the proceedings to "Companies (Winding-Up) Proceedings" and for orders to carry out various steps under the Companies (Winding-up) Rules (Cap.32H) ("**the Rules**") which ought to have been carried out prior to the first hearing of the petition.

The Court held that whilst the amendments sought by the Petitioner would enable retrospective compliance with the requirements of the Rules, they nevertheless do not address the concern that a separate petition should be issued in respect of each company, in the absence of which the Respondents will have difficulty in (for example) identifying the allegations of unfairly prejudicial conduct specific to each of the 1st and 2nd Respondents: *Active Team International Ltd* [2005] 4 HKLRD 375.

In the circumstances, the Petition was dismissed, without prejudice to the Petitioner instituting fresh proceedings in respect of the same subject matter.

3. Court confirmed the reasonableness of a proposed sale upon the liquidators' application for direction under section 200(3)

Re Founder Information (Hong Kong) Ltd [2021] HKCFI 1749

The Company was wound up on 1 February 2021 with the liquidators being appointed on 1 March 2021. One of the Company's largest current assets is its approximately 60% shareholding in a company named PKU Resources, which is incorporated in Bermuda and listed on the Main Board of the Hong Kong Stock Exchange. Given the financial difficulties of PKU Resources and its operating subsidiaries, as well as the pending litigation and creditor enforcement actions in Mainland China against them, the liquidators of the Company decided to explore a sale of the Company's shareholding in PKU Resources. They have since conducted a tender resulting in three offers, the average price of which is approximately 10% more than the external valuation obtained by the liquidators. The liquidators thus believe that it would be prudent to dispose of the shareholding in PKU Resources.

There are however two interested groups in the Company who have voiced objections to the liquidators' proposed course of action. The first group stated that such a course of action would amount to a fire sale and so the liquidators should delay the sale pending obtaining a more informed assessment of the likely value of the Company's interest in PKU Resources. They have not, however, been able to provide any information which supports their concern. The second group indicated that if the sale were to proceed, they will take certain steps, in the nature of enforcement, to interfere with the underlying assets owned by the subsidiaries of PKU Resources.

These objections have led the liquidators to take the view that it is appropriate and prudent for them to seek an order from the Court under section 200(3) that their proposed course of action falls within the range of decisions that a liquidator in possession of the information available to them might decide to take.

In determining whether or not it is appropriate to make the directions, the Court is guided by the following principles:-

1. An application by a liquidator for directions is not the occasion for the making of order affecting the rights of outsiders. Its effect is merely to sanction a course of conduct on the part of the liquidator so that he may adopt that course free from the risk of personal liability for breach of duty.

2. The Court may give directions where it will be of advantage in the liquidation. The Court may give directions that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion.

3. The Court will not generally give a direction where the matter relates to the making or implementation of a business or commercial decision or when no legal issue is raised or there is no attack on the propriety or reasonableness of the liquidator's decision, but may do so where such an attack is in prospect.

Further, according to ***Re X*** (unreported, HCCW 118/2017, 30 August 2017), the approach that the Court takes faced with applications for confirmation of the reasonableness of a proposed contentious course of action is for the Court be satisfied that it is desirable that the business is sold quickly and that in the circumstances the way in which the liquidators have proceeded and the offer that they propose to accept are within the range of reasonable procedures and price.

On the facts, the Court is satisfied that this is an appropriate case for the Court to provide a direction which gives the liquidators' reassurance that the Court agrees that on the basis of the evidence before the court, the liquidators' proposed course of action is within the range of reasonable decisions available to them.

4. For future application to adjourn a winding-up petition against a listed company, it must be listed before Companies Judge

Yao Weitang v China Creative Global Holdings Ltd [2021] HKCFI 1565

This is a petition concerning China Creative Global Holdings Ltd, a poorly run financially challenged company, which is incorporated in the Cayman Islands and listed on the Main Board of the Hong Kong Stock Exchange ("**HKSE**") whose underlying business is in the Mainland.

The claim arose from a bond held by the petitioner. Interest on that bond has not been paid. On 23 October 2020, the petitioner served a statutory demand on the Company. It was not responded to by the Company and as a consequence a petition was issued on 11 December 2020. The Company said that as a result of a boardroom dispute it has been unable to respond to the petitioner's claim. Further, it is said that it proposed to introduce a scheme of arrangement although precisely what the Company envisaged a debt restructuring would involve is not explained. The petitioner had not been told about these plans at all until the hearing. The Judge made directions for the petition to be adjourned to a substantive hearing because there are issues relating to the ability of the Petitioner to satisfy the three core requirements.

The Judge then went on to deal with the unsatisfactory way in which the Company responded to the petition. The Court commented that the Company had not taken the service of a statutory demand and the service of a petition seriously. Rule 32 requires a company to file evidence in opposition to a petition within seven days of the filing of the affirmation verifying the petition. This strict timetable is a matter which one would expect all companies to be told of by those they instruct, particularly in the case of listed companies. It is necessary for winding up proceedings to progress quickly and efficiently, if the interests of unsecured creditors are to be properly protected,

The Judge directed that in future, all applications by companies listed on either board of the HKSE for extensions of time to file evidence, or adjourn the progress of winding up proceedings, should be listed before the Companies judge or such other judge as directed. Masters should not grant, even by consent, adjournments of winding up petitions against listed companies.

5. Official Receiver's claim for *ad valorem* fees dismissed as the same was only raised after the winding up proceedings were permanently stayed

Re GW Electronics Co Ltd [2021] HKCFI 1869

On 12 November 2020, upon the application of a contributory of the Company (the "**Applicant**"), the Court granted a permanent stay of all proceedings in the winding up of the Company, subject to the Official Receiver as the PL (the "**ORPL**") complying with the following three conditions:-

(1) The liquidation costs and the fees, costs and expenses of the Official Receiver of and arising out of the winding up of the Company ("**Liquidation Expenses**") be paid out of the cash fund in the Liquidation Account held by the ORPL;

(2) Applying the balance of the cash in the Liquidation Account after deducting liquidation expenses to discharge untaxed costs and the debt owed by the Company to the Petitioner; and

(3) Paying the entire surplus in the Liquidation Account to the Petitioner.

The Court further directed that upon compliance with the conditions, the Applicant shall apply on paper for an order to stay the winding up proceedings permanently and to release ORPLC as PL of the Company (the "**Conditional Order**"). The terms of the Conditional Order was approved on 25 November 2020 and the Order was sealed on 4 December 2020. On 4 February 2021, the winding up proceedings of the Company were stayed permanently and the ORPL was released as PL.

One of the main issues in the Applicant's stay application was the solvency of the Company, specifically whether the fund kept in the Liquidation Account was sufficient to discharge the Company's liability to pay the Liquidation Expenses payable to the ORPL, as well as the debt and the untaxed costs payable to the Petitioner. The Applicant and the Petitioner both relied on the information and evidence adduced by the ORPL including the followings:

(1) ORPL's report stating that the Company appears to be solvent as of 29 December 2017; and

(2) ORPL's letter dated 23 June 2020 stating that she would seek her fees and costs in the total of HK$ 64,443.50.

It was not until after the terms of the Conditional Order were approved, ORPL, in her letter dated 25 November 2020, for the first time, asserted her entitlement to charge *ad valorem* fee ("**AV Fee**") said to be chargeable under Item I of Table B of Schedule 3 to the Companies (Fees and Percentages) Order (Cap 32C) ("**CFPO**") out of the Liquidation

Account, which eventually resulted in two Summonses taken out by the ORPL for an order to allow her to pay the AV Fee in the sum of HK$2,076,400 out of the Liquidation Account.

In the end, the Court dismissed both Summonses for the following reasons:

(1) Res judicata

The Court found that ORPL is barred by the reason of the doctrine of *res judicata* and could not seek to re-litigate issues of fees as the amount of Liquidation Expenses payable formed part of the foundation upon which the Court concluded that the Company was solvent.

(2) Abuse of process

Even if the issue of AV Fee has not been decided by the Court such that *re judicata* does not apply, the Court considered that it is an abuse of process for the ORPL to seek AV Fee in subsequent proceedings when the issue should and could have been raised during the stay application: *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313; *Ko Hon Yue v Chiu Pik Yuk* (2012) 15 HKCFAR 72. It would be unfair and oppressive to the Petitioner to be vexed again on the question of what amount the ORPL was entitled to receive from the Liquidation Account. It is also against the underlying objectives of the Rules of High Court (Cap 4A).

(3) *Functus* point

Once the Conditional Order was sealed on 4 December 2020, the Court is *functus* and does not have jurisdiction to deal with or review the issue of the amount of the Liquidation Expenses payable to the ORPL and it is not open to the OR to re-open the proceedings with a view to argue a point which ought to have been raised at the time when the stay application was heard.

(4) No jurisdiction

Since the winding up proceedings has come to an end and the ORPL are released as PL, the Court has no jurisdiction to make any order under the application.

6. Timely reminder on the principles applicable in an application for leave to continue an action against a company in liquidation

Anglo Chinese Corporate Finance Ltd v Apastron Capital Ltd [2021] HKCFI 2042

Anglo Chinese Corporate Finance Ltd ("**ACCF**") applied under section 186 for leave to continue HCA 2954/2017 against the Company, which is in liquidation.

In determining whether to exercise its discretion under section 186, the Court is guided by the following principles as stated in *Re B+B Construction Co. Ltd* (unreported, HCCW 114/2001, 4 April 2003):-

> "5. The test as to the exercise of the court's discretion whether or not to grant leave is what is right and fair according to the circumstances of each case and this involves a balancing exercise.
>
> 6. If the issue can be conveniently decided in the course of the winding up, leave will be refused in the absence of special circumstances, as there is a positive benefit in having the issue decided by the liquidator since this should be less expensive and quicker than an independent action and the liquidator is obliged to act even-handedly as between each class of claim so prejudice would not normally be caused to any particular class of claimant."

On the evidence, the Court found that it is appropriate to give leave to ACCF to continue the action for the following reasons:-

(1) Both ACCF and the Company, through its liquidators, consider that it is appropriate for the court to give leave to continue the action.

(2) The action is inevitably going to proceed against all other defendants and it is clear that the Company would in ordinary circumstances be a necessary and proper party to that action.

(3) There are complex and substantial issues of fact that are in dispute. Those issues will have to be determined by the court in any event because of the involvement of the other defendants in the action. Consequently, if those issues are left to be determined by the liquidator within the liquidation of the Company there is a risk of inconsistent decisions being made.

7. Hsin Chong Saga: Yau Lee's application to validate its takeover of the JV with Hsin Chong stayed pending outcome of the arbitration on the validity of the takeover notice

Re Hsin Chong Construction Co Ltd [2021] HKCFI 1295

Hsin Chong Construction Company Limited ("**Hsin Chong**") and Yau Lee Construction Company Limited ("**Yau Lee**") entered into a joint venture agreement on 4 February 2009 (the "**JVA**"), pursuant to which the parties agreed:

(1) to form a joint venture (the "**JV**") to prepare for the tendering of a contract ("**Contract**") for the design and construction of the Public Rental Housing Development at Kai Tak ("**Project**");

(2) upon the successful tendering by the JV, to execute the Contract as the contractor in accordance with the terms and conditions of the JVA and the Contract;

(3) if a party shall, *inter alia*, become insolvent or commence to be wound up or go into liquidation, then the other party may issue a Takeover Notice and increase its proportionate share to 100%;

(4) all disputes arising out of the JVA shall first be referred to the Executive Board of the JV ("**EB**") and then to the Chief Executives of the parties. If parties are not satisfied, the dispute shall be referred to a mediator. If mediation also fails, the dispute shall be referred to arbitration.

The JV became the main contractor for the Project, which commenced in November 2009 and practical completion was achieved in March 2014.

Disputes arose between Yau Lee and Hsin Chong regarding the JV. Hsin Chong accused Yau Lee of certain mismanagement issues and Yau Lee alleged Hsin Chong had committed various defaults and issued a default notice. The EB meeting held in November 2018 did not resolve the said disputes.

On 18 January 2019, PLs were appointed for Hsin Chong. On 20 February 2019, Yau Lee issued a Takeover Notice to Hsin Chong. On 4 April 2019, Yau Lee further issued two Summonses (the "**Yau Lee Summons**") for (a) an order to confirm that Yau Lee's takeover of the JV from Hsin Chong by way of a takeover notice dated 20 February 2019 did not constitute a disposition within section 182 and (b) validation of the payments out of a JV bank account and other disposition of property arising from the takeover;

On 22 October 2019, PLs initiated arbitration between Yau Lee and Hsin Chong pursuant to the JVA. One of the key issues to be determined by the arbitrator is whether the Takeover

Notice is valid. The arbitration has proceeded to the stage where Hsin Chong served its Statement of Claim dated 17 July 2020 and Yau Lee served its Defence dated 8 October 2020.

The PLs filed a summons on 24 October 2019 to stay the Yau Lee Summons pending the final determination of all disputes between Hsin Chong and Yau Lee arising out of the JVA by way of arbitration.

The Court found that the Yau Lee Summons was drafted on the assumption that the Takeover Notice was valid and effective and with the presumption that Yau Lee has validly taken over 100% of the JV. However, the validity of the takeover notice was in fact subject to challenge by Hsin Chong and forms a key dispute in the arbitral proceedings, which is to be resolved by the arbitrator.

Having considered the balance of convenience and fairness as between the parties, as well as to ensure the Court's procedures are used in a logical, fair and cost-efficient manner, the Court decided that the Yau Lee Summons should be stayed pending the final determination of the disputes between Hsin Chong and Yau Lee by way of arbitration.

In passing, the Court observed that producing over 3,000 pages of documents for a 1-day stay application is unhelpful and reminded the practitioners that core bundles would be expected in such case.

8. Singapore Court of Appeal considered whether the company's directors should be entitled to control the appeal against a winding-up order, and who should be responsible for the costs of the appeal

Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd) [2021] SGCA 60

The respondent ("**RCMA**"), having obtained a judgment sum of $11,500 against the Company, served a statutory demand on the Company for the judgment sum along with accrued interest in the total sum of $11,568.88. On the 22nd day after the statutory demand was served, the Company paid $3,000 to RCMA, reducing the balance to $8,568.88. RCMA applied to have the Company wound up ("**Winding Up Application**").

RCMA contended that the Company should be deemed unable to pay its debts pursuant to section 254(2)(c) of the Companies Act since it was cash flow insolvent and balance sheet insolvent. Alternatively, RCMA relied on section 254(2)(a) of the Companies Act, which provides that a company will be deemed as unable to pay its debts if, within three weeks from being served a statutory demand for a debt exceeding $10,000 by a creditor, the company fails to pay the sum. The Singapore High Court accepted all grounds for the Winding Up Application. The Company appealed under the directions of its sole director.

The Singapore Court of Appeal first found that the directors of a company should be allowed to control the conduct of the appeal against a winding up order. However, to address the concern of directors wasting the company's funds to pursue an unmeritorious appeal, the Court of Appeal set out two general rules. First, the directors controlling the conduct of the appeal should expect to use their own funds for any appeal costs incurred by the company. Secondly, those directors should expect to be personally responsible for the respondent's costs if the appeal fails.

As to the grounds relied by RMCA for the Winding Up Application, the Court of Appeal agreed that the Company is cash flow insolvent. Further, *in obiter*, the Court commented that a company which makes a partial payment of the debt demanded in a statutory demand within the prescribed three-week period, such that the remaining amount payable falls below $10,000, should not be deemed to be unable to pay its debts.

In conclusion, the Court of Appeal dismissed the appeal and ordered the director of the Company to pay $50,000 to RCMA as costs of the appeal.

9. Re China All Access Limited: First decision on Pilot Program for Mutual Recognition and Assistance to Insolvency Proceedings between the Courts of the Mainland and Hong Kong

Re China All Access (Holdings) Ltd [2021] HKCFI 1842

In the May issue of ONC Corporate Disputes and Insolvency Quarterly 2021, we reported that the Supreme People's Court and the Government of the Hong Kong Special Administrative Region have on 14 May 2021 signed the "Record of Meeting between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on the Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region". Under the pilot program, liquidators from Hong Kong may apply to the relevant Intermediate People' s Court at a pilot area in the Mainland for recognition of insolvency proceedings in Hong Kong. Likewise, insolvency administrators from the Mainland may apply to the High Court in Hong Kong for recognition of bankruptcy proceedings in the Mainland (the "**Pilot Programme**").

In the recent case of *Re China All Access (Holdings) Ltd* [2021] HKCFI 1842, the Court for the first time considered this recent development and the Pilot Programme. The Company was incorporated in the Cayman Islands and listed on the Main Board of the Hong Kong Stock Exchange (stock code: 633). The Company's assets are located in the Mainland and Malaysia, with the majority of the assets located in Shenzhen. The operating subsidiaries are separated from the holding company by intermediate subsidiaries incorporated in the BVI. A winding up petition was presented against the Company. The petition was previously adjourned in order to give the Company the opportunity to pay the debt which is not disputed. It transpired later that the cheque that was presented was dishonoured. The Petitioner thus pressed for an immediate winding up order.

It is well established now that the following three core requirements must be satisfied before the court would exercise its discretionary jurisdiction to wind up a company incorporated in a foreign jurisdiction:-

(a) There had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;

(b) There must be a reasonable possibility that the winding-up order would benefit those applying for it; and

(c) The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

The second core requirement had, until *Shandong Chenming* case, given rise to less controversy than the first core requirement. In *China Huiyuan Juice Group Limited* [2020] HKCFI 2940, the Court observed, amongst other things, that in determining whether the second core requirement is satisfied, the court will take a pragmatic approach. It will not be necessary for a petitioner to identify with great precision what the benefit will be or quantify with exactness the value of the benefit. But the petitioner must be able to point to a discernible and real benefit, i.e. a real possibility that a winding-up order would benefit the Petitioner.

Referring to the Pilot Program, the Court took the view that on the face of the matter it is reasonably likely that the liquidators appointed over the Company by the Hong Kong Court can be recognised in Shenzhen as the Company has its centre of main interest in Hong Kong and its principal assets are in Shenzhen. Similarly if action can be taken to appoint liquidators in Hong Kong over subsidiaries incorporated in the BVI, which also have their centre of main interest in Hong Kong, then the Hong Kong-appointed liquidators can be recognised in Shenzhen. Liquidators appointed over the BVI subsidiaries could then take steps to take control of the Mainland subsidiaries, of which the BVI subsidiaries are the immediate holding companies.

In addition, the Court found that the majority of the board of the Company reside in Hong Kong, and are, therefore, subject to the *in personam* jurisdiction of the Hong Kong court. It will, therefore, be possible for liquidators to seek orders from the Hong Kong court requiring the directors to execute documents necessary to enable the liquidators to take control of subsidiaries. The Court concluded that the Petitioner has demonstrated that there is a real possibility of the winding up order benefiting it and that the second core requirement is satisfied and accordingly made the normal winding up order.

10. Concerned with misuse of the *Z-Obee* technique, the Court refused to assist offshore soft-touch provisional liquidators

Re China Bozza Development Holdings Ltd [2021] HKCFI 1235

The Company is incorporated in the Cayman Islands and listed on the GEM board of the Stock Exchange of Hong Kong Limited. On 15 May 2020, a creditor's petition was presented in Hong Kong for the Company to be wound up on the grounds of insolvency. On 30 November 2020, a director of the Company presented a petition in the Cayman Islands for the winding up of the Company and soft-touch JPLs were appointed to facilitate a restructuring of the debt of the Company. On 5 February 2021, an application was then made for recognition and assistance of the JPLs in Hong Kong. This arrangement was commonly called the *Z-Obee* technique.

In the decision, the Judge expressed his concern that the *Z-Obee* technique, which has become increasingly common, "is being abused to obtain a *de facto* moratorium of enforcement action by creditors in Hong Kong", especially in recent cases where the restructuring plans seem to be developed without any creditor input or regard to the winding up proceedings commenced by creditors in Hong Kong.

The Judge stressed that once a company becomes insolvent, the interests of the creditors become paramount and the directors' fiduciary duties are owed to the general body of creditors, instead of to the shareholders. Consistently, creditors should play a central role in developing a restructuring plan regarding the company's debt.

The Judge also noted that recent cases have deviated from above principle and the Court needs to supervise closely when the *Z-Obee* technique is used such that the arrangement will not be misused and that creditors' interest will be taken in to account and protected.

In the circumstances, although the Court recognised the appointment of the JPLs, the Court did not grant any order for assistance to the JPLs. Instead, the Court granted the JPLs the liberty to apply for assistance if it is required and if they can justify it in future.

Further, the fact that PLs have been appointed in the place of incorporation does not mean that the Court will automatically adjourn a petition issued in Hong Kong. The Court will adjourn the petition if the company can show that its restructuring proposal is in the best interests of the general body of unsecured creditors.

11. For the third time in a Row – Court raised serious concerns on the potential misuse of overseas soft-touch provisional liquidation

Victory City International Holdings Ltd [2021] HKCFI 1370

The Company was incorporated in Bermuda and listed on the Main Board of the Stock Exchange of Hong Kong Limited ("**SEHK**"). It acted as a guarantor of a loan facility entered into between one of its Hong Kong-incorporated subsidiaries and a total of 12 money lenders (including HSBC) (the "**Majority Lenders**"). As the borrower failed to repay the loan, in January 2021, the Majority Lenders notified the Company that an event of default had occurred and demanded immediate repayment of the outstanding debt. A statutory demand was served on the Company on 2 February 2021.

The Company's Petition

Shortly thereafter, on 12 February 2021, the Company presented a petition to the Supreme Court of Bermuda (the "**Company's Petition**") for its winding up and to appoint joint provisional liquidators (the "**Initial PLs**") for restructuring purposes. The Bermudian Court made an order appointing the Initial PLs as joint provisional liquidators (the "**Initial PL Order**") and issued a Letter of Request to the Hong Kong Court for, *inter alia*, recognizing the Initial PLs' appointment. Despite the Bermudian Court having issued a Letter of Request, the Initial PLs did not apply to the Hong Kong Court for recognition of their appointment by the time of their resignation on 23 April 2021.

The Company did not notify the Majority Lenders about the proceedings in the Bermudian Court (including the appointment of the Initial PLs) and HSBC only found out about the same through the Company's announcement published on the SEHK's website on 16 February 2021. Neither did the Company take any further steps to elucidate a restructuring plan or respond to the any of the Majority Lenders' request. The Majority Lenders were not provided with meaningful explanation as to the financial position of the Company and the grounds of the Company's Petition either. The Majority Lenders also raised serious doubts as to whether the Company's Petition was merely a "stalling tactic" by the Company.

The Creditors' Petition

On 11 April 2021, with a view to rectifying the situation, HSBC, who acted as the agent of the Majority Lenders, presented a winding up petition to the Supreme Court of Bermuda in the same action ("**HSBC's Petition**") for an order that (1) the Company be wound up in accordance with the laws of Bermuda; and (2) Patrick Cowley and Lui Yee Man (of KPMG Hong Kong) and Charles Thresh and Mike Morrison (of KPMG Bermuda), (the "**Applicants**") be appointed as joint provisional liquidators of the Company; and (3) the Applicants be

authorised to obtain the recognition of their appointment and to make applications to the courts of any other jurisdiction for that purpose.

A winding up order was made by the Bermudian Court on 23 April 2021. The Applicants then applied to the Hong Kong Court for recognition and assistance of their appointment as PLs.

Harris J granted the Applicant's application.

In passing, Harris J expressed his concerns again about the misuse of soft-touch provisional liquidation commenced in the place of incorporation. Those concerns largely arise from the circumstances (1) in which soft-touch provisional liquidations come to be commenced and the way in which they are dealt with suggesting that the companies that use them are more concerned with the interests of the owners with whom the board is aligned than the creditors and (2) the involvement of professionals who are not ensuring that creditors' interests are being properly protected. The Judge also indicated that he will in future approach any applications for recognition and assistance which exhibit the aforementioned characteristics with the greatest circumspection.

Restructuring Cases

12. Parallel scheme should only be introduced in the place of incorporation if absent which there is a genuine risk of the company being wound up there

Re China Oil Gangran Energy Group Holdings Ltd [2021] HKCFI 1592

The Company was incorporated in the Cayman Islands and listed on the GEM board of the Hong Kong Stock Exchange. Cayman soft-touch PLs were appointed over the Company in November 2019. With the PLs' assistance, the Company sought to promote parallel schemes in Hong Kong and the Cayman Islands. It is noteworthy here that more than 98% of the debts compromised under the schemes were governed by Hong Kong law.

The Court sanctioned the Hong Kong scheme but held that the Cayman parallel scheme was unnecessary and unjustifiable. The Court considered that in the case of a company listed in Hong Kong, whose debt is very largely governed by Hong Kong law, the principal relevant jurisdiction is Hong Kong. It is Hong Kong in which a scheme is necessary and any restructuring should proceed on this basis. It is only necessary to introduce a scheme in the place of incorporation if there is good reason to believe that absent a scheme sanctioned in the place of incorporation there is a genuine risk of the company being wound up there. As most of the debts of the Company were governed by Hong Kong Law and its creditors are almost exclusively in Hong Kong, the compromise under the Hong Kong scheme was already effective in the Cayman Islands according to the *Gibbs rule*, which provides that a debt is treated as discharged if it is compromised in accordance with the law governing it. Accordingly, the Cayman scheme was unnecessary and the costs associated to it were harmful to the creditors. The Court also reminded the management that incurring parallel scheme expenses unnecessarily would be inconsistent with their fiduciary duties to creditors.

13. Sanction application ordered to be adjourned *sine die* pending the determination of the Listing Review Committee

Re Burwill Holdings Ltd (Provisional Liquidators Appointed) [2021] HKCFI 1318

The Company applied for sanction of a scheme of arrangement, which was unanimously approved by the unsecured creditors. However, at the time, the Company had already been subject to a delisting decision. The PLs had proposed to review such decision.

The Court refused to sanction the proposed scheme of arrangement and ordered to adjourn the application *sine die* with liberty to restore, pending the determination of the Listing Review Committee, for the following reasons:

1. If the listing of the Company is to be cancelled, the proposed scheme of arrangement will collapse and the application to the Court will have been a waste of judicial resources.

2. It is not appropriate for the Court to make a decision which it might be suggested should influence the Listing Review Committee's deliberations and ultimate decision.

14. Scheme meeting was allowed to proceed despite that the Listing Committee's delisting decision was still under review

Re Grand Peace Group Holdings Ltd [2021] HKCFI 1563

The Company, which is listed on the GEM Board of the Stock Exchange, had been subject to a winding-up petition. The Listing Committee of the Stock Exchange has recently determined that the Company should be delisted and the Company had applied to review the decision. The Company nevertheless would like to convene a scheme meeting to consider the restructuring proposal.

Harris J allowed the Company to apply to convene a scheme meeting and observed that although the Court will not hear a petition to sanction a scheme of arrangement when a determination by the Listing Review Committee is pending, an application for an order that a meeting of creditors is convened will normally fall into a different category. The Court will be amenable to making such order, unless it is concerned that the interests of unsecured creditors might be prejudiced, for example, the company, instead of the prospective investors, will be paying the costs. In *obiter*, his Lordship also remarked that parallel schemes would not be permitted in future unless it is in the genuine best interests of unsecured creditors of the company: see *Re China Oil Gangran Energy Group Holdings Ltd* [2021] HKCFI 1592.

15. English Court refused to sanction a Scheme due to inadequate explanation of alternatives and the unfair balance between the redress for the Scheme Creditors and the shareholders

Re All Scheme Limited [2021] EWHC 1401 (Ch)

The Company was part of the Amigo group (the "**Group**") which offers "guarantor loans" to those who are unable to borrow from mainstream lenders due to their poor credit records. Due to the increasing amount of complaints filed against the Group regarding its lending activities and the COVID-19 pandemic, the Group was unable to repay creditors and substantial liabilities were incurred by the Group. On 6 January 2021, the Company was incorporated for the purpose of promoting a scheme of arrangement pursuant to section 899 of the Companies Act 2006 (the "**Scheme**") to redress those liabilities. Under the Scheme, a mechanism, including a bar date, was provided for the determination of the claims of the Scheme Creditors and a fund was to be set up to pay part of their claims. In turn, the Scheme Creditors shall release their claims against the Group.

On 12 May 2021, the Group convened the creditors' meeting where the Scheme was approved by over 95% by number and value of voting scheme creditors. However, only 10% or less (by number and value) of Scheme Creditors had turned out to vote. Further, despite the apparent high level of creditor support, the sanction of the Scheme was opposed by the Financial Conduct Authority (the "**FCA**") at the sanction hearing. The FCA's main concern was that the Scheme only offered the Scheme Creditors a binary option between the Scheme or insolvency without other alternatives. Further, the Scheme failed to strike a fair balance between the redress for the Scheme Creditors and the shareholders with economic interests retained in the Group valued at well over £100 million.

The Court held that the Scheme was not a fair one that a court could reasonably approve for, amongst other things, the following reasons:-

(1) The Scheme Creditors were typically financially inexperienced with relatively low levels of financial literacy and hence would be unable to fully comprehend the Scheme and corporate insolvency.

(2) The Group had failed to pay for lawyers and financial experts to represent the Scheme Creditors. The Scheme Creditors therefore did not receive any professional advice in relation to the Scheme.

(3) The Scheme Creditors were not actually fully informed in relation to the terms of the Scheme.

(4) The explanatory statement given to the Scheme Creditors also gave the wrong impression that an insolvency would be automatic and immediate if the Scheme was not passed. The Scheme Creditors would not have been able to understand that there were alternatives other than the binary options provided to them.

(5) The shareholders should not be involved in the Scheme as they would be entitled to retain the whole of their equity interests in the circumstance that the Scheme was sanctioned and yet, the Scheme Creditors' claims were to be compromised by accepting a 90% haircut. The Scheme Creditors were not put in the position where they could reasonably assess whether the allocation of losses between themselves and the shareholders were appropriate and fair.

Accordingly, the Court refused to sanction the Scheme.

16. English Court held that in considering class compositions for scheme of arrangements, the court should avoid creating small voting classes as far as just and possible

Re DTEK Energy BV and Re DTEK Finance Plc [2021] EWHC 1456 (Ch)

DTEK Energy BV ("**Energy**"), the parent company of the DTEK Group ("**Group**"), is a company incorporated in the Netherlands. The Group operates as energy supplier in Ukraine with ancillary operations in the manufacture and supply of mining equipment and plant. The Group is funded by, *inter alia*, loans from various banks advanced to Energy's subsidiaries. There are three categories of third-party loans, namely:

1) Unsecured loans governed by English law totalling US$353,842,215 and €149,623,858, all repayable on 30 June 2023;

2) A loan of CHF21,693,253 to Energy's subsidiary which matures on 18 November 2024, with Gazprombank (Switzerland) Ltd being the sole lender pursuant to an Amended and Restated Facility Agreement and Energy being the primary obligor as the result of a Deed of Contribution; and

3) Loans provided by Ukrainian banks and guarantee obligations to a Russian bank.

(collectively, "**Loans**")

In addition, there were also bonds issued by the Group's wholly owned subsidiary DTEK Finance plc ("**Finance**"), consisting of an original issue of US$1.275 billion senior notes at 10.75% interest, with supplemental issue and accrued interest bringing the total outstanding up to US$1.5 billion ("**Notes**"). The borrowers have been in default of the Loans and the Notes for about one year. The projected cash flow until 2024 also demonstrated an inability to service the Loans and Notes until their respective maturities.

Energy and Finance thus seek to restructure some of their financial obligations by two inter-conditional schemes of arrangement pursuant to Part 26 of the Companies Act 2006 ("**Schemes**") and proceeded to apply for orders convening a single meeting of creditors for each of the Schemes. Gazprombank objected and argued that foreign freezing orders it had obtained gave it secured creditor status, and thus entitled it to a separate voting class.

The Court held that it had to be cautious about giving effect to creditors' "without notice" efforts to obtain additional rights, such as seeking foreign freezing orders, which is done simply to engineer a separate scheme voting class.

Further, the Court emphasized that even material difference may not amount to a dissimilarity so as to render it impossible for those meeting together to consult together with

a view to their common interest. And the court should avoid creating small voting classes as far as just and possible, as this gave the minority veto rights. Instead, the court should ask whether there was more to unite or divide class members.

On the facts, the Court took the view that Gazprombank was in the same situation as other scheme creditors. As such a single meeting could be held in each of the Schemes. The objections of Gazprombank was dismissed.

17. Court granted retrospective time extension for a company to lay financial accounts but refused out-of-time application to hold AGM

Re Goldbond Group Holdings Ltd (金榜集團控股有限公司) [2021] 2 HKLRD 742

Goldbond Group Holdings Ltd is a public company. Under section 431(1)(b)(i) of the CO, its directors should lay the financial statements before the company in annual general meeting within 6 months after the end of its financial year. Under section 610(1) of the CO, the Company should hold a general meeting as its annual general meeting also within the same 6-month period.

For the financial years of 2019 and 2020, the Company failed to comply with the statutory requirements. The Company's explanation was that there was an ongoing forensic investigation involving one of its wholly owned subsidiary and because of that, it was not able to finalize the financial statements within the statutory periods.

On 8 December 2020, an executive director and a shareholder of the Company issued an application pursuant to ss.429, 431 and 610 of the CO and retrospectively applied for time extension for:

(1) the Company to hold its annual general meeting for the years ended 31 March 2019 and 31 March 2020; and

(2) the Company's directors to lay its audited financial statements and the reports of the directors and of the auditors for the two financial years in its annual general meeting.

On 28 December 2020, the Company held the AGM for 2019 and 2020, during which the 2019 and 2020 financial statements were considered and approved.

Laying of Financial Statements

The Court held that it has power to extend time for the directors to comply beyond the prescribed 6-month period. This is made clear by the express words "or any longer period directed by the Court" under section 431(1)(b)(i) of the CO. It is also reasonably plain that the court has the power to grant time extension whether the application is made before or after the original deadline. Where an application is made retrospectively, a more compelling justification is required than where it is made in advance of the deadline.

When exercising its discretion, the Court would take into account factors including:

(1) Whether the shareholders were aware of the financial position of the company in question and thus were not prejudiced by the non-compliance;

(2) Whether the default was inadvertent; and

(3) Whether the court is satisfied that the company would comply with the obligations to lay its financial statements before general meetings in future.

On the evidence, the Court was satisfied that the audited financial statements for the two financial years could not have been finalized within the respective statutory deadlines due to the Company's need to carry out the forensic investigation and the subsequent investigation. As such, the Court concluded that the default was not deliberate and it was not due to any disregard of the relevant statutory obligations on the part of the respondent or its directors. Further, the shareholders were kept informed of the financial status and there does not appear to be any prejudice suffered by them as a result.

Accordingly, the Court allowed the application for extension of time for the Company's directors to lay its audited financial statements and reports.

Holding of annual general meeting

The duty to hold an annual general meeting in respect of a financial year is set out in section 610 of the CO. The Court considered that reading from the express wording in section 610(5), it has the power to extend the time for the holding of an annual general meeting only if an application is made *before* the time expires. It has no power to grant any extension if the application is made after the prescribed deadline.

The applicant then turned to rely on section 610(7) of the CO, which provides that if a company contravenes the requirement to hold an annual general meeting, whether within the original period or the period extended under subsection (5), a member may apply to the court for an order that a general meeting be called.

The Court accepted that it should *prima facie* order that a meeting be called for the benefit of the members: *Re Belgravia Properties Limited* [2013] 5 HKLRD 337. However, the Court does not consider the present case a proper case to exercise its discretion for the following two reasons.

(1) the Company had already held the annual general meeting for the two financial years in December 2020. Insofar as an order under section 610(7) is intended to protect and enforce a member's fundamental entitlement to an annual general meeting, there was no need for the Court to act when the meeting had already been held;

(2) it would appear that the only reason for the applicant to pursue the order was to avoid prosecution for the original default. Given that a section 610(7) order does not have the effect of turning the original default into a “non-default”, even where the order was granted and the members’ entitlement was safeguarded, the default remained.

In view of the above, the Court refused to make an order under section 610(7) of the CO.

18. Recent decision sheds light on how the Court would approach costs of the valuation process as a consequence of a buy-out order

Vitaly Orlov v Magnus Leonard Roth [2021] HKCFI 1705

Following cross-petitions brought by the two equal shareholders of Three Towns Capital Limited ("**TTC**"), Vitaly Orlov ("**Orlov**") and Magnus Leonard Roth ("**Roth**"), each seeking the relief for a buyout order, the Court made an order for Roth to buy out Orlov. The price or valuation of the shares to be bought out by Roth was ordered to be determined by a certified public accountant (the "**Valuer**") to be appointed by the Court. Ms. Edwina Tam of Deloitte was later appointed as the Valuer.

Ms. Tam valued the shares at US46,717,000. Neither party disputed that Valuation. At issue is who shall be bear the costs of the valuation.

It is trite that the Court has a wide discretion when dealing with matters of costs. In the particular context of unfair prejudice petitions leading to buy-out orders, the Court has frequently awarded the costs of valuation to petitioners who had succeeded in obtaining buy-out relief. The rationale is that the respondent had involved in unfairly prejudicial conduct against the petitioner, and that the costs of valuation are simply necessitated if a buy-out order is to be implemented.

In the present case, Coleman J considered it not helpful to try to identify any supposed starting position, and then to consider whether a departure from it can be justified. Rather, he believed that it was more appropriate for him to simply look at and take into account all the particular circumstances of the case, weighing each point and conclude by exercising the Court's discretion.

In reaching his decision, the Judge took into account, amongst the others, the following matters:-

(1) the valuation process was conducted in a manner similar to the entirety of these proceedings, namely in a hard-fought, fully contested and extremely adversarial manner;

(2) hence, the valuation was almost certainly inevitable, and was almost certainly not going to be able to be conducted except on an extremely adversarial basis;

(3) the conduct of the valuation process reflects little effort on the part of either side to bring some sense of economy or proportionality to bear;

(4) the valuation reached by the Valuer was on the basis of a valuation method largely argued for by Orlov and argued against by Roth;

(5) nevertheless, the Valuer appears to have accepted some of the representations from both sides;

(6) the Valuer's conclusion does reflect that the valuation figures argued for by Orlov were significantly too high;

(7) on the other hand, the Valuer's conclusion also reflects that the valuation figures argued for by Roth were too low;

(8) Orlov's previous open offer (US$49.5 million) was not too far from the Valuation reached by the Valuer, and there was no counter-offer in a similar 'ball-park';

(9) rather, Orlov certainly "beat" the valuation figures being put forward by Roth, and did so by a not inconsiderable margin (the Valuation figure of US$46,717,000 was an uplift of approximately 30% on even the high end of Roth's bracket);

The Judge concluded that there is real force in the point that the only way in which Orlov could have achieved that price for the buy-out of his shares was to have proceeded with the valuation.

Accordingly, the Judge held that Roth should pay 80% of Orlov's costs of the Valuation process and 80% of the costs of the Valuer. Orlov should pay the other 20% of the costs of the Valuer. The costs of TTC should be borne equally by the parties.

19. Latest in BVI: Unfair prejudice claims against the Majority Shareholder allowed to proceed whilst the claims against the Company stayed pending arbitration

Siong Beng Seng v Caldicott Worldwide Limited (BVIHCMAP 2020/0020)

The Eastern Caribbean Court of Appeal affirmed an established principle in the current case that the appellate court should be slow to intervene in the case management decisions of lower courts and found that minority shareholders had every right to continue to pursue claims for unfair prejudice damages against the Majority Shareholders, although their claims against the company had been stayed in favour of arbitration.

Caldicott Worldwide Limited ("**Caldicott**") is a minority shareholder of the Company. It made an unfair prejudice claim against the Company and the Majority Shareholders in the BVI on the ground that the Majority Shareholders had conducted the business of the Company in a manner that was prejudicial and oppressive towards Caldicott.

At first instance, the Court stayed the claim against the Company as its articles of association contained an arbitration agreement referring disputes between the Company and its members to arbitration. The claim was allowed to proceed against the Majority Shareholders.

The Majority Shareholders appealed.

The Easter Caribbean Court of Appeal dismissed the appeal, finding that the power to grant a stay of proceedings is discretionary and can only be exercised in rare and compelling circumstances. The Court of Appeal agreed with the Judge below that Caldicott's unfair prejudice claim could be amended to exclude the claim against the Company and that it would be appropriate for the claim against the Majority Shareholders to be carried out before or at the same time as the arbitration proceedings. The issues in dispute would not be affected by the Company's presence, as it was the Majority Shareholders who controlled the Company and caused the Company to withhold declared dividends which was unfairly prejudicial to Caldicott. In addition, the Court held that there was no sufficient risk of inconsistent judgment nor a close enough overlap between the liability of the Company and that of the Majority Shareholders to warrant a stay of claim against the Majority Shareholders.

Bankruptcy Cases

20. Court of Appeal clarified that post-bankruptcy events could be taken into account in considering whether to rescind a bankruptcy order

Re Cheung Hing Chik also known as Charles H.C. Cheung, the debtor [2021] HKCA 981

The present case is an appeal against a bankruptcy order made on 3 August 2020 (the "**Bankruptcy Order**"). The Petitioner is a company from whose bank account the Bankrupt stole or misappropriated a sum of US$749,000. On 27 February 2020, the Petitioner served a statutory demand for the said sum on the Bankrupt, which was not settled. At the petition hearing on 3 August 2020, the Bankrupt orally asserted that he was able to repay the debt as:- (1) he could sell his 50% interest in Charles HC Cheung & CPA Ltd for an estimated sum of $6 million; and (2) he might receive some other funds.

The Judge was not satisfied and found that there was no proof that the Bankrupt would be able to repay the debts and therefore made the Bankruptcy Order.

On 14 August 2020, the Bankrupt applied, by way of Summons, for an order that the Bankruptcy Order be rescinded pursuant to section 98 of the BO on the basis that the bankruptcy petition should and would have been dismissed pursuant section 6D(3) of the BO, which provides that the court may dismiss the petition if it is satisfied, amongst other things, that the debtor is able to pay all his debts.

The grounds advanced for rescission were that the Bankrupt (a) had entered into an agreement with a Mr. Lam for him to receive $5.6 million; and (b) is due to receive other loans and funds.

At first instance, the Judge dismissed the Bankrupt's application for rescission, for, amongst others, the following reasons:

1. section 6D(3) of the BO had no application as it deals with the court's power to dismiss the petition based on facts *before* a bankruptcy order is made, while in the present case, the Bankrupt is relying on facts occurring *after* the Bankruptcy Order to have it set aside;

2. there was no evidence on the availability of funds that allegedly would be received by the Bankrupt; and

3. the total amount of money allegedly would be received by the Bankrupt was barely sufficient to cover the outstanding debt(s).

On appeal, the Court of Appeal took the view that there is no reason why section 6D(3) of the BO cannot be applied in an application where the relevant facts occurred "post-bankruptcy order". It was held that the bankruptcy jurisdiction is unique in the sense that the court has power under section 98 of the BO to review, rescind or vary any order made by it, and such statutory power does not contain express limitations. The applicable test should be whether an applicant for rescission has shown exceptional circumstances, involving a material difference to what was before the court earlier, to justify the overturning of a bankruptcy order. The court's jurisdiction is so wide that the Bankrupt can rely on facts occurring whether *before* or *after* the Bankruptcy Order. Having said that, the Court of Appeal considered that even if the fresh evidence had been adduced at the hearing of the petition, they still would not be considered sufficient to meet the requirements under section 6D(3) of the BO.

In conclusion, the appeal was dismissed.

21. Court of Appeal affirmed the decision below finding that the trustees in bankruptcy did not breach their duties to act with reasonable care and skill towards a major creditor of the bankrupt

Lau Chun Ming v Deloitte Touche Tohmatsu [2021] HKCA 546

In the January issue of ONC Corporate Disputes and Insolvency Quarterly 2020, we discussed the Court of First Instance's decision in *Lau Chun Ming v Deloitte Touche Tohmatsu (A Firm)* [2019] HKCFI 2722.

In gist, the Plaintiff, who was the major creditor of Ma Koon Sik ("**Ma**") entered into a contract with the Defendant (the "**Contract**"), Deloitte, pursuant to which the Defendant agreed that it would arrange its partners Lai Kar Yan Derek ("**Lai**") and Darach E Haughey ("**Haughey**") (i) to seek appointment as the Joint and Several Trustees of the estate of Ma and (ii) to assist the Plaintiff to handle or otherwise deal with the properties of Ma charged to the Plaintiff.

Lai and Haughey were appointed Joint and Several Trustees of the estate of Ma ("**1st Trustees**"). The 1st Trustees acted as such from 21 November 2002 to 29 June 2009 when they were removed and replaced by 2nd Trustees. Shortly afterwards, the 2nd Trustees were replaced by 3rd Trustees. In the following years, the 3rd Trustees brought 3 recovery actions, which were met with challenges on the ground that they were time-barred.

The Plaintiff claimed against the Defendant for breach of an implied term of the Contract for failing to ensure Lai and Haughey would act with reasonable skill and care in their position as the 1st Trustees (the "**Implied Term**"). The Plaintiff contended that the recovery actions were discovered and/or proceeded with by the 3rd Trustees but were not discovered, followed up, investigated and/or procured with by the 1st Trustees during the nearly 7 years of their trusteeship.

At first instance, the trial Judge ruled in favor of the Defendant. The Plaintiff appealed.

The Court of Appeal agreed with the trial Judge that the Implied Term should not be implied in law because the extensive remedies against trustees in bankruptcy under the BO has provided sufficient protection to the Plaintiff.

Further, the Court of Appeal held that nor was it necessary for the Implied Term to be implied in fact. The fact that damages for breach of the Implied Term would be payable to the Plaintiff rather than to Ma's estate and the unsecured creditors, or that liability would rest with the firm rather than individual trustees did not make the Implied Term necessary or obvious.

Accordingly, the Plaintiff's appeal was dismissed.

22. A hybrid personal injury claim taken out by a bankrupt struck out due to lack of consent from his trustee in bankruptcy

Yip Kam Chun v Wellgain International Industrial Ltd [2021] HKDC 718

The Plaintiff, who was declared bankrupt on 19 September 2018, took out an action against his former employer on 31 October 2018 for the latter's alleged negligence causing him to suffer personal injuries.

The former employer applied to strike out the present action on the basis, amongst other things, that the present action was issued without the prior consent of the Official Receiver. As the Plaintiff's claim includes a property claim for loss of earnings, and not just a personal claim for general damages for pain, suffering and loss of amenities, it constitutes a hybrid claim rendering the whole cause of action of this action having been vested in the Official Receiver as the trustee in bankruptcy. The Plaintiff therefore had no *locus* to proceed with this action unless the Official Receiver's consent or agreement to assign the right of action to the Plaintiff had been obtained.

Since the Plaintiff's bankruptcy estate does not have the funds to cover costs in the event that this negligence action failed, the Official Receiver informed the Court that she had decided not to adopt this action or give her consent or assign the right of action in this action to the Plaintiff.

The Plaintiff's claim was thus struck out.

23. English Court of Appeal clarified that a bankrupt's place of residence shall be given its natural meaning and hence it must be a settled or usual place of abode of the Bankrupt

Lakatamia Shipping Company Ltd v Su and others [2021] EWHC 1866 (Ch)

The Bankrupt was a dual citizen of Japan and Taiwan. Subsequent to his default on the contract entered into with Lakatamia Shipping Company Ltd ("**Lakatamia**"), two judgments were made against him in the English Commercial Court in late 2014 and early 2015.

As the Bankrupt failed to discharge any of the judgment debts totaling over US$60 million, an order was made in January 2018 requiring the Bankrupt to surrender his passports and to remain in England and Wales until the conclusion of the hearing on the disclosure of his assets. A few days later, he was arrested for contempt of court when attempting to flee the country, which led to his imprisonment. The Bankrupt was released from prison on 9 April 2020 but was again prohibited from leaving the country.

On 4 July 2020, the Bankrupt petitioned his own bankruptcy and on 8 July 2020, a bankruptcy order was made. Subsequently on 28 September 2020, Lakatamia applied for an order to annul the bankruptcy order on the basis that section 263I(2)(b)(i) of the Insolvency Act 1986 (which confers jurisdiction on an adjudicator to make a bankruptcy order on a debtor's application where, at any time in the period of the preceding three years, the debtor has been ordinarily resident or has had a place of residence in England and Wales) was not satisfied. Lakatamia's application was dismissed at first instance. It then appealed. On appeal, at issue is whether the Court has jurisdiction to make a bankruptcy order in the circumstances where the Bankrupt's presence in England and Wales during the past three years has been involuntary.

The Bankrupt submitted that he had been ordinarily resident or had had a place of residence in England and Wales during the three years prior to his bankruptcy application. From 16 January 2018 to 4 July 2020, besides the days when he was serving his sentences in prison, he stayed in various places including several hotels, serviced apartments, and at a friend's place, each lasting for several weeks.

The Court of Appeal clarified that the phrase "has had a place of residence" should be given its natural meaning and hence the proper test should be whether the place was a settled or usual place of abode of the Bankrupt. It connotes a degree of substantiality, permanence and an expectation of continuity connecting the debtor with the jurisdiction.

In this present case, the Court of Appeal found that the Bankrupt's presence at each of the properties he occupied was temporary and transient with no degree of permanence or expectation of continuity. Hence the Bankrupt cannot be described as having had a place of

residence at any of the places he has occupied during his involuntary stay in England for the purpose of section 263I of the Insolvency Act 1986. Accordingly, the appealed was allowed.

24. The Singapore Court refused to validate division of matrimonial assets, finding it nothing but an attempt, through divorce proceedings, to put the Bankrupt's assets out of the reach of his creditors

Ong Dan Tze Magdalene v Chee Yoh Chuang & Anor [2021] SGHC 129

On 8 August 2019, the Applicant commenced divorce proceedings against her husband. On 25 September 2019, a creditor presented a bankruptcy petition against the husband (the "**Bankrupt**"). On 7 November 2019, the Applicant obtained an interim judgment for the dissolution of the marriage (the "**Interim Judgment**"), which included consent orders of a sale of a property (the "**First Property**") with the proceeds be paid to the Applicant and transfer of the Bankrupt's title and interest in another property (the "**Second Property**") to the Applicant with no cash consideration.

On 23 January 2020, the Bankrupt was adjudged bankrupt and later on 10 February 2020, the Interim Judgment was made final. However, it later transpired that the First Property was in fact sold between the bankruptcy application and the Interim Judgment. The Applicant applied to Court to seek ratification of the Interim Judgment.

Under the laws of Singapore, when a person is adjudged bankrupt, any disposition of property made by him from the date of the bankruptcy application to the making of the bankruptcy order is void unless the Court consents to or ratifies the disposition, including a consent order made by the Court. The onus was on the Applicant to persuade the Court that the dispositions of the properties pursuant to the consent orders should be ratified. The position in Hong Kong is the same under section 42 of the BO.

The Court did not find in favour of the Applicant. For the First Property, the Court found that the Interim Judgment contemplated that it was still a matrimonial asset and did not contemplate that it had already been sold. The ratification request was thus a non-starter. In any event, since the Applicant concealed the truth about the sale of the First Property from the Family Court Judge and that she knew about the bankruptcy proceedings against the Bankrupt, the Court held that the Applicant did not act in good faith when she obtained the Interim Judgment and declined to ratify the disposition of the First Property.

The Court also refused to ratify the disposition of the Second Property because the Applicant failed to prove that the disposition of the Second Property would benefit the general pool of creditors. Rather, the evidence suggested that the Interim Judgment was really an attempt to put the Bankrupt's assets out of the reach of his creditors.

25. The Court considered a married couple's claim for common intention constructive trust in the context of bankruptcy

The Joint and Several Trustees of the Property of Yeung Wing Sing v. Yeung Wing Sing and Kwok Lai Au [2021] HKCFI 2018

Mr. Yeung and Madam Kwok (collectively the "**Respondents**") got married in 1990. On 1 October 2008, the couple bought a flat in The Belcher's (the "**Property**"), which however was registered in Mr. Yeung's sole name only. On 12 November 2018, Mr. Yeung transferred 50% of his interest in the Property to Madam Kwok for no consideration (the "**Transfer**"). On 1 March 2019, Mr. Yeung petitioned for his own bankruptcy and was adjudged bankrupt on 16 April 2019. The Trustees claimed that the Transfer is a transaction at an undervalue and sought to set aside the same.

As the Transfer took place within two years of Mr. Yeung's bankruptcy, it was not necessary to show that Mr. Yeung was insolvent at the time by virtue of section 51(2) of the BO. It was also not disputed that the Transfer was at an undervalue. But Madam Kwok claimed that she was all along a 50% beneficial co-owner of the Property pursuant to a common intention with the Mr Yeung, and that the Transfer simply gave effect to that common intention. Alternatively, Madam Kwok said that she holds a 7.15%, alternatively 5%, interest in the Property pursuant to a resulting trust, as she paid for the initial deposit for the acquisition of the Property.

The relevant legal principles relating to common intention constructive trust have been recently summarized in *Leung Hang Lin and Li Kwai Fuk v. Lam Mei Yung* [2019] HKCFI 2819. In gist:-

(i) there must be a common intention that both parties should have a beneficial interest in the property;

(ii) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest in the property; and

(iii) it is unconscionable for the property owner to assert ownership in reliance on the legal title.

The burden of proof rests on the claimant.

On the evidence, the Court found that the common intention was not established for the following reasons:-

(1) The provisional sale and purchase agreement of the Property (the "**2008 PSPA**") was signed by Mr. Yeung only;

(2) Despite the Respondents' claim that Mr. Yeung promised to transfer 50% of his interest in the Property to Madam Kwok as soon as the mortgage on the Property was discharged, there was a substantial delay in adding Madam Kwok's name to the title of the Property which was inconsistent with their claimed arrangement;

(3) Despite it was the Respondents' case that the Property was their dream matrimonial home, they did not move into the Property until 2015 sometime after their tenant terminated the tenancy agreement in June 2015;

(4) There was insufficient evidence to prove that the Respondents intended to share all of their assets in equal shares and therefore the Court found the alleged verbal agreement not established;

(5) Although there was no dispute that Madam Kwok paid the initial deposit, being 5% of the Property price, the Court considered that it is unclear as to what extent the funds may have been supplied by Mr. Yeung. Further, when taken into consideration along with the other matters referred to above, including the fact that the 2008 PSPA bore only Mr Yeung's name as the buyer despite the provision of the deposit cheque by Madam Kwok, and at a time when there was no reason for Madam Kwok's name not to be included as joint owner, the Court took the view that the payment could not give rise to the inference that there was a common intention that Mr. Yeung and Madam Kwok would jointly own the beneficial interest in the Property.

(6) Likewise, for the renovation expenses, the Court found that the source of the funds was not clear.

(7) The document effecting the Transfer did not make any reference to the claimed common intention. Instead, the Transfer was done by way of a sale and purchase with Mr. Yeung being the beneficial owner.

Madam Kwok's claim for a common intention constructive trust thus failed.

In light of the findings above in relation to the Respondents' claim of a common intention, the Court considered that there is no room for the operation of the presumption of resulting trust in the present case.

In conclusion, the Court held that the Transfer constitutes transaction at an undervalue and ordered it to be set aside.

26. Non-Commencement Order made against Ex-Akai chief James Ting on the basis of his total failure to cooperate with the Trustees in Bankruptcy

James Henry Ting v Akai Holdings Ltd [2021] HKCFI 1704

The Bankrupt, James Henry Ting, former chairman and CEO of Akai Holdings Limited, previously a Hong Kong listed company, applied to annul the Bankruptcy Order made against him on 29 November 2016 (the "**Annulment Application**"), alleging that the Petition was not properly served on him ("**Service Ground**") and that he was not domiciled in Hong Kong at the time the said Petition was presented in 2012, such that the Hong Kong Court has no jurisdiction to make the Bankruptcy Order against him ("**Domicile Ground**").

The Trustees in Bankruptcy also took out an application to extend time for taking out a Non-Commencement Order pursuant to section 30AC of the BO, as well as an application for a Non-Commencement Order to be made. At last, the Court dismissed the Annulment Application and granted the Non-Commencement Order sought by the Trustees.

Ting's Annulment Application

At the outset, the Court noted that the Annulment Application was not supported by any evidence because the Bankrupt failed to attend the substantive hearing of two summonses for his cross-examination, and as result his affirmations were not allowed to be adduced in evidence. On this ground alone, the Annulment Application must fail. But the Court went on to consider the Service Ground and the Domicile Ground.

Regarding the Service Ground, the Court found that in fact the Bankrupt's former solicitors had already conceded in open Court that a sealed copy of the Petition was served on them, that they could concede on the issue of service of the Petition and that no such issue would be taken. Only the issue of jurisdiction was disputed by the Bankrupt all along. Given these reasons, the Service Ground must fail.

As to the Domicile Ground, the Bankrupt had not challenged his Hong Kong domicile at the time of the presentation of the Petition. There was also no evidence to support that his domicile was not in Hong Kong. Rather, the Court has long accepted Akai's (the Petitioner) case that the Bankrupt has been domiciled in Hong Kong since 1957, when his parents moved here permanently with him, all the way up to the presentation of the Petition. As such, the Domicile Ground failed.

The Trustees' application for time extension to take out an application for a Non-Commencement Order, and the application for the Non-Commencement Order

Section 30AB of the BO provides that where a bankruptcy order is made on or after 1 November 2016 and the bankrupt fails to physically attend the initial interview, or has

physically attended the initial interview, but failed to provide the trustee at the initial interview with all of the information concerning the bankrupt's affairs, dealings and property as reasonably required by the provisional trustee/trustee, the provisional trustee/trustee may apply to court for an order that the relevant period shall not commence to run. The effect of the non-commencement order is to delay the commencement of the relevant period of bankruptcy until compliance with the terms of the order. As a result, the date of the automatic discharge will be delayed accordingly.

The Court found that the evidence clearly demonstrates that since the Bankruptcy Order, the Bankruptcy has been wholly uncooperative and has failed to engage with the Trustees at all in the administration of his estate. Nor has the Bankrupt made any disclosure of his assets or made any contribution to his estate. The Court is thus satisfied that the matters stated in section 30AB are satisfied and there is no evidence to explain, let alone justify, the Bankrupt's failure to attend the initial interview and cooperate with the Trustees.

Further, the Court agreed that the Trustees could rely on section 30AB(3) and/or section 100(4) of the BO for extension of time to apply for the Non-Commencement Order. Moreover, having considered all the circumstances, the Court concluded that the Bankrupt had been highly uncooperative and that it would make a complete mockery of the bankruptcy regime if the Trustees' application for the Non-Commencement Order was defeated simply because it was made outside the initial 6-month period. In conclusion, the Court granted the time extension sought by the Trustees and made a Non-Commencement Order against the Bankrupt.

27. The court will not lightly accede to a request by the spouse of a bankrupt not to sell the co-owned property on the basis of hardship

Re Wong Lee Thomas [2021] HKCFI 1317

Wong Lee Thomas ("**Wong**") and his wife Tse Ngan Choi ("**Tse**") were joint tenants of a small residential unit in Tuen Mun ("**Property**"). Upon Wong's bankruptcy in 2006, the joint tenant was converted into a tenancy in common by operation of law and Wong's 50% interest in the Property ("**Interest**") became vested in his trustees ("**Trustees**").

In 2012, after Tse had rejected the Trustees' request for her to either purchase the Interest or agree to a joint sale of the Property, the Trustees applied for an order for sale of the Property by way of summons ("**Summons**"). Wong opposed the Summons on the basis of hardship in light of the poor physical and financial conditions of Wong and Tse. In order to accommodate the personal circumstances of Wong and Tse, the Trustees have not taken further steps in respect of the Summons for over 9 years, during which Wong and Tse continued to reside in the Property without paying any rent or fee in respect of the use of the Interest.

On 20 November 2020, the Trustees restored the hearing of the Summons and sought an order for sale of the Property under section 6 of the Partition Ordinance (Cap 352). Both Wong and Tse opposed the proposed sale of the Property.

Since there is no evidence to show that Wong would be able to raise funds to repay all the debts and expenses already accrued as at the date of the hearing, which amounted to around HK$1.2 million and which included amount owed to creditors, fees of the Trustees and fees payable to the Official Receiver, the only realistic alternative option available to Tse would be to purchase the Interest from the Trustees. The Court therefore decided to give one last opportunity to Tse to see if she could purchase the Interest.

In deciding that 4-month is an appropriate period for this purpose, the Court took into account the possibility for Tse to use the Property as a security to obtain a loan to finance the purchase, the facts that Tse had already been told about this option in 2011, and that it would be unfair to the creditors to allow Wong and Tse to continue to enjoy the benefit of using the Interest without any time limit. Subject to giving the one last opportunity to Tse to purchase the Interest within the following 4 months, the Court held that it was an appropriate case to make an order for sale of the Property since the Trustees as co-owner of the Property have the right to ask for an order for partition (which was held to be impractical since the Property is a small residential unit) or sale of the Property.

Although an order for sale would not ordinarily be made where it will result in very great hardship to one co-owner, the Court was not satisfied that Tse has established such

hardship in light of the fact that the Trustees have already deferred their sale application for over 9 years, the overriding interest of the creditors and the ability of Tse to use her 50% share of the net sale proceeds of the Property to rent an alternative flat as her residence.

In the circumstances, the Court granted an order for sale of the Property with an interim stay of execution for a period of 4 months.

For enquiries, please contact our Litigation & Dispute Resolution Department:

E: enquiry_cdniq@onc.hk
W: www.onc.hk
T: (852) 2810 1212
F: (852) 2804 6311

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong